Neutral Citation Number: [2008] IEHC 252

THE HIGH COURT

2002 370 COS

IN THE MATTER OF
DEV OIL AND GAS LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF
THE COMPANIES ACTS 1963-2001

BETWEEN

J.W.R JACKSON

APPLICANT

AND
VIVIAN DEVLIN

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan delivered on the 21st day of July, 2008

1. The applicant is the Official Liquidator of Dev Oil and Gas Ltd. ("the Company"). He was so appointed by order of the High Court on 11th September, 2002.

2. The respondent and Ms. Sonia McCooey were the Directors of the Company at the date of commencement of the winding up.

3. By motion issued on 2nd August, 2007, the applicant sought a number of reliefs against the respondent and also an order pursuant to s. 150 of the Companies Act, 1990, as amended, restricting Ms. McCooey from acting as a Director or Secretary of a company or engaging in the formation or promotion of a company for a period of five years.

4. The application was served on both the respondent and Ms. McCooey. The matter was adjourned from time to time by the High Court, at least on one or more occasion at the request of counsel then appearing for the respondent and Ms. McCooey. The applications against the respondent and Ms. McCooey were put in for hearing on Monday 17th December, 2007. On that day, counsel appeared on the instruction of Wells O'Carroll, Solicitors, who had appeared for the respondent and Ms. McCooey. Counsel informed the court that she was appearing as a matter of courtesy and for the purpose of informing the court that neither she nor her solicitors had any further instructions from the respondent and Ms. McCooey to defend the application. Counsel also informed the court that, pursuant to a prior direction given by the court, her solicitor was now in a position to confirm to the court that the respondent was aware that the proceedings were before the Court on 17th December, 2007, and that if he did not appear on that day that they were likely to be heard in his absence. An undertaking was given that Mr. Callanan, solicitor, of Messrs. Wells O'Carroll, Solicitors, would file an affidavit on or before 19th December, 2007, confirming the facts in relation to the respondent's knowledge of the application of which counsel had informed the court. Such affidavit has been filed.

5. In those circumstances, I proceeded to hear the application in the absence of the respondent, as it appeared to me that he had been properly served, had the benefit of advice from solicitors and appeared to have made a decision not to appear in court to defend the application. At the end of the hearing, I determined the application against Ms. McCooey and made the declaration requested pursuant to s.150 of the Companies Act, 1990. I reserved my decision on the applications against the respondent to permit me to consider the facts in the affidavit of the applicant, the exhibits referred to, and the law to which I have been referred in submission by counsel for the applicant.

6. The reliefs pursued on behalf of the applicant against the respondent at the hearing were those in paras. 1, 2, and 4 of the Notice of Motion. These are:

> "1. A Declaration that the Company did not cause to be kept proper books of account within the meaning of Section 202 of the Companies Act 1990 as amended.
>
> 2. An Order directing Vivian Devlin, a director of the Company, be held personally liable for the debts and any other liabilities of the Company pursuant to Section 204 of the Companies Act 1990 as amended.
>
> 3. An Order pursuant to Section 160 of the Companies Act 1990 as amended disqualifying Vivian Devlin from acting as a director or secretary of a company or engaging in the formation or promotion of a company for such period as this honourable Court deems fit."

7. As appears, they fall into two parts; the connected reliefs relating to ss. 202 and 204 of the Companies Act, 1990 as amended, and the relief pursuant to s. 160 of the Act of 1990.

Sections 202 and 204

8. Section 202 of the Act of 1990, obliges a company to cause proper books of account to be kept. Insofar as relevant, it provides:

"202.

> (1) Every company shall cause to be kept proper books of account, whether in the form of documents or otherwise, that-
>
> > (a) correctly record and explain the transactions of the company,
> >
> > (b) will at any time enable the financial position of the company to be determined with reasonable accuracy . . .
>
> (3) Without prejudice to the generality of subsections (1) and (2), books of account kept pursuant to those subsections shall contain - . . .
>
> > (b) a record of the assets and liabilities of the company,
> >
> > (c) if the company's business involves dealing in goods -

(i) a record of all goods purchased, and of all goods sold (except those sold for cash by way of ordinary retail trade), showing the goods and the sellers and buyers in sufficient detail to enable the goods and the sellers and buyers to be identified and a record of all invoices relating to such purchases and sales . . .

(10) A company that contravenes this section and a person who, being a director of a company, fails to take all reasonable steps to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder, shall be guilty of an offence:

Provided, however, that -

(a) in any proceedings against a person in respect of an offence under this section consisting of a failure to take reasonable steps to secure compliance by a company with the requirements of this section, it shall be a defence to prove that he had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of ensuring that those requirements were complied with and was in a position to discharge that duty."

