THE HIGH COURT

[No. 2009/627 COS]

IN THE MATTER OF SAGAMU DEVELOPMENTS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

AND

IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990

BETWEEN

BRENDAN O'DONOGHUE

APPLICANT

AND

ALAN HANLY AND JOSEPH ALBERT HANLY

RESPONDENTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 2nd day of February, 2017

Introduction

1. By Notice of Motion dated 25th April, 2013 the applicant liquidator ("the Applicant") of Sagamu Developments Limited ("the Company") brought an application for a declaration that the respondents be restricted from acting as a director or secretary of a company which does not meet the capital requirements of s. 150(3) of the Companies Act 1990 (as amended).

2. Seven affidavits in addition to two affidavits as to documents were sworn by the Applicant between 16th April, 2013 and 5th June, 2015 while ten affidavits were filed for the respondents between 22nd November, 2013 and 29th June, 2015 prior to a full day of opening the application in January 2016. Then there were two further and separate days for cross examination of three deponents in February and March 2016. Final written and oral submissions with a spreadsheet of a chronology of events considered relevant by one or other of the parties were completed in Michaelmas term 2016.

3. It is with that background that this Court finds itself in the unenviable position of reviewing the evidence and submissions. Parties like those before the Court now and the Court itself should avoid such protraction in the future.

Delay

4. The following extract from the judgment of Hogan J. in *Donnellan v. Westport Textiles Limited* [2011] IEHC 11 at para 31 is quite apt although the claim for hearing loss which lead to that judgment is different to the circumstances giving rise to the motion before the Court now:-

> *"…quite apart from any considerations of the personal rights contained in Article 40 and Re Haughey-style basic fairness of procedures, the speedy and efficient dispatch of civil litigation is of necessity an inherent feature of the court's jurisdiction under Article 34.1. As I ventured to suggest in my own judgment in O'Connor v. Neurendale Ltd. [2010] IEHC 387, this constitutional imperative means that the courts have a jurisdiction (and, in an appropriate case, a duty) to exercise their powers in a way which will best ensure that a litigant's right to a hearing within a reasonable time is best vouchsafed. In any event, and for good measure, the same right is guaranteed by Article 6 ECHR: see Gilroy v. Flynn [2004] IESC 98, [2005] 1 ILRM 290 and McFarlane v. Ireland [2010] ECHR 1272. One might add that this duty also extends to protecting the public interest in ensuring the timely and effective administration of justice…"*

Protection of the Public

5. The form of application before the Court now is mandated by the Oireachtas for the protection of the public "*against the future supervision and management of companies by persons whose past record as directors of insolvent companies have shown them to be a danger to creditors and others*". Those are the words of Finlay Geoghegan J. in *Re Colm O'Neill Engineering Services Limited* [2004] IEHC 83.

Relevant Periods

6. The alleged irresponsible conduct which was the focus of this application is traced back to 2008. The Company was wound up on 30th November, 2009 and the Applicant further highlighted alleged lack of cooperation and candour on the part of the respondents following his appointment.

7. The letter from the liquidator to the first named respondent ("Mr. A") of 3rd January, 2012 as copied to the Director of Corporate Enforcement ("DCE") set out the Applicant's preliminary results of his investigations which outlined failures to:

> (i) submit correct tax returns,
>
> (ii) discharge VAT liabilities for identified periods,
>
> (iii) file a correct Statement of Affairs and;
>
> (iv) co-operate with the Applicant "*including delays in providing substantive and relevant company books and records despite requests from the applicant*".

8. The Applicant submitted four reports to the DCE beginning with a report on 26th May, 2010 and ending with a report on 13th June, 2012. The DCE by letter dated 19th July, 2012 confirmed that the Applicant was not relieved of his obligation to make this application.

9. It was accepted rightly and fairly by the Applicant under cross examination that the respondents were not responsible for a delay

in establishing facts in the liquidation from February 2012. Nevertheless, the Notice of Motion was not issued until 25th April, 2013.

