

THE HIGH COURT

2006 442 COS

IN THE MATTER OF HEATHER WILSON TOPPING, PETITIONER
AND IN THE MATTER OF ZOTA MANUFACTURING LIMITED
AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2003

Judgment of Miss Justice Laffoy delivered on the 22nd day of March, 2010.

1. In the petition in this matter, which was filed in the Central Office on 13th December, 2006, Heather Wilson Topping (the petitioner) described herself as a member of Zota Manufacturing Limited (the company). In the grounding affidavit sworn by her on 21st November, 2006 she described herself as a director of the company.
2. The company, which was incorporated on 6th June, 1997 as a private company limited by shares, was dissolved on 19th December, 2003 for failure to make annual returns. On the petition the petitioner seeks to have the company restored to the Registrar of Companies pursuant to s. 12B of the Companies (Amendment) Act 1982, as amended.
3. The petitioner has served the three statutory notice parties who require to be served under s. 12B(3), the Registrar of Companies, the Revenue Commissioners and the Minister for Finance. By letter dated 15th January, 2010, the Revenue Commissioners have indicated that they have no objection to the application to restore the company on the basis of the petition served. As regards the Minister for Finance, the Chief State Solicitor, by letter dated 15th January, 2010, indicated that the position of the Minister for Finance is that he has no objection to the company being restored to the register given that the petitioner (in a supplemental affidavit sworn on 12th December, 2009) has averred that neither the Minister nor the State has, either directly or indirectly, intermeddled in any of the assets of the company and that the company makes no claim against the Minister arising from the provisions of the State Property Act 1954.
4. The problem on this petition is that the annual returns, that is to say, ten years annual returns in respect of the years 2001 to 2010 are still outstanding and, that being the case, the Registrar of Companies is not in a position to issue a letter to the effect that he has no objection to the company's restoration. As has been pointed out in a letter from the CRO dated 15th February, 2010 it is a matter for the Court to determine whether "cause is shown to the contrary" justifying the non-inclusion of an order under s. 12B(5) in this case.
5. Insofar as is relevant for present purposes, section 12B(5) provides:

"The court shall, unless cause is shown to the contrary, include in an order under subs. (3) of this section, being an order made on the application of a member or officer of the company, a provision that the order shall not have effect unless, within 1 month from the date of the court's order –

(a) if the order relates to a company that has been struck off the register under s. 12(3) of this Act, all outstanding returns required by s. 125 or 126 of the Principal Act are delivered to the registrar of companies ..."

By virtue of subs. (3) of s. 12B, the Court has a discretion to order the name of a company be restored to the register "if satisfied that it is just" to so order.

6. According to the filings in the Companies Registration Office, when the company was dissolved its directors were:

- (a) Simon Lawrence, with an address in this jurisdiction, who was also the secretary of the company;
- (b) Stephen Joyce, with an address in Northern Ireland;
- (c) Noel Geraghty;
- (d) the petitioner; and
- (e) Ian O'Flynn.

The registered office of the company was given as Emily House, Trafalgar Road, Greystones, Co. Wicklow.

7. Only one of those persons named as directors, Noel Geraghty, has participated in this application. In an affidavit sworn by him on 8th August, 2008, Mr. Geraghty has averred that he is a chartered certified accountant and the director of an accountancy firm trading under the style of Noel P. Geraghty & Co., chartered certified accountants, carrying on practice at Emily House, Trafalgar Road, Greystones, Co. Wicklow. In his affidavit, Mr. Geraghty set out the efforts he has made to assemble the documentation necessary to prepare accounts and returns for the company. Although he has not repeated this in his affidavit, in a letter of 29th November, 2005 to the petitioner's solicitors, Mr. Geraghty stated that he had resigned as a director of the company on 2nd December, 2002 and that he had informed the managing director both verbally and in writing of his decision at the time.

8. In his affidavit, Mr. Geraghty averred that to the best of his information, knowledge and belief the company had ceased trading in 2004 and would not re-commence to trade. Mr. O'Flynn, who had died prior to the swearing of the affidavit by Mr. Geraghty, had been the managing director of the company and had been involved in the day to day running of the business. Mr. Geraghty has averred that Mr. O'Flynn would have been in sole possession of all company records, which would have been primarily contained on a computer in his possession. Mr. Geraghty has also averred that he had contacted the remaining directors and the widow of Mr. O'Flynn, but he had been unable to obtain the paperwork, such as a list of debtors, cheque stubs, or records such as PAYE and PRSI records, which would have been kept on the computer in the possession of Mr. O'Flynn, or the backup system in relation to VAT returns, which would also have been kept on the computer. In short, Mr. Geraghty averred that it is impossible, because of the

absence of the relevant material, to produce accounts and to make annual returns.

