

THE HIGH COURT

[2014 No. 3 COS]

IN THE MATTER OF FF COURIERS LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2013

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 286 OF THE COMPANIES ACT 1963 (AS AMENDED)

BETWEEN

THOMAS KEANE

APPLICANT

AND

WILLIAM DAY, STEPHEN FULLER, ALAN FLEMING

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 29th July, 2016.

1. This application arose in the Examiner's List on 17th July. It is a matter that has significant monetary, and perhaps other, implications for Mr Day, the sole man with whom the application made before the court was concerned. Mr Day appeared in person at the hearing of the application. He looked understandably worried, though he spoke steadily and with transparent honesty to the court. It is, of course, a matter of some concern that directors of liquidated companies continue regularly to appear unrepresented in court. That they do so is a consequence of the fact that many of them suffer considerably straitened circumstances after the companies they serve go into liquidation. But a concern must arise as to whether such directors are properly aware of their legal rights when they come before the courts, or in a position to defend themselves adequately against such arguments as may be made against them on behalf of liquidators, skilled professionals who are able invariably, it seems, to afford the offices of counsel versed in law and skilled in advocacy.

2. Here, the liquidator of FF Couriers Limited (in liquidation), a company which entered liquidation on 4th January, 2014, has come to court seeking a declaration that certain payments made to Mr Day by FF Couriers Limited during the waning months of its active operation constitute a fraudulent preference pursuant to s.286 of the Companies Act, 1963, as amended. So far as relevant to the within proceedings, that provision provides as follows:

*"(1) Subject to the provisions of this section, any...payment...made...by...a company which is unable to pay its debts as they become due in favour of any creditor...with a view to giving such creditor...a preference over the other creditors, shall, if a winding-up of the company commences within 6 months of the making or doing of the same and the company is at the time of the commencement of the winding-up unable to pay its debts...be deemed a fraudulent preference of its creditors and be invalid accordingly.*

*... (3) A transaction to which subsection (1) applies in favour of a connected person which was made within two years before the commencement of the winding-up of the company shall, unless the contrary is shown, be deemed in the event of the company being wound up –*

*(a) to have been made with a view to giving such person a preference over the other creditors, and*

*(b) to be a fraudulent preference, and be invalid accordingly...*

*(5) In this section, a 'connected person' means a person who, at the time the transaction was made, was –*

*(a) a director of the company..."*

3. The court notes in passing that Mr Day, as a director of FF Couriers Limited, was a connected person within the meaning of s.286(5). This being so, (a) the presumption established by s.286(3) arises *"unless the contrary is shown"*, and (b) all the impugned payments, per s.286(3), ought to have occurred within a two-year period before 4th January, 2014, which, as will be seen hereafter, they did.

4. Turning then to the facts at hand, the reason the liquidator has brought the within application is that between June 2013 and December 2013, Mr Day was paid a salary of €1,710.15 every month. This is a modest enough sum for a man seeking to support himself and his family. Unfortunately, the payment was accounted for as being drawn from certain loan monies that had previously been advanced, *inter alia*, by Mr Day to FF Couriers Limited. So, viewed from the liquidator's perspective, it was a preference of Mr Day in his capacity as a creditor (lender) and not a payment by way of salary to Mr Day in his capacity as director. Viewed from Mr Day's perspective, matters look rather different. He avers, *inter alia*, as follows in a brief affidavit furnished to the court:

*"2. The payments received by me that the Liquidator takes issue with were paid to me as salary as my job in the Company was my only source of income to live on and provide for my family. I did think that the Company would*

*overcome its difficulties...and would be able to continue to trade and pay all of its debts. However, this didn't happen.*

*3. I was not paid my salary in the last month and was also not paid expenses of several hundred euros to which I would have been entitled.*

*4. I put €60,000 into the company and have lost it all....I simply cannot afford to pay €10,000. I already have been ordered to pay €1,000 to the Liquidator for his costs."*

5. These are, therefore, High Court proceedings in which the liquidator, with the assistance of counsel, seeks a declaration that there has been a fraudulent preference of in or about €10k in circumstances where (a) notwithstanding the deemed but rebuttable fraudulent preference arising under s.286(3), the facts in play suggest (and the court finds) something rather less untoward to have occurred, and (b) it is, at the least, unclear whether, notwithstanding any declaration sought, there would be any real prospect of recovering such monies as were paid. Though not expressly averred to by the liquidator, it appears from the fact that the within application has been brought and certain correspondence exhibited in evidence that he considers the impugned payments to have been made (as is necessary for s.286 to become applicable) at a time when FF Couriers Limited was "a company which is unable to pay its debts as they become due".

6. When the court asked Mr Day at the hearing of the within application what he had to say as to the issue of his salary being accounted for in such a manner as to suggest that it was a fraudulent preference, in the form of an improper repayment of his loan ahead of other creditor liabilities, Mr Day replied, in effect, that he did not know how his salary was being accounted for when he received what he perceived to be his salary, and that he wished the company accountant was present to answer the court's question. It did not seem to the court that Mr Day was being coy in this response. Rather, his answer seemed the honest response of a man who honestly thought himself back in 2013 to have done nothing wrong in continuing to draw what he perceived to be his salary, and a modest enough salary at that.

7. It appears to the court that the evidence before it suffices to overcome the presumption arising pursuant to s.286(3) that "unless the contrary is shown" the impugned payments were (a) "made with a view" to preferring Mr Day, as creditor, over other creditors of FF Couriers Limited, and (b) involved a "fraudulent preference" of Mr Day, as creditor, over those other creditors. Here, the payments received were modest amounts handed over, strikingly, in a constant fashion every month, all of which points to the truth of Mr Day's evidence, viz. that the payments were understood and intended as, the ongoing payment of his relatively modest monthly salary. They were not, for example, suspicious 'scatter-gun' payments of large amounts that were clearly effected to achieve a quick repayment of the loan monies owed to Mr Day by FF Couriers Limited. There is suggestion in the evidence that the, doubtless modest, tax liabilities arising in respect of Mr Day's relatively modest monthly salary may not have been fully discharged. The court does not consider that any (if any) failing to meet a tax liability points to the payments received by Mr Day as having been made "with a view to giving [Mr Day as creditor], a preference over the other creditors". All that seems to have occurred is that matters were accounted for in a manner that did not correctly reflect the practical reality of what was occurring.

8. Good corporate governance standards are rightly expected of all company directors. And the company law code is now replete with sanctions for directors who fall short of those rightful standards. However, a careful application of the sometimes quite draconian provisions of our company law code is required of our courts if company directors are not to lose their good name – so vital a commodity in business life – and much more besides, by way of un-tempered adjudication in a matter such as that now presenting. In the present case, for the reasons stated, and having had careful regard to the evidence furnished by the liquidator, on the one part, and Mr Day, on the other, the court is not satisfied to grant the declaration sought.