9. The business carried on by the Company was as an oil and gas sales company which sold petrol, red diesel, gas and home heating oil, on a retail and wholesale basis. The business was located in Castleblaney, County Monaghan. The customers were petrol stations, haulage contractors, farmers and domestic households. The gas was sold in cylinders and in bulk.

10. The applicant has examined the books of the Company produced to him. He has also issued questionnaires to the respondent, Ms. McCooey, and Mr. Gill, an insolvency practitioner, who advised the Company shortly prior to the winding up, and received responses. The respondent and Ms. McCooey were examined before the Master of the High Court pursuant to order of the High Court, and the applicant has considered the evidence given in those examinations and has exhibited those transcripts, together with the questionnaires and responses, in the affidavit grounding this application.

11. I have concluded that, on the evidence presented by the applicant, the Company did not keep proper books of account that correctly recorded and explained the transactions of the company and enabled the financial position of the Company to be determined with reasonable accuracy as required by s. 202 (1) (a) and (b) of the Act of 1990. I further concluded that the Company, being one which dealt in goods, did not maintain books which kept a record of all the goods purchased and showed the goods and buyers in sufficient detail to enable the buyers to be identified, as required by s. 202 (3) (c) (i) of the Act of 1990. I have reached this latter conclusion in relation to the evidence adduced by the applicant in relation to what were termed the "cash debtors" of the Company.

12. The applicant, in his affidavit, explained that the cash debtors were debtors of the Company who were supplied goods by the Company (largely petrol) on credit. At the date of commencement of winding up, it appears that the total amount owed to the Company by such debtors was €515,855.21. No invoices with the names and addresses of the debtors were brought into existence by the Company. The evidence by the respondent on examination was that he recorded sales to those debtors with a number which he was aware corresponded to the identity of a particular debtor. However, the Official Liquidator was never furnished with any records of the Company, which fully identified with accuracy all of the persons by whom the total sum of €515,855.21 was owing at the date of commencement of the winding up. A list was furnished by the respondent subsequent to the examination before the Master of the High Court. The applicant maintains that there continued to be discrepancies and that dispute is not relevant to the issues in this application.

13. Whilst it appears from the examination of the respondent before the Master of the High Court that he did retain accountants and appears to have relied upon them in relation to the books and records of the Company, it does not appear to me that the facts are such that if the respondent had appeared the facts disclosed on examination could have provided him with a defence under s. 202 (10) of the Act of 1990.

14. Accordingly, I have concluded that the Company did not cause for proper books of account to be kept within the meaning of s. 202 of the Act of 1990 and the applicant is entitled to the declaration sought at para. 1 of the Notice of Motion.

Section 204 of the Companies Act 1990

15. Section 204 imposes personal liability on an officer of the company where a company that is being wound up and unable to pay its debts has contravened s. 202 of the Act of 1990, where certain conditions are met. Insofar as relevant, this provides:

"204

(1) Subject to subsection (2), if -

(a) a company that is being wound up and that is unable to pay all of its debts has contravened section 202, and

(b) the court considers that such contravention has contributed to the company's inability to pay all of its debts or has resulted in substantial uncertainty as to the assets and liabilities of the company or has substantially impeded the orderly winding up thereof, the court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks it proper to do so, declare that any one or more of the officers and former officers of the company who is or are in default shall be personally liable, without any limitation of liability, for all, or such part as may be specified by the court, of the debts and other liabilities of the company . . .

(4) The court shall not make a declaration under subsection (1) in respect of a person if it considers that -

(a) he took all reasonable steps to secure compliance by the company with section 202, or

(b) he had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of a director of the company who had been formally allocated such responsibility, was charged with the duty of ensuring that that section was complied with and was in a position to discharge that duty."

16. Section 204 of the Act of 1990, was considered by Shanley J. in the matter of *Mantruck Services Ltd.* (in liquidation) [1997] 1

I.R.340. In his judgment he considered the proper approach of the court to the exercise of the discretion given it under s. 204 (1) (b) of the Act of 1990. At p. 359 he stated:

> "(e) The exercise of the discretion under s. 204
>
> The Companies Act, 1990, is a post-1937 statute and as such enjoys a presumption of constitutionality. Thus, where the Act makes provision for the exercise by a court of a discretionary power, that power must be exercised in such a way as to respect the provisions of the Constitution. As Murphy J. said in *O'Keeffe v. Ferris* [1993] 3 I.R. 165 at p. 174 (in relation to s. 297, sub-s. 1 of the Act of 1963):—
>
> > 'The sub-section confers a wide discretion on the court and it must be assumed that the court will exercise those powers, not merely in a responsible but also in a constitutional fashion. If the Constitution does require that in civil proceedings the burden imposed on the defendants should in general be commensurate with the loss suffered by the plaintiff (or the class whom the plaintiff represents) then it must be assumed that the sub-section will be so construed and applied.'
>
> The discretion, given by s. 204 to the court, must be exercised, as Murphy J. notes (in relation to s. 297), in a "responsible but also in a constitutional fashion". In my view, the court in the exercise of this discretion must have regard to (but not necessarily exclusively) the extent to which the contravention of s. 202 resulted in financial loss and, if it did, whether or not such losses were reasonably foreseeable by the officer as a consequence of the contravention."