Application for Extension of Time
10. The liquidator in his affidavit sworn on 16th April, 2013 sought, for the first time from the Court, an order extending the time for seeking the declarations. At that time, only the Court could extend the time for bringing this type of application under s. 56 of the Company Law Enforcement Act 2001 ("CLEA 2001"). S. 683 of the Companies Act 2014 which came into operation on 1st June, 2015 replaced s. 56 of the CLEA 2001 and that section allows the DCE to grant an extension. The DCE did not specifically allow for this late application.

11. Barrett J. in *DLOK Electrical Services Ltd v. O'Kane and Long* [2014] IEHC 481 (which involved a similar application under s. 150 of the Companies Act 1990) made a number of points about s. 56(2) of the CLEA 2001 including:-

> *"First, it appears that each report made to the Director of Corporate Enforcement is a "report" for the purposes of section 56, i.e. it does not appear that where a series of reports is made that the series of reports should be treated as a cumulative single report. Second, unless the Director of Corporate Enforcement has relieved a liquidator of the obligation to bring a s.150 application within the timeframe prescribed in s.56(2), such an application must ("shall") be brought, absent an extension of that timeframe by the court. Third, non-compliance with s.56(1) or (2) by a liquidator renders the liquidator guilty of a criminal offence."*

12. In that judgment at para. 13 Barrett J. went on to state:-

> *"It seems to the court that there are at least two grounds why a liquidator should seek to comply with s.56. First, it is the law and that should be reason enough. Second, it is in a liquidator's personal interest to comply. After all, a liquidator who breaches s. 56(2) will be guilty of an offence unless a court later grants an extension of the applicable timeline."*

13. Barrett J. at para. 14 went on to explain:-

> *"…an appropriate course of action for a liquidator to take if he or she contemplates that a potential difficulty may arise under s.56(2) would appear to be that identified by Dr Ahern in her learned text, Directors' Duties, (Dublin, 2009) in which she states, at p.511, that:*
>
> *"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 s. 56(2)."*

14. In *Coyle v. O'Brien & Ors*. [2003] 2 I.R. 627 at p. 633 Finlay Geoghegan J. indicated factors which the Court should bear in mind when granting an extension of time:-

> *"It [the 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 of an offence. It appears to be that the grounds must be such that they warrant the court in fairness and justice, [bold print added by this Court] relieving the liquidator from the intended statutory consequences of a failure to act within the specified time".*

15. The Applicant relied on the letter from the DCE dated 19th July, 2012 which did not relieve him from the requirement to bring proceedings. The Applicant accepted that as of 20th February, 2012 when he wrote a four page letter to the DCE, the basis for this application existed.

16. In summary, the alleged lack of cooperation with which this Court is concerned relates principally to the years 2010 and 2011 or more accurately a period which was just over two years.

17. Given the legal principles which I have referenced above, it is difficult to see the fairness and justice in allowing this application for a declaration to proceed to a determination against the second named respondent who is now 76 years of age with health issues. In any event, the focus of attention was always on his son, Mr. A. Mr. A took upon himself the task of answering the questions of the Applicant, swearing affidavits in this application and giving instructions for the responses. Without further ado and having regard to the purpose and intention of the Oireachtas in enacting the provision pursuant to which this application is brought, the Court declines to extend the time and thereby refuses to make a declaration in respect of the second named respondent.

The First Named Respondent
18. In deference to the extensive evidence adduced and then the submissions which were made to vindicate Mr. A's reputation, the Court will proceed to outline its consideration of the concerns expressed about the conduct of Mr. A as a director of the Company. The Court's decision in this regard ultimately renders unnecessary a deliberation about the fairness and justice in extending the time for bringing and adjudicating upon the application concerning Mr. A. In other words, the Court, as will be explained, has decided that the declaration sought should not be granted against Mr. A.

19. Three issues were identified for the Court's attention:-

> (i) Whether the use of value added tax ("VAT") recovered from customers of the Company, amounted to conduct which was irresponsible;
>
> (ii) Whether the debt of €13.3 million due to the Company by a group company was written off in a manner which amounted to irresponsible conduct;
>
> (iii) Whether the respondents failed to cooperate materially with the applicant.

Mr. A's Relevant Background
20. Mr. A has qualifications in engineering from Dublin and Belfast. He had been a director of many companies, including management companies for residential developments, before the collapse of the group of companies known as the Hanly group in 2008. At the time

of his cross-examination on 16th March, 2016 he stated that he was not a director of any company at that time. Further, it was mentioned that this was the only application by a liquidator of a company in the Hanly Group which sought a declaration arising from Mr. A's conduct as a director of a company in the Hanly group.

