Neutral Citation: [2014] IEHC 227

THE HIGH COURT

[2013 No. 509 COS]

IN THE MATTER OF ABINGTON GARAGE DOORS 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

JAMES CLANCY

APPLICANT

AND

CON O'CALLAGHAN AND BRIDIE O'CALLAGHAN

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 6th day of May 2014

1. The applicant is the liquidator ("the Liquidator") of Abington Garage Doors Ltd. (In Voluntary Liquidation) ("Abington"). He was so appointed on 27th June, 2012.

2. Abington was incorporated on 11th November, 1999. The respondents, Mr. and Mrs. O'Callaghan were directors of Abington within twelve months of the date of the winding up. Mr. O'Callaghan remained a director at the time of the passing of the resolutions in favour of winding up. Mrs. O'Callaghan resigned as a director on 7th December, 2011.

3. The Liquidator brings this application as he has not been relieved of his obligations to do so by the Director of Corporate Enforcement following a report made pursuant to s. 56 of the Company Law Enforcement Act 2001.

4. It is not in dispute that Abington was insolvent at the date of commencement of the winding up and that each of the respondents was a director within twelve months of the date of commencement of the winding up. The respondents accept that there is an onus on them in such circumstances to satisfy the Court that they acted both honestly and responsibly in relation to the conduct of the affairs of Abington whilst a director thereof if they are to avoid a declaration of restriction pursuant to s. 150 of the Companies Act 1990.

5. The Liquidator commenced the application on an originating notice of motion grounded on an affidavit, and in accordance with the practice direction on s. 150 applications of 24th March, 2003, set out the matters of concern which appeared to him to require consideration by the Court. He deposed that they fell under three headings:

(a) Engagement in 'Phoenix'-Type Practices;

(b) Misapplication of Company Property; and

(c) Filing of Inaccurate Directors' Statement of Affairs.

Each of the respondents filed replying affidavits dealing with the factual matters raised by the Liquidator and explaining certain other matters. There were also further affidavits from the Liquidator and respondents. Ultimately, the matter came on for oral hearing and the respondents represented themselves and handed in to the Court a written submission which they supplemented by oral submission.

6. The primary facts are not in dispute. There are disputes as to the inferences which the Court is asked to draw from those facts. The business of Abington was a focused niche business of installing electronic garage doors. It appears to have taken over a prior unincorporated business of Mr. O'Callaghan in 1999. Its supplier of the electronic garage doors was PC Henderson Ltd. That company was also the principal creditor of Abington at the time of its winding up and nominated the Liquidator. The statement of affairs discloses a sum of €69,728.74 as the debt due to PC Henderson. The total debts due by Abington to all creditors at the date of commencement of the winding up, including a directors' loan of approximately €40,000, was in the order of €120,000.

7. The trading of Abington appears to have become difficult following the economic downturn starting in 2008. By 2010, the respondents depose that they notified PC Henderson Ltd. of its financial constraint and trading difficulties and exhibit a copy letter to that company. They also depose that they kept PC Henderson Ltd. as their main creditor "frankly and honestly appraised of the company's status and difficulties at all times". Further, they depose that PC Henderson Ltd. chose to continue to extend credit to the company and they exhibit a note which one of the respondents prepared for the accountant of Abington of a meeting held with a representative of PC Henderson Ltd. in Portlaoise in November 2011. That note records the respondents informing Mr. Mooney of PC Henderson Ltd. of their intention to close Abington because of difficulties with cash flow, in relation to a cheque written to Henderson's and a downturn in turnover. It also records Mr. Mooney expressing a view that it would serve "both our interests better" if Abington were to continue trading. He also indicated a willingness by Henderson's to accommodate a failure to meet payment deadlines. Finally, it records a decision taken by the respondents to continue with Abington.

8. Notwithstanding that decision, the facts deposed to also disclose that on 6th December, 2011, Mrs. O'Callaghan and one of their children incorporated Garage Doors Direct Ltd. with objects similar to those of Abington. Mrs. O'Callaghan became a director of Garage Doors Direct on 6th December, 2011, on its incorporation. It is accepted that the intention was that Garage Doors Direct would carry on business installing electronic garage doors. This is the factual basis of the 'Phoenix' syndrome concern raised by the Liquidator.

