Neutral citation no. [2005] IEHC 85

THE HIGH COURT

[Record No. 2004/427COS]

IN THE MATTER OF CLAWHAMMER LIMITED AND IN THE MATTER OF SECTION 160 OF THE COMPANIES ACT, 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

MARITA McDONNELL AND FRANCIS ENDICOTT

RESPONDENTS

[Record No. 2004/428COS]

IN THE MATTER OF SHINRONE FOOD MARKET LIMITED AND IN THE MATTER OF SECTION 160 OF THE COMPANIES ACT, 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

ANDREW HOCTOR AND DEIRDRE HOCTOR

RESPONDENT

[Record No. 2004/455COS]

IN THE MATTER OF CAUTIOUS TRADING LIMITED AND IN THE MATTER OF SECTION 160 OF THE COMPANIES ACT, 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

MARTIN FORRISTAL AND LINDA FORRISTAL

RESPONDENTS

Judgment of Finlay Geoghegan J. delivered on 15th day of March 2005.

1. This judgment is given in three separate applications brought by the Director of Corporate Enforcement ("the Director") for the disqualification of the respondents pursuant to s. 160(2)(h) of the Companies Act, 1990 (as inserted by s. 42(b) of the Company Law Enforcement Act, 2001). The applications are amongst the first such applications (I was informed of one earlier application) and I reserved judgment in each for the purpose of considering certain of the issues raised on behalf of the Director and on behalf of certain of the respondents. It appears appropriate to give one judgment dealing with the general principles and the individual applications.

Applicable statutory scheme

2. Section 160(2) (h) of the Act of 1990 provides as follows:

> (2) Where the court is satisfied in any proceedings or as a result of an application under this section that –
>
> > (h) a person was a director of a company at the time of the sending, after the commencement of section 42 of the Company Law Enforcement Act, 2001, of a letter under subsection (1) of section 12 of the Companies (Amendment) Act 1982, to the company and the name of which, following the taking of the other steps under that section consequent on the sending of that letter, was struck off the register under subsection (3) of that section…
>
> the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit.

3. Section 42 of the Act of 2001 commenced on 1st March, 2002, pursuant to the Company Law Enforcement Act, 2001 (commencement) (No.5) Order 2002 (S.I. No. 53 of 2002).

4. Section 160(3A) of the Act of 1990 provides a defence to applications brought under s. 160(2) (h) of the Act of 1990. It provides:

> "(3A) The court shall not make a disqualification order under paragraph (h) of subsection (2) against a person who shows to the court that the company referred to in that paragraph had no liabilities (whether actual, contingent or prospective) at the time its name was struck off the register or that any such liabilities that existed at that time were discharged before the date of the making of the application for the disqualification order."

5. Section 160(6A) of the Act of 1990 permits the Director to bring the application under s. 160(2) (h). Section 160(9A) enables the court, on an application for disqualification, in certain circumstances in the alternative to make a declaration under s. 150 of the Act of 1990 by providing:

> "(9A) In considering the penalty to be imposed under this section, the court may as an alternative, where it adjudges that disqualification is not justified, make a declaration under s. 150."

6. Section 160(8) of the Act of 1990 enables a person who is subject to a disqualification order to apply to the court for relief, either in whole or in part by providing:

> "(8) Any person who is subject or deemed subject to a disqualification order by virtue of this part may apply to the court for relief, either in whole or in part, from that disqualification and the court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit."

Necessary proofs under s. 160(2)(h)

7. Counsel for the Director submits that in order that the Director succeeds under s. 160(2)(h) it is only necessary that he prove:

i. That a letter was sent to the Company, after 1 March, 2002, under s. 12 of the Companies (Amendment) Act 1982. That the Company was struck off the register pursuant to s. 12(3) of the Act of 1982 following the taking of the other required steps consequent on the sending of such letter

ii. That the Respondents were directors of the Company at the time of the sending of such letter.

