Neutral Citation Number [2007] IEHC 43

THE HIGH COURT

2006 No. 214 COS

IN THE MATTER OF SECTION 371 OF THE COMPANIES ACT, 1963
AND IN THE MATTER OF THE COMPANIES ACTS, 1963 TO 2005
AND IN THE MATTER OF SECTIONS 204, 205, 297A OF THE COMPANIES ACT, 1990
AND IN THE MATTER OF SECTIONS 243 AND 245 OF THE COMPANIES ACT, 1963
AND IN THE MATTER OF POWERTECH LOGISTICS LIMITED

BETWEEN

AIRSCAPE LIMITED

APPLICANT

AND
POWERTECH LOGISTICS LIMITED,
MATTHEW O'REILLY AND DAVID McKEE

RESPONDENTS

Judgment of Miss Justice Laffoy delivered on 5th February, 2007

The motions before the court

1. On 14th June, 2006 the applicant issued a motion returnable for 26th June, 2006 (the first motion) seeking an order pursuant to s. 371(1) of the Companies Act, 1963 (the Act of 1963) directing the first respondent to make good its default as set out in a statutory notice dated 10th May, 2006 pursuant to s. 371 within such time as the court should direct. The statutory notice was addressed to the second respondent and the third respondent, the directors of the first respondent, and also to the first respondent. It called on the notice parties to make good two defaults as follows:

> (a) by "producing copies of the Register of Members, the Register of Directors and the Register of Directors and Secretaries interests in shares in" the first respondent within fourteen days after service of the notice, and
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> (b) by submitting all outstanding statutory annual returns and audited financial statements to the Companies Registration Office, in particular, in respect of the years 2002, 2003, 2004, 2005 and 2006 immediately.

2. An order was made on foot of that motion on 10th July, 2006. It ordered the respondents within the period of twelve weeks from the date thereof to submit all outstanding statutory returns as required to be filed in the Companies Office pursuant to the provisions of the Companies Acts, 1963 – 2005 and it particularised the years 2002, 2003, 2004, 2005 and 2006. The order recited that it was made in the presence of counsel for the third respondent and with the consent of the first and second respondents. The order only related to default referred to at (b) in the immediately preceding paragraph hereof, not that at (a), presumably because the grounding affidavit only addressed non-compliance with the notice in relation to that default.

3. On 5th July, 2006, before the court made an order on foot of the first motion, the applicant issued another motion which was returnable for 10th July, 2006 (the second motion), in which the applicant sought the following reliefs:

> (a) an order to have the provisions of s. 251(2) of the Companies Act, 1990 (the Act of 1990) applied to the first respondent pursuant to s. 251(1);
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> (b) an order pursuant to s. 245(1) and 245(2) of the Act of 1963 requiring the second respondent and the third respondent, directors of the first respondent, to attend before the court to give information in relation to the promotion, formation, trade, dealings, affairs and property of the respondent and ancillary orders pursuant to sub-ss. (3) and (4) of s. 245;
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> (c) an order pursuant to s. 243 of the Act of 1963 providing for inspection of the accounting books and accounting records of the first respondent including certain particularised records;
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> (d) an order pursuant to s. 297A of the Act of 1990 against the second respondent and the third respondent declaring them personally liable as directors of the first respondent in respect of debts not paid by the first respondent to the applicant;
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> (e) an order pursuant to s. 204 of the Act of 1990 against the second respondent and the third respondent declaring them personally liable as directors of the first respondent in respect of the failure to maintain proper books and records; and
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> (f) an order pursuant to s. 160 of the Act of 1990 that the second respondent and the third respondent be disqualified from acting as a director and in certain other roles in relation to a company.

