

THE HIGH COURT

[2015 No. 417 COS]

IN THE MATTER OF LES JUELLES LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF SECTION 819 OF THE COMPANIES ACT, 2014 AND SECTIONS 682 AND 683 OF THE COMPANIES ACT 2014

BETWEEN

CONOR O'BOYLE

APPLICANT

AND

MARY MCSWEENEY, MARGARET GALLAGHER

AND TIM MCSWEENEY

RESPONDENTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 16th day of November, 2017

Introduction

1. The extension of time for a liquidator to apply for declarations pursuant to s. 819 of the Companies Act 2014, arises for consideration as a result of a preliminary application made on behalf of the respondents on 3rd November, 2017, to determine whether the Court could proceed with the hearing of the entire application scheduled for that day.

Dates Relevant to this Application

24.01.2014 The applicant was appointed liquidator of Les Jumelles Limited ("the Company") by ordinary resolution.

23.01.2015 The final report from the applicant pursuant to s. 56(1) of the Company Law Enforcement Act 2001 ("the Act of 2001") was received by the Director of Corporate Enforcement ("DCE").

27.04.2015 The DCE wrote to the applicant to confirm that he was "*obliged to make an application pursuant to s. 150 of the Companies Act 1990 ('the Act of 1990') for the restriction of all directors (including the shadow director, Mr. Tim McSweeney) within five months from*" 23rd January, 2015. The period of five months derived from the then applicable s. 56(2) of the Act of 2001.

01.05.2015 Commencement order for Companies Act 2014 ("the Act of 2014") [S.I. No. 169/2015] was made which set 1st June, 2015, as the date for the coming into operation of the Act of 2014 save for four provisions which are not relevant to this judgment.

26.11.2015 The notice seeking an order pursuant to s. 819 of the Act of 2014 was filed and issued with an initial return date of 7th December, 2015. This notice of motion was issued some six months after the period allowed.

09.11.2016 The Office of the DCE ("ODCE") replied to a letter from the applicant's solicitor which had sought "*a greater period of time under s. 683(4)(b)*" of the Act of 2014 to make the application for the declaration. The ODCE in this letter stated:-

"In accordance with the legislation then applicable, [the applicant] was obliged to make the relevant application not later than five months after the s. 56 report which was submitted i.e. 23rd June, 2015"

The ODCE noted that no explanation was offered for the failure to make the relevant application "on a timely basis" before refusing the time extension sought. The ODCE then added:-

"...the ODCE does not consider that the High Court's jurisdiction to proceed with the determination of the liquidator's application is in any way contingent upon the grant of an extension of time by the Director..."

Statutory Provisions

2. S. 56(2) of the Act of 2001 provided that a liquidator of an insolvent company "*shall not earlier than 3 months nor later than 5 months (or such later time as the court may allow and advises the [DCE])*" [underlining inserted by this Court for emphasis] after "*the date on which*" he has provided a report to the DCE under s. 56(1), apply to the court for the restriction of directors under s. 150 of the Act of 1990 unless the liquidator has been relieved by the DCE of the obligation to do so.

3. S. 683(4) of the Act of 2014 provided that an application in respect of a director under s. 819(1) of the Act of 2014 "*shall be made not later than the expiry of (a) 2 months after the date on which the [DCE] has notified the liquidator that*" he is not relieved of the obligation to make the application, or (b) "*such greater period of time*" as the DCE may allow for the application [underlining inserted by this Court for emphasis].

4. Both s. 56 (3) of the Act of 2001 and s. 683(5) of the Act of 2014 made it an offence for a liquidator not to make such an application under the earlier subs. (2) of those sections.

Coyle v. O'Brien

5. In *Re E. Host Europe Limited (in voluntary liquidation) – Coyle v. O'Brien* [2003] 2 I.R. 627, the chronological history was as follows:-

29.11.2002 The report of the applicant liquidator was furnished to the DCE.

07.04.2003 The DCE notified the applicant liquidator that he was not relieved from his obligation to seek a declaration.

28.04.2003 Was the last day for the liquidator to issue a notice of motion by virtue of the operation of s. 56(2) of the Act of 2001.

01.05.2003 A notice of motion was issued on behalf of the applicant seeking the declarations.

Regulatory Limitation

6. Finlay Geoghegan J. at p. 631:-

"concluded on balance that the time limitation imposed by s. 56(2) of the Act of 2001 is a regulatory limitation imposed on the liquidator which potentially has for him the consequence of committing the offence specified in s. 56(3) of the Act of 2001 but does not bar his entitlement to bring an application under s. 150 of the Act of 1990..."