8. I accept that submission. The prohibition contained in s. 160(3A) against the court making a disqualification order under s. 160(2)(h) is against "a person who shows to the court that the company . . . had no liabilities . . .". This does not oblige the Director, on an application to establish that there are no such liabilities but rather gives to a respondent the possibility of avoiding the making of a disqualification order if that person "shows to the court" meaning presumably establishes as a matter of probability that the company either had no liabilities at the time it was struck off the register or that such liabilities that existed were discharged prior to the date of the application under s. 160(2)(h).

9. In each of these applications the respondents did not dispute the entitlement of the Director to an order under s. 160(2)(h). In the case Clawhammer Limited the respondents appeared personally and swore a joint affidavit which they personally filed. In the case of Cautious Trading Limited the respondents were represented by counsel and did not offer any evidence to the Court. In the case of Shinrone Food Market Limited there was no appearance on behalf of the respondents but the Director properly put before the Court 2 letters which he had received from the first named respondent on behalf of the respondents. Whereas in the case of Shinrone Food Market Limited there is no appearance in the proceedings. The court must of course be satisfied both, that the Director has put before the court facts to support the necessary proofs on the balance of probabilities and also be satisfied as to service of the application. In Shinrone Food Market Limited there is an affidavit of personal service of this application on each of the respondents.

10. In Shinrone Food Market Limited, I am satisfied that the Director on the affidavits sworn in these proceedings has put before the court appropriate evidence to discharge the necessary proofs under s. 160(2)(h) in the following manner.

1. Section 12 of the Act of 1982 permits the Registrar of the Companies to send to a company, by registered post a letter stating that unless all annual returns which are outstanding are delivered to him within one month of the date of the letter, a notice will be published in Iris Oifigiúil with a view to striking the name of the company off the register.

2. The further steps which must be taken by the Registrar after the sending of such a letter are where either he receives an answer to the effect that the company is not carrying on business or does not within one month receive all annual returns outstanding to publish in Iris Oifigiúil a notice stating that at the expiration of one month from the date of the notice the name of the company will, unless all outstanding returns are delivered to the Registrar be struck off the register and the company dissolved.

11. Section 12(3) of the Act of 1982 permits the Registrar at the expiration of the time specified, unless cause to the contrary is shown by the company, to strike its name off the register and to publish a notice thereof in Iris Oifigiúil and on the publication in Iris Oifigiúil of the notice the company is deemed to be dissolved.

12. Each of the relevant facts have been proved by the production to the Court of two certificates issued by Ms. Anita McCarron under s. 370(4) of the Companies Act 1963 (as inserted by s. 62 of the Company Law Enforcement Act, 2001) and pursuant to s. 110(A) of the Company Law Enforcement Act, 2001 (as inserted by s. 52 of the Companies (auditing and accounting) Act, 2003). In addition there is exhibited to an affidavit of Brian O'Hare, a copy of the warrant of appointment of Ms. McCarron as an authorised person by the Minister for Enterprise, Trade and Employment pursuant to s. 52(2) of the Companies (Amendment) (No.2) Act, 1999. I am satisfied having regard to the provisions of s. 370(4) of the Act of 1963 and s. 110(A) of the Act of 2001 that in the absence of evidence to the contrary such certificates are admissible as evidence of the proof of the facts stated therein.

13. I would make one observation only on the form of certificate issued under s. 110(A) of the Act of 2001. In it Ms. McCarron purports to sign as "appropriate officer" as defined in s. 110(A) of the Company Law Enforcement Act, 2001 as inserted by s. 52 of the Companies (Auditing and Accounting) Act, 2003. Section 110(A)(1)(d) defines "appropriate officer" as meaning *inter alia*:

"in respect of functions that, under the Companies Act are to be performed by the registrar of companies, a registrar, an assistant registrar or any other person authorised in that behalf by the Minister under s. 52(2) of the Companies (Amendment) (No.2) Act, 1999;"

14. Accordingly, a person who purports to be an authorised officer should on the face of the certificate indicate on what basis the person is purporting to be an authorised officer as defined i.e. that he or she is a registrar, assistant registrar or a person appointed under s. 52(2) of the Act of 1999 by the Minister. Ms. McCarron so indicates on the certificate issued pursuant to s. 370(4) of the Act of 1963 and also a copy of the warrant of her appointment as an authorised person under s. 52(2) is exhibited to the affidavit of Mr. O'Hare. Accordingly, on the facts of this case I am satisfied that this certificate is one which purports to be signed by an appropriate officer.

