Neutral Citation [2015] IEHC 669

THE HIGH COURT

[2012 No. 265 COS]

IN THE MATTER OF MCSWEENEY CIVIL ENGINEERING LIMITED (IN LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

TOM KEANE

APPLICANT

AND

THOMAS KEVIN O'CALLAGHAN

RESPONDENT

JUDGMENT of Mr. Justice Gilligan delivered on the 3rd day of November, 2015

1. This is an application brought by the liquidator of McSweeney Civil Engineering Limited (in liquidation) pursuant to s. 150 of the Companies Act 1990, for a declaration restricting the respondent for a period of five years from acting as a director of any company (other than one that meets the requirements of s. 150(3) of the Companies Act 1990).

2. Section 150 of the Companies Act 1990, provides:-

> 150.—(1) The court shall, unless it is satisfied as to any of the matters specified in subsection (2), declare that a person to whom this Chapter applies shall not, for a period of five years, be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in subsection (3); and, in subsequent provisions of this Part, the expression "a person to whom section 150 applies" shall be construed as a reference to a person in respect of whom such a declaration has been made.
>
> (2) The matters referred to in subsection (1) are—
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> (a) that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this section, or
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> (b) subject to paragraph (a), that the person concerned was a director of the company solely by reason of his nomination as such by a financial institution in connection with the giving of credit facilities to the company by such institution, provided that the institution in question has not obtained from any director of the company a personal or individual guarantee of repayment to it of the loans or other forms of credit advanced to the company, or
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> (c) subject to paragraph (a), that the person concerned was a director of the company solely by reason of his nomination as such by a venture capital company in connection with the purchase of, or subscription for, shares by it in the first-mentioned company.
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> (3) The requirements specified in subsection (1) are that—
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> (a) the nominal value of the allotted share capital of the company shall—
> (i) in the case of a public limited company, be at least £100,000,
>
> (ii) in the case of any other company, be at least £20,000,
>
> (b) each allotted share to an aggregate amount not less than the amount referred to in subparagraph (i) or (ii) of paragraph (a), as the case may be, shall be fully paid up, including the whole of any premium thereon, and
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> (c) each such allotted share and the whole of any premium thereon shall be paid for in cash.
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> (4) Where a court makes a declaration under subsection (1), a prescribed officer of the court shall cause the registrar of companies to be furnished with prescribed particulars of the declaration in such form and manner as may be prescribed.
>
> (5) In this section—
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> "financial institution" means—
> (a) a licensed bank, within the meaning of section 25, or
>
> (b) a company the ordinary business of which includes the making of loans or the giving of guarantees in connection with loans, and "venture capital company" means a company prescribed by the Minister the principal ordinary business of which is the making of share investments."

The insolvent companies to which the restriction provisions of s. 150 apply are those companies referred to in ss. 149 and 154 of the 1990 Act (being the sections comprised in Chapter 1 of Part VII of the Act). Section 149 provides:-

> "149.—(1) This Chapter applies to any company if—
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> (a) at the date of the commencement of its winding-up it is proved to the court, or
>
> (b) at any time during the course of its winding-up the liquidator of the company certifies, or it is otherwise proved, to the court, that it is unable to pay its debts (within the meaning of section 214 of the Principal Act).
>
> (2) This Chapter applies to any person who was a director of a company to which this section applies at the date of, or within 12 months prior to, the commencement of its winding-up.
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> (3) This Chapter shall not apply to a company which commences to be wound up before the commencement of this section.
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> (4) In this Chapter "company" includes a company to which section 351 of the Principal Act applies.
>
> (5) This Chapter applies to shadow directors as it applies to directors."

Section 154 of the 1990 Act provides:-

> "154.—Where a receiver of the property of a company is appointed, the provisions of this Chapter shall, with the necessary modifications, apply as if the references therein to the liquidator and to winding up were construed as references to the receiver and to receivership."

3. In brief, McSweeney Civil Engineering Ltd and a number of other companies, including McSweeney Building & Civil Engineering Ltd, were limited liability companies owned effectively by the respondent, his wife, and daughter, with often common directors, and these companies inter-traded and were involved principally in property development and construction.

