Neutral Citation [2015] IEHC 651

THE HIGH COURT

RECORD NUMBER 2015/66 COS

IN THE MATTER OF EYECOM TECHNOLOGIES LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT, 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001

BETWEEN:

TOM MURRAY

Applicant

– and –

ALAN BROWNE

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 22nd October, 2015.

PART 1: OVERVIEW

1. To expect perfection is to expect too much. Mistakes happen and, when it comes to the liquidator here, that is all that happened. There was no deliberation, only inadvertence. He misplaced the letter from the ODCE advising him that he was not relieved of his obligation to bring a 's.150 application' under the Companies Act 1990. As soon as he realised this, he contacted the ODCE and the within proceedings then commenced. The liquidator was honest in his dealings with the ODCE, he was honest in his dealings with the court, and that honesty is to be applauded. But the liquidator's error does have the consequence that the within proceedings have been commenced long out of time. The question for the court is whether Mr Browne ought now to benefit from the liquidator's mistake. The court concludes that he must, though it concludes too that it would not in any event have been obliged to issue a declaration of restriction against him under s.150.

PART 2: TIMING UNDER SECTION 56

2. Under s.56(1) of the Company Law Enforcement Act 2001:

> *"A liquidator of an insolvent company shall, within 6 months after his or her appointment…and at intervals as required by the Director* [of Corporate Enforcement] *thereafter, provide to the Director a report in the prescribed form."*

3. Under s.56(2) of the Act of 2001:

> *"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 Director) after the date on which he or she has provided to the Director a report under subsection (1) apply to the court for the restriction under section 150 of the Act of 1990 of each of the directors of the company, unless the Director has relieved the liquidator of the obligation to make such an application."*

4. A mark of the significance that the Oireachtas attaches to compliance with the foregoing requirements, including the timelines prescribed therein, is the provision in s.56(3) of the Act of 2001 that:

> *"A liquidator who fails to comply with subsection (1) or (2) is guilty of an offence.*

5. One might – this Court respectfully does – query whether regulatory sanction by a professional body, rather than criminal sanction by the courts, with all the consequences such a form of sanction invariably entails (including the potential to be struck off as a professional in the event of a conviction being sustained) would not be the more appropriate sanction in the unlikely occurrence of a deliberate transgression by a liquidator of s.150 – and here, the court notes again, there was no deliberation, just inadvertence.

6. In any event, the liquidation of Eyecom commenced on 14th January 2013. The first report to the Director was filed slightly out of time on 14th August, 2013. If one ignores this delay, any application for restriction ought, by virtue of s.56(2), to have commenced sometime between 14th November, 2013 and 14th January, 2014. Consistent with the honest manner in which he has approached these proceedings, the liquidator accepts this to be so, averring in his affidavit evidence that *"The application herein ought to have been brought by me before the 14thof January 2014."* In fact, the Notice of Motion grounding the within application is dated 18th February, 2015. So the application was commenced at least 13 months out of time.

7. Mr Browne contends, by reference to case-law and the European Convention on Human Rights, that the delay arising in the within proceedings is such that the court ought now to refuse to allow the proceedings to continue. In effect, he seeks that (1) the court now exercise its discretion under s.56(2) of the Act of 2001 not to allow the continuation of proceedings that were commenced significantly out of time and/or (2) by reference to Article 6(1) of the European Convention on Human Rights, the court should not allow these s.150 proceedings to continue.

PART 3: SOME RELEVANT JUDGMENTS CONCERNING DELAY

8. When it comes to the issue of delay, the court has been referred to three judgments of interest, namely the High Court decisions in *Dowall v. Cullen* [2009] IEHC 580 and *Taite v. Breslin* [2014] IEHC 184, and the decision of the European Court of Human Rights in *Davies v. United Kingdom* [2002] 355 EHRR.

a. Dowall v. Cullen

9. This was as.150 application in which McKechnie J. observed as follows, at para.92 of his judgment:

> *"It would thus appear that in the context of s. 150…certain specific factors should be taken into account which render it particularly unjust to allow an application to proceed where there has been a large lapse of time, notwithstanding that no actual prejudice can be identified….*[I]*n a s. 150 application the mere inordinate passage of time, due to the special features of the section, in particular the burden on a respondent to show that he has acted honestly and responsibly in relation to the affairs of the company, and that there are no just and equitable reasons for restricting him, would render it particularly iniquitous to allow such an application to continue where a large period of time has elapsed. In those circumstances, the passage of time would severely hamper a respondent's delay to properly defend himself, and thus tend to tip the scales of justice in favour of the respondent even in the absence of any specifically identifiable prejudice."*