15. In making this observation I have taken into account s. 110(A)(3) which provides:

"A certificate referred to in subsection. (2) that purports to be signed by an appropriate officer is admissible in evidence in any legal proceedings without proof of the officer's signature or that the officer was the proper person to sign that certificate."

16. Notwithstanding the above provision it appears to me that the above subsection may only be relied upon where the certificate on its face purports to be signed by a person who is included by reason of s. 110(A)(1)(d) as being within the meaning of an appropriate officer. Hence the certificate must disclose that the person is a registrar, an assistant registrar or other person authorised by the Minister under s. 52(2) of the Act of 1999.

17. I am also satisfied in each of Clawhammer Limited and Cautious Trading Limited that the Director with similar affidavits and certificates, has established the necessary minimum proofs under s.160(2) of the Act of 1990.

Disqualification Order

18. Section 160(2)(h) and s. 160(9A) of the Act of 1990 offer no guidance to the court as to the circumstances in which the Oireachtas intended that the court should exercise the discretion given to it under those sections either to make a disqualification order or to make a declaration of restriction under s. 150. Further s. 160 offers no direct guidance to the court as to the appropriate length of a disqualification order made under that subsection.

19. Counsel for the Director submitted that the court should have regard to the scheme of the Companies Acts and in particular part VII of the Act of 1990 in considering the appropriate order. Further, it was submitted that the Oireachtas, by including in s. 160(2)(h) the possibility of disqualification in the circumstances set out therein reflects a serious legislative concern about the practice whereby to the detriment of creditors, insolvent companies are allowed by their directors to be struck off the register rather than be wound up in a proper fashion. The concern for the position of creditors is reflected in s. 160(3A) of the Act of 1990 which permits directors to escape either disqualification or restriction under the section where they can show that there were in fact no creditors at the time of strike off or that such creditors have been discharged prior to the making of the application.

20. I accept the submissions. There is potential prejudice to creditors of an insolvent company if the directors, by default, permit it to be struck off the register rather than taking steps to wind it up. In such circumstances such assets of the company as remain are not applied, as a matter of course in the discharge of creditors according to statutory priorities. Even directors who seek to discharge liabilities of the company may do so in accordance with their own preferences and possibly perceived future commercial needs or future commercial intentions or to escape liabilities under guarantees. It also may be of benefit to the directors in the sense of escaping the scrutiny of their conduct of the company's affairs which might follow an investigation by a liquidator including the possibility of being fixed with personal liability for liabilities of the company in circumstances where same is mandated by the Companies Acts. Accordingly, I accept the submission made on behalf of the Director that the Oireachtas regards the fact that directors may have permitted a company to be struck off the registrar as a result of their failing to make annual returns as more than a technical breach of their obligations under the Companies Acts.

21. There is no direct guidance from the Acts as to the appropriate period for a disqualification order. Section 160(9A) clearly envisages that a declaration of restriction under s. 150 is to be considered as a lesser sanction than a disqualification order under s. 160. It enables the court "as an alternative, where adjudges that disqualification is not justified, make a declaration under s. 150." Under s. 150 of the Act of 1990 the court has no discretion as to the period for which the declaration of restriction when made shall apply. It is a declaration of restriction for a period of five years. Section 152 enables an application to be made for relief but only within one year from the making of the declaration and as there is an even more general entitlement to apply for relief against a disqualification order under s. 160(8) this does not appear relevant to the present consideration. The declaration of restriction under s.150 on its face does not disqualify such a person from acting as a director or from being otherwise involved in a company as set out in s. 150(1) but rather precludes them from doing so unless the requirements of subs. (3) of s. 150 are complied with. The principal requirement is for a minimum paid up share capital for the company in question. Section 155 of the Act of 1990 also imposes additional obligations on a company of which the person subject to a declaration of restriction becomes a director. Accordingly, the effects of a declaration of restriction are stringent and in practice may often effectively preclude a person from being involved, directly or indirectly as a director or otherwise take part in the promotion or formation of a company during the five year period.

