Neutral Citation Number: [2011] IEHC 340

THE HIGH COURT

2009 147 COS

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2006

AND IN THE MATTER OF

DEVEY ENTERPRISES LIMITED (IN VOLUNTARY LIQUIDATION)

BETWEEN

DEVEY ENTERPRISES LIMITED

(IN VOLUNTARY LIQUIDATION)

AND

JAMES STAFFORD LIQUIDATOR OF DEVEY ENTERPRISES LIMITED (IN VOLUNTARY LIQUIDATION)

APPLICANTS

AND

MARK DEVEY AND JACINTA DEVEY

RESPONDENTS

JUDGMENT of Ms. Justice Laffoy delivered on the 24th August, 2011

1. The Proceedings

1.1 These proceedings are one of three matters which are pending in this Court between the same parties and arising out of the same circumstances. The other two matters are:-

> (a) Plenary proceedings (Record No. 2008/1606 P) between the first applicant (the company), as plaintiff, and the respondents, as defendants, in which there is extant an undertaking given by the respondent on the discharge of a Mareva type injunction restraining the respondents from removing from the State or dealing with their assets save insofar as the value of the assets shall exceed the sum or value of €2.8m, and in which proceedings the company seeks repayment of the sum of €2.8m from the respondents; and
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> (b) Summary proceedings (Record No. 2009/1176S),between the company, as plaintiff, and the respondents, as defendants, for recovery of the sum of €1,241,677.99 from the respondents.

1.2 These proceedings were initiated by an originating notice of motion dated the 26th March, 2009, wherein, in addition to seeking directions in relation to the trial of the action and the related plenary proceedings and summary proceedings and, if necessary, an order linking or consolidating these proceedings with the plenary proceeding and the summary proceedings, and seeking an order for summary judgment in the sum of €1,241,677.99, the applicants sought the following reliefs at paras. 4, 5, 6, 7 and 8:-

> (a) a declaration in relation to each payment identified by reference to a so called "directors loan account" and the analysis thereof exhibited in the liquidator's grounding affidavit of the 25th March, 2009 that the said payments constituted a fraudulent preference within the meaning of s. 286 of the Companies Act 1963 (the Act of 1963) of the respondents or one or other of them and are void or invalid accordingly (para. 4.);
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> (b) an order that the respondents do repay to the applicants the said sums referred to para. 4. (para. 5);
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> (c) a declaration in relation to each of the said payments referred to in para. 4 that it constituted a fraudulent disposition within the meaning of s. 139 of the Companies Act 1990 (the Act of 1990) in favour of the respondents or one or other of them (para. 6);
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> (d) an order that the respondents do repay to the applicants the said sums referred in para. 4(para. 7); and
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> (e) an order that the respondents do pay to the applicants such interest pursuant to statute or pursuant to contract as to the court seems fit (para. 8).

1.3 The progress of these proceedings has been tortuous. It is necessary to outline the manner in which the issues with which this judgment is concerned came before the court. The originating notice of motion was returnable for the 27th April, 2009. In the early stages of the proceedings the respondents, who live in Funchal, Madeira, were represented by a firm of solicitors and counsel. As the notice of motion discloses, the application was grounded on an affidavit sworn by the liquidator on the 25th March, 2009. A replying affidavit was sworn by the first respondent on the 6th July, 2009, in which he disputed certain averments which had been made by the liquidator in the grounding affidavit. Those matters were responded to by the liquidator in his second affidavit sworn on the 8th October, 2009. At that stage it appeared that the proceedings would go to plenary hearing in the ordinary way, and in accordance with a request by the first respondent in his replying affidavit. An order for discovery was made on the 16th November, 2009, in favour of the applicants against the respondents. That order was not complied with by the respondents and this led to a motion to

strike out the defendants' defence, which came before the court on the 14th January, 2010. The respondents were given certain leeway. However, the affidavit of discovery was not forthcoming. On the 1st March, 2010, the court acceded to an application by the solicitors on record for the respondents to be allowed to come off record in these proceedings and in the plenary and summary proceedings. The liquidator was anxious to proceed with the matter, but, as it appeared likely that the respondents would not appear in court to answer the proceedings, the court considered it important that the matter should go forward in a manner which was procedurally and substantively correct. By order made on the 8th March, 2010, the court listed the issues referred to at paras. 4 - 8 inclusive of the originating notice of motion for hearing on oral evidence on the 14th May, 2010. Directions were given for service of notice of the hearing on the respondents. I am satisfied that those directions were fully complied with and that by mid-March 2010 the respondents were aware that the hearing was to take place on 14th May 2010 and of its nature. However, they did not appear at the hearing, nor were they represented.

