Neutral Citation [2016] IEHC 483

THE HIGH COURT

[2015 No. 98COS]

IN THE MATTER OF PAURAIC LARKIN AND ASSOCIATES LIMITED

(IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACT 1963 – 2013

AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990

AND IN THE MATTER OF SECTION 56 OF THE COMPANY LAW ENFORCMENT ACT 2001

BETWEEN

EUGENE McMAHON

APPLICANT

AND

PAURAIC LARKIN AND MARIE GORMAN

RESPONDENTS

JUDGMENT of Mr. Justice David Keane delivered on the 24th June 2016

Introduction
1. This is an application for a declaration of restriction against each of the respondent company directors under s. 150 of the Companies Act 1990, as amended ("the 1990 Act").

Background
2. Pauraic Larkin and Associates Limited ("the company") was incorporated on the 30th August 1999 and commenced trading in the month of January 2004. The company was engaged in the provision of professional advisory services, and in the sale of hedging plants or trees, to the agricultural sector.

3. The applicant is a chartered accountant and was appointed liquidator of the company on the nomination of the Revenue Commissioners by resolution passed at the meeting of the creditors of the company held on the 19th December 2012, pursuant to the requirements of s. 266 of the Companies Act 1963, as amended ("the 1963 Act").

4. The first named respondent is a qualified agricultural advisor. He operated and managed the company's business. He became a director of the company at its inception on the 30th August 1999 and continued to act in that capacity until the company went into liquidation.

5. The second named respondent is the spouse of the first named respondent and is a bank official by occupation. She became a director of the company on the 16th July 2007. She was a non-executive director and had no other role in the business beyond making bank lodgements on its behalf for a brief period and at one point arranging for the transfer of the company's bank account from one financial institution to another. While it is not in dispute that the second named respondent resigned her position as director prior to the commencement of the winding up of the company, precisely when she did so is a matter of controversy between her and the applicant.

The necessary proofs
6. The applicant avers that the company was unable to pay its debts on the date of the commencement of its winding up and that proposition has not been disputed by either of the respondents. Nor is it in issue that the first named respondent was a director of the company at the date of the commencement of its winding up. As it is accepted that the second named respondent had resigned as a director of the company before then, under s. 149 (2) of the 1990 Act the applicant bears the burden of establishing that she was a director 'within 12 months prior to' that event. Whether he has discharged that burden is a question to which I will return. Finally, the applicant avers that the Director of Corporate Enforcement has not relieved him of the obligation otherwise incumbent on him under s. 56 (2) of the Company Law Enforcement Act 2001 ("the 2001 Act") to apply for a declaration of restriction against each of the respondents, and he exhibits certain relevant correspondence in support of that assertion.

The defence under s. 150(2)(a) of the 1990 Act
7. In anticipation of the assertion by either of the respondents that he or she is entitled to avail of the defence under s. 150(2)(a) of the 1990 Act that he or she acted 'honestly and responsibly in relation to the conduct of the affairs of the company', the applicant avers to a number of matters that, he contends, preclude that defence from being made out. For the purposes of the present judgment, it is only necessary to refer to three of those.

8. The first is that, while the statement of affairs presented to the meeting of the company's creditors on the 19th December 2012 disclosed a liability to the Revenue Commissioners of €10,650, a subsequent investigation by the Revenue Commissioners resulted in an assessed liability of €345,050.09, comprising €178,039 in unpaid VAT between February 2008 and October 2012; €105,000 in corporation tax incurred between March 2010 and February 2011; and €62,011.09 in unpaid PAYE for the years 2010 and 2011.

9. The second matter raised by the applicant is that, at the creditors' meeting on the 19th December 2012, the first named respondent informed him that the company had two employees at the commencement of its winding up. The applicant has since received confirmation from those employees that they did not receive any minimum notice or redundancy payments. The applicant's

subsequent investigations have disclosed that neither employee was issued with a P45 and that no payroll record exists for the period of their employment, nor is there any record of any taxation or social insurance deductions taken from their salaries.

10. Third, the applicant avers that the company continued to trade after the commencement of the voluntary winding up of the company (which, under s. 253 of the 1963 Act, is deemed to have occurred at the time of the member's resolution to that effect, necessarily prior to the holding of the creditors' meeting) in that the first named respondent accepted a customer deposit of €1,000 from a customer who was unaware of the company's insolvency.