22. A disqualification order under s. 160 means in accordance with s. 159 of the Act of 1990:-

> (a) an order under this Part that the person against whom the order is made shall not be appointed or act as an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company, or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978,

23. Counsel for the Director drew the courts attention in particular to the fact that the person to whom an order applies in precluded from *inter alia*, taking part directly or indirectly in the management of any company. It also precludes persons from acting as auditors, receivers, liquidators or examiners which may be relevant to certain directors but on the facts of these three applications probably not relevant to any of the respondents herein. In general they are likely to be a small minority of respondents to applications under s. 160(2)(h). If the restriction on taking part directly or indirectly in the management of a company includes a prohibition on being employed by a company in a managerial rule then a disqualification order even for a relatively short period is probably in general a significantly more severe sanction than a declaration of restriction. As a matter of common sense, it appears probable that many people who were directors of insolvent companies may into the future seek to earn a living in an employed position and as a matter of probability most employers would be companies and many respondents may seek employment at managerial level. I do not wish in these proceedings to express a concluded view on the precise meaning or effect of a disqualification order but consider that I must take into account the fact that it is potentially significantly more restrictive of future actions than a declaration of restriction. Section 160(8) as has already been observed permits a person to apply to the court for relief, either in whole or in part from the disqualification. This would appear to permit a court on such an application to grant relief from one part of a disqualification order (such as the restriction on being concerned in the management of a company) alone. It is to be noted that an application to the court under s. 160(8) for relief is not subject to the notice provisions on an application for relief against a declaration under s. 150 as set out in s. 152. It remains to be seen whether on an application for a disqualification order the respondent can simultaneously ask the court for relief from part of such a disqualification. No such application was made on behalf of any of the respondents in this application.

24. Limited further assistance is obtained from part VII of the Act of 1990 by the references to disqualification for a period of five years in s. 160(1) following a conviction on indictment of an indictable offence or one involving fraud or dishonesty and s. 162 where under certain other provisions a person following conviction is deemed to be disqualified. However, in both such sections whilst there is reference to a period of five years from the date of conviction there is an alternative of "such other period as the court, on the application of the prosecutor having regard to all the circumstances of the case may order". It is not clear from these sections what the Oireachtas intended by referring to five years. It is not specified to be a minimum period or a maximum period nor is there any indication as to the circumstances in which the court might consider it appropriate to fix a different period.

25. Taking all of the above into account I have reached the following conclusions as to the exercise by the court of the jurisdiction conferred on it by s160(2)(h) of the Act of 1990.

> 1. Where the Director satisfies the court on the necessary proofs under s. 160(2)(h) and the respondent directors do not offer any exculpatory evidence to the court either as to their involvement in the company, the circumstances leading up to the striking off of the company or the outstanding liabilities of the company an order of disqualification is probably in general justified.
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> 2. In any application where the respondent directors appear and offer evidence to the court it will be appropriate to take that evidence into account in determining whether or not to make a disqualification order or a declaration of restriction.
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> 3. Where the respondents adduce evidence of the likely quantum of the undischarged liabilities of the company or their role in relation to the company or other circumstances leading to the striking off of the company it will be appropriate for the court to take such facts into account in determining any period of disqualification. Similarly it will be appropriate for

the court to take into account any impact on the respondent of the making of a disqualification order in the context of any evidence offered of future proposals to earn a livelihood.

4. The scheme of s. 160(2)(h) is such that the Director may satisfy the court that the circumstances for the making of a disqualification order exist without the court having any evidence of the extent of the liabilities of the company in question or any information as to the role of the respondent directors in the affairs of the company or leading up to the striking off of the company other than that such person was a director of the company. It appears appropriate that the court should attempt to apply a consistent period of disqualification in such cases.

