Neutral Citation Number: [2005] IEHC 145

THE HIGH COURT

[1991 No: 14268P]

IN THE MATTER OF SUPREME OIL COMPANY LIMITED
(IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACTS 1963 - 2001
AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990

BETWEEN

DAVID HUGHES

APPLICANT

and

SEAMUS DUFFY AND EUGENE HANRATTY

RESPONDENTS

Judgment of Ms. Finlay Geoghegan delivered on the 19th day of April 2005.

The applicant is the Official Liquidator of Supreme Oil Company Limited (in Liquidation) ("The Company") having been so appointed by order of the High Court of the 25th November 1991. The application was made pursuant to a petition presented on the 4th November 1991 and the winding up is deemed to have commenced on that day.

The respondents do not dispute that they were directors of the Company at the date of commencement of winding up nor do they dispute that the Company is insolvent and accordingly s. 150 of the Act of 1990 applies to both the Company and the respondents.

The application is for a declaration that each respondent shall not for a period of five years be appointed to 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 that company meets the requirements set out in s. 150 (3) of the Act of 1990.

The respondents raise a preliminary point. They seek to have the application dismissed or refused by reason of the delay in bringing the application.

The facts relevant to the delay issue appear to be as follows.

The Company was incorporated on the 15th April 1987. It traded in oil and petroleum products from a yard at Longfield, Castleblayney Co. Monaghan until the 8th November 1991. A petition was presented to wind it up on the 4th November 1991 and the order made on the 25th November 1991. Petition was presented by the Revenue Commissioners.

A meeting was held between the Official Liquidator and the first named respondent on the 4th December 1991 when certain books and records of the Company were handed over. These did not comprise a full set of books and records for the Company. The first named respondent claimed that books and records of the Company had been seized previously by the Customs and Excise Authorities.

In February 1994 the Official Liquidator made a report to the Revenue Commissioners. Between September 1994 and October 1995 there was correspondence between the Official Liquidator, the first named respondent and solicitors acting on his behalf in connection with his outstanding obligation to furnish a statement of affairs and the obtaining of copies of the books and records of the Company for the purpose of doing this.

On the 5th December 2003 the motion with the herein application was issued returnable for the 19th January 2004. Affidavits were sworn by each of the respondents on the 13th February 2004 raising the issue of delay. A further affidavit was sworn by the Official Liquidator on the 27th February 2004. The Liquidator asserts that by reason of the failure of the respondents to cooperate and deal with the preparation of a statement of affairs that they have nor been prejudiced by the time which has elapsed before bringing the application. No explanation is given for the failure to bring the application prior to December 2003.

Applicable law

Section 150 of the Act of 1990 came into force on the 1st August 1991. As originally enacted, and as applying to this application it did not contain any express provision requiring a liquidator to bring an application for a declaration of restriction to the High Court. Notwithstanding, it imposed a mandatory obligation on the High Court to make a declaration of restriction where s.150 applied, unless the directors satisfied the Court of the matters specified in s. 150 (2). By reason of such lacuna a practice direction was issued in the early 1990s requiring official liquidators in compulsory liquidations such as this to bring a motion before the court seeking a declaration of restriction. This was considered to be the only practical way in which the High Court could exercise the jurisdiction imposed on it by the Oireachtas under s. 150 (1).

It is undisputed that the Court has jurisdiction to dismiss an application under s. 150 of the Act of 1990 on grounds of delay. The issue was considered by the Supreme Court in *Duignan v. Carway* [2001] 4 I.R. 550 albeit in differing factual circumstances. In that case the delay occurred between the issue of the notice of motion and the date upon which the liquidator sought to re-enter the notice of motion. The delay was explained by two sets of proceedings between the parties in the intervening period.

