Neutral Citation: [2014] IEHC 363

THE HIGH COURT

[2014 NO. 92 COS]

IN THE MATTER OF CHERCREST LIMITED AND IN THE MATTER OF RIVERSTOWN INDUSTRIAL ESTATE MANAGEMENT COMPANY LIMITED AND IN THE MATTER OF SECTION 160 OF THE COMPANIES ACT 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

MICHAEL SLATTERY AND VAL SLATTERY

RESPONDENTS

JUDGMENT of Mr. Justice Barrett delivered on the 23rd day of July, 2014.

1. In this case the Director of Corporate Enforcement is seeking, pursuant to s.160(2)(h) of the Companies Act 1990, as amended, a disqualification order in respect of each of the respondents. A disqualification order is a severe measure that prevents an affected person from having any involvement whatsoever in the promotion, formation or management of any company for the duration of the disqualification period. The court considers first the application made in respect of the respondents as directors of Chercrest Limited, and then the application made in respect of the first-named respondent as a director of Riverstown Industrial Estate Management Company Limited.

Chercrest Limited

2. Both of the respondents were directors of Chercrest Limited, a company that got into financial difficulty ultimately, Mr. Slattery claims, because of alleged impropriety by a former director. Despite the injection of significant additional capital into the company by Mr. Slattery from personal borrowings, Chercrest's financial position ultimately worsened to the point that it became insolvent. The Director of Corporate Enforcement's complaint is that, notwithstanding Chercrest's insolvent status, the respondents allowed it to be struck off the register of companies for failure to file annual returns instead of putting it through a formal liquidation process. It emerged in the course of the hearings before the court that during the period in which Chercrest was in clear financial difficulty an accountant was brought into the company with a view to identifying the best way forward for the company as regards confronting the financial difficulties with which it was then faced. The professional advice received from this accountant was not that the company be placed in liquidation but that an investor should be sought who would inject fresh capital into Chercrest. The directors of Chercrest acted on this professional advice, a point that will be returned to hereafter. The court turns first, however, to consider the legal basis on which a 'strike-off of the type at issue in these proceedings is effected.

3. Such a 'strike off process is available to the registrar of companies under s.12 of the Companies (Amendment) Act 1982, as amended, which provides:

> *"(1) Without prejudice to the generality of section 311 of the Principal Act, where a company does not, for one or more years, make an annual return required by section 125 or 126 of the Principal Act, the registrar of companies may send to the company by post a registered letter stating that, unless all annual returns which are outstanding are delivered to him within 1 month of the date of the letter, a notice will be published in the Companies Registration Office Gazette with a view to striking the name of the company off the register.*
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> *(2) If the registrar of companies either receives an answer to the effect that the company is not carrying on a business, or does not within 1 month after sending the letter receive all annual returns which are outstanding, he may publish in the Companies Registration Office Gazette a notice stating that, at the expiration of 1 month from the date of that notice, the name of the company mentioned therein will, unless all outstanding returns are delivered to the registrar, be struck off the register, and the company will be dissolved.*
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> *(3) Subject to subsections (1) and (2) of section 12B of this Act, at the expiration of the time mentioned in the notice, the registrar of companies may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Companies Registration Office Gazette and on the publication in the Companies Registration Office Gazette of this notice, the company shall be dissolved."*

4. In essence, s.12 establishes a process whereby the registrar may strike off a company that is in breach of its annual return requirements. This may seem a venial transgression, certainly by reference to some of the abuses that one sees reported in the company law arena. However, strike-off has a particular significance for the creditors of an insolvent company, as was noted by Finlay Geoghegan J. in *Re Clawhammer Limited, Director of Corporate Enforcement v. McDonnell and Another* [2005] 1 I.R. 503 at p.510, when she stated that:

> *"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 possible 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 register as a result of their failing to make annual returns as more than a technical failure of their*

obligations under the Companies Acts."

5. On 11th November, 2012, Chercrest was struck off the register of companies pursuant to s.12(3) of the Companies (Amendment) Act 1982. For the reasons mentioned by Finlay Geoghegan J. in *Re Clawhammer*, a strike-off has the potential to engender unfairness for creditors. It is also a matter to which the Oireachtas attaches some considerable seriousness, making such strike-off a basis for the possible issuance of a disqualification order under s.160 of the Act of 1990. However, the Oireachtas also clearly recognises in the Companies Act 1990 that there may be instances in which, amongst other matters, a company is struck off, rather than being liquidated, but in which either a disqualification order need not follow or a shortened disqualification order might be imposed. It does this through the expedient of entrusting to the discretion of the High Court the decision as to whether a disqualification order should be imposed and, if so, for how long. Insofar as is relevant to these proceedings, s.160, at ss.(2), provides that:

> *"Where the court is satisfied in any proceeding or as a result of an application under this section that ...*
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> *(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...*
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> *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." [Emphasis added].*