9. On the facts deposed, and the exhibits, I accept that Mrs. O'Callaghan has established that Garage Doors Direct did not commence trading until April 2012. The respondents have also deposed, which I accept, that Abington ceased trading at that time. Further, it is

deposed, and I accept, that no assets of Abington were transferred to or used by Garage Doors Direct. Finally, it is also averred that Garage Doors Direct did not do business with any customer or supplier of Abington. I also accept this as a matter of fact.

10. Finally, on this issue, the respondents depose that in 2012, Abington had no goodwill left. They depose that the installation of electronic garage doors is a small business, and in submission, explained that it does not give rise to repeat business. Once installed, the doors may remain in place for approximately twenty years. Nevertheless, as the Liquidator points out, the accounts reflect the fact that a valuation was placed on the goodwill of the prior, unincorporated business when taken over by Abington in 1999. It appears to me unnecessary to determine, for the purposes of this application, whether of not there was any goodwill attached to the business of Abington in 2012. The skill, expertise and contacts relating to the garage installation business carried on, firstly, by Mr. O'Callaghan as a sole trader, and then by Abington, were available to Mrs. O'Callaghan as a former director of Abington. In April 2012, Garage Doors Direct appears to have found a new supplier with whom it commenced doing business on a cash-on-delivery basis. Mrs. O'Callaghan has deposed that no money or assets of Abington were used for the benefit of Garage Doors Direct.

11. The facts relevant to the alleged misapplication of company property raised by the Liquidator relate to a deposit paid to Abington of €650 by a customer for whom Abington was unable, by reason of the winding up, to carry out the installation. The cheque was lodged in the ordinary way, it is deposed by the respondents, to the bank account of Abington and used in the ordinary course of business. The Liquidator contends that as this was a deposit, it should have been treated as trust monies and set aside and not used by the company as part of its revenue, presumably, prior to the completion of the installation. There is no suggestion that the monies were used other than in the ordinary course of business of Abington.

12. The preparation of an inaccurate directors' statement of affairs, as at 10th April, 2012, for use at the meetings of members and creditors called for the purpose of passing resolutions to wind up Abington is accepted by the respondents. Strictly speaking, this is a matter which concerns Mr. O'Callaghan alone as Mrs. O'Callaghan was not, at that date, a director of the company. However, it would appear that both were taking advice and involved in the preparation of the relevant documents for the purposes of the winding up of Abington. The respondents depose that they sought advice of a named firm of auditors whom, they were told, had considerable experience in relation to the winding up of companies. Further, that the advice received was to the effect that they could include a claim for rent in the statement of affairs as part of the debt due to them as directors. It is not in dispute that the directors were owed, at the time, just over €40,000. However, the inclusion of rent increased the debts set out in the statement of affairs to €76,658.95. Subsequently, when PC Henderson raised the issue, the respondents accepted that they could not pursue the claim for rent and agreed that the debt owing to them should be recorded at approximately €40,000.

13. The Liquidator points out the importance of the increase and its probable purpose being to put the respondents in the position that they were jointly the largest creditor, being owed approximately €7,000 more than PC Henderson. This enabled the respondents, it is contended, at the meeting of 10th April, 2012, oppose the appointment of a liquidator and no liquidator was appointed. Ultimately, following correspondence with Mr. O'Callaghan, an adjourned meeting of creditors was reconvened on 27th June, 2012, and the Liquidator was appointed on the nomination of PC Henderson Ltd.

14. The respondents depose that their approach to the winding up of Abington and their failure to agree to the appointment of a liquidator on 10th April, 2012, was pursuant to professional advice received. It appears to me that notwithstanding the receipt of such professional advice (which I accept occurred), it was an error of judgment by the respondents to include in the amount allegedly owing to them in the statement of affairs, a sum for rent, when it would appear no prior rent had been paid and there was no lease in place, and also to oppose the appointment of a liquidator in circumstances where it had been resolved that the company should be wound up. However I accept that their was no dishonest intent on their part.

15. On the above facts, I am satisfied that there is no issue before the Court in relation to the honesty of the respondents in relation to the conduct of the affairs of the company.

16. It necessary for the Court to consider, having regard to the admitted facts and the facts as found above in relation, both to the incorporation and commencement of trading of Garage Doors Direct, and the presentation of an admittedly incorrect statement of affairs with the debt due to the directors improperly increased, the Court can be satisfied, in accordance with the decided case law, that the respondents each acted responsibly as directors in the conduct of the affairs of Abington.