5. In determining a period of disqualification the court must have regard to the fact that the Oireachtas intended such order as a more serious sanction than a declaration of restriction under s. 150 of the Act of 1990. This follows from the express wording of s.160(9A) of the Act of 1990.

6. The mandatory period for the declaration of restriction under s. 150 is five years.

7. Whilst a full disqualification order is in its terms more restrictive than a declaration of restriction in practice the latter may operate to prevent certain respondents from acting as directors. This depends upon the particular circumstances of a respondent director. In the absence of a respondent putting before the court any relevant evidence, it is difficult to conclude that a disqualification order for any period less than five years will be a more onerous sanction for the respondent than a declaration of restriction which must be for five years.

8. If a respondent by failing to offer any evidence to the court has over looked putting before the court evidence which might have persuaded the court to either make a disqualification order for a lesser period or grant a declaration of restriction there is available an application for relief under s. 160(8).

9. Hence in the absence of any relevant evidence in relation to a respondent, other that the minimum proofs to satisfy s.160(2)(h) of the Act of 1990, a period of disqualification for 5 years appears appropriate.

26. Applying the above principles to the facts of three applications before me I have reached the following further conclusions.

Cautious Trading limited
27. On the application in Cautious Trading, the only factual information put before the court in relation to the history of this company and the respondents' position is by the Director in establishing the minimum proofs. It includes that the company was incorporated on 25th June, 1998; on 18th March, 1999 a notice of change of directors and secretaries was received in the companies registration office indicating that the respondents were appointed as directors with effect from 9th October, 1998; the respondents remained directors of the company and were so as of 8th November, 2002, when the letter under s. 12 of the act of 1982 was sent; at that time the last annual return submitted by the company was made up to 30th October, 2000; the company was struck off the register on 9th May, 2003 and dissolved on 16th May, 2003. The respondents did not engage with the Director nor offer evidence to the Court.

28. For the reasons set out above a disqualification order for a period of 5 years appears appropriate.

Shinrone Food Market Limited
29. In the matter of Shinrone Food Market Limited, the first named respondent wrote two letters dated 16th November and 26th November, 2004, to the Director. In those letters the first named respondent explains that he and his wife the second named respondent are near retirement age and also indicates that they are willing to sign affidavits indicating that they will not now act as directors or into the future. The first named respondent also indicates their present personal assets and sets out certain significant liabilities. It is not clear from the letter whether or not those liabilities are personal liabilities or liabilities of Shinrone Food Market Limited (with possible personal guarantees). The extent of the liabilities indicated are such that the court could not form the view that this company was one which only had minimal liabilities at the time it was struck off. Further, whilst the first named respondent makes reference to a fire for which there was no insurance cover that does not appear to be sufficient to explain or warrant allowing the company to be struck off rather than taking steps to have it wound up. In all the circumstances of this application and taking into account the letters from the first named respondent I have concluded that disqualification for a period of five years in respect of each of the respondents is appropriate.

Clawhammer Limited
30. In the matter of Clawhammer Limited the respondents swore a joint affidavit in which they stated:-

"1. The company (Clawhammer Ltd) was formed in 1993 and ceased trading in October 2001

2. Audited accounts were furnished to the CRO from 1993 until January 1999. No accounts were submitted for the period February 1999 to October 2001

3. When the company ceased trading the following monies were owed:-

Action Hire Ltd	€1322.24	Paid in full on 20th February 2002.
Vodafone	€406.78	Paid in full on 20th June 2002.
National Irish Bank	€6009.00	Paid in full on 24th November 2003.
Revenue Commissioners	€7442.00	Not paid.

4. No other monies were owed to any suppliers, employees, financial institutions or clients.

The revenue debt dates back to a period in 1995/1996 where the company experienced difficulty and owed the revenue Euro 1554 for that period.

The debt was subsequently reduced to Euro 7442

In other years the company was tax complaint."

31. The reference to the debt of €1,554 to the revenue in 1995/96 appears to be in error. It is more likely to have been a figure of €15,540 as the statements suggests a reduction in the debt to €7,442.