10. Counsel for the liquidator has pointed to the fact that Dowall ultimately did not fall to be decided on the issue of timing (see para.111 thereof) and thus the above-quoted text is *obiter*. However, given the eminence of McKechnie J., this Court is inclined to pay heed to the above-quoted observations regardless of whether or not they form part of the *ratio* in *Dowall*. McKechnie J. makes, in essence, two points when it comes to s.150 proceedings: (1) delay *per se* may tip the scales of justice in favour of a respondent

even in the absence of any specifically identifiable prejudice; and (2) this is because "*a large lapse of time*" may hamper a respondent in discharging the burden on her or him under s.150.

11. When it comes to (2), it is important to note that McKechnie J. is referring to delay within the context of s.150 of the Companies Act 1990, not s.56 of the Act of 2001. When it comes to that latter provision, it is clear from the tight timelines it prescribes, and the criminal sanctions that can arise for a liquidator if those provisions are breached, that the Oireachtas expects swift action by a liquidator pursuant thereto. Given this 'need for speed' which s.56 clearly apprehends, a circa.14-month delay in commencing proceedings, *i.e.* a period almost three times longer than the 5-month maximum contemplated by s.56(2), is in that context a very significant delay. It may not have been such as to hamper Mr Browne in discharging the burden on him under s.150. But, if the court might borrow from Macbeth, the *idée fixe* of s.56 is that when it comes to any s.150 application contemplated thereby, "*'twere well it were done quickly*" – and here 'twere not'. This being so, the court considers the delay arising has to tip the scales of justice in Mr Browne's favour when it comes to deciding whether the within application should be allowed to continue.

b. Taite v. Breslin
12. The second judgment to which the court was referred in this regard was the decision of this Court in *Taite v. Breslin*, another s.150 application, in which the court observed as follows, at para.17:

> *"If a liquidator is guilty of particularly egregious delay, it may be possible for an affected director to sustain an objection to a s.150 application on the grounds of such delay. This was expressly contemplated by Finlay Geoghegan J. in* Coyle [v. O'Brien [2003] 2 I.R. 627], *albeit with the suggestion, at 633, that within the constraints of a s.56(2) application, the courts should not consider the position of directors. Whether it will be practicable in all instances to uncouple the actions of a liquidator from the consequences for directors of those actions may arise for consideration in one or more future cases."*

13. It seems to the court that the within proceedings afford agood example of a case in which it is not practicable to uncouple the actions of the liquidator from the consequences that have ensued. It is the liquidator's error, innocent though it was, and honestly though he has behaved since he discovered it, that has led to the entirely unnecessary delay in the commencement of the within proceedings for a period that is a multiple of the maximum period contemplated by s.56. Mr Browne is in no way responsible for that delay; however, it is exclusively him who has had to suffer all the additional angst and worry that has arisen as a consequence, not knowing what the future would bring or what the court would decide. This despite the fact that it was the clear intention of the Oireachtas in setting the tight timelines under s.56 that justice would be done quickly.

14. The court notes in this last context the liquidator's averment in his affidavit evidence that *"[T]he delay has not caused any prejudice to* [Mr Browne]*…in defending the application*". That is not the same as saying that it has caused Mr Browne no prejudice at all. The Sword of Damocles threatened its eponymous victim for but the shortest of time. Here, thanks to the liquidator's inadvertence, Mr Browne has had at least 13 months of completely unnecessary worry hanging over his head. That is very great prejudice indeed. Particularly when one bears in mind that it comes at a time when Mr Browne's wife, regrettably, has become unemployed, and that latterly the home in which they live with their three young children has, unfortunately, become the target of repossession proceedings.

c. Davies v. The United Kingdom
15. In this case an application was brought before the European Court of Human Rights claiming a violation of Article 6(1) of the European Convention on Human Rights. That Article provides that *"In the determination of his civil rights and obligations…everyone is entitled to a hearing within a reasonable time by [a]…tribunal"*. In the case of Mr Davies, disqualification proceedings had been commenced against him (in his capacity as a sometime company director) in July 1992. They appear to have been abandoned in January 1998. That timeframe was held by the European Court of Human Rights to involve a breach of Article 6(1).