The Family Group
21. Laragan Holdings Limited ("the Holding Company") was the parent company of two operating companies:-

(i) Hanly Brothers Limited (incorporated in 1972) ["HBL"] and;

(ii) Laragan Developments Limited (incorporated in 1998) ["LDL"].

Both of these companies were placed in receivership and liquidation following the collapse of the construction industry in Ireland. It was following Mr. A's return from college to the family business in 1993 that HBL expanded into steel design and construction. The modus operandi of LDL was to procure development sites resulting in building contracts for LDL and a ready market for the materials produced by HBL.

22. In 2005 the Rocky Valley site in Kilmacanogue, Co. Wicklow was purchased by LDL by way of a share purchase of the entire share capital in the Company. It was a prerequisite of the vendor that this was the mode of acquisition. All of the Company's liabilities were then guaranteed by LDL and ultimately by Mr. A. The Rocky Valley estate became one of twelve sites developed by LDL at this time. LDL provided all of the personnel and resources for the completion of the development at Rocky Valley.

Success
23. LDL's business model was to increase housing density where possible followed by pre-selling of properties to minimise exposure. Mr. A explained that between 2002 and 2006, LDL sold 240 residential units which were evenly divided between spring and autumn of each year. This model of operation had been agreed with Anglo Irish Bank ("Anglo") which principally financed the Hanly group.

Collapse
24. As is well chronicled now, the housing market in Ireland collapsed by September, 2006. The Hanly group only sold twelve units at its autumn launch in 2006 when 150 sales had become the traditional volume.

25. By late 2007 it had become increasingly difficult to persuade customers to honour their contractual arrangements made in 2005 or 2006 to complete the purchase of their properties which had been presold.

26. After September, 2007 LDL met with Anglo on a monthly basis to assess the availability of continued lending. By 2008 when many economists were still predicting a soft landing in the construction industry, LDL and the Company became totally dependent on Anglo which itself was unable to continue support until after the decision to nationalise Anglo which occurred in December, 2008.

anly group in 2008
27. The Hanly group management team recognised that they had a problem. As soon as any sale closed, it became customary from January, 2008, at least for the Company's solicitors, to transfer the entire proceeds of sales to Anglo including VAT payments by purchasers of residential units. Mr. A confirmed that the day to day money came from Anglo and that effectively the VAT proceeds became part of the general funds. Mr. A was candid in his replies to questions when cross-examined. He explained that Anglo micro-managed the business of the Company from 2008 while he took responsibility for the use of VAT for cash flow as a result of that micro-management.

The Revenue
28. The Company's auditor contacted the Revenue in January, 2008 in advance of the liability becoming due for that period to discuss the actual cash flow problem. The auditor emailed the Company's financial controller on 21st April, 2008 to outline how €240,000, due to the respondents personally, would be used by the Revenue to decrease the liabilities. More significantly, it was proposed to the Revenue that the balance of the liabilities would be paid by post-dated cheques over a period of nineteen months with the first payment due on 1st May, 2008.

29. Suffice to say that the Court is satisfied that the Company was engaging with the Revenue and paying the Revenue some of the various agreed instalments. However, the inevitable occurred and I say that with the benefit of hindsight. The collapse in the economy and more specifically in the construction industry took its toll. The Revenue ultimately petitioned for the winding up of the Company on 9th October, 2009 following the refusal of Clarke J. in July 2009 to approve a scheme of arrangement for LDL- (*Laragan Developments Ltd v. Companies Act* [2009] IEHC 390).

30. It is worth noting at this stage that the Company had secured an alternative banking arrangement in January, 2009 to make available €150,000 per month to part clear the debt to the Revenue while also hoping that substantial tax refunds would further assist in decreasing the accrued debt due to the Revenue.

2009
31. The Irish property market was in an irreversible downward spiral from the beginning of 2009. Undoubtedly, 2009 was a most difficult time for very many, including the directors, employees and management team of LDL which had come together over a twenty year period. In the seven years since 2009 the parties and those having an interest in the construction industry have learned a lot about the cause and effect of the crash in the economy at that time.