4. McSweeney Civil Engineering Ltd ceased trading in 2006, but a Mr. Austin Connole took the view that he was owed €10,018.00 by the company which debt the respondent disputed as it related to the delivery of stone to a construction site by Mr. Connole and the respondent held the view that the stone was not actually delivered to the benefit of McSweeney Civil Engineering Ltd, that there were no weighbridge invoices in respect of the amount of €10,018, whereas the overall stone that was delivered by Mr. Connole was well in excess of €100,000.00 and in respect of which he was paid, and that apparently McSweeney Civil Engineering Ltd had a small judgment for almost €2,000 against Mr. Connole which was never satisfied.

5. Mr. Connole, however, proceeded to obtain an uncontested judgment in the sum of €10,018.00, together with costs against McSweeney Civil Engineering Ltd, and when this debt remained unsatisfied an application was made for the liquidation of McSweeney Civil Engineering Ltd, and Mr. Tom Keane was appointed as liquidator.

6. McSweeney Civil Engineering Ltd ceased trading in 2006, and in fact was not insolvent, and was fully tax compliant.

7. It appears that McSweeney Civil Engineering Ltd (in liquidation) put up no resistance to the appointment of Mr. Keane as liquidator.

8. In essence, what Mr. Keane ascertained on taking up his position as liquidator of McSweeney Civil Engineering Ltd was that the company was not insolvent, and was owed a very substantial inter-company debt which Mr. Keane estimated at €291,000.00.

9. The respondent did not agree that this was a correct analysis of the position and disputed the contention which resulted in a very substantial hearing before this Court (Laffoy J.) in High Court proceedings bearing the Record No. 2013/61COS *In the matter of McSweeney Building and Civil Engineering Ltd,* being a related company which Mr. Keane alleged owed McSweeney Civil Engineering Ltd (in liquidation) the sum of €291,000.

10. This Court (Laffoy J.) in a judgment of 10th March, 2013, took the view that it was appropriate to make an order winding up McSweeney Building and Civil Engineering Ltd as, in the view of the court, there was a very substantial sum of money owing between the two companies and the court took the view that McSweeney Civil Engineering Ltd was not *bona fide* disputing the debt and that there was, therefore, a deemed insolvency and that the court had jurisdiction to make a winding up order. Subsequently, a settlement was arrived at with the approval of the Court whereby McSweeney Building and Civil Engineering Ltd paid to the liquidator on behalf of McSweeney Civil Engineering Ltd a sum of €180,000.

11. Mr. Keane also took the view that there were other inter-company debtors namely O'Callaghan Investments Ltd in the sum of €373,139 and Cicero Electrical Ltd in the sum of €5,566.

12. As Mr. Keane, the applicant, states in his grounding affidavit, he believes the primary reason the company was wound up was because of the outstanding judgment against the company by Mr. Connole, and as he then sets out, the company refused to answer any correspondence from the creditor's solicitors in relation to the matter and accordingly, the creditor petitioned to have the company wound up.

13. Mr. Keane, in respect of the application that is presently before the court, takes the view that it would be just and equitable to restrict the respondent from acting as a company director for the following reasons, as he sets out in his grounding affidavit:

> "a) Failure to keep proper books and records
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> I say that the Respondent at all times attempted to obstruct my investigations into the affairs of the company. I say that the only information I was able to obtain in relation to the company was obtained though contacting the Respondents' previous auditors namely Kelly Foley & Company.
>
> I say and believe, and it is evident from my investigations, that the Respondent acted dishonestly and irresponsibly in relation to the affairs of the company in that he completed and swore a statement of affairs that was misleading and had errors which had failed to include the debt owing to the deponent and also other inter-company debt. Also, in furtherance, the Respondent detailed the only assets the company had was scrap vehicles. I say and believe this to be

untrue as it was detailed in the Affidavit of Service of John Somers that when he attempted to deliver the Petition on the Respondent at his dwelling house he [saw] that the farm buildings were acting as a storage facility for plant and machinery owned by the Respondent…

As per the statement of affairs, the total assets in respect of the Company are €600 as detailed by Mr Thomas Kevin Callaghan. The assets comprise of 3 scrap motor vehicles. Mr Thomas Kevin Callaghan is disputing my rights to collect the said scrap vehicles despite having produced a sworn statement for the courts that the vehicles belonged to the company. I say and believe that the Respondent is engaged in a delaying tactic thus causing further work and costs for me and my legal team in pursuit of these assets.