32. On the facts of this case the directors have discharged almost all the creditors of the company. However, it does not appear the court can overlook the fact that the directors failed to submit annual returns or accounts subsequent to February, 1999. Further by not putting the company into liquidation, they discharged commercial creditors after cessation of trading and did not discharge the revenue commissioners who may have ranked as a preferential creditor in any winding up of the company. That said, the amount left unpaid is relatively small. The lesser option of a declaration of restriction under s. 150 of the Act of 1990 might be warranted on the facts. However at the hearing the second named respondent Mr. Endicott appeared personally and indicated that having regard to the personal circumstances of the respondents they consider a declaration of restriction for five years more onerous than an order for disqualification for a short period.

33. I was informed by counsel for the Director that in *Re Norse Security Limited* in which there was evidence of an undischarged revenue debt of €275,000 Laffoy J(in an ex-tempore decision given on 15 November 2004) made a disqualification order for a period of 2 years on the only executive director. I am not aware of any other facts in relation to that application.

34. In the circumstances of this application I propose making a disqualification order in respect of each of the respondents for a period of one year.

Costs

35. In each of the cases the Director has applied for an order for the costs of the application against the respondents and an order that such costs be taxed in default of agreement. The Director through his counsel undertook that if such an order for costs were made he would not seek to recover the costs of instructing a senior counsel which it was stated was done by reason of the fact that these were almost the first group of applications.

36. The court is given an express statutory power under s. 160(9B) in relation to costs which provides:-

> "The court, in hearing an application for a disqualification order under subsection (2), may order that the persons disqualified or against whom a declaration under section 150 is made as a result of the application shall bear the costs of the application and, in the case of an application by the Director, the Director of Public Prosecutions, a liquidator, a receiver or an examiner, any costs incurred by the applicant for the disqualification order in investigating the matter".

37. It is difficult to understand the purpose of s. 160(9B) insofar as it gives to the court a power to make an order for the costs of the application against a person in respect of whom a disqualification order or declaration of restriction is made. This appears to be a power which the court already had under Order 99 of the Rules of the Superior Courts 1986. However, there is no indication that such power is to be exercised in any different way to the existing power under Order 99. In accordance with Order 99 where, as in these three cases, the applications were successful an order for costs in favour of the Director would ordinarily follow unless the court in its discretion considers the interests of justice require a different order.

38. In the case of Clawhammer Limited, the second named respondent Mr. Endicott referred to the figures given on behalf of the applicant in the written submissions to the effect that in 2003 over 14,800 companies were struck the Register of Companies on an involuntary basis. He submitted that no explanation was given as to why he and the first named respondent in that case were singled out for the applications now brought by the Director. He also referred to the relatively small amount left outstanding as a debt of the company and submitted that the respondents had personally sought to discharge certain of the other debts with personal borrowings. He asks that any order for costs against the respondents be of a minimal nature.

39. On the facts in Clawhammer Limited I consider that the interests of justice require that I should exercise the discretion conferred on the court by making a limited order for costs namely that the respondents therein jointly and severally contribute to the costs of the Director and measure such contribution in the sum of €2000.

40. In the Shinrone Food Market Limited whilst the respondents did not appear before the court they did engage with the Director in correspondence and have set out the facts pertaining to their personal circumstances which include the fact that they are a couple who are nearing retiring age, appear to have very significant personal liabilities. That application was heard with the application in Clawhammer Limited and similarly it appears to me on the facts of that application that justice requires that there be a limited order against the respondents jointly and severally that they contribute to the costs of the Director and measure such contribution in the sum of €2000.

41. In the case of Cautious Trading Limited whilst counsel appeared on behalf of the respondents at the hearing of the application the respondents have neither engaged in correspondence with the Director nor sought to put any evidence before the court. Prior to the commencement of the application a letter dated the 14th November 2003 was written to each of the respondents by an officer of the Director in which they were invited to show cause as to why this application should not be brought. No response was received to this letter.

42. In the circumstances of this application it appears to me that an order for costs jointly and severally against the respondents should be made and further that such costs be taxed in default of agreement between the parties.