Neutral Citation: [2016] IEHC 525

THE HIGH COURT

[2013 No. 335 COS]

IN THE MATTER OF EVENTELEPHANT LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963-2013

BETWEEN

JOSEPH WALSH AND NEIL HUGHES

APPLICANTS

AND

ALAN BARRETT AND RON DOWNEY

RESPONDENTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 27th day of July, 2016

Introduction

1. This is an application to disqualify the first named respondent and restrict the second named respondent pursuant to s. 160(2) and s. 150 of the Companies Act 1990 ("the 1990 Act")[s. 842 and s. 819 of the Companies Act 2014 ("the 2014 Act") respectively]

Background

2. Eventelephant Limited **("the Company")** operated a self-service online event registration website which allowed customers to use the site to create their own web pages to advertise and sell tickets for events. The Company processed ticket payments and received a commission for same. Many charities and some high profile sport organisations and airlines used the website according to the report of an independent accountant dated 18th July, 2013 which was relied upon to appoint the first named applicant as an interim examiner on that day. The applicants were appointed joint liquidators by order of this Court on 9th August, 2013. A mareva type injunction was made on 23rd August, 2013 freezing the accounts and assets of the first named respondent.

Fraud

3. The first named respondent did not dispute any of the facts asserted by the liquidator. The second named respondent in his replying affidavit of 28th May, 2015 recognised his obligation to satisfy the Court that he acted responsibly from an objective viewpoint at the times relevant to the Court's consideration. No allegation of dishonesty was levelled at the second named respondent.

4. Suffice to say that the first named respondent siphoned off significant portions of the income destined for the customers of the company to a paypal account of the Company which he then transferred to a PTSB account in the first named respondent's name and control. The software developed for the Company should have been intended and designed to direct payments to a trust account or the actual account of the event organiser.

5. The first incident of wrongful diversion as detected by the applicants occurred in 2009 which was within a year of the commencement of business and incorporation of the Company. The applicants identified that a total of €967,276.71 was transferred from 8th May, 2009 to 6th August, 2013 to the paypal account controlled exclusively by the first named respondent in a 21 page listing of each such transfer.

6. In addition, solicitors for the second named respondent brought to the Court's attention quite properly a letter from the solicitors for the first named respondent dated 1st June, 2016 confirming that the second named respondent had pleaded guilty to nine charges of making incorrect VAT returns for nine different periods in the years 2009, 2011, 2012 and 2013 in addition to one charge of failing to comply with keeping PAYE records. The letter indicated that the first named respondent awaits sentencing on 25th October, 2016.

Disqualification

7. Mr. Flynn, counsel for the first named respondent, implicitly acknowledged the inevitability of a disqualification order and the obligation on the Court to disqualify. In regard to the period of disqualification he emphasised that the first named respondent is 38 years of age with young children. I was informed that one of the children has a long term medical condition. Counsel sought to ensure that there was no infirmity in the disqualification order by reason of the suggested alternative reliance solely on s. 160(1) of the Companies Act 1990 which refers to an application by a "prosecutor". It is for another day to decide that issue raised by Mr. Flynn but the Court appreciates the effort of all counsel and solicitors to keep the Court right in making an effective disqualification order.

8. Having regard to the detailed consideration of s. 160(2) and the facts which the Court might take into account given by Finlay Geoghegan J. in *Director of Corporate Enforcement v. McDonnell* [2005] 1 IR 503 at 513, I conclude that the first named respondent should not be deprived of hope, redemption and an opportunity to make a living for himself and his family in the future. The purpose of the Companies Acts in this context is to protect others from an abuse of the privileges afforded to people like the first named respondent when trading through a company. The first named respondent has deprived charities and event organisers of hard earned income which the Court cannot acknowledge sufficiently through its words. I conclude that a disqualification order pursuant to s. 160(2)(a) of the 1990 Act which is now s. 842(a) of the 2014 Act should be made in view of the undisputed wrongful actions of the first named respondent in relation to the Company and its creditors. Aggravating circumstances which could affect the public in the future and personal to the first named respondent are not known to the Court. It is in that vein that the Court has applied what is now considered the minimum period (save in exceptional circumstances) of disqualification of five years.

Restriction application

9. Mr. Leahy (counsel for the second named respondent) fairly acknowledged the per se omissions which could be attributed to the first named respondent like the failure to prepare and swear a statement of affairs and the filing of the statutory return for the year ended 30th June, 2012. He stressed the undisputed fact that the first named respondent's conduct hindered compliance by the second named respondent. The evidence is that the second named respondent was as shocked as most people were to learn of the egregious wrongs perpetrated by the first named respondent.

