

**THE HIGH COURT**  
**IN THE MATTER OF FORTWILLIAM CATERING LIMITED (IN LIQUIDATION)**  
**AND**  
**IN THE MATTER OF THE COMPANIES ACTS 1963–2013 AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990**  
**AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001**  
**ON THE APPLICATION OF**  
**ANTHONY J. FITZPATRICK IN HIS CAPACITY AS LIQUIDATOR**

**Applicant**

**AND**  
**SHIV KUMAR SHARMA, GEETA SHARMA, TRISHA SHARMA & KAVITA SHARMA**

**Respondents**

**Judgment of Mr. Justice Max Barrett delivered on 13th January, 2015.**

1. This is an application for a declaration of restriction against each of the respondents under s.150 of the Companies Act, 1990, as amended. One of the respondents was a shadow director, one a so-called 'nominal' director, and the remaining two were, it seems, entirely inactive directors.

**Background facts.**

2. Fortwilliam Catering Limited was incorporated on 19th July, 2010, to carry on the operation of the Woodstock Hotel, near Ennis, County Clare. It appears that it was a 'phoenix company', by which the court means a company that has emerged from the ashes of another entity that had collapsed and which was trading in the same line of business. Here the entity Fortwilliam supplanted was the former operator of the Woodstock Hotel, Fortmere Hotels Limited, a tax delinquent company that was eventually struck off the register of companies in January 2013 for not filing its annual returns. Notwithstanding Fortmere's strike-off in 2013, it appears that it had in fact ceased trading in August 2010, at which point Fortwilliam took over the operation of the Woodstock Hotel. From the outset, Fortwilliam sustained substantial losses. In the months before it ceased trading, it also appears to have been trading without the benefit of an intoxicating liquor licence; in fact Garda interest in this last aspect of its affairs may have precipitated its decision to cease trading. Be that as it may, the liquidator was appointed on 23rd January, 2013. As at the date of its liquidation, Fortwilliam owed significant amounts of money to various creditors, including the Revenue Commissioners and Clare County Council. Its tax liabilities alone amounted to almost a quarter of a million euro, by coincidence, the same tax liability that Fortmere left unpaid when it ceased trading.

3. Mr. Shiv Sharma appears to have been a shadow director of Fortmere. From 16th February, 2012 to 23rd January, 2013, he was a director of Fortwilliam. Ms Geeta Sharma, the liquidator avers, "*was a non-executive director of the Company from 16th February 2012 to the date of liquidation and appears to have been...appointed solely to fulfil the numeric requirement to have two directors and had no role in the management or operation of [Woodstock].*" Ms Trisha Sharma and Ms Kavita Sharma, the liquidator avers "*were non-executive directors of the Company from 19th July 2010 to 16th February 2012.*" Insofar as the director uses the terms "*non-executive director*" he intends to connote that the relevant individuals, though listed as directors of Fortwilliam at the Companies Registration Office, had no role in its day-to-day management or operation; in truth it is not clear that Ms Trisha Sharma or Ms Kavita Sharma played any role at all in relation to Fortwilliam.

4. On a daily basis, the Woodstock Hotel was run by a general manager and a management team. Although UK-based, Mr. Shiv Sharma appears to have been a part-time managing director of the hotel; certainly he was the person from whom the general manager of the hotel took direction and instruction. In truth, he appears to have been the originator of all the shenanigans that surrounded the operation of Fortwilliam and previously of Fortmere.

5. Although reference has been made to Fortmere Hotels, and to Mr. Shiv Sharma's alleged shadow directorship of same, the court in arriving at its judgment has had regard exclusively to the role of the respondents as directors of Fortwilliam. That said, the court has had regard to the fact that Fortwilliam appears to have been a phoenix company. Moreover, the court considers it of significance that Fortwilliam incurred substantial losses from the outset, ultimately traded for some time without the benefit of an intoxicating liquor licence and, by the liquidator's reckoning, ought to have ceased trading almost half a year before it did.