I say and believe that the records that were kept are entirely inadequate and incomplete, that same are not consistent and that they do not maintain continuity. It would therefore seem apparent to the deponent that the Respondent violated his obligations as a director pursuant to section 202 of the Companies Act 1990.

b) Inter-company debt

I say and believe that there are inter-company debtors in the sum of €670,084. This can be broken down as follows:

McSweeney Building & Civil Engineering Limited €291,379

O'Callaghan Investments Limited €373,139

Cicero Electrical Limited € 5,566

As already alluded to the Respondent failed to include these figures in the Statement of Affairs and also failed to include the debt relating to the deponent company in the financial statement filed in the Company Registration office by his new auditors for the year ending December, 2010. It should be noted that the Respondent's new auditors also filed the financial statement for December, 2011 which clearly included the debt outstanding to the deponent.

I also say further that the Respondent claimed capital allowances on the fact that the debt was owed to the deponent company and for the Respondent to now challenge the debt would clearly mean that the company had filed incorrect tax returns which would raise serious issues as to whether the Respondent and the company have acted *bona fides*.

c) Delay

I say that the Respondent continuously challenged my position and it was only when I was forced to issue a petition to wind up his company that the Respondent started to communicate with me. The Respondent issued replying affidavits in response to my affidavit and in total I was forced to file a further three affidavits as his affidavits stipulated that the outstanding debt to the deponent company did not exist. I say and believe that the Respondent did not act *bona fides* in relation to the communications and proceedings and in doing so caused undue delay in this matter."

14. Where Mr. Keane makes an allegation that the respondent completed and swore a statement of affairs that was misleading and had errors which had failed to include the debt owing to the deponent and also other inter-company debt, the respondent says that in fact an agreement had been reached whereby the inter-company debt had been forgiven by McSweeney Civil Engineering Ltd, but yet as previously referred to this resulted in a protracted legal action resulting in the judgment of Laffoy J. of this Court, and the subsequent settling of this aspect of matters in the sum of €180,000 with the approval of the Court.

15. Further, there was an issue between the applicant and the respondent in respect of certain assets and the applicant says that he received no cooperation from the respondent and the respondent says that these goods were only valued at €600.00, and eventually it appears a settlement was reached in this sum in that regard.

16. The applicant maintains that the respondent failed to keep proper records and violated his obligations as a director pursuant to s. 202 of the Companies Act 1990, which the respondent denies.

17. The applicant says that the respondent effectively continuously challenged his position and it was only eventually after the issuance of proceedings that the respondent began to respond.

18. There is an issue as regards a claim for capital allowances which has resulted in a difference of opinion between Mr. Keane and Mr. O'Callaghan.

19. Mr. Keane in his report to the Director of Corporate Enforcement indicates that the respondent has, in his opinion, acted dishonestly and irresponsibly in relation to the affairs of the company.

20. Shanley J., *In the Matter of La Moselle Clothing Ltd* in his judgment of 11th May, 1998, took the view that in determining the responsibility of a director for the purpose of s. 150(2)(a) the court should have regard to:-

"(a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts 1963-1990.

(b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.

(c) The extent of the director's responsibility for the insolvency of the company.

(d) The extent of the directors responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.

(e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards.

21. Shanley J did not, however, intend that these factors be exhaustive and gave examples of other situations in which the Court may restrict a director (at 352):

> "… not all situations of a want of responsibility will result from a breach of obligations imposed by the Companies Acts: for example, a director's inability to see the 'writing on the wall' (e.g. an inability to see from a perusal of the company's management accounts that the company was trading while insolvent) may result from sheer incompetence and justify a restriction… Equally a director who takes excessive sums from the company by way of drawings for salary without regard to the financial state of health of the company may be said to have acted without commercial probity…"

The *La Moselle Factors*, as they have come to be known, were subsequently approved by the Supreme Court in its decision in *Re Squash (Ireland) Limited* [2001] 3 IR 35.