1.4 This judgment deals with the issues raised in paras. 4 – 8 inclusive of the originating notice of motion on the basis of the hearing on the 14th May, 2010, at which the liquidator gave evidence by reference, inter alia to the affidavits had already filed on his behalf in the proceedings.

1.5 I consider it appropriate to record that this judgment had been prepared for delivery and was intended to be delivered during August 2010 but unfortunately for some reason I did not arrange to have it listed and overlooked it until it was recently brought to my attention.

2. **The Factual Background**

2.1 The company was incorporated on the 8th May, 1998. Thereafter, it was involved in the business of plastering contractor until it ceased trading around the 30th July, 2007. On the 10th October, 2007, at an extraordinary general meeting of the company, it was resolved that the company was insolvent and should be wound up. The statement of affairs presented at the creditor's meeting of the same day showed the company's deficit to be in the amount of €1,971,857.54. The liquidator was appointed liquidator for the purposes of the winding up. Accordingly, the creditors' voluntary liquidation commenced on the 10th October, 2007.

2.2 The respondents were the directors of the company from the 12th May, 1998, until the commencement of the winding up on the 10th October, 2007. They were also the proprietors of Kingsdale Stud Farm in County Kildare and they carried on the business of that enterprise in their personal capacities.

2.3 The starting point of the liquidator's complaints against the respondents was what he ascertained on his initial review of the company's books and records. On that review, and from what he described as "the limited information" provided to him by the first respondent, it became apparent to him that the company had failed to maintain proper books and records. He discovered that certain personal expenditure of the respondents was recorded as being business expenditure on behalf of the company. On the basis of his initial assessment, he concluded that there was a balance of €2,799.134.98 owing to the company by the respondents. The initiation of the plenary proceedings and the application for an interlocutory Mareva type injunction were designed to protect the company's interest on that account.

2.4 Subsequently, in late 2008 and early 2009 there was engagement between the liquidator and the respondents' accountant in relation to trying to reach agreement as to the respondents' personal liability to the company. As a result of that engagement, the liquidator was in a position to whittle down the respondents' liability to the sum of €1,241,677.99, being the figure referred to in the originating notice of motion. Despite the fact that the liquidator had furnished to the respondents' accountant all of the material he sought, the engagement came to an end without the respondents' accountant having expressed a view on the liquidator's "bottom line" after taking into account all of the objections of the respondents in his assessment of their liability to the company. It was against the backdrop of an apparent unwillingness on the part of the respondents to discuss the matter further that the liquidator decided that he had no option but to initiate these proceedings.

3. **Affidavit Evidence**

3.1 The comprehensiveness of the factual information and the manner in which it was presented to the court by the liquidator in the grounding affidavit is nothing short of extraordinary. He has exhibited a five page document which he has referred to as a "directors loan account" to illustrate in summary form how he arrived at his assessment of the respondents' liability at €1,241,677.99. The approach he adopted will be explained later. In pp. 4 – 79 inclusive of the grounding affidavit he has explained the entries on that document and, where appropriate, he has backed up the averments by exhibits. On pp. 80 and 81 of the grounding affidavit the liquidator itemised the only issues which he regarded as being outstanding, which I understand to mean not resolved, as a result of his discussions with the accountant for the respondents. Some of those matters were addressed the replying affidavit of the first respondent.

3.2 Broadly speaking, in his replying affidavit, the first respondent took issue in relation to the liquidator's claim as to the respondents' liability on two grounds. The first related to payments made by the company, which the liquidator had contended were made on behalf of the respondents , which the first respondent contended were incorrectly treated as "directors' loans". The second related to "personal payments", transfers and lodgments, which the first respondent contended the respondents had made to the company's bank account in the years 2003 to 2007, for which the liquidator had not allowed them full credit. The first respondent gave details of the amounts in question and averred that the respondents had not been credited by the liquidator with sums aggregating €2,043,322.00 paid by the respondents personally to the company, so that any amount which the respondents might owe to the company (and it was denied by the first respondent that any sum was owed) should be reduced by that amount.