The position of the first named respondent
11. The first named respondent did not appear either in person or through any legal representative in opposition to the present application. Being satisfied that the necessary proofs are in order, and as I cannot be satisfied that the first named respondent acted either honestly or responsibly in relation to the conduct of the company's affairs, I must therefore make the appropriate declaration of restriction concerning him. For the reasons set out in my judgment in *Murphy v. O'Flynn & Anor* [2016] IEHC 197, I propose to do so pursuant to the terms of s. 819 of the Companies Act 2014.

The position of the second named respondent
12. The position of the second named respondent is very different. While the arguments advanced on her behalf at the hearing of the present application were directed to seeking to persuade the court that she had acted honestly and responsibly in the conduct of the company's affairs (by, in effect, accepting appointment as a director of the company without playing any meaningful part whatsoever in the conduct of its affairs), it seems to me that a more fundamental issue clearly arises.

13. That issue, already flagged above, is whether she is a person to whom Chapter 1 of Part VII of the 1990 Act, on the restriction of directors of insolvent companies, applies. S. 149(2) of the 1990 Act states:

> "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 the winding up."

14. Under s. 253 of the 1963 Act, a voluntary winding up is deemed to commence at the time of the passing of the resolution for voluntary winding up. The relevant resolution is that contemplated under S. 251(1)(c) of that Act, whereby a company may be wound up voluntarily 'if the company in general meeting resolves that it cannot be reason of its liabilities continue its business, and that it be wound up voluntarily.'

15. At paragraph 2 of the affidavit that the applicant swore on the 4th March 2015 to ground the present application, he avers that 'on 19th day of December 2012, it was resolved pursuant to s. 251 of the 1963 Act that the company be wound up and that your deponent be appointed as liquidator.' There is some reason to doubt the accuracy of that averment in the following circumstances.

16. S. 266(1) of the 1963 Act states:

> "The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed…."

17. The applicant has exhibited minutes of the creditors' meeting that was held on the 19th December 2012. Those minutes record a statement by one Ian McKeown of McKeown Associates that he had been nominated as liquidator of the company at a meeting of the members of the company held the previous day, the 18th December 2012.

18. Perhaps understandably, as the applicant was only appointed liquidator at the creditors' meeting on the 19th December 2012, he has not exhibited the members' resolution to wind up the company, which ought to have been passed at a meeting of the members earlier on the day of, or on the day preceding, the creditors' meeting. He has exhibited a peculiar kind of hybrid document, which purports to record the 'ordinary resolutions' passed at the meeting of the company's creditors on the 19th December 2012. Those resolutions were to wind up the company and to appoint the applicant as liquidator. However, the form utilised is the old Companies Registration Office 'Form 16A', which is, or certainly was, the standard form used to record ordinary resolutions of the members of a company passed at a general meeting.

19. The author of Doyle *The Company Secretary* (Dublin, 1994) expresses the view (at p. 233) that "[i]n practice, the creditors' meeting will generally take place on the same day as, and shortly after, the winding up meeting."

20. In summary, while there is a strong suggestion that the members in general meeting resolved to wind up the company on the 18th December 2011, that is not the position adopted by the applicant and it is, at least, possible that the applicant is correct in his understanding that the relevant general meeting did not occur until the 19th December 2011.

21. The issue of the precise date upon which the winding up of the company commenced is crucial because of the controversy concerning the date on which the second named respondent resigned as a director of the company.

22. The applicant has exhibited the Form B10 ('change of director or secretary form') recording the termination of the second named respondent's relationship with the company as its director. That form is dated the 1st December 2012 and is stamped received by the Companies Registration Office on the 13th December 2012, which, the applicant seeks to emphasise, was just six days prior to the creditors' meeting at which he was appointed liquidator. This fact, in turn, appears to form the basis for the applicant's assertion on affidavit that the second named respondent "was a director of the company within twelve months prior to the winding up of the company."