22. In *Re Tralee Beef and Lamb Limited* [2004] IEHC 139, Finlay Geoghegan J expanded on the criteria identified by Shanley J in *La Moselle* as follows (at page 8):

> "At common law, directors owe duties to the company which are normally divided into duties of loyalty based on fiduciary principles, developed initially by the courts of equity, and duties of skill and care developed initially by the common law courts from the principles in the law of negligence. There is no suggestion in the above decisions that the courts should ignore those duties. Accordingly, it appears to me that when considering the matters referred to by Shanley J in *La Moselle Clothing Limited v Soualhi* [1998] 2 ILRM 345 under paragraph (a) a court should have regard not only to the extent to which a director has or has not complied with any obligation imposed on him/her by the Companies Acts but also with duties imposed by common law."

Relying on the proposition as set out in Keane, *Company Law, 3rd Ed*. (Dublin, 2000) that directors "owe a duty to the Company to exercise skill and diligence in the exercise of their functions," Finlay Geoghegan J cited with approval the following propositions formulated by Parker J in *Re Barings plc* (No.5) [1999] 1 BCLC 433:

> "(i) Directors had, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.
>
> (ii) Whilst directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegated functions.
>
> (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, depended on the facts if each particular case, including the director's role in the management of the company."

23. The decision of Finlay Geoghegan J in *Re Tralee Beef and Lamb* was successfully appealed to the Supreme Court. However, it is clear that the Supreme Court did not disagree with the judgment of Finlay Geoghegan J in so far as common law duties ought to be considered in deciding the question of whether a director had acted responsibly. Hardiman J commented (at page 357):

> "I wish to make it clear that I am in agreement with these propositions of law enunciated by the High Court Judge. In particular I would endorse her citation from Keane's *Company Law* (3rd ed., 2000) and the cases cited there."

Subsequently, the Supreme Court in *Re Mitek Holdings Limited; Grave v Kachkar* [2010] 3 IR 374 confirmed that the amplifications introduced by Finlay Geoghegan J. in *Re Tralee Beef and Lamb* represent the applicable law.

24. It is clear from the authorities that the purpose of section 150 is to protect against future management of companies by persons whose past record as directors of insolvent companies have shown them to be a danger to creditors, as per Finlay Geoghegan J. in *Re Colm O'Neill Engineering Services Limited* [2004] IEHC 83. At paragraph 3 of that judgment, the learned judge stated:

> "In considering the matters raised by the liquidator in relation to the four respondent directors, I think it is necessary just briefly to consider the legal framework which has been established by s.150 and the authorities on the section. Firstly, it is well established that the purpose of the section is to protect the public against the future supervision and management of companies by persons whose past record as directors of insolvent companies have shown them to be a danger to creditors and others. It is also established that it is not the purpose of the section to punish the individuals concerned."

25. In my view, the underlying assumption in respect of an application pursuant to s. 150 is that the directors allowed or caused or permitted the company to trade while insolvent as a result of which creditors were at a loss. In the most unusual and probably unique circumstances of this case, the company never traded while insolvent and there are no creditors, and the company was fully tax compliant, but for the reasons as already set out, the respondent took a particular view in respect of the claim by Mr. Connole and then declined to accept the validity of the judgment in respect of the amount claimed by him and costs as awarded to him and events proceeded from there. The respondent has brought all his troubles upon himself by the stance he adopted, and the particularly strong views he expressed in respect of events subsequent to the appointment of the liquidator. However, the fact remains that while the liquidator was put to substantial inconvenience and expense by Mr. O'Callaghan, the company was not insolvent, was fully tax compliant, and Mr. Connole's judgment and costs have been paid in full and Mr. Keane's costs and expenses have been fully discharged.

26. I take the view that the basic premise of applications pursuant to section 150 of the Companies Act 1990 and section 56 of the Company Law Enforcement Act 2001, is to protect members of the public and companies from those whose past record as directors of insolvent companies have shown them to be a danger to creditors and others.

27. Mr. O'Callaghan was not a director of an insolvent company and no third party is at any financial loss arising from his directorship. I also take into account that it is not the purpose of the section to punish, in this case, Mr. O'Callaghan.

28. I do not consider that where the company concerned is actually solvent, section 150 of the Companies Act 1990 and section 56 of the Company Law Enforcement Act 2001 have any role to play, and accordingly, I refuse the reliefs as sought on the applicant's behalf.