7. Finlay Geoghegan J. noted that s. 150 of the Act of 1990 did not originally provide for any specific person to apply for the relevant declarations. s. 41(1)(c) of the Act of 2001 inserted as subsection 4A in s. 150 of the Act of 1990 "[a]n application for a declaration under [s. 150(1) of the Act of 1990] may be made to the court by the [DCE], a liquidator or a receiver."

8. The learned judge sought the legislature's intent by reference to the "express words" used by the Oireachtas. The judgment continued:-

"Having given a liquidator a power, unlimited in time to bring s. 150 applications by the amendment in s. 41 of the Act of 2001, it appears to me that if the Oireachtas intended the power given to be limited in time there would have been express words to that effect... Rather it imposes an obligation to exercise the power (unless relieved) and to do so within a specified time with penal consequences for failure to do so."

Difference between the Acts of 2001 and of 2014?

9. The primary issue before the Court now, while recognizing the operation of the *stare decisis* doctrine, is to identify whether the legislative intent for the Act of 2014 is different to that of the Act of 2001 as determined by Finlay Geoghegan J.

10. In fact, the same background prevails because s. 820(1) of the Act of 2014 mirrors the relevant enabling powers given by the Act of 2001 to the DCE and a liquidator of an insolvent company. In passing I mention for completeness that the Act of 2014, identifies a receiver as "a receiver of the property of the company". That clarification makes no difference to the background explained by Finlay Geoghegan J. Therefore, since 2001, a liquidator has had an obligation in addition to the power to make an application.

11. The Court does not favour any suggestion that the legislature by using the words "shall be made not later" in s. 683(4) of the Act of 2014 is peculiarly different to "shall not ...later than" in s. 56(2) of the Act of 2001. The use of those words arise in the section dealing with the obligation of a liquidator to bring such applications. Liquidators faced a criminal sanction for failure to comply with s. 56(1) and (2) of the Act of 2001 by virtue of s. 56(3). Similarly s. 683(5) of the Act of 2014 provides:- "A liquidator who fails to comply with subsection (2) shall be guilty of a category 3 offence".

12. The failure or omission by a liquidator to comply with s. 683(4) of the Act of 2014 is not included in s. 683(5) of the Act of 2014 while failure to comply with the time limits in s. 56(2) of the 2001 Act specifically rendered a liquidator guilty of an offence.

13. One might then ask about the purpose of s. 683(4) of the Act of 2014. On close examination it emerges that "in compliance with subsection (2)" can only refer to the obligation in s. 683(2) of the Act of 2014 which is regulatory in nature for liquidators. It remains for a liquidator who fulfils his/her duty later than the periods allowed for in s. 683(4) of the Act of 2014 to argue that s. 683(5) ought not apply. I am not deciding that issue because it would require much more detailed argument on behalf of parties who were not before the Court for this preliminary application.

14. In short, the imperative arising from s. 683(4) of the Act of 2014 does not avail the respondents because the applicant continues to have the power to bring the application. The legislature has not imposed a time limit on the exercise of that specific power. I do not discern an intention of the legislature from the Act of 2014 to change the law which has existed since 2001 so that directors could avoid an application for a declaration by a liquidator under s. 820(1) of the Act of 2014 as was argued for the respondents. The history and explanation set out by Finlay Geoghegan J. in *Coyle v O'Brien* remains. The words in s. 820 of the Act of 2014 which allows a liquidator to bring this type of application are clear, precise and unambiguous.

Ferris v Hui

15. During the course of oral submissions, I was referred to my judgment in *Ferris v Hui* [2016] IEHC 227 which concerned an application to dismiss on the grounds of inordinate and inexcusable delay in making the application pursuant to s. 819 of the Act of 2014. The facts presented at the short hearing on the 3rd November, 2017 do not establish an injustice caused by the delay of the applicant. Therefore, the circumstances do not prompt the Court to weigh the public interest in determining whether the respondents acted responsibly against any unfairness caused to themway. Bluntly there is nothing in that judgment which assists the respondents in this preliminary application.

16. I therefore refuse the application made on behalf of the respondents and I shall hear Counsel now about proceeding with the application including the cross-examination of witnesses which was originally scheduled for the 3rd November, 2017.