23. However, as the applicant accepts, the relevant Form B10 recites on its face that the date upon which the relevant change of directorship was to take effect was the 19th December 2011. The applicant appears to be submitting, by implication if not expressly, that the court should reject that assertion as a convenient fiction, contrived by the respondents just prior to the commencement of the winding up, to spare the second named respondent from the risk of a declaration of restriction under s. 150 of the 1990 Act. As against that, the second named defendant has now deposed at length and on oath to the particular personal and professional circumstances in which she resolved to resign in or about November 2011 and did resign with effect from the 19th December 2011, as recorded in a letter of resignation of that date, which she has exhibited to an affidavit that she swore in opposition to the present application on the 20th November 2015.

24. Beyond an apparent invitation to the court to draw an inference from the failure to file the relevant Form B10 prior to the 13th

December 2012, the second named respondent has adduced no evidence of any statement or action by the second named respondent inconsistent with her sworn evidence that she did indeed resign as a director of the company on the 19th December 2011.

25. In Re *Cavan Crystal Group Ltd* (26 April 1996, unreported, High Court), Murphy J. held that the position of a director who had resigned more than twelve months prior to the commencement of a receivership (equivalent to a liquidation) was not captured by the requirements of s. 149 of the 1990 Act, even though in that case the termination of his directorship was never notified to the Companies Registration Office. That conclusion reflects the approach that has been adopted by the Chancery Division of the High Court in England to the equivalent provisions of the law there, as exemplified by the following passage from the decision of Jacob J. in *POW Services Ltd and anor. v. Clare and ors* [1995] 2 BCLC 435 (at 440-441):

> "What then is the legal position? First, a word about registration of a person as a director or company secretary (or as a person who has resigned as such) at Companies House. The general rule is that the fact of registration or no has nothing whatever to do with whether a person is in fact a director or company secretary. Subject to one exception there is no deeming provision arising from registration. It is the company, acting by the procedures under the articles, which makes or sacks a director or company secretary. There are statutory requirements for registration of the persons whom the company has made a director with sanctions for non-compliance. It may well be that where a company has permitted registration of a person who is not in fact a director or secretary, the company would be estopped as against a third party who relied upon the registration from denying it, but that is as far as the matter goes. The only exception relates to the first directors and secretaries. By s 13(5) of the [UK] 1985 Act the persons named on the appropriate form (Form 10) as these persons are deemed to be such.
>
> I cannot help thinking that in this case the parties (on both sides) have sometimes thought the law goes further – that registration or not itself made a person director or not."

26. Thus, the question of when the second named respondent ceased to be a director is one of fact, the answer to which is in no way contingent upon when the occurrence of that event is notified to the Companies Registration Office.

27. Of course, the applicant bears the burden of establishing the necessary proofs in a s. 150 application. In this case, I have come to the conclusion that the applicant has failed to establish on the balance of probabilities that the second named respondent remained a director of the company at any time after the 19th December 2011 or that the winding up of the company commenced at any time prior to the 19th December 2012.

28. S. 18(h) of the Interpretation Act 2005 ("the 2005 Act") provides that where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period. It seems to me that the 12 month period prescribed under s. 149 of the 1990 Act is expressed to be reckoned to the day upon which the winding up of the company concerned commences. In this case, I cannot be satisfied that the winding up commenced on any date prior to the 19th December 2012. Accordingly, the 19th December 2012 must be included as the last day of the relevant 12 month period reckoned to that date.

29. *McCann v. An Bord Pleanála and Sligo County Council* [1997] 1 ILRM 314 was a case involving the application of a one month time limit for appeal under certain planning legislation to an appeal received on the 7th July 1995 in respect of a decision made on the 7th June 1995. The High Court (*per* Lavan J.) held that the "corresponding date" rule, whereby the relevant period ends on the corresponding date in the next month (or, where appropriate, the next year), was expressly disapplied under s. 11(h) of the Interpretation Act 1937, a provision identical in all material respects to s. 18(h) of the 2005 Act.

30. Applying the same analysis to the facts in this case as I have found them to be, I cannot be satisfied that the period of 12 months prior to the commencement of the company's winding extended backwards in time beyond the 20th December 2011.

31. It follows that the applicant has failed to satisfy me that the second named respondent was a director of the company within 12 months prior to its winding up and that, accordingly, I cannot be satisfied that I have jurisdiction to consider an application for her restriction as a director under s. 150 of the 1990 Act. For that reason, I must decline to make the declaration sought against the second named respondent.