3.3 In his final affidavit sworn on the 8th October, 2009, the liquidator comprehensively addressed each of the grounds raised by the first respondent in his replying affidavit.

3.4 In relation to payments which the first respondent had alleged should not have been treated as payments on account of the respondents, in the case of four items in small amounts, which aggregated €7,169.00, the liquidator accepted that the expense in question was a business expense of the company and accepted that the respondents should not be charged with the liability therefor. By way of example, the liquidator accepted that a sum of €1,990.00 incurred in April, 2007 for corporate hospitality at Punchestown Races was a genuine business expense of the company. In relation to other items, the liquidator set out the reasons why he considered that they could not be regarded as business expenses of the company. By way of example, in his grounding affidavit the liquidator had identified a payment by the company to BDS Security as an area of dispute between him and the respondents' accountant. On the affidavit evidence it is common case that the company discharged invoices aggregating €213,400.10 in respect of the installation and maintenance and monitoring of a security system at the family home of the respondents which, at the time, was at Kingsdale Stud. In his replying affidavit the first respondent averred that the security system had been installed on

the recommendation of the Special Branch of An Garda Síochána because of a threat to him and his family "directly related to the success of" the company. He also averred that on a VAT audit the Revenue Commissioners accepted that the reclaiming by the company of the VAT on payments made to BDS Security was allowable on the basis of "satisfying themselves as to the fact that the security system had been installed on the advice of the Special Branch arising out of the threats as aforesaid". In his response, the liquidator has disputed that all the threats made to the respondents "were owing to the success of the company" and recorded that the first respondent also received threats as a result of issues arising in relation to this stud farm. The liquidator has deposed to the fact that he does not accept that those payments should be treated as a business expense of the company. The court cannot ignore his expert opinion.

3.5 The liquidator has also taken issue with the contention of the first respondent that the respondents should be given credit for the sum of €2,043,322.00 because of payments made by the respondents to the company. The position of the liquidator is that allowance has been given by him for all genuine personal lodgements made by the respondents to the company. His position is that the lodgements itemised by the first respondent in his replying affidavit were in fact monies due by the respondents to the company for works carried out by the company. Some examples have been given by the liquidator. For instance, a transfer of €250,000.00 out of the first respondents' personal bank account on the 10th June, 2004 to the company's bank account came from a cheque for €265,528.17 from Trident Home Builders Limited payable to the first respondent on the 8th June, 2004, which the liquidator has sworn was for works carried out by the company, and so belonged to the company.

3.6 While in his final affidavit the liquidator acknowledged that, as the records of the company are not complete, it is extremely difficult to assess the transfers made in 2005 by the respondents to the company, he has sworn to his belief, on the basis of practice in earlier years which he believes continued into 2005, that all monies transferred in the period were also used to reimburse the company for works carried out by it for or on behalf of the first respondent.

3.7 As a result of the adjustment of €7,169.00 made by the liquidator in respect of genuine business expenses of the company, the balance which the liquidator considered as due by the respondents to the company when he swore the replying affidavit was €1,234,508.99

4. **Oral Evidence**

4.1 The liquidator testified at the hearing on the 14th May, 2010. He confirmed that, in his opinion, the company was insolvent from the 16th February, 2007 onwards. At that stage the bank was "bouncing" the company's cheques and there was a very large debt, in excess of €1m, due to the Revenue Commissioners. He also confirmed that the respondents had become net debtors rather than creditors of the company, on the 16th June, 2006. On the basis of the foregoing facts, he furnished two additional schedules of payments to the court, which were based on the material contained in the affidavits and the exhibits therein.

4.2 One schedule was prepared in the context of the liquidator's fraudulent preference claim. It set out all payments made for and on behalf of the directors from and including the 16th February, 2007, the date, approximately eight months before the commencement of the winding up, on which, in the liquidator's opinion, the company first became insolvent. The total amount of the payments in question was shown as €686,718.09.

