Neutral Citation: [2014] IEHC 305

THE HIGH COURT

[2013 No. 94 COS]

IN THE MATTER OF M.K. FUELS LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT, 1990, AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001

BETWEEN

MICHAEL COTTER, LIQUIDATOR OF THE SUBJECT COMPANY

APPLICANT

AND

MICHAEL GILLIGAN, ANTHONY KELLY AND STANLEY MORRISSON

RESPONDENTS

JUDGMENT of Mr. Justice Barrett delivered on the 30th day of May, 2014

1. This is an application for a restriction order under s.150 of the Companies Act 1990, as amended, in respect of Mr. Michael Gilligan, Mr. Anthony Kelly and Mr Stanley Morrisson. There is a related application for an order extending the time for the making of this application.

Facts

2. Mr. Gilligan, Mr. Kelly and Mr. Morrison are former directors of M.K. Fuels Limited, a company that was engaged in the sale and distribution of liquid fuels and related products in the Sligo area. The company was incorporated on 26th February, 2001, and its liquidator was appointed just over a decade later on 29th April, 2011.

3. Under s.150 of the 1990 Act, the court must grant the declaration sought in respect of each of Mr. Gilligan, Mr. Kelly and Mr. Morrison unless satisfied that any of a variety of circumstances identified in s.150(2) pertains in respect of such individual, the relevant circumstances in this case being that each individual has acted (a) honestly and (b) responsibly in relation to the conduct of the affairs of M.K. Fuels Limited and (c) there is no other reason why it would be just and equitable that he should be the subject of an order made under s.150. In the course of the proceedings before the court it became apparent, and the court finds, that there is no issue as to the honesty of any of Mr. Gilligan, Mr. Kelly or Mr. Morrison. Moreover, apart from the issue of whether each individual acted responsibly in relation to the conduct of the affairs of M.K. Fuels Limited, there is no other ground on which a s.150 declaration should issue. Thus the only substantive issue that survives for the court to consider from a s.150 perspective is whether each of Mr. Gilligan, Mr. Kelly and Mr. Morrison acted responsibly in relation to the conduct of the affairs of M.K. Fuels Limited.

Principles to be applied

4. There is, if anything, a possible surfeit of judicial guidance on the criteria that are relevant in determining a s.150 application. An early but significant contribution was made by Shanley J. in *La Moselle Clothing Limited (in liquidation) v. Soualhi* [1998] 2 I.L.R.M. 345, his observations having since been described by Hardiman J. in *In the Matter of Tralee Beef & Lamb Limited* [2008] 3 I.R. 347 at 358, as being, at least at that time, of "*near canonical status*". Shanley J.'s observations were later affirmed and expanded upon by the Supreme Court in *Re Squash (Ireland) Ltd.* [2001] 3 I.R. 35, the court holding, *inter alia*, that it is important, in a s.150 application, to have regard to the entire tenure of an individual as director of a company. In his judgment in *La Moselle*, Shanley J. had, at 352, mentioned that the extent to which a director has or has not complied with the Companies Acts is a relevant factor when determining a s.150 application. In the High Court decision in *Kavanagh v. Delaney* [2005] 1 I.L.R.M. 34 at 41, Finlay Geoghegan J. suggested that compliance by a director with the common law obligations of a director is also a relevant factor. In his above-mentioned judgment in what is now often referred to as the *Tralee Beef* case, Hardiman J., at 358, indicated that he did not disagree with this 'amplification' by Finlay Geoghegan J., though he was concerned that no injustice should be wrought in that case as a result of the amplification being sounded therein for the first time. In truth it is somewhat difficult to see how a director could be held to have acted responsibly where he or she had complied with the Companies Acts but was in breach of his or her common law duties, though equally it is difficult offhand to see how a director could breach his or her common law duties where he or she is not guilty of any breach of, or subject to any penalty under, the detailed and comprehensive code established by the Companies Acts. Be that as it may, the jurisprudence appears in any event to have further evolved, with Fennelly J. clearly signalling in *Re Mitek Holdings Limited* [2010] 3 I.R. 374 at 396 that it is important not to adopt a formulaic, standardised, 'tick the box' approach to determining s.150 applications. Thus Fennelly J. emphasises "*the need to identify the issues that are important in the particular case*" and then continues:

> *"I would not be disposed to limit the matters to which regard should be had or to substitute standardised judicial criteria for the general words of the statute."*

Section 150 enjoins the court to have regard to whether an affected person has acted "*honestly*" and "*responsibly*" and also to consider whether there is any other reason why it would be "*just and equitable*" that a s.150 order should issue. All of the quoted terms bear their ordinary meaning. As mentioned above, there are no 'honesty' or 'just and equitable' grounds arising in this case. In deciding whether each of Mr. Gilligan, Mr. Kelly and Mr. Morrison has acted responsibly the court may of course have regard to his respective obligations as director, to general commercial practice and to prior case-law but perhaps more to anchor than to determine any decision of the court as to the responsibility or otherwise of their respective actions.