9. As regards the other directors, the evidence before the Court is that Mr. Lawrence now resides in Northern Ireland and Mr. Joyce now resides in Canada.

10. The necessity for restoring the company to the register relates to the existence of a policy of insurance with Scottish Provident Ireland Limited under policy No. 8223619K. In her grounding affidavit, the petitioner averred that she was unable to obtain a copy of the policy in question, but she exhibited a letter dated 18th March, 2003 from Scottish Provident. That letter pre-dated the dissolution of the company. It is not clear to whom it was addressed. The policy number is given and the life assured is named as "Noel Geraghty". The then encashment value of the policy was given as €91,098.67. Apparently, the policy was taken out on foot of an agreement entered into in 1997 for the acquisition and use by the company of patents owned by two companies which were controlled by Robert Conway and Jim McMahon, who is since deceased. The policy secured the payment of royalties to Mr. Conway and Mr. McMahon and their successors. Apart from the letter from Scottish Provident, the only other document exhibited by the petitioner is an undated agreement which would appear to be supplemental to the main royalty agreement for use of the patents by the company. It makes no mention of the policy.

11. Fortunately, some clarity is brought to the matter in the affidavit of Mr. Geraghty, who has averred as follows:

"... the sole reason why it is necessary to have the company restored to the Register is so that the proceeds of the insurance policy ... may be realised for the benefit of the persons for whom the policy was put in place, namely Mr. Robert Conway and the Personal Representatives of Mr. Jim McMahon."

Mr. Geraghty has also averred that, as soon as the policy has been realised, the Registrar of Companies will be invited to remove the company from the register voluntarily in accordance with the powers vested in the Registrar in that behalf.

12. In a more recent affidavit, which was sworn on 8th April, 2009, the petitioner has included a similar averment and has further deposed to the fact that there are no creditors of the company other than Mr. Conway and the personal representatives of Mr. McMahon and that they are only creditors to the extent of their interest in the insurance policy.

13. In her most recent affidavit, which was sworn on 22nd February, 2010, the petitioner has averred that the beneficiaries of the proceeds of the policy are a widow in her seventies and a retired pharmacist in his eighties, who are, and who always were, reliant on the proceeds for their pensions. Once again, the petitioner has averred that it is her intention to dissolve the company as soon as the policy issue has been finalised.

14. In *New Ad Advertising Company Limited* [2006] IEHC 19, I expressed the view that the Court has a very limited discretion to dispense with the requirement that outstanding returns be delivered to the Registrar of Companies in accordance with an order made pursuant to s. 12B(5). As I stated, the legislative intent in enacting that requirement was to ensure that the striking-off mechanism as a deterrent against a breach of company law is not devalued. It would be devalued, if a company could be restored to the register without the breach which gave rise to its striking-off being required to be remedied.

15. It is not clear to me why some approach other than the restoration of the company could not have been adopted in order to compel Scottish Provident to pay the proceeds of the policy to the beneficiaries thereof. However, having said that, these proceedings have been ongoing for over three years and have involved time and expense in getting to this point. The only persons who will benefit from the restoration of the company are persons who had no responsibility whatsoever for compliance with the provisions of the Companies Act 1963 in relation to making annual returns. On the basis of the facts averred to in Mr. Geraghty's affidavit, and, in particular, the fact that Mr. O'Flynn has died and that the relevant records of the company cannot be traced, I am satisfied that it is not feasible to deliver the outstanding returns at this remove. Therefore, I am satisfied that, in the very unusual circumstances of this case, cause has been shown contrary to requiring the outstanding annual returns to be delivered. I am also satisfied that it is just that the company should be restored to the register.

16. As to the form of order, it will recite –

(a) that the Court is dispensing with the requirement contained in s. 12B(5)(a), and

(b) the undertaking by the petitioner to apply to the Registrar of Companies to have the company dissolved once the proceeds of policy 8223619K with Scottish Provident Ireland Limited have been obtained and disbursed to the beneficiaries thereof.

It will be an order restoring the company to the register pursuant to s. 12B(3). The order will contain the term usually included at the behest of the Registrar of Companies in restoration orders made where all outstanding annual returns have been filed – that the order be filed in the CRO within three months.