16. The delay Mr Browne has suffered in the within proceedings is nowhere near the almost 6 year delay in *Davies*. Nonetheless it is, perhaps, arguable that the delay that has arisen in these proceedings is unreasonable when one has regard to the relevant yardstick of reasonableness, being the strict timelines identified in s.56 for the commencement of related s.150 proceedings. All that said, the court does not consider that it is necessary to decide this point or even to have recourse to Article 6(1) of the European Convention in deciding the within proceedings; s.56(2) of the Act of 2001 suffices.

PART 4: THE PUBLIC INTEREST
17. The public interest in the bringing of s.150 proceedings was a matter to which counsel for the liquidator repeatedly referred during the hearing of the within application. He argued in effect that any delay arising paled when viewed against the public interest in the pursuit of allegedly errant directors under s.150. But, of course, the public interest in the prosecution of proceedings under s.150 quickly runs up against a competing public interest, namely that entrepreneurs such as Mr Browne and others who found and operate the businesses which generate employment and are the lifeblood of our national economy should at some time be freed from a Janus-like existence in which they seek to move forwards but are forced ever to look backwards. Who better to determine where the public interest lies in such complicated circumstances than our elected public representatives? And the Oireachtas has determined, as is its right, that subject to the discretion afforded the court under s.56(2), the making of timely reports under s.56(1) and the commencement of timely proceedings under s.56(2) is so important that deliberate breach of the time-requirements arising is grounds for criminal prosecution. In the face of such a clear manifestation of legislative belief in the 'need for speed' when it comes to s.56 and the commencement of the s.150 proceedings contemplated thereby, this Court does not find persuasive the argument that an, at best, 13-month delay for no good reason is of such little consequence as to justify the invocation and application by the court of the discretion granted to it in s.56(2).

PART 5: CONCLUSION AS TO DELAY
18. For the reasons stated above, the court is not satisfied to allow any extension of time under s.56(2) for the commencement of the within proceedings. The court considers that Mr Browne's application in this regard might perhaps have been made sooner but, in all the circumstances, the court does not consider that this is a reason for refusing him the relief that he now seeks. The foregoing has the result that the court declines to allow these proceedings to continue and thus has no need to adjudicate on whether or not a restriction order falls to issue pursuant to s.150.For the sake of completeness, however, the court indicates below how it would have determined matters had it decided that it was necessary to adjudicate on the substance of the s.150 application.

PART 6: SECTION 150 APPLICATION
19. Eyecom specialised in providing certain mobile phone software. The essence of the application made by the liquidator under s.150 was that over the three-year period from 2009 to 2012, Mr Browne allowed Eyecom to run up liabilities of about €185k to the Revenue Commissioners. However, it is clear from the liquidator's own evidence that Eyecom was encountering some financial difficulty from 2008. Thus it had a retained loss of just under €18k for the year ended 30th June, 2008, a retained profit of just over €22k for the

year ended 30th June, 2009, and by 2010 was seriously unstable, its current liabilities in that year exceeding its current assets by just under €50k. There were realistic prospects that Eyecom might secure a very large tender in 2011 but this fell through. This disappointment, plus other changes in the fast-changing telecommunications sector, meant that Eyecom quickly became an unviable concern. Perhaps unsurprisingly in the last couple of years, some filings went missed and director remuneration/expenses became Eyecom's pre-dominant outgoing. However, it does not seem to the court that these could be described as even remotely excessive: for example, in the calendar year 2012, director remuneration/expenses amounted to €43k. That does not suggest to the court that the directors were 'making hay while the rain poured'.