Concerns arising

5. It has been suggested in the course of this application that there are essentially five grounds on which the behaviour of each of the directors could be categorised as other than responsible, viz. (1) a claimed failure to cooperate in the liquidation, (2) the manner of disposal of a particular motor vehicle, (3) an alleged preference of certain creditors, (4) the dealings on a director's loan account, and (5) a purported discrepancy as to stock held.

6. *Lack of cooperation with the liquidator*: It is clearly of vital importance that directors of any failed company cooperate with the liquidator of such company and the court will not lightly countenance any want of cooperation in this regard. However, the court is mindful that there will often, perhaps invariably, be an element of strain between the former directors of a failed entity and its liquidator, with the directors perhaps fearful that their commercial decisions will lead to proceedings such as those now before the court and the liquidator naturally desirous of discharging his or her duties competently and well. In addition, there may also be something of a 'culture clash' between business-minded directors accustomed to the rough and tumble of commercial life and professionally qualified liquidators who inhabit a world where documentation and detail are of paramount importance. In the present case the alleged lack of cooperation appears to amount in essence to the directors saying that they had provided all the information they could and the liquidator claiming that he was not provided with all the information he wanted, particularly certain information that he sought by way of questionnaire and which the directors appear to have believed was otherwise provided. It may be the case that the directors could have handled their dealings with the liquidator better than they did and, to the extent that this is so, if so, their behaviour is undoubtedly reprehensible. However, the court does not consider that any want of cooperation that the directors may have manifested in this case is of such seriousness as to constitute their behaviour being classified as behaviour that is other than responsible and thus deserving of sanction under s.150.

7. *Disposal of vehicle*: This issue was not canvassed at length at the hearing of this matter. It concerned the circumstances in which a company vehicle was sold. The liquidator was concerned to have received a notice of seizure from the Revenue Commissioners of a company vehicle which it turned out had previously been sold by the company. To the extent that there was any issue perceived to arise in this regard, the court accepts the explanation offered in the affidavit evidence of Mr. Gilligan that there was an entirely legitimate sale of the vehicle in early-2011 which was documented. The documentation trail may not be what a professionally qualified individual might have put in place but it appears to the court that it is unreasonable to expect the same exactitudes of non-professional people engaged in trade that one would expect of a professionally qualified person placed in the same circumstances. Be that as it may, there is nothing in the facts of the sale which suggests that in this regard any of the directors acted other than responsibly in relation to the conduct of the affairs of M.K. Fuels Limited.

8. *Apparent preference of certain creditors*: In his initial affidavit evidence the liquidator expressed concern that towards the end of its existence the company switched fuel suppliers, paying off amounts to suppliers who were the beneficiaries of certain guarantee arrangements and moving on to suppliers who were not the beneficiaries of those arrangements. However, the liquidator admits that the company's bankers have refused to share the detail of the guarantee arrangements with him and there is no explanation offered in any of the affidavit evidence as to what these arrangements entailed or what improper benefit or detriment there would have been to anyone in seeing the guaranteed debts discharged. What the respondents' affidavit evidence suggests is that there was sound commercial reason for the company to switch suppliers in that it enabled them to avail of more favourable credit terms. On the limited evidence available to the court, it is not possible to conclude that there was any preference of creditors or that the ostensibly valid reasons offered by the directors for their actions in this regard were in any way tainted by impropriety. It has been clear since at least the time of the decision of Murphy J. in *Business Communications Limited v. Baxter & Anor.* (Unreported. High Court, 21st July 1995), that the main onus of proof in s.150 proceedings lies on a respondent director to show that his or her actions were neither dishonest or irresponsible. However, this does not of course mean that an unsubstantiated allegation of preference must prevail over what on its face is, and has been claimed and explained by the respondent directors to be, legitimate commercial behaviour. The court concludes that the directors did not in this regard act other than responsibly in relation to the conduct of affairs of M.K. Fuels Limited.

9. *Dealings on director loan account*: The accounts of M.K. Fuels Limited for the financial year ended 28th February, 2010, show a balance of €225,000 for a director loan owed by the company to Mr. Gilligan. The statement of affairs submitted by the directors on 29th April, 2011, notes a balance on the account of €85,000. An analysis by the company's liquidator shows repayments by the company of €101,000 during the period that the company, per the liquidator, was in financial difficulty. However, Mr. Gilligan offers an explanation that the court accepts as true. According to Mr. Gilligan he mortgaged a property owned by him so as to give an ailing brother a loan that he required at the time. When his brother, by now seriously ill, repaid the loan by cheque, Mr. Gilligan quickly lodged the cheque to the company account lest his brother pass away before it was cashed. With the benefit of hindsight this was unwise, not least as when the company went into liquidation, Mr. Gilligan effectively lost any chance that the entirety of the monies paid to him by his brother would ever be recovered. In fact he estimates that he has lost some €85,000 in this regard as a result of the liquidation. The cheque was never intended to be a long-term loan and the substantial repayments that were made to Mr. Gilligan from the company coffers were reflective of this fact. It is very much to Mr. Gilligan's credit that from about the end of 2010 when it appeared that the company was in real financial difficulty the repayments to him ceased. Mr. Gilligan may have acted imprudently in lodging the monies as he did. He undoubtedly acted in a manner that would be surprising in someone who was professionally qualified but is perhaps less surprising when done by a non-professional gentleman engaged in the hurly-burly of commercial life. The court concludes that Mr. Gilligan did not in this regard act in a manner that was other than responsible.