4. The factual circumstances in which the applicant sought the relief granted in the order of 10th July, 2006 and seeks the relief sought in the second motion are that the applicant has an unsatisfied judgment for €289,548.94 together with costs against the first respondent which it obtained in this Court on 30th May, 2005. An appeal to the Supreme Court against that order was struck out for want of prosecution on 3rd November, 2006. The debt represents the licence fee payable by the first respondent to the applicant in respect of the use of a warehouse or storage facility during the months of November and December, 2001 and January and February, 2002 under a licence agreement made around November, 2001. The first respondent used the warehouse for storage in connection with its distribution business. It is common case that the first respondent is insolvent. The reason given by the second and third respondents for its insolvency is the loss without notice of its contract with its sole customer, a soft drinks manufacturer. On the evidence before the court there is a conflict as to when the first respondent ceased trading. In response to the s. 371 notice, in a letter dated 15th May, 2006 stated to be written on behalf of both the second and third respondents, but signed only by the second respondent, it was stated that the company ceased trading on 31st December, 2001. However, in an affidavit sworn by him on 27th November, 2006 in response to the second motion, the third respondent has averred that the directors believed that there was no need to cease trading in 2002 and that it was later that it was decided to cease "renting the premises" from the applicant and to cease trading.

5. On 9th October, 2006, which on my reckoning was just over a week after the expiry of the twelve weeks allowed in the order of 10th July, 2006, the applicant issued a motion returnable for 16th October, 2006 (the third motion) invoking O. 44, r. 6 and O. 42, r.

32 of the Rules of the Superior Courts, 1986 (the Rules). The relief sought on the third motion was as follows:

> (i) an order pursuant to O. 42, r. 32 of the Rules enforcing sequestration against the property of the first respondent, the property of the second respondent and the third respondent, if any such property exists, and an order of attachment against the second respondent and the third respondent; and
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> (ii) in the alternative, an order pursuant to O. 44, r. 6 of the Rules seeking attachment and committal to prison of the second respondent and the third respondent on account of their failure to comply with the order of 10th July, 2006.

6. The second and third motions were adjourned from time to time in the Chancery 2 List and came on for hearing on 29th January, 2007. In this judgment I propose dealing with each of those motions separately, although I think it is logical to deal with the third motion first.

7. It is common case that since the third motion was issued annual returns for the years 2002 to 2006 inclusive in respect of the first respondent have been filed in the Companies Registration Office. The Companies Office search exhibited discloses that the returns in respect of 2002, 2003 and 2004 were received in the Companies Registration Office on 6th November, 2006. The annual returns in respect of 2005 and 2006 were subsequently lodged. It is not clear on the evidence precisely when that occurred, although I note that in an affidavit sworn on 24th November, 2006 the second respondent averred that at the date thereof the order had been fully complied with at the expense of the second and third respondents.

The third motion

8. On the hearing of the third motion the applicant abandoned the alternative relief sought, that is to say, relief under O. 44, r. 6. Order 42, r. 32 provides as follows:

> "Any judgment or order against a company wilfully disobeyed may, by leave of the Court, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by order of sequestration against their property."

9. It was made clear on the hearing of the third motion that the applicant was not seeking sequestration against the corporate property on the sensible basis that none such exists, nor was it seeking an order for attachment against the second respondent or the third respondent. What it was seeking was an order of sequestration against the property of the second respondent and the third respondent. When the court queried whether this meant that those parties be directed to discharge the amount of the debt of the first respondent, counsel for the applicant responded in the affirmative but suggested that as an alternative the court might order the payment of some appropriate amount which would signal the court's disapproval for non-compliance with the order of 10th July, 2006 or, perhaps, award costs on a solicitor and client basis.

10. I do not consider it appropriate to make an order of sequestration against the property of the second respondent or the third respondent for a number of reasons.

11. First, the primary purpose of an order under O. 42, r. 32 is to procure enforcement of a judgment or order of the court. Counsel for the applicants referred the court to the observations of O'Hanlon J. in *Ross Company Limited (In Receivership); Shortall v. Swan & Ors.* [1981] I.L.R.M. 416 to the following effect:

> "The jurisdiction of the court to imprison for an indefinite period for what is known as civil contempt of court is one which is exercised sparingly for a number of reasons. The procedure is primarily intended to be coercive rather than punitive."