20. When it comes to applications under s.150, when it is suggested, for example, that a person has evinced a lack of honesty and/or responsibility, the court considers that it is reasonable to look at the wider course of an individual's conduct in order to gauge the particular actions that are impugned. Here Mr Browne's actions since the company's liquidation show him to be anything but the type of man who is prone to want of honesty or responsibility. So, for example, since the liquidation of Eyecom commenced, Mr Browne has been served with an income tax bill of about €76k arising from the company's activities, of which he has paid an impressive €50k thus far. That does not seem the hallmark of a man who is generally wanting in honesty; quite the contrary. Moreover, apart from the issue of non-payment of taxes, there seems to be no suggestion that Mr Browne has ever shown himself to be wanting in responsibility. So when one finds that (a) the company's non-payment of tax liabilities arises in a context in which Eyecom was in a state of flux from 2008 and deeply unstable from 2010, and (b) director attentions were focused from about 2009 on winning new business in a context where this remained realistic, is the court to find that (i) Mr Browne was wanting in honesty and/or responsibility, or (ii) that Mr Browne was doing the very best he could in very trying circumstances? This Court inclines towards the latter view. The not insubstantial but still un-princely payments to directors in the last full year of trading do not incline the court to the opposite view. In truth, it seems an all but inevitable feature of the waning days of any trading concern that liabilities to directors, and indeed employees, will begin to loom larger in the company accounts than if the company was trading into a profit.

21. During the course of argument, counsel for the liquidator placed some reliance on the decisions of the court in *Stafford v. Fleming* [2007] IEHC 55 and *Kelly v. Monson* [2014] IEHC 573.

22. It seems to the court that *Stafford* is entirely distinguishable from the present case on its facts. *Stafford* involved a close on €1m liability to the Revenue Commissioners, a liability of such a scale that it would likely have a significant influence on any judge called to decide a s.150 application. It also featured a business arrangement that, to use a phrase beloved of *sommeliers*, had an 'interesting' bouquet, involving a pre-insolvency transfer of a company's valuable goodwill for what appears to have been nil value. That is a factor which would likely loom large in any judge's thinking when presented with a subsequent s.150 application. Here, by contrast, the liabilities to the Revenue Commissioners, though not insubstantial, are more limited; they arose over a time when the company was generally in difficulty and (from 2010) failing; and there are no unusual transactions or transfers. Instead one is greeted with the, sadly, very usual picture of a director trying unsuccessfully to save a sinking company that still has some prospects of being turned around and, as a result, not having the time to be sufficiently attentive to other aspects of the company's affairs. Notably too, there is also the dimension presenting here that Mr Browne has, since the company's liquidation, paid significant sums to the Revenue Commissioners in respect of certain Eyecom-related tax liabilities arising.

23. As for *Kelly*, counsel for the liquidator sought to draw a parallel between that case and this by reference to the ongoing director payments that were made by Eyecom in, *e.g.,* 2012. Counsel suggested that the facts of *Kelly* were not on 'all fours' with those presenting here. In truth, the two cases are like chalk and cheese. As this Court indicated in its judgment in *Kelly*, at para.2, the details of the director remuneration paid by the insolvent company in that case made for "*startling reading*". Thus in the last four years of its trading, director remuneration in the relevant company as a percentage of turnover rose from 63% in 2009, to 77% in 2010, to 134% in 2011, to 175% in 2012. It was these figures that led this Court to conclude, at para.11 of its judgment, that one of the directors against whom the s.150 proceedings were brought *"evinced a lack of commercial probity and/or a want of proper standards in allowing director remuneration to increase as it did, and for those amounts to be paid as they were, during a period of overall decline in the financial performance…[of the relevant company] from 2009 through to 2012."* (The other director who was the subject of the s.150 proceedings in that case escaped liability for other reasons arising). In this case there is no suggestion that anything similar was afoot within Eyecom: the only reason that director remuneration/expenses, *e.g.,* in 2012, seem to loom somewhat large within Eyecom – and, in truth, they are not tremendously large – is because the company was otherwise pretty much at rock-bottom in terms of what it was earning and how it was performing. Such a state of affairs is hardly "*startling*"; on the contrary, it is perhaps to be expected to some extent in any failing company.

PART 7: CONCLUSION AS TO SECTION 150 APPLICATION

24. For the reasons stated above, the court does not consider that the within s.150 application should be allowed to proceed. However, even if the court were required to make an adjudication under s.150 – and it does not consider that this is required of it – the court, again for the reasons stated above, would have found that Mr Browne has not evinced that want of honesty or responsibility that would have necessitated the issuance of a declaration of restriction under s.150. Nor would the court have found any other reason as to why it was just and equitable that such a declaration should issue.