6. That s.160 (2) establishes a discretionary jurisdiction on the High Court was made clear by Murphy J. in *Business Communications Ltd. v. Baxter* (Unreported, High Court, 21st July, 1995), when he stated, at p.12 of his judgment, that *"Section 160 confers a discretion on the Court by the use of the word 'may' (rather than the word 'shall' ...) with regard to the imposition of a disqualification order".* Likewise, McCracken J. in *Re Newcastle Timber Limited* [2001] 4 I.R. 586 at p.589 notes that *" ...the use of the word 'may' in s.160 gives the court a discretion ...".* The consequences of a disqualification order are so severe for the person against whom it issues that the courts, historically, have not tended lightly to issue such orders. Thus in Business Communications, Murphy J. stated, at p.13 of his judgment, that *"there is a substantial burden to be discharged before the court has jurisdiction to make the appropriate order".* In a similar vein, the Supreme Court in *Re CB Readymix Limited; Cahill v. Grimes* [2002] 1 I.R. 372 accepted in principle that there is a heavy onus on an applicant in s.160 cases. Continuing in a not dissimilar vein in the much more recent case of *Re Kentford Securities Limited; Director of Corporate Enforcement v. McCann* [2011] 1 I.R. 585 at p.601, O'Donnell J. writes that:

> *"[G]iven the penal consequences of a disqualification order for any director or other officer, a court must feel a high degree of confidence before making any such disqualification order."*

7. It was established in these proceedings by the Director of Corporate Enforcement that the facts which underpin these proceedings are such that it is open to this Court to make an order against either of the respondents under s.160(2). In *Re Kentford*, O'Donnell J. refers, at p.600 of his judgment, to the *"two stage structure"* of s.160(2). In applying this two-stage structure, the court must look first to whether conduct falling within any of the sub-categories of s.160(2) is established as a matter of fact and then to whether it should exercise its discretion in favour of or against making a disqualification order. In the present case, the court finds as a matter of fact that the situation posited in s.160(2)(h) arises in respect of each of the respondents and thus that each is exposed to a disqualification order being made against him or her. The court turns now to the issue of how it ought to exercise its discretion under s.160.

8. It appears to the court that a factor that may be borne in mind by it when it comes to exercising its discretion in proceedings such as these is the scale of the enterprise involved. During the course of hearing the present case, it was queried by the court whether the present proceedings were not analogous to those that presented in *Doherty v. Donohoe and Others* [2014] IEHC 187. That was a case involving an application for the restriction of certain directors under s.150 of the Companies Act, 1990. In the course of its judgment in that case, the court considered the extent to which a director of a small, family-run company can be held liable for breaches of the Companies Acts in circumstances where that director is not expert in accountancy, tax or company law and has sought appropriate advice in relation to a proposed course of action from suitably qualified professional advisers. Following an analysis of relevant precedents, the court concluded in that case, at para. 14 of its judgment, that:

> *"The general thrust of the above case-law suggests that where a director, acting in good faith, seeks comprehensive professional advice of suitably qualified advisors and in good faith acts in accordance with such advice as is tendered, that will generally suffice to prevent such director from later being the subject of a s.150 or like order. Perhaps the only caveat to this broad principle is that where the courts are dealing with a director who is professionally qualified or who directs a large or quoted enterprise, more exacting standards of behaviour will typically be applied than those which fall to be applied in the instant case where the court is dealing with enterprising but professionally unqualified individuals who doubtless are competent in their own field of endeavour but who are not expert in matters of law, tax or accounting. For these last directors the above case-law suggests that it suffices that they seek to do what is right, that they entrust their legal, tax and accounting affairs to the care of suitably qualified professionals, and that they seek to conform fully with such advices as are tendered to them. Were the contrary to apply the result would be absurd. A director of a small enterprise who, as here, was unskilled in law, tax or accounting and who enlisted suitable professional assistance to ensure that his or her enterprise acted in compliance with applicable law and regulation would nonetheless suffer very serious sanction in the event of non-compliance. Were a director to suffer so, a question would surely arise as to whether there was any advantage to engaging professional advisors if the law was effectively going to set the value of their advices at nought. Moreover, the person who sought such advice would be placed in an impossible situation in which, despite a lack of knowledge of applicable law and regulation, he or she would have to contemplate and raise queries regarding every possible breach of laws or regulations about which he or she knew little or nothing."*

10. In the present instance, the court is presented with a family company that sought professional advice in relation to identifying the best way forward for the company as regards confronting the financial difficulties with which it was faced following the alleged misbehaviour of a former director and despite the injection of significant additional capital borrowed by the first-named respondent. The professional advice received from this accountant was not that the company be placed in liquidation but that an outside investor should be sought; the directors then proceeded down this path. This seems an almost classic example of the type of situation contemplated by the court in *Donohoe*, and thus to be a case in which it is appropriate for this Court not to exercise its discretion under s.160(2) of the Companies Act 1990 to make a disqualification order against the respondent directors.