12. An order of sequestration against the property of the second respondent and the third respondent in the circumstances which now prevail, would not be coercive. It would be a punitive order and penal in nature (cf. the judgment of Barrington J. in *Larkins v. NUM* [1985] I.R. 671). The order of 10th July, 2006, the terms of which I have recorded, ordered the submission of the outstanding statutory annual returns within the period of twelve weeks stipulated. The order was fully complied with by the time the third motion came to be heard. To make an order of sequestration would serve no purpose other than to punish the second respondent and the third respondent for delay in complying with the order. In my view, the interests of justice do not require that.

13. Secondly, a procedural point was raised on behalf of each of the second respondent and the third respondent by their respective counsel that the application must be refused because of failure by the applicant to comply with O. 41, r. 8 of the Rules. That rule provides as follows:

> "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or order which shall be served upon the person required to obey the same … there shall be endorsed a memorandum in the words or to the effect following, *viz*.:-
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> > 'If you within named AB neglect to obey this judgment or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgment or order.'"

14. The court was referred to an old Irish decision dating from 1893, *Prior v. Johnston* 27 I.L.T.R. 108 in which the court made no order on an application to attach a defendant for non-compliance with an order to file accounts because of failure to serve the defendant with a copy of the order containing the necessary penal endorsement. The court refused the defendant his costs. Counsel for the applicant sought to draw a distinction between an application for an order of attachment and an application for an order of sequestration, suggesting that O. 41, r. 8 need not be complied with when attachment, that is to say, imprisonment, is not being pursued. No authority was cited in support of that proposition and, in my view, as sequestration against the property of a director of a company is a penal sanction, as a matter of principle, such a distinction is not tenable. In this case, before the third motion issued, O. 41, r. 8 should have been complied with. It certainly should have been complied with because of the alternative relief sought under O. 44, r. 6. It is common case that it was not. In those circumstances, in my view, the application should be refused.

15. Thirdly, in order to succeed under O. 42, r. 26 the applicant would have had to satisfy the court that the second respondent and the third respondent wilfully disobeyed the order of 10th July, 2006. It was submitted on behalf of the applicant that it is not necessary for the court to consider the standard of proof required, on the basis that the applicant was not seeking to have the second respondent or the third respondent imprisoned but was merely asking the court to signal its dissatisfaction by directing payment of all or part of the debt of the first respondent to the applicant. Again, I do not accept that the distinction between an

order of attachment and an order of sequestration which underlies that argument is tenable. I consider that to procure an order of sequestration under O. 42, r. 32 against the property of a director of a company, the applicant must prove wilful disobedience of the order beyond reasonable doubt. That conclusion is consistent with the decision of this Court (Keane J.) in *National Irish Bank v. Graham* [1994] 1 I.R. 215. On the evidence before the court, I am not satisfied that it has been established beyond reasonable doubt that the failure to comply with the order of 10th July, 2006 within the time limit specified was wilful. I do not accept that it was, as counsel for the applicant suggested, a studied position of inadvertence. It was suggested that the second and third respondents could have applied to court for an extension of time in which to comply with the order. That is true and the probability is that they would have been granted the extension. They have done what the order required them to do, albeit after the third motion issued. Taking an overall view of the evidence, I am not satisfied that I can make a finding of wilful disobedience on the basis of what I consider to be the appropriate standard of proof.

The second motion

16. Sub-section (1) of s. 251 of the Act of 1990 provides:

> "This section applies in relation to a company that is not being wound up where –
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> (a) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
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> (b) it is proved to the satisfaction of the court that the company is unable to pay its debts, taking into account the contingent and prospective liabilities of the company, and
>
> it appears to the court that the reasons or the principal reason for it not being wound up is the insufficiency of its assets."