**Applicable principles.**

6. There is, if anything, a possible surfeit of judicial guidance on the criteria that are relevant in determining a s.150 application. An early but significant contribution was made by Shanley J. in *La Moselle Clothing Limited (in liquidation) v. Soualhi* [1998] 2 I.L.R.M. 345, his observations having since been described by Hederman J. in *In the Matter of Tralee Beef & Lamb Limited* [2008] IESC 1 at p.19, as being, at least at that time, of "*near canonical status*". Shanley J.'s observations were later affirmed and expanded upon by the Supreme Court in *Re Squash (Ireland) Ltd.* [2001] 3 I.R. 35. In his judgment, Shanley J. had, at p. 11, mentioned that the extent to which a director has or has not complied with the Companies Acts is a relevant factor when determining a section 150 application. In the High Court decision in *In the Matter of Tralee Beef & Lamb Limited* [2004] I.E.H.C. 283, Finlay Geoghegan J. suggested that compliance by a director with the common law obligations of a director is also a relevant factor. In the Supreme Court judgment in that case, Hederman J., at p.19, indicated that he did not disagree with this 'amplification' by Finlay Geoghegan J., though he was concerned that no injustice should be wrought in that case as a result of the amplification being sounded therein for the first time. Finlay Geoghegan J.'s views appear to have received implicit approval by the Supreme Court in *Re Mitek Holdings* [2010] 3 I.R. 374 and ought perhaps now to be treated as settled law. Certainly it is difficult to see how a director could be held to have acted responsibly where he or she had complied with the Companies Acts but was in breach of his or her common law duties, though equally it is difficult offhand to see how a director could breach his or her common law duties where he or she is not guilty of any breach of the detailed and comprehensive code established by the Companies Acts. Be that as it may, what Fennelly J. signals most clearly in the *Mitek* decision is that it is important not to adopt a formulaic, standardised, 'tick the box' approach to determining s.150 applications. Thus, Fennelly J., at p.396, emphasises "*the need to identify the issues that are important in the particular case*" and then continues "*I would not be disposed to limit the matters to which regard should be had or to substitute standardised judicial criteria for the general words of the statute.*" Section 150 enjoins the court to have regard to whether an affected person has acted "*honestly*" and "*responsibly*" and also to consider whether there is any other reason why it would be "*just and equitable*" that a s.150 order should issue. The last-quoted terms bear their ordinary meaning.

**Jurisdiction of court as regards non-resident directors.**

7. One issue that arises in this application is that the respondents are and appear at all material times to have been resident in the United Kingdom. A query therefore arises whether, under s.150, the court has any jurisdiction to issue an order against persons who have little connection to this jurisdiction and are resident abroad. The relevant general presumption of statutory interpretation in this regard is succinctly stated as follows by Byrne and McCutcheon in their learned treatise "*The Irish Legal System*" (5th edition, 2009),

*"It is accepted both in national and international law that the state may legislate with extraterritorial effect, that is with effect beyond its geographical boundaries. At the same time it is presumed that the operation of an Act is intended to be confined to the territory of the state unless a contrary intention is evident."*

8. When it comes to s.150 of the Act of 1990, there is existing precedent of the court that confirms that the Oireachtas intended it to have extra-territorial effect. Thus, in *Re Euroking Miricale (Ireland) Limited (In Voluntary Liquidation)* [2003] IEHC 15, Finlay Geoghegan J. arrives at this conclusion by reference both to the wording of s.149(2) of the Act of 1990 and the general purpose and nature of the provisions of Chapter 1 of Part VII of that Act, being the Chapter concerned with the restriction of directors of insolvent companies. The application of s.150 to directors of Irish companies who are not resident in Ireland can also be seen in *Re Mitek*. It would, in truth, be nonsense to read Chapter 1 of Part VII in any other way. Otherwise irresponsible and dishonest directors could, for example, avoid coming within the scope of s.150 through the simple expedient of operating Irish-registered companies jurisdiction from across the border in Northern Ireland. All that said, while s.150 has extra-territorial effect in law, a question possibly arises as to whether this has any meaningful consequence in practice. Thus, in this judgment, the court finds that declarations of restriction under s.150 are required to issue against two of the respondents; whether this will have any meaningful consequence for them in the conduct of their business affairs in the United Kingdom, their long-time place of residence, remains to be seen.