10. *Discrepancy as to stock held*: The liquidator suggests that upon winding-up the company ought to have been in possession of stock worth about €427,000 whereas the statement of affairs produced by the directors suggested that the company had no stock as at the date of winding-up. It would be fair to say that the respondents' affidavit evidence robustly collapses the assertions made by the liquidator in this regard. Thus, per the respondents, it appears that when it became clear that a petition to place the company in liquidation was imminent the company ceased to buy new supplies and, over a period of about three weeks, sold all supplies that had already been bought. This was done to maximise the benefit to creditors and the proceeds were lodged in the company's bank account. Mr. Gilligan avers in his affidavit evidence, and the court accepts, that contrary to the liquidator's assertion there was no sudden sell-off of supplies. Rather, "*there was just a selling off of products and…the products were simply sold to the company's normal customers. It was not difficult to sell off a couple of days' supply of product in a couple of weeks*." The court does not find anything in this behaviour that suggests that Mr. Gilligan or any of the directors acted other than responsibly in relation to the conduct of the affairs of M.K. Fuels Limited.

Refusal of declaration

11. For the reasons stated above, the court is not satisfied that it is required to make an order under s.150 of the Companies Act 1990, in respect of any of Mr. Gilligan, Mr. Kelly or Mr. Morrisson, and declines to do so.

Application for extension of time

12. The liquidator has, pursuant to s. 56(2) of the Company Law Enforcement Act 2001, as amended, sought an order extending the time for the making of the instant application. Under s.56(1) of the 2001 Act, a newly-appointed liquidator is now required within six months after appointment, and at such intervals as required by the Director of Corporate Enforcement thereafter, to provide a report to the Director in the prescribed form. It appears that each report provided to the Director pursuant to s. 56(1) is "*a report*" for the purposes of s.56. Under s. 56(2), a liquidator must bring a s.150 application not earlier than three and not later than five months after the date on which "*a report*" under s. 56(1) is provided to the Director. Relief from the obligation to bring such application may be granted by the Director but, absent such relief, and absent any extension of the five-month timeline which the court may grant, that

five-month timeline applies. It is clear that the Oireachtas attached considerable significance to compliance by a liquidator with his obligations under s. 56(1) and (2) as, under s. 56(3), a breach of these obligations by a liquidator is a criminal offence. In *Coyle v. O'Brien & Ors.* [2003] 2 I.R.627 at 633, Finlay Geoghegan J. noted in this regard that:

> *"[T]he court should consider the matters put forward by or on behalf of the liquidator grounding the application for an extension of time in the context of the very clear intent expressed by the Oireachtas in s.56(2) of the Act of 2001 that the liquidator must within the specified time bring the application before the court and if he fails to do so is to be considered guilty of an offence. It appears to be that the grounds must be such that they warrant the court, in fairness and justice, relieving the liquidator from the intended statutory consequences of a failure to act within the specified time."*

13. Notably, Finlay Geoghegan J. was sympathetic to the position of the liquidator in the Coyle case because the s.150 application brought in that case was among the first batch of applications which followed the making of the first reports to the Director of Corporate Enforcement under s.56. However, the *Coyle* case was decided more than a decade ago and liquidators and legal practitioners are now familiar with the 2001 Act. It seems to this Court that at this time an appropriate course of action for liquidators is that identified by Dr. Ahern in her text on "*Directors' Duties*" (Dublin, 2009) in which the learned author states, at 511, that:

> *"[I]t is possible that a less sympathetic judicial view [to that of Finlay Geoghegan J. in Coyle] may be taken should another such case arise although each case will turn on its own discrete facts. Rather than a liquidator being in…[a] difficult position with the attendant criminal consequences, if there is likely to be a difficulty with the timing, it is sensible for a liquidator to make a pre-emptive application to the High Court for more time pursuant to section 56(2)."*

14. If a liquidator is guilty of particularly egregious delay, it may be possible for an affected director to sustain an objection to a s.150 application on the grounds of such delay. This was expressly contemplated by Finlay Geoghegan J. in *Coyle*, albeit coupled with the suggestion, at 633, that within the constraints of a s. 56(2) application, the courts should not consider the position of directors. Whether it will be practicable in all instances to uncouple the actions of a liquidator from the consequences for directors of those actions may arise for consideration in one or more future cases. In the present case, given that this Court has adjudicated on the s.150 application that is the subject of these proceedings and found that no restriction order is merited, no purpose is served by declining the liquidator's application for an extension of time and thus the court grants the extension sought.