17. Shanley J. then went on to consider the approach taken by Tompkins J. in the High Court in New Zealand to a similar provision in the New Zealand Companies Act 1955, in the case of *Maloc Construction Ltd. (In Liquidation) v. Chadwick* [1986] 3 N.Z.C.L.C. 99. In that case, Tompkins J. had suggested that there were three factors relevant to the exercise of discretion given by the Act to the court, namely causation, culpability and duration. Shanley J. then stated at p. 360:

> "It seems to me that the three elements identified by Tompkins J. are relevant to the principles which should guide the exercise of discretion under s. 204 and that in assessing liability under s. 204, the court should have regard to the extent to which the officer's involvement in the s. 202 contravention resulted in financial loss and, if it did, whether such loss was reasonably foreseeable by the officer as a consequence of the contravention and that, save in exceptional circumstances, liability should not be imposed for contraventions not resulting in loss, or for losses not reasonably foreseeable as a consequence of the contravention."

18. Finally, Shanley J., having considered the burden of proof requied by s. 204 of the Act of 1990, concluded that "in considering whether to impose liability under s.204, no higher degree of probability of a contravention of s. 202 is required than in any other civil matter".

19. Following the approach of Shanley J., I am satisfied on the facts of this application:

> (i) The company did contravene s. 202 of the Companies Act, 1990 in relation to the proper keeping of books of account.
>
> (ii) At the time of its winding up, the company was unable to pay its debts.
>
> (iii) The respondent is an officer of the company.

The further issues which have to be addressed are:

> (iv) Did the company's contravention of s. 202 of the Act of 1990 contribute to its inability to pay all of its debts or has it resulted in substantial uncertainty as to the assets and liabilities of the company or has it substantially impeded the orderly winding up of the company?
>
> (v) Whether, if it has resulted in any of the matters at para. (iv) above, is the respondent an officer of the company who is "in default" within the meaning of s. 204 (1) (b)?
>
> (vi) Whether the respondent can avail of a defence under s. 204 (4) of the Act of 1990.
>
> (vii) If not, and the matters at paras. (iv) and (v) above are answered in the affirmative, what order, if any, should the court, in the exercise of its discretion, make against the respondent?

20. I am satisfied, first on the evidence adduced by the applicant, that the Company's contravention of s. 202 of the Act of 1990 contributed to its inability to pay all of its debts and has resulted in substantial uncertainty as to the assets and liabilities of the Company. I am so satisfied, particularly by reason of the facts already referred to in relation to the failure to record the names and addreses of those persons to whom cash sales, particularly of petrol, were made. This is not the only failure to keep proper books to which I have had regard. There were also failures in respect of the recording of trade debts. The applicant, at para. 31 of his grounding affidavit, states as follows:

> "The failure to keep proper books of account significantly impeded me as liquidator in recovering the monies from both the cash and non-cash debtors. In particular it has directly contributed to the company's inability to pay all of its debts and resulted in ongoing and substantial uncertainty as to the assets and liabilities of the Company. It has also substantially impeded the orderly winding up of the Company. Although it varies from case to case in my experience I would typically expect a debtor recovery rate of 70% in a liquidation such as this. To date the debtor recoveries are running at 1.85% which is extraordinarily low. I believe this is directly attributable to the failure to keep proper books and records and from the conduct of the directors."

21. As appears from this judgment, I have made findings which are consistent with the views expressed by the applicant in the first part of the above paragraph following his examination of the affairs of the Company. I accept the views expressed by the applicant, who is an experienced liquidator, as to his expectation of a debtor recovery rate of approximately 70% in a liquidation such as this.