#### **'Ties of affection'.**

9. This is yet another case in which the court is confronted with the issue of how to treat a spouse who, as the liquidator has averred, *"was a non-executive director of the Company from 16th February 2012 to the date of liquidation and appears to have been...appointed solely to fulfil the numeric requirement to have two directors and had no role in the management or operation of the Company."* The court has previously considered this issue and relevant precedent in its judgment in *Director of Corporate Enforcement v. Slattery* [2014] IEHC 363 at paras. 15-16. In that case it also had regard to the decision of the court in *Re Hunting Lodges Limited (in liquidation)* [1985] I.L.R.M. 75, in which Carroll J. indicated in effect that a married female director cannot escape liability as a director by reference, for example, to some sort of subservience to husbands that may have existed before the modern age of equality between the sexes.

10. It is important to recognise the limits of what Carroll J. stated in *Re Hunting Lodges*. She did not say that a married female director can never escape liability as a director where she embarks upon a directorship through ties of natural affection and never does anything in relation to the company of which she is director. That would place so great a premium on legal reality above practical reality as to be almost certain to result in injustice in some instances, an outcome which Carroll J. undoubtedly did not intend. Neither does Carroll J. dismiss the possibility that a passive director may be excused liability in some circumstances. Indeed she gives one instance, at p.85 of her judgment, that of where a passive director *"reasonably endeavoured to keep abreast of company affairs and had been deceived"*, in which it might be possible to excuse such director from liability. Nor does Carroll J. indicate that there are no other instances in which a passive director might be so excused. Carroll J. establishes as the litmus-test of personal liability in respect of such a director that there should, as a matter of necessity, be some *"real moral blame"* attaching to her before personal liability should arise.

11. The foregoing does not have the effect that it is 'closed season' as regards bringing s.150 applications against, for example, husband-and-wife directors. All it means is that just as it did not suffice for the female director in *Re Hunting Lodges* to claim that she should be excused from liability as a director because of her status as spouse, neither statute nor case-law requires the imposition of liability on a person regardless of his or her status as a spouse and heedless of the fact that it may be primarily 'ties of affection' that drove a person to assume what is in practice, albeit not in law, a 'nominal' directorship.

#### **Conclusion.**

12. *Mr Shiv Kumar Sharma*. The court considers that the facts as outlined above indicate that Mr. Shiv Sharma, at the least, did not act responsibly in relation to the conduct of the affairs of Fortwilliam. He allowed it to be established as a 'phoenix company', that incurred substantial losses from the outset, allowed it to trade for some time without the benefit of an intoxicating liquor licence and allowed it to continue trading for a considerable time after it ought, by the liquidator's reckoning, to have ceased trading.

13. *Ms Geeta Sharma*. The court considers that, to use the test settled upon by Carroll J. in *Re Hunting Lodges*, 'real moral blame' attaches to the actions of Ms Geeta Sharma in acting as the required second director necessary to the establishment of a 'phoenix company'. The court considers that her role in this regard offers reason why it is just and equitable that a declaration of restriction should issue against her under s.150.

14. *Ms Trisha Sharma and Ms Kavita Sharma*. It is not clear why Ms Trisha Sharma or Ms Kavita Sharma were appointed directors of Fortwilliam. They appear never to have done anything as directors beyond allowing themselves to be appointed as such. This was unwise and may evince a lack of understanding as to the proper role of a director. It is possible that they were animated by familial affection into agreeing to serve. Regardless, the court does not find in their actions that want of honesty or responsibility that would require the issuance of a declaration under s.150, nor does it perceive there to be any other reason why it would be just and equitable that a declaration of restriction should issue against either of them. The liquidator, who initially requested of the Director of Corporate Enforcement that he be relieved of his obligation to bring s.150 proceedings against Ms Trisha Sharma and Ms Kavita Sharma, then later changed his mind, offers as a rationale for the issuance of a declaration under s.150 that the two facilitated the operation and trading of the business of Fortwilliam. However, the court struggles to see that this is so. A company need only have two directors and Ms Geeta Sharma was that second director. Ms Trisha Sharma and Ms Kavita Sharma did nothing as directors and the rationale for their appointment and retention as directors is a mystery. In truth, their appointment appears to offer merely a further example of how Fortwilliam Catering was operated by Mr Shiv Sharma, the kingpin in all that occurred, in a manner that evinces a thorough want of responsibility on his part.

15. For the reasons outlined above, the court considers that: (a) it is required to issue a declaration of restriction against each of Mr. Shiv Kumar Sharma and Ms Geeta Sharma pursuant to s.150 of the Companies Act 1990; (b) it is not required to issue any such declaration in respect of either Ms Trisha Sharma or Ms Kavita Sharma.