Issues identified for consideration
32. The parties usefully acknowledged the issues to be considered by the Court for this application. Those issues are abbreviated for ease of reference in the way in which the Court proposes to make the Court's determination in relation to Mr. A :-

A. VAT
33. Did Mr. A fail to act honestly or responsibly with respect to the failures of the Company to discharge VAT due in respect of the following periods and sums:-

January\February, 2008 - €464,794.00

May\June, 2008 - € 49,675.00

July\August, 2008 - €116,758.00

November\December, 2008 - €139,015.00

March\April, 2009 - €136,580.00

May\June, 2009 - € 3,451.00.

B. INSOLVENCY

(i) What was the cause of the Company's insolvency and would the Company have been profitable but for the writing off of the inter-company balance owed by LDL in the period 30th November, 2009 in the sum of €13.3million?

(ii) How does the identification of the true cause of the insolvency of the Company impact on the Court's assessment of:-

(a) the honesty or responsibility of Mr. A.;

(b) Mr. A's cooperation with the liquidator?

C. COOPERATION

Did Mr. A fail materially to cooperate with the Applicant having regard to:-

(i) the manner or time by which the books and records of the Company were provided to the applicant?

(ii) the manner or time by which Mr. A explained the business, affairs and insolvency of the Company to the Applicant?

Determination relating to Mr. A

34. The Applicant following his appointment on 30th November, 2009 was obliged to follow lines of enquiry into the cause of the Company's insolvency. Although the Statement of Affairs of 5th February, 2010 did not identify the non-recoverability of the €13.3 million owed by LDL to the Company, Mr. A was overwhelmed by the demands on his time and resources which became more limited as time elapsed with the loss of employees and advisors. The Hanly group had collapsed and the Court is satisfied that Mr. A was busy gathering and disseminating information about the affairs of the Hanly group while seeking professional assistance. Initially there may have been a suggestion of dishonesty on the part of Mr A. but no allegation of dishonesty was pursued at the hearings in 2016.

35. Despite the unavailability of assistance and records to Mr. A, the Court was nevertheless left with a lingering suspicion that Mr. A and his advisors conveniently ignored the Applicant's legitimate concerns about the distinct legal personality of the Company in the Hanly group.

36. The Applicant had to extract information and it took until July, 2011 to get a seven page explanatory report from Mr. A which still did not explain matters satisfactorily. By that time the Applicant had reported to the Director of Corporate Enforcement.

37. There is some small merit in the complaints made by Mr. A about the lack of continuity of personnel in the Applicant's office dealing with the liquidation and its contribution to the delay in the Applicant completing his investigations into whether Mr. A conducted himself responsibly. Notwithstanding, it was for Mr. A. as a respondent in an application like this to satisfy the Court that he acted responsibly. Therefore, the contribution caused by the change of personnel in the Applicant's office does not assist Mr. A to any material degree in his quest to satisfy the Court that he acted responsibly.

38. Having read the affidavits and exhibits and more importantly having considered the evidence adduced in cross-examination, the Court was ultimately satisfied by Mr. A that:-

(i) He had few options from 2008 to keep the Company going according to the business model devised for it by the Hanly group and its advisors. In other words, the Court is satisfied that Mr. A acted honestly while it is to the credit of the Applicant and its counsel that such a proposition was not pursued in cross-examination.

(ii) The purchase of the share capital of the Company in order to acquire the Rocky Valley site was indeed unfortunate. There had been a tried and tested formula which had worked for the Hanly group over the years prior to the worst economic collapse ever experienced in the State.

(iii) There may have been practices involved in the management and running of the Company which would not stand up to scrutiny in 2017 from a director's sense of responsibility now. However, this Court has long recognised that it should not benefit from hindsight. I also emphasise that I take the entire tenure of Mr. A's directorship into account in accordance with that principle outlined by Shanley J. in *La Moselle Clothing* [1998] 2 ILRM 345.