4.3 The other schedule was prepared in connection with the fraudulent disposition claim. It set out all of the payments made for and on behalf of the directors from and including the 23rd June, 2006, the date, in the liquidator's opinion, on which the respondents became net debtors in the amount of €36,883.21, to the date of the commencement of the liquidation. The schedule included all but three of the payments in the schedule referred to at para. 4.3. The total amount of those payments is shown as €1,987,005.10. However, it appears to me that that figure is not correct. On the basis of the judicious use of a calculator, I believe it should be in region of €1.069m.

4.4 Both schedules represent a continuation of the liquidator's thorough and comprehensive analysis in recording the details of the transactions: the method of payment; the date of payment; the name of the payee; the reason for the payment; and the amount of the payment. In the column dealing with the reason for the payment, the attitude adopted on behalf of the respondents by their accountant while he was engaging with the liquidator is recorded, which, in the case of most of the transactions, was an acknowledgement of expenditure by the company to or on behalf of the respondents. While I have not been able to reconcile the figures referred to in para. 3.7 with what I have suggested is the approximate correct figure in para. 4.3, I am satisfied that the figure in para 3.7 correctly represents the amount due by the respondents to the company on the basis of the detailed reconciliation conducted by the liquidator in the so-called "director loan account" since 31st December 2002, which he confirmed in his oral evidence.

5. **The Statutory Provisions Invoked**

5.1 The distinction between fraudulent preferences and fraudulent dispositions and specifically the distinction between s. 286 of the Act of 1963 and s. 139 of the Act of 1990 is explained in Courtney on "The Law of Private Companies" (2nd Ed. 2002) at para. 27.096 as follows:-

> "There is a distinction between fraudulent preferences and fraudulent dispositions, as Warner J. observed in Clasper Group Services Limited [[1989] B.C.L.C. 143 at 148] when he said:-
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> > '…there is a distinction between a payment to a creditor as such and a payment which, albeit made to a person who is a creditor, is a sheer misapplication of the company's money.'
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> Section 139…does not apply to fraudulent preferences, which are addressed by…s. 286. Section 139 can be analysed by counter reference to the limits of s. 286… Accordingly, it is irrelevant for the purposes of s. 139 that the company was insolvent at the time of the disposition or that it was made to a creditor, or that the disposition was made within a certain time frame. There needs only to be a disposal where the effect is to perpetrate a fraud on the company, its creditors or its members."

5.2 If I understand the case made by the liquidator correctly, it is that the company's money was misapplied in that it was gifted to or used to discharge the personal debts of the respondents, who were the directors of the company. As I understand the case, it is not that, in relation to the money in issue, the respondents, as creditors, had an entitlement to the money and they were preferred over other creditors of the company at a time when the company was insolvent. In other words, the liquidator's case is that the respondents had no entitlement whatsoever the money in issue, being sums either paid to them or to third parties at their direction. In the circumstances, it seems to me that s. 286 has no application.

5.3 Subsection (1) of s. 139, insofar as it is relevant for present purposes, provides as follows:-

> "Where, on the application of a liquidator…of a company which is being wound up, it can be shown to the satisfaction of the court that –
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> (a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and
>
> (b) the effect of such disposal was to perpetrate a fraud on the company…the court may, if it deems it just and equitable to do so, order any person who appears to have the use, control or possession of such property or the proceeds of the sale or development thereof to deliver it or pay a sum in respect of it to the liquidator on such terms or conditions as the court sees fit."

5.4 Strangely, despite the fact that twenty years have elapsed since s. 139 was enacted, it has been the subject of very little judicial consideration. The annotation on s. 139 contained in MacCann & Courtney "Companies Acts 1963 – 2009" (2010 Ed.) at (p. 1302) sets out the current state of the jurisprudence on that provision as follows:-

> "In some respects the provisions of s. 139 represent a statutory embodiment of the principles enunciated in Re Frederick Inns Limited [[1994] 1 ILRM 387]. In order to set aside a disposition of assets the liquidator does not have to prove that the company intended to defraud its creditors. Rather, he has the lower evidential burden of merely establishing that the effect of the disposition has been to defraud the creditors. However, in Re Comet Food Machinery Co. Ltd. [[1999] 1 ILRM 475] the Supreme Court observed, albeit obiter, that the section could be invoked if it were established that assets had been diverted with a view to frustrating a judgment against the company. This is hardly a controversial observation since, in such circumstances, the disposition would not only have had the effect of defrauding the creditors; rather, it would have been intended to defraud them. More recently, in Le Chatelaine Thudichum Ltd. v. Conway [[2008] IEHC 349] Murphy J. has held that the effect of a transaction is to perpetrate a fraud where the company, its creditors or members are deprived of something to which it is, or they are, lawfully entitled."