17. It is clear beyond peradventure that the first respondent is insolvent. I am satisfied that the reason the first respondent is not being wound up is that there is an insufficiency of its assets. In the circumstances, s. 251 applies to the first respondent. The consequence of that finding is provided for in sub-s. (2) of s. 251, which provides that certain sections of the Companies code, with necessary qualification, shall apply to a company to which the section applies, notwithstanding that it is not being wound up. All of the sections invoked by the applicant on the second motion come within the ambit of s. 251(2). Accordingly, having found that the first respondent is unable to pay its debts and is not being wound up because of insufficiency of assets, the provisions invoked automatically apply to the first respondent as of now.

18. On the hearing of the second motion counsel for the applicant informed the court that the applicant is only pursuing relief under s. 245 of the Act of 1963 at this juncture and requires that its application in relation to the other reliefs sought be adjourned. There was some controversy as to whether the third respondent only became aware of the fact that the applicant only intended to pursue the relief claimed under s. 245 at the hearing of the second motion. I cannot resolve that controversy.

19. Section 245(1) of the Act of 1963 provides as follows:

> "The court may … summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of giving information relating to the promotion, formation, trade, dealings, affairs or property of the company."

20. The first thing to be noted about the foregoing provision is that on its terms the court's power is discretionary.

21. Sub-section (2) of s. 245 provides that the court may examine a person summoned on oath. Having regard to the terms of the second motion, the applicant's purpose in having the second and third respondents summoned for examination is on the basis that they are capable of giving information relating to the promotion, formation, trade, dealings, affairs and property of the first respondent. It is not suggested that either is known or suspected to have in its possession any property of the first respondent nor is it suggested that either is indebted to the first respondent.

22. No authority has been opened to the court in which the application of s. 245 in consequence of an order under s. 251 has been considered. However, two authorities in liquidation contexts have been cited by counsel for the second and third respondents.

23. The earliest in time was a decision of the Chancery Division of the High Court of England and Wales in *Re Embassy Art Products Limited* [1988] BCLC 1. In that case, the company was being wound up by the court. Contributories had obtained an order under a provision in precisely the same terms as s. 245(1) and ancillary orders under the analogues of sub-ss. (2) and (3) of section 245 for production of records and the examination of certain individuals who had been involved in the management of the company prior to its liquidation. The application before the High Court was to discharge that order. The application was successful. In his judgment, Hoffman J. considered the appropriate use of the section in the following passage (at p. 6):

> "Any application to use the section, which is *prima facie* an invasion of the rights of privacy of the persons whom it is sought to examine, is subject to the overriding requirement that the examination must be necessary in the interests of the winding up and not oppressive or unfair to the respondent. It is clear, however, that in applying these principles there are significant differences in the court's approach to applications by liquidators, on the one hand, and contributories, on the other. Firstly, the liquidator is an officer of the court entrusted with the fulfilment of the court's duty … to cause the company's assets to be collected and applied in discharge of its liabilities. He therefore has by virtue of his office locus standi to apply for an order. A contributory, on the other hand, or for that matter a creditor, must demonstrate that examination will probably result in some benefit accruing to him as such. … Unless there is a likelihood of such benefit, the contributory or creditor has no more interest in the outcome of the winding up than anybody else …
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> Secondly, in deciding whether to order an examination order …, the court will ordinarily attach considerable weight to the view of the liquidator, as an independent professional man, that an examination is necessary. The same weight cannot always be given to the views of a contributory, who must adduce evidence to satisfy the court that an examination would be beneficial to him as such … .
>
> Thirdly, the powers of the court … are, to quote Cotton L.J. in *Re Imperial Continental Water Corp.* …'*Prima facie* to be exercised for the purposes of the winding up and for the benefit of those who are interested in the winding up' …"

24. Hoffman J. went on to consider whether the contributories had demonstrated that examination was necessary in the interests of the winding up and that it was likely to result in some benefit to the applicants. In that context he made the following observations (at p. 9), which were relied on by counsel for the second and third respondents:

> "Next I think it is relevant that no prior notice has been given to the respondents of any of the matters on which it is sought to examine them. In *Re Rolls Razor Limited (No. 2)* … Megarry J. said that the court retained a discretion to order an examination notwithstanding that the respondent had been given no notice of the subject of the inquiry. He did, however, add that he could visualise cases in which it would be oppressive to seek to examine without such notice having been given, and this seems to me such a case … There are no doubt cases in which the object of the inquiry would be defeated if the respondent were given advance notice of what he was going to be asked, but this certainly does not seem to me to be one of them. In my view it is oppressive to seek production of documents in the wide terms which have been ordered against the bank and examination of the other respondents in the most general terms without having made any attempt to obtain information by letter or other means in the first place."

25. The decision of Hoffman J. was considered by the Supreme Court in In *re Comet Food Machinery Company Limited (In Liquidation)* [1999] 1 I.R. 485. The applicant in that case had obtained judgment against the company, Comet, in January, 1996 for a substantial sum, IR£255,000. Between the institution of the proceedings and obtaining judgment a resolution to wind up the company had been passed. A new company, Comet Food Equipment Limited, was formed, which occupied the same premises as Comet and had the respondents, who were the directors of Comet, as shareholders and one of the respondents and his wife as directors. It also had former employees of Comet working for it. Comet had a deficiency of liabilities over assets, but it appeared that trade creditors had been paid prior to the liquidation. The applicant was concerned that Comet had been put into liquidation and the new company formed to frustrate its claim. It sought examination of the respondents under s. 245 and the application was successful in this Court. An appeal to the Supreme Court was dismissed. In delivering judgment in the Supreme Court, Keane J., with whom the other two judges agreed, observed that the conclusion seemed inescapable that all trade creditors, other than the applicant, had been paid at some stage prior to the liquidation. He also observed that, at first instance, Costello P. accepted that the application was unusual in that it was being brought by a creditor, not by the liquidator, but that he was satisfied there was evidence of the existence of what he described as "the phoenix syndrome".

26. Having stated that it was clear that the power of the High Court to order examination of persons under s. 245 is a discretionary one, and that, in the case of a voluntary winding up, the application may be made by a creditor of the company, Keane J. went on to consider the decision of Hoffman J. in the following passage (at p. 490):

> "It was held in England in *Re Embassy Art Products* … , that in the case of an application for an examination in a winding up by the court, a creditor, unlike the liquidator, in order to be entitled to such order would have to demonstrate that the examination would probably result in some benefit accruing to him. It was also held that, in deciding whether to order an examination, the court would ordinarily attach considerable weight to the view of the liquidator that an examination was necessary, but that the same weight could not always be given to the views of a contributory or creditor. Those considerations are undoubtedly applicable where, as here, the application is made in the course of a voluntary winding up."

27. Keane J. then considered the reason advanced for bringing the application before him: the suspicion that assets of Comet had been diverted to the new company and that the trade creditors of Comet had been paid off with a view to frustrating the execution of any judgment which the applicant might recover in the pending proceedings. He commented as follows (at p. 490):

> "That suspicion may or may not be well founded: if it was, the ground might then be laid for an application pursuant to s. 139 of the Companies Act, 1990, for the return to the liquidator of assets improperly transferred by Comet.
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> It cannot be said that, in these circumstances, the application is one which is manifestly brought by the applicant without any hope of recovering any benefit but simply in order to initiate an unnecessarily intrusive inquiry because of pique arising from the fact that its proceedings against Comet have so far proved fruitless."