(iv) The use of the VAT paid by purchasers of units became apparent to the Revenue and Anglo while Mr. A sought to work out an arrangement with those institutions. In May 2008 an arrangement was made with the Revenue for the substantial arrears which had accrued since the beginning of 2008. The Court does not condone the failure to make proper returns and payments but these defaults occurred within a limited period during which the Company was under significant financial pressure in the midst of an apocalyptic time for the industry in which it operated. The paragraphs written by Finlay Geoghegan J in *Kavanagh v Cummins* [2014] 2 ILRM 35 at 44 spring to mind when considering this type of activity in a limited period.

39. Therefore although significant VAT payments were not made as may be gleaned from para. 33 above, Mr. A satisfied me that he acted honestly and responsibly by engaging and seeking to comply with arrangement made with the Revenue.

40. The cause of the Company's insolvency was indeed due to the way in which the Company was slotted into the Hanly group and operated within that group. The debt of €13.3million due by LDL to the Company caused the significant insolvency. Were it not for the purchase of Rocky Valley and the necessity to purchase the Company, the sales and outlays for that development would have occurred as the Hanly group always worked as explained by Mr. A. The explanation about failing to identify how and when the €13.3 million due by a group company became irrecoverable was glossed over until the Applicant exercised his right and duty to have that

given. Ultimately it became clear that the discharge of the debt was dependent upon the solvency of the Hanly group as a whole.

41. No matter what way one looks as the situation, if the Company did not suffer that loss another group company was going to be even more indebted. I was satisfied by Mr. A that he acted under such pressure during those turbulent times that his conduct was honest and responsible. Mr A's conduct may not be an example of how to conduct oneself as a director in 2017 or perhaps in 2013 when this application was commenced because corporate governance and advice standards have improved since the collapse of the economy.

Cooperation
42. It has long been the law that directors also have a responsibility to cooperate with a liquidator and that they may be restricted on the just and equitable grounds referred to in s.150 of the Companies Act 1990 for failing to do so. S 819 (2) of the Companies Act 2014 refers to that duty now but this judgment does not concern itself with that provision.

43. The significant delay of Mr. A in explaining the write off of the €13.3million debt did increase the attention and work required of the Applicant. The Applicant was seeking to fulfil his statutory duties in enquiring about the legitimacy and propriety of the inter group debt. Mr. A cannot be rewarded for the delay which he caused but neither should he be penalised by the determination of this application which is not concerned with imposing penalties. The purpose of this type of application is to protect the public. The years have now elapsed and it is quite apparent from the exchanges in this application that the Applicant now has the information which he requires. I might also add that Mr. A did not always have ready access to the books records and advice which would have allowed him to satisfy the Applicant's legitimate questions.

44. Mr. A, his reputation and the fate of his family group of companies were devastated following the events from 2008 right up to the commencement of this application in April, 2013.

45. The Court has already expressed views concerning the late application viz-a-viz Mr. A's father who is the second named respondent. As explained, this Court proceeded to determine whether Mr. A has satisfied the Court that he acted responsibly as a director. Mr. A has indeed satisfied the Court that he has now cooperated with the Applicant even though that cooperation improved as a result of the imminence and prosecution of this application.

Conclusion
46. The Court repeats that it should not look at matters with the benefit of hindsight. Mr. A finally got around to explaining in writing and accepting in cross-examination that he and his advisors had a track record of acquiring potential developments through LDL which then procured materials from HBL. The acquisition of the Rocky Valley development created a situation where the group's bankers in particular with the assistance of the Company's solicitors at the time transferred the proceeds of all property sales to Anglo. As the property development market collapsed in those years the debt owed to the Company by another group company became unrecoverable.

47. The Revenue, which was a significant creditor of the Company, was aware of the cash flow difficulties in the early part of 2008. The arrangement entered into in good faith was incapable of being performed and the Revenue then petitioned successfully for the winding up of the Company. Furthermore, Anglo, which was a principal banker to the Hanly group, ran into its own difficulties and exercised pressure to recover monies from any company within the Hanly group.

48. Unfortunately, the circumstances giving rise to this application is a tale of some distress. For the sake of clarity, the Court has been satisfied, albeit as a result of a protracted process, that Mr. A did not act dishonestly or irresponsibly in the conduct of the affairs of the Company.

49. For all of those reasons, the Court refuses to make the declarations sought against Mr A, the first named respondent.