11. Another factor that the court will bear in mind when approaching applications made under s.160 is the past behaviour of

respondents. In *Re Kentford*, O'Donnell J. emphasised the importance of looking to this past behaviour, writing, at p.601, that:

> *"In my view, it is clear from an analysis of the Act of 1990, that that Act directs attention to that past conduct as certainly the best, if not the only, guide to the necessity for disqualification."*

12. Apart from the failure as regards the submission of annual returns which led in turn to the eventual strike-offs, the court's attention has not been drawn to any other misbehaviour on the part of either of the respondents as directors. This good behaviour is a relevant factor when deciding whether either of them should be exposed to the severity of a disqualification order and inclines this Court to the view that they should not. Neither in this nor in any other respect does it appear to this Court that the behaviour of either of the respondents to these proceedings comprises the egregious type of behaviour at which s.160 is aimed.

13. For the reasons stated above, and having regard to all of the factors mentioned, the court does not consider that it is appropriate in this case to issue a disqualification order against either of the respondents. Having so adjudged, the court is entitled under s.160(9A) to make a restriction declaration under s.150 of the Act of 1990. Section 160(9A) provides that:

> *"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 section 150."*

14. The use of the word *"may"* in the above-quoted text points to the power under s. 160(9A) being a discretionary power; the reasoning of Murphy J. in *Business Communications* and McCracken J. in *Re Newcastle Timber*, considered above, appears to put this beyond doubt. The discretion arising, however, seems to be confined to the court's electing whether or not to consider if a s.150 disqualification falls to be made. Once the court goes down the path of considering whether a s.150 declaration falls to be made, it seems from the decision of McCracken J. in *Re Newcastle Timber*, at p.592, that the court is trammelled by all the requirements of s.150, most notably that if the criteria set by that provision are satisfied the issuance of a restriction order is mandatory, a perhaps surprising turn of the law given that s.160(9A) confers a power that, as stated, is ultimately discretionary. Under s.150 of the 1990 Act, the court must grant a restriction order unless satisfied that any of a variety of circumstances identified in s.150(2) pertain, the relevant circumstances in this case being that the respondents acted (a) honestly and (b) responsibly in relation to the conduct of the affairs of the company(ies) of which they were respectively directors and (c) there is no other reason why it would be just and equitable that any of them should be the subject of a declaration made under s.150. It does not appear to the court that there is any issue arising concerning the honesty of either of the respondents in these proceedings. Nor does it appear to the court that, apart from the issue of whether they each acted responsibly, there is any other reason why it would be just and equitable that any of them should be the subject of an order made under s.150. So the sole issue arising for the purposes of s.150 is whether they each acted responsibly. For the reasons identified above as to why the court would not exercise its discretion to grant a s.160 order, namely the reliance on professional advice by what was a small, family-run company and the generally good behaviour of the respondents as directors, the court finds that the directors in this case did not act less than responsibly. That is not to say that the respondents' failure to make the necessary returns and their apparently complacent acquiescence in the strike-off process is not reproachable. However, it does not appear to the court to be of such wantonness as to merit its being described as irresponsible. The words of McGuinness J. in the Supreme Court decision in *Re Squash (Ireland) Limited* [2001] 3 I.R. 35 at p.39 seem to apply with equal vigour to the respondents in this case:

> *"... [S]ome criticisms of the directors may be made. Commercial errors may have occurred; misjudgements may well have been made; but to categorise conduct as irresponsible feel that one must go further than this."*

15. One further issue that arose during the hearing of these proceedings is the extent to which it is open to a spouse, in this case a married woman, who acts as the second-named director of a company solely to satisfy the minimum two-director requirement under the Companies Acts, and who in point of fact does nothing in relation to that company, can rely upon the passive role that she has consistently played to justify the non-issuance of an order against her under s.160 of the Act of 1990. During the hearings mention was made of the judgment of the court in *Re Hunting Lodges Limited (in liquidation)* [1985] I.L.R.M. 75 in which Carroll J. stated, at p.85:

> *"In relation to Mrs. Porrit, the case has been made on her behalf that she played no part in the running of the company. The day has long since passed since married women were classified with infants and persons of unsound mind as suffering from a disability so far as responsibility for their acts was concerned, or since a married woman could escape criminal responsibility on the grounds that she acted under the influences of her husband Mrs. Porrit cannot evade liability by claiming that she was only concerned with minding her house and looking after her children. If that was the limit of the responsibilities she wanted, she should not have become a director of the company, or having become one she should have resigned Any person who becomes a director takes on responsibilities and duties, particularly where there are only two ...A director who continues as director but abdicates all responsibility is not lightly to be excused. If she had reasonably endeavoured to keep abreast of company affairs and had been deceived (and there is no such evidence) it might be possible to excuse her. Mrs. Porrit was concerned with the concealment of £148,000 all of which has been recovered, therefore no loss arises. In deciding whether to make Mrs. Porrit liable for debts where nothing was lost through her actions, it is necessary that there should be 'real moral blame ' attaching to her. In my opinion this does arise because Mrs. Porrit took all of the advantages and none of the responsibilities connected with the company."*

