THE HIGH COURT

[RECORD No. 2015 251 COS]

IN THE MATTER OF

LACROMBS LIMITED (INVOLUNTARY LIQUIDATION)

AND IN THE MATTER OF SECTION 819 OF THE COMPANIES ACT, 2014

BETWEEN

MARTIN V. FERRIS

APPLICANT

AND

DAVID HUI, KEVIN HUI AND JULIE HUI

RESPONDENTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 25th day of April, 2016

The applications
1. At the end of the Hilary Term in March 2016 this Court heard applications pursuant to s.819 of the Companies Act, 2014 ("the 2014 Act") [previously s.150 of the Companies Act. 1990 ("s. 150")] for declarations that the respondents shall not be appointed or act in any way as directors or secretaries of a company unless such a company had allotted share capital of not less than €100,000 where it is a private limited company and €500,000 where it is a public company.

Preliminary issue
2. Ms. Corcoran, counsel for the respondents, confined the preliminary objection about the extension of time for the bringing of this application to the effects of the cumulative delays arising which may be gleaned from the following chronological summary:-

> 3.3.2010 – The applicant liquidator ("the liquidator") was appointed at a meeting of the creditors to Lacrombs Limited ("the company").
>
> 3.9.2010 – Was the deadline for the liquidator to provide the director of corporate enforcement ("the director") with a report under s.56(1) of the Company Law Enforcement Act 2001 ("the 2001 Act") which envisages further reports as the director requires.
>
> 11.12.2014 – Was the date of receipt by the director of the liquidator's 9th report under s.56 of the 2014 Act according to the director's letter dated 28th of April, 2015. The liquidator referred to the date of submission of this report as being 5th of December, 2014.
>
> 13.3.2015 – The director requested documentary evidence to support the information set out in the s.56 report.
>
> 28.4.2015 – Was the date of the director's letter to the liquidator which informed him that he was not relieved from the obligation to make an application under s.150.
>
> 22.6.2015 – Was the date of issue of the notice of motion seeking the declarations with an initial return date of the 20th of July, 2015.

Submissions of counsel for the respondents
3. Counsel for the respondents pointed out that even if the 9th report was to be taken as the report to be used for the purpose of s.56(2) of the Company Law Enforcement Act, 2001 ("2001 Act") **(1)**, the notice of motion for this application ought to have been issued in May, 2015.

4. Counsel then emphasised that the delay in commencing this application and having this application determined was inordinate and inexcusable while causing injustice to the respondents.

5. It was also mentioned that no reference was made in the notice of motion seeking an extension of time in accordance with High Court practice direction HC28 which took effect from the 24th of March, 2003. The applicant's affidavit sworn on the 16th of June, 2015 did indeed aver that these applications "had to be issued by 5 May, 2015" and that counsel was instructed immediately following receipt of the director's letter of the 29th of April, 2015. Reference was then made in the applicant's affidavit to advice from the director's office that "in practice a reasonable delay in submission" of this type of application has no implications and that follow up letters from the director do not issue "until at least six weeks after the deadline for submitting the application has passed".

6. The Court was not informed about the content or dates of the nine reports. The only reasons suggested for the approximate five year delay from the date of appointment of the liquidator to the issue of the notice of motion for these applications were:-

> (1) The alleged lack of cooperation of the respondents; and

(2) the absence of a complete set of books and records for the company which impeded the liquidator's investigations.

Background
7. The second named respondent in his replying affidavit sworn on the 25th of November, 2015 explained that his father (the first named respondent) ["the father"] moved with his mother (the second named respondent) ["the mother"] to Dublin in 1969. The father worked in restaurants and then started his own restaurant in Dun Laoghaire in 1972 followed by a restaurant in Stillorgan in 1982. All went well until the landlord of the Stillorgan restaurant informed the father that he was going to seek a 100% increase in the rent for the Stillorgan restaurant.

8. The respondents through the company which had been incorporated in 1991 planned then to move to a purpose built restaurant in January, 2007. Disaster struck in that staff expected from Sichuan in China were caught up with the effects of an earthquake. On top of that the economy in Ireland collapsed which hit the catering industry very hard.

9. More ill fortune hit the respondents. Since the appointment of the liquidator on the 3rd March, 2010, the father was diagnosed with Parkinsons and he is now confined to a wheelchair with severe mobility and speech restrictions.