10. It is indeed sad to learn that the second named respondent (aged 69 in 2016) who resides in England had invested much time and money for his pension type fund in the Company while his reputation has been damaged at an age which is unlikely to afford him a chance to reinstate his pension investment and to recover his reputation. However, as the Court of Appeal in *Director of Corporate Enforcement v.Walsh* [2016] IECA 2 at para. 60 explained:-

"The whole thrust of the legislative provision [there s. 160(2)(h)] is to ensure that all directors of all companies comply with their obligations. It matters not that they be directors of family companies, or be at the helm of large or quoted enterprises. Neither do the qualifications of the directors or the economic challenges that the companies may be facing affect the obligations of directors to act responsibly in respect of an insolvent company."

11. There is no question that the Company was insolvent for a number of years prior to the appointment of the applicant.

12. The assessment of whether a director's conduct was irresponsible is not a formulaic process although the practice is for applicant liquidators to highlight the areas of concern which in this case were identified as:-

(a) Failure to maintain proper books and records of the Company which is a requirement of s. 202 of the 1990 Act (now s. 281 of the 2014 Act);

(b) Failure to prepare and swear a statement of affairs;

(c) Failure to cooperate with the applicants in the liquidation;

(d) Failure to file a company's registration office return.

13. The respondents according to the second named respondent, divided responsibility between them. The first named respondent was the financial controller and primarily responsible for financial administration while the second named respondent, based in the UK, was responsible for sales. He travelled regularly to Dublin and attended board meetings. He referred to management accounts which were prepared but which were not exhibited, apparently due to their unavailability following the appointment of the applicant.

14. The second named respondent was indeed hampered in regard to the one outstanding return to the Companies Registration Office due for the year ending 30th June, 2012 by the activities of the first named respondent. It was indeed only one return that was outstanding.

15. The second named respondent at his own expense gathered boxes of records after the landlord of the London offices of the Company placed them in a basement. He then arranged for the delivery to the applicants and engaged with the applicants subsequently.

16. Undoubtedly, the horror of discovering the deception together with the loss of his investment, job, and reputation would affect many directors in the aftermath of the liquidation.

17. As for the argument that the auditors whose last report was dated 5th April, 2013 for the year ending 30th June, 2011 and the independent accountants report dated 18th July, 2013 for the application to appoint an interim examiner, did not allude to the deception of the first named respondent, the Court was still not satisfied by the averments of the second named respondent that he as a director particularly in the period 2011-2013 acted responsibly when one looks at the state of affairs objectively.

18. The auditors rely on directors and staff and it is noteworthy that the last audited accounts were for the year ending 30th June, 2011. The independent accountant could not have been expected to do an auditing analysis and clearly had to rely on the information and concerns of the directors. There is no evidence that the second named respondent alerted the auditor or the independent accountant to the chargeback problems which were becoming more common.

19. Apart from the failure of the Company to make proper VAT and PAYE returns for which the first named respondent has pleaded guilty and which the second named respondent does not deal with in his affidavits, the second named respondent does not explain if and when he sought or was given proper assurances about turnover and income. In his position I believe that he ought to have known the volume of sales which he was generating. The repeated vacuous excuses offered by the first named respondent by referring to "chargeback difficulties" that gave rise to a media expose in 2013 prior to the appointment of the interim examiner were accepted by him without delving further. Naivety and total ignorance of potential deception does not excuse the necessity for directors like the second named respondent from seeking more than just an oral assurance without further enquiry. I was not satisfied that the second named respondent acted as responsibly in the period 2011-2013 having regard to the necessity to prepare proper books, records and returns in view of the continuing significant losses which the Company was incurring according to the information available.

20. To the credit of the second named respondent he acknowledged that he was not using a passive director type defence and through his counsel admitted the shortcomings other than that which the Court has sought to summarise just now. In short, the second named respondent ought to have asked harder questions and sought more corroborating evidence for assurance beyond that which he mentions in a general way. The Court in making this assessment is looking at matters objectively at the period from 2011-2013 and when the second named respondent ought to have known the extent of sales generated by the Company.

Conclusion

21. Therefore, as the law requires, the Court is obliged to make a declaration in the terms of paragraph no. 3 in the notice of motion issued on 3rd March, 2015 while noting that the order should actually refer to s. 819(3) of the Companies Act 2014 with the capital requirements specified in the 1990 Act.

22. It may be some small consolation to the second named respondent to be advised that s. 822 of the Companies Act 2014 provides for an application which he can make if the necessity and circumstances arise to grant relief from the restrictions which follows the declaration which the Court is obliged to make.