28. The second motion was grounded on the affidavit of Patrick Power, a director of the applicant, which, although running to 43 paragraphs, does not seem to me to advance any specific reason for, or demonstrate that some benefit will accrue to the applicant from, the examinations sought. The only reference I can find to s. 245 in it is an oblique reference in para. 42, which merely asserts that the second respondent and the third respondent are in a position to give information in relation to the company and "in particular in relation to the issue that the Company appears unable to pay its debts when they become due and the transactions entered into between the Applicant Company and the Respondent Company". The bulk of the affidavit is taken up with alleged failures and irresponsibility on the part of the second and third respondents in complying with their statutory obligations as directors of the first respondent and other companies, and would seem to be directed to procuring an order under s. 160 of the Act of 1990, on the basis of my understanding of what is averred, *pro bono publico*. I see no reference express, implied or oblique to s. 297(A) of the Act of 1990 in the affidavit.

29. The second respondent's first response to the second motion was in an affidavit sworn on 18th July, 2006, the gist of which was that the applicant was attempting to pre-empt the appeal to the Supreme Court against the judgment in favour of the applicant. That response, of course, ceased to be of significance when the appeal was struck out. The second respondent filed a further response by affidavit sworn on 24th November, 2006, to which I have already referred, in which he asserted that the second motion appears to be premised on the basis that, because the applicant has an undischarged judgment against the first respondent, it is to be inferred, or it is to be presumed, that the second respondent acted improperly as a director. The second respondent asserted that he had been advised that that was not a correct proposition in law and that he was entitled to know the grounds on which the applicant now seeks to proceed against him. He also disclosed that in proceedings initiated in 2003 (Record No. 2003/373 COS), the existence of which had been deposed to by Mr. Power in his grounding affidavit, the applicant had sought relief under ss. 243 and 245 of the Act of 1963 and that those proceedings were adjourned generally with liberty to re-enter, on the basis of "back to back" as to costs. He commented that the present proceedings are new proceedings, not by way of re-entry.

30. The third respondent filed an affidavit sworn on 27th November, 2006, to which I have already referred, in response to the second motion. He averred that he had been advised that there was no need for him to be examined pursuant to s. 245 and that there would be no need for production orders under s. 243 in the light of what was being made available to the court in the affidavit. He averred that he had no involvement in the 2003 proceedings, in which the directors were not named as respondents. He put before the court by way of exhibit a considerable amount of documentation. By way of illustration he exhibited 26 copies of Revenue forms P.60 which issued to employees of the first respondent for the year ended 31st December, 2002.

31. No affidavit in reply to the affidavits of the second and third respondents was filed by the applicant.

32. The basis on which it was put in the submissions that an order under s. 245 should be made was that the manner in which the second respondent and the third respondent operated the first respondent calls for further inquiry and examination. It was suggested that there was a considerable amount of irregularity in the manner in which they conducted the affairs of the first respondent. There is undoubtedly some truth in that, in the sense that they clearly did not comply with their statutory obligations to make annual returns, which has now been rectified.

33. In my view, there is an onus on a creditor of a company which is not being wound up, who is seeking an order under s. 245 in reliance on s. 251, to demonstrate that the examination would probably result in a benefit accruing to him. That onus is more rigorous than the onus borne by a contributory or a creditor in a compulsory or a voluntary winding up. The applicant here has wholly failed to discharge that onus. An examination pursuant to an order made under s. 245 would, as matters are currently structured, amount to a "fishing expedition". While it might uncover evidence in relation to the manner in which the business of the first respondent was conducted which would reflect unfavourably on the second and third respondents, there is no evidence from which one could infer that anything would emerge which would be of benefit to the applicant in, say, pursuing proceedings under s. 297(A).

34. The public interest aspect of the applicant's application, however commendable, does not entitle it to an order under s. 245 (cf. observations of Hoffman J. at p. 7). In any event, there is a public body in existence now which is empowered to pursue the *pro bono publico* aspects of the failure of the first respondent: the Office of the Director of Corporate Enforcement.

35. Accordingly, an order will be made on the second motion in the terms of paragraph 1 and refusing applications in the terms of paragraphs 2, 3 and 4. I will hear submissions as to what is to happen to the remainder of the reliefs sought on the second motion.