The principles applied by Fennelly J. in the Supreme Court in *Duignan v. Carway* were those laid down by the Supreme Court in *Premor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and in particular as stated by Hamilton C.J. at p. 475. In that passage Hamilton C.J. summarised the principles as follows:-

(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the

interests of justice require them to do so;
(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

Hamilton C.J. then set out 7 matters to which a court might take into consideration when considering whether the balance of justice is in favour of or against proceeding with the case. Those matters were indicated in *inter partes* proceedings and may not all be relevant to the procedure under s. 150, which is not a normal *inter partes* proceeding. In *Duignan v. Carway* [2001] 4 I.R. 550 Fennelly J. at p. 561 having referred to the above principles had regard to the legislative intent of s. 150; the effect of delay upon same and the respondents' constitutional rights to fair procedures in the following terms:-

> "It is right firstly, to point to the mandatory character of the court's jurisdiction (see *Business Communications Ltd. v. Baxter* (Unreported, High Court, Murphy J., 21st July, 1995)). The use of the word shall connotes an obligation to make the declaration in the ordinary case, though the relieving provision of s. 150(2) significantly qualifies that. It was fairly and properly accepted on behalf of the respondents at the hearing of the appeal that the section gives effect to a public interest in seeing that persons should no longer enjoy the unqualified right to become involved in the formation of companies where they have been directors of companies which have failed due to insolvency. That public interest diminishes, it was said, when there is excessive delay such as in the present case. That proposition was rejected on behalf of the applicant. Ultimately, it was accepted that the public interest in question may be outweighed if there is such delay as to put a just hearing at risk. Whichever way it is put, I think the result is the same. There is a public interest represented by the section. However, excessive delay may render it unjust to permit a liquidator to proceed with his application.
> It cannot be contested that the respondents have had at all material times a right to a fair and speedy trial of the issue as to whether their normal rights to become directors and promote and take part in the formation of companies should be limited restricted or taken away. It is unnecessary, in order to establish the existence of this right, to resort to the European Convention, however undisputed the value of the rights guaranteed by that instrument at international level may be. It is inherent in the notions of fair procedures guaranteed by the Constitution and identified in a long line of cases (see, for example, in the field of criminal justice, *S.F. v. Director of Public Prosecutions* [1999] 3 I.R. 235)."

I would respectfully suggest that in the above passages Fennelly J. envisaged two separate circumstances in which the Court might determine the balance of justice was against proceeding with an application under s.150 of the Act of 1990:-
(i) Where the delay is such as to put a just hearing at risk;
and
(ii) Where the delay would render it unjust to permit the application to proceed by reason of being in breach of the respondents' constitutional right to fair procedures including the right to have determined whether their normal rights to become directors and promote and take part in the formation of companies should be limited, restricted or taken away by reason of their prior involvement as a director of an insolvent company.
In considering the second circumstance identified above it is relevant to note the mandatory period of the declaration of restriction under s. 150 and the shift in the onus of proof to the respondent directors. Unless the respondents satisfy the Court that they have acted honestly and responsibly in relation to the conduct of the affairs of the company then the Court is obliged to make a declaration of restriction for a period of five years. The five year period is subject to the entitlement to apply within one year for the relief under s.152.
On the facts of this application I am satisfied that there was both inordinate and inexcusable delay in the bringing of this application. The communications between the Liquidator and the first named respondent appear to have ceased in October 1995. There do not appear to have been any communications between the Liquidator and the second named respondent since shortly after the commencement of the winding up. No explanation has been offered for the lapse of time until December 2003. Quite simply this appears to have been a liquidation in which there were no assets; no progress being made; it was allowed to remain dormant rather than be finalised and the bringing of an application under s.150 overlooked. .
I have concluded that if the Court were now to permit this application to proceed and put the respondents at jeopardy of a declaration of restriction against them that it would be in breach of their constitutional rights to fair procedures as identified by Fennelly J. in *Duignan v. Carway* [2001] 4 I.R. 550. At the date of issue of this motion a period in excess of 12 years had expired since the commencement of the winding up and a period in excess of 8 years from the last contact between the Liquidator and either of the respondents. Even, having regard to the legislative intent of s. 150 of the Act of 1990 I have concluded that on this ground alone on the facts of this case the balance of justice is against permitting the application to proceed. In the light of this conclusion it is unnecessary to consider whether on the facts referred to by the respondents in their affidavits that the delay is such as to put a just hearing at risk.
There will be an order striking out the application against each respondent.