5.5 In essence, what the liquidator's review and analysis of the books and records of the company indicates is that the company's money was gratuitously paid to or used to discharge the personal liabilities of the respondents. The only reasonable inference which can be drawn from the evidence is that this was done at the direction of the respondents. Further, to the extent that that happened, the respondents did not at any time reimburse the company. Therefore, in reality, the respondents procured a gratuitous disposition of the company's money in their own favour. I am satisfied that the effect of the making of the payments identified by the liquidator, which were made by the company to the respondents or in discharge of the respondents' liabilities, was to perpetrate a fraud on the company and its creditors. As I have noted earlier, according to the statement of affairs produced at the extraordinary general meeting of the company and at the creditors' meeting on the 10th October, 2007, as of that date, the company's deficit was €1,971,857.54. It seems to me that it is just and equitable that the respondents, who procured benefits from the depletion of the assets of the company to the extent assessed by the liquidator, should be directed to repay an equivalent sum to the liquidator on behalf of the company in liquidation.

6. **Conclusion and Order**

6.1 Given that the first respondent, in his replying affidavit of the 6th July, 2009, disputed the liquidator's claim and requested that the matter go to plenary hearing, it is very unsatisfactory that the respondents left their solicitors (who through their counsel gave the court such assistance as it was appropriate to do while on record) in a position that they had to apply to come off record and then failed to appear in person at the hearing of the application. However, I have already commented more than once on the comprehensiveness and thoroughness of the work done by the liquidator, which I must say inspires confidence that the claim he is pursuing is justified. In his oral testimony, the liquidator confirmed that his affidavit evidence as adjusted after the engagement of the respondents' accountant with him is accurate.

6.2 There is no doubt that the respondents were in serious default in relation to their statutory obligations as directors of the company during the last four years in which the company was trading. On the direction of the Director of Corporate Enforcement the liquidator brought proceedings in this court (Record No. 2008/282Cos) under s. 150 and s. 160 of the Act of 1990 against the respondents which resulted in the respondents being disqualified from acting as directors of a company for a period of six years.

6.3 One element of the default on the part of the respondents which created considerable difficulties for the liquidator was that the last audited accounts of the company were in respect of the year 2002. In the abridged Financial Statements for the year ended 31st December 2002, a sum of €186,207.25 appeared as representing the balance on the directors' loan account. As the liquidator pointed out in his affidavit, the accounts constituted an acknowledgement by the respondents that they owed the company that sum as of the 31st December, 2002. In relation to the subsequent years, the liquidator approached assessing the respondents' liability to the company by reconstituting a "directors loan account" for each subsequent year (2003, 2004, 2005, 2006 and 2007,) starting with the figure of €186,207.25 as a debit at the beginning of 2003. It seems to me that the approach adopted by the liquidator was a sensible manner of putting structure on the task of assessing the respondents' liability to the company. The "directors' loan" terminology was used by the liquidator in his engagement with the respondents' accountant. However, the reality of the situation is that, save as regards the amount which was due by them to the company as of the 31st December, 2002, the respondents did not take any steps to have the sums expended by the company in payments to them or in discharging their personal liabilities treated as loans by the company to them, or to otherwise acknowledge their liability to the company in respect of those sums before the company was wound up. Therefore, in the absence of further evidence or legal submissions to the contrary, I consider that it is appropriate to regard the actions of the respondents in procuring the payments made by the company as giving rise to dispositions which come within s. 139 of the Act of 1990.

6.4 There will be an order pursuant to s. 139 of the Act of 1990 directing the respondents to pay to the liquidator the sum of €1,234,508.99.