22. The next issue I have to consider is whether the respondent is an officer of the Company who is "in default" within the meaning of section 204 (1) (b). The respondent is a Director and, as such, an officer of the Company. The respondent, as one of two Directors

of the Company, had responsibility for ensuring that the Company kept proper books of account. I am satisfied on the evidence adduced by the applicant that the respondent was aware and participated in the system of recording the cash debts by a number only and not recording the names and addresses of the debtors. In those circumstances, it does not appear to me that there is evidence before the court from which I could conclude that either the respondent took all reasonable steps to secure compliance by the Company with s. 202 or believed (with reasonable grounds) that a competent and reliable person, acting under the supervision or control of a director, had been formally allocated the duty of ensuring that s. 202 was complied with and was in a position to discharge that duty. Accordingly, the Court is not precluded by s. 204 (4) of the Act of 1990 from making the declaration sought against the respondent, pursuant to s. 204 (1) of the Act.

23. The final issue in relation to s. 204 is, therefore, the nature of the order which this court should make against the respondent in the exercise of its discretion. In accordance with the decision of Shanley J. in *Mantruck Services Ltd*. (in liquidation) [1997] 1 I.R. 340, it is necessary to examine the extent to which the contravention of s. 202 by the Company resulted in financial loss and, if so, whether or not such losses were reasonably foreseeable by the respondent as a consequence of the contravention.

24. I am satisfied on the evidence of the applicant referred to above that the breach by the Company of s. 202 has resulted in a failure by the Company in liquidation to recover a significant percentage of the debts due to the Company at the date of commencement of the winding up. The evidence of the applicant suggests that this is in the order of 68% (a normal recovery of 70% less 1.85% recovered in this liquidation) of the debts due to the Company. I am also satisfied that it must have been reasonably foreseeable to the respondent that if the Company failed to keep proper books of account, recording accurately the debts due to the Company, including the names and addresses of the persons from whom the debts were due, and the other relevant details, that this would hinder the Company in due course in recovering those debts.

25. The evidence of the applicant in his second report as Official Liquidator to the Court and exhibited in his grounding affidavit is that, whilst in the petition presented for the winding up of the Company approximately €1.4 M was stated to be outstanding on the trade debtors' ledger following further work done by Mr. Philip Gill who was then advising the Company, €626,271 was the balance on the debtors' ledger at the commencement of the winding up. This was made up as to cash sale debtors of €515,957, and trade debtors of €110,314. The applicant states that a sum of €9,436.52 has been recovered from the trade debtors, and none from the cash debtors.

26. I am satisfied that the applicant has established that as a matter of probability the Company has been at the loss of 68% of €626,271 being the debts outstanding at the commencement of the winding up, which is €425,864.

27. Accordingly, I propose making an order that the respondent be personally liable for the debts of the Company in the sum of €425,864, pursuant to s. 204 of the Companies Act, 1990, as amended.

28. I should add that I am also satisfied on the facts that the contravention by the Company of s. 202 in respect of which the respondent is in default has impeded the orderly winding up of the Company and that such must have been foreseeable to the respondent. However, the applicant did not, in his grounding affidavit, put before the court any evidence of the additional costs in the winding up attributable to the failure of the Company to keep proper books of account, in accordance with s. 202 of the Act of 1990. Whilst at the hearing some figures were offered to the court, it does not appear to me that, in the absence of evidence from the applicant of such additional costs which was served on the respondent, I can, on the facts of this application, make any declaration that the respondent be held personally liable for such additional costs.

Section 160

29. The applicant also seeks a disqualificaiton order pursuant to s. 160 of the Act of 1990 against the respondent. The applicant submits that, by reason of the evidence adduced in this application, the court must be satisfied of the matters set out in s. 160 (2)(d), which provides:

> "(d) The conduct of any person as promoter, officer . . . of a company, makes him unfit to be concerned in the management of a company;"

30. I am satisfied that the evidence adduced by the applicant in relation to the respondent's actions, in permitting a situation whereby the Company failed to keep proper books of account, made cash sales with uncertain records on credit aggregating a sum in excess of €500,000 which remained unpaid, whilst at the same time permitting the Company to owe significant sums to its creditors, demonstrates a lack of commercial probity on the part of the respondent and, makes him unfit to be concerned in the management of a company in accordance with the approach taken by the Supreme Court in *Cahill v. Grimes* [2002] 1 I.R. 372.

31. The Court having so determined has a discretion as to the period of disqualification. The proper approach to exercising this discretion has previously been considered by me in *The Director of Corporate Enforcement v. McDonnell* [2005] 1 I.R. 503 and by Kelly J. in *Re. NIB Ltd: Director of Corporate Enforcement v. D'Arcy* [2006] 2 I.R. 163, amongst other decisions. Applying those principles which are now well established, it appears to me that the facts in this case demonstrate that a period of disqualification of eight years is appropriate. There will, therefore, be an order pursuant to s. 160 (2)(d) of the Act of 1990, that the respondent be disqualified for a period of eight years.