16. By way of initial remark, the court notes that Carroll J.'s observations in the above-quoted text were made solely in relation to a married woman who embarks upon a passive company directorship. However, in our contemporary society where (i) there are many couples in which the wife is the principal commercial actor, and (ii) there are many unmarried and same-sex couples, there seems no reason why Carroll J.'s comments should not be considered to apply by analogy to any spouse or indeed to any romantic partner, male or female, heterosexual or homosexual, or any person who by virtue of ties of affection agrees to act as a passive director in a company so as to satisfy the minimum two-director requirement that arises under current company law. It is important also to recognise the limits of what Carroll J. stated in *Re Hunting Lodges.* In effect she said that a married female director cannot escape liability as a director by reference, for example, to some sort of subservience to husbands that may have existed before the modem age of equality between the sexes. However, Carroll J. did not say that a married female director can never escape liability as a director where she embarks upon a directorship through ties of natural affection and never does anything in relation to the company of which she is director. That would place so great a premium on legal reality above practical reality as to be almost certain to result in injustice in some instances, an outcome which Carroll J. undoubtedly did not intend. Notably, Carroll J. states that *"A director who continues as director but abdicates all responsibility is not lightly to be excused*'. She does not, however, dismiss the possibility that such a passive director may be excused in some circumstances. Indeed she gives one instance, that of where a passive director *"reasonably endeavoured to keep abreast of company affairs and had been deceived*', in which it might be possible to excuse such director from liability. Neither expressly nor impliedly does Carroll J. assert that there are no other instances in which a passive director might be so excused. Carroll J. establishes as the litmus-test of personal liability in respect of such a director that there

should, as a matter of necessity, be some *"real moral blame"* attaching to her before personal liability should arise. In *Re Hunting Lodges*, the purportedly passive director, Mrs. Porrit, had been party to fraudulent trading that included the opening of a building society account under a false name, with the mandate documents for that account being signed by herself and her husband under false names. As a consequence of her actions, Mrs. Porrit would likely have struggled to persuade any judge that no moral blame attached to her.

However, later case-law presents with instances in which, though it is reiterated that non-executive or passive directors cannot simply wash their hands of responsibility, in fact such responsibility is not visited upon them because they are not guilty of specific wrongdoing. In the present case, the court considers that in any event no liability should attach to either of the respondents, whether under s.160 or s.150 of the Act of 1990, and thus the court is not required to render judgment on the contention made in respect of the second-named respondent that she was in effect only a passive director of Chercrest who never played any role in relation to the activities of same. Were it required to do so, however, the court does not see on the evidence before it any "*real moral blame*" on the part of Ms. Caffrey which so taints her behaviour as a director as to place it in one or more of the categories of behaviour in respect of which a s.150 declaration is required or, alternatively, to render it behaviour that merits a disqualification order under s.160.

Riverstown Industrial Estate Management Company Limited
17. Riverstown was incorporated on or about 4th April, 2007, it never traded, never filed any annual returns, and was struck off on 22nd February, 2009. Only the first-named respondent was a director of this company. Forming a company and becoming a director of same are significant legal steps and the first-named respondent is certainly to be reproached for the apparent casualness with which he approached the genesis and demise of Riverstown. However, given that the company never traded, it does not appear to the court to be an instance in which an order of s.160 is merited. As with Chercrest, the only ground on which a s.150 order would appear to be possible is that the first-named respondent did not act responsibly in relation to the conduct of its affairs; there is no suggestion that he did not act honestly or that there is any other reason why it would be just and equitable that the first-named respondent should be the subject of an order made under s.150. Again, the words of McGuinness J. in *Re Squash (Ireland) Limited* and referred to above seem apposite: some criticism of the first-named respondent is merited as regards his actions as a director of Riverstown; however, those actions do not seem to stray across that line beyond which they would fall to be categorised as less than responsible. Consequently the court does not consider that a s.150 declaration requires to issue in respect of Mr. Slattery in his capacity as a director of Riverstown.

Conclusion
18. Strike-off is not an alternative to liquidation and this judgment should not be construed or relied upon to suggest otherwise. However, in the very particular circumstances in which the strike-offs that are the subject of these proceedings occurred, the court considers that no order under s.160 is merited and that no declaration under s.150 is required against either of the respondents as directors of Chercrest or, in respect of the first-named respondent, as a director of Riverstown.