10. The mother explained in the replying affidavit that she moved to the United Kingdom in 1965 where she trained as a nurse for two years before moving to Ireland. She only became a director of the company in 2004 as the second named respondent (her son) intended to pursue other interests and the law required the company to have two directors. Significantly she referred to the fact that her family invested over €900,000 in the business and that she relied upon the father to prepare and sign the accounts.

11. The second named respondent explained that the father kept hand written records of the company's transactions and did not maintain the records on any computer software programme for the accounts. The father disposed of his hand written records following the liquidation of the company in the mistaken belief that they were no longer required. Therefore it has not been possible to recreate the records.

The liquidator's focus
12. The liquidator understandably brings to the attention of the Court:-

(1) the absence and destruction of the records for the company;

(2) the company's claim for €68,587 from a company with common directors and shareholders as those which the company had.

13. Against this the liquidator acknowledges that the father made lodgements to the company after the 31st of July, 2008 in the region of €500,000 while expressing a view that it is impossible to reconcile the directors' loan accounts due to the absence of records.

The law
14. Taking into account that no issue of dishonesty is suggested, the relevant law is that the respondents bear the onus to satisfy the Court that their conduct as directors was responsible.

15. In *Re: E Host Europe Limited (in voluntary liquidation), Coyle v O'Brien & Ors* [2003] 2 I.R. 627, Finlay-Geoghegan J. held that the only effect of an extension granted by the Court is to relieve a liquidator from being considered guilty of an offence. In excusing the three day delay in that case she noted at p. 634 that "in so deciding, I do not wish this to be taken as a signal that the court will extend time where there has been inaction on the part of the liquidator or his solicitor. I am heavily influenced in this application by the fact that this was amongst the first batch of reports, decisions and application pursuant to s. 56 of the Act of 2001. There is a very clear legislative intent that the application should be made within the specified time".

16. Earlier in the judgment Finlay-Geoghegan J. stated at p. 633 "any entitlement of directors to preclude the application being pursued against them by reason of delay would have to be considered in accordance with the principles referred to by Fennelly J. in his judgment in *Duignan v Carway* [2001] 4 I.R. 550.

17. In *Duignan*, Fennelly J. referred to the often repeated criteria from the judgment of Hamilton C.J. in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 at p. 475 of the report, when referring to the Court's jurisdiction to dismiss an application of the sort in that case and in the application before the Court now.

18. As in *Duignan*, the Court has an obligation to make the declarations sought to protect the public interest. That obligation to restrict the unqualified right to become involved in the formation of companies is weighed against putting a fair hearing at risk

19. Unlike the respondents in *Duignan*, the father has become more severely restricted in his speech and movement since the appointment of the liquidator over six years ago. Although a respondent may not usually rely on his own actions which could have avoided the injustice, there is no evidence that the father was alerted to the possibility of this application by the liquidator at a time when he was in a much better position to explain his conduct. Moreover, the absence of any detail for the Court about the communications between the director and the liquidator up to the letter dated 28th April, 2015, causes the Court some concern about the director's reason to delay the perceived commencement of the period for the liquidator to bring this application.

20. The delay in bringing this application has detrimentally affected the father's right to a fair hearing within a reasonable period of time. Given the father's condition, the protection of the public interest as sought by the legislature in restricting the unqualified right to be involved in companies is far less demanding than in most other cases.

21. Taking all of the facts into account, the unfairness caused by the delay in commencing this application outweighs the public interest in having the father restricted as sought.

22. Neither the second named respondent nor the mother were party to the destruction of records. No evidence was adduced to suggest that they did anything wrong in allowing the father to maintain and report on the accounts of the company to them and to the auditors of the company in the way that he did. The liquidator has not suggested that it is irresponsible to keep manuscript as opposed to software based accounts.

23. As for the disputed relatively small sum owed by the associated company, the Court notes that this may be the subject of proceedings. In other words the Court is not in a position to resolve the claim due to the conflict of evidence; such evidence needs to be heard so that the dispute can be resolved.

24. It is apparent that the company faced huge changes in circumstances, some of which have caused many other companies to fail. Therefore the Court declines to make the declarations sought.

(1) "a liquidator…shall not earlier than three months nor later than five months (or such later time as the court may allow and advises the director), after the date on which he or she has provided to the director a report under subs.1 apply to the court…".