Case Law

17. In a judgment which I delivered on 20th April, 2012, in the matter of *Derbar Developments Ltd. (In Liquidation)* [2012] IEHC 144 I summarised the case law relevant to the determination of whether persons acted responsibly in the conduct of the affairs of a company for the purposes of s. 150 following the judgment of the Supreme Court *per* Fennelly J. in *Re Mitek Holdings Ltd.: Grace v. Kachlar [*2010] IESC 31, [2010] 3 I.R. 374. This remains the proper approach of this Court and therefore I simply propose repeating what I stated at paras. 13 to 15 of *Derbar Developments*:

> "13. The caselaw relating to s. 150 was reviewed in some detail by Fennelly J. in delivering the judgment in *Mitek Holdings Ltd. and the Companies Act* [2010] IESC 31, with which Hardiman J. and Finnegan J. concurred. In doing so, he cites with approval passages from the well-known judgments of Murphy J., in the High Court in *Business Communications v. Baxter and Parsons* (Unreported, High Court, 21st July, 1995) and Shanley J. in *La Moselle Clothing Ltd. v. Soualhi* [1998] 2 ILRM, 345. In the latter, Shanley J. interpreted s. 150 in the following way:
>
> > "Thus it seems to me that in determining the '*responsibility*' of a director for the purposes of s. 150 (2)(a) the court should have regard to:
> >
> > (a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts 1963-1990.
> >
> > (b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.
> >
> > (c) The extent of the director's responsibility for the insolvency of the company.
> >
> > (d) The extent of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.
> >
> > (e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards."

Fennelly J., at para. 74, summarises the proper approach of the Court to an application under s. 150 in the following terms:

> 'It is always appropriate to keep in the forefront of one's mind the terms of the applicable statutory provision. The question to be considered, in a case such as the present, where no question of honesty arises, is whether the director against whom an application for a restriction order is made "*has acted responsibly in relation to the conduct of the affairs of the company*". The context is, of necessity, a company which is unable to pay its debts. The court should, in the words of Shanley J. [in *La Moselle] "look at the entire tenure of the director and not simply at the few months in the run up to the liquidation*".

14. The above conclusion must be considered in the context of two earlier passages cited by Fennelly J. with approval. The first is from the judgment of McGuinness in *Re Squash Ireland Ltd.* [2001] 3 I.R. 31 at p. 40, where she stated:

> 'The question before the court is whether they acted responsibly and this, as was correctly stated by counsel on behalf of the respondent must be judged by an objective standard. In the cases of all companies which have become insolvent it is likely that some criticisms of the directors may be made; but to categorise conduct as irresponsible I feel that one must go further.'

And, secondly, the caution expressed by Murphy J. in *Baxter* that:

> 'Of course, one must be careful not to be wise after the event. There must be no single "witch hunt" because the business failed as businesses will.'

15. Fennelly J. also cited with approval from Clarke J. in the High Court in the matter of *Swanpool Ltd. McLaughlin v. Lannen [*2006] 2 ILRM 217, and in particular, his emphasis on the need for the Court, in each application under s. 150, to take account of the context in which the relevant acts or omissions of the directors need to be considered. In *Swanpool Ltd.*, at issue was a repayment of funds to BES Investors at a time when the directors knew the company was insolvent or facing insolvency. In that decision, Clarke J., at p. 8, having considered certain of the earlier decisions already referred to, stated:

> 'It does, however, seem to me that the differences in approach identified in those authorities are more apparent than real. The approach of the court in any case under s.150 will necessarily differ depending on the type of acts or omissions which are under scrutiny. In broad terms there would seem to me to be three types of situation which the court is typically required to consider in such applications. They are:
>
> 1. Issues involving compliance by the company with its formal obligations under the Companies Acts including keeping books and records, making returns, holding meetings and the like;
>
> 2. The commercial management of the company most particularly at the period when the company was insolvent or heading in that direction; and
>
> 3. Compliance by the directors with the obligations identified in *Frederick Inns* to ensure that once the company was facing insolvency its assets were dealt with in a manner designed to ensure the proper distribution of those assets in accordance with insolvency law.'

Fennelly J expressed the view that the above is 'a particularly useful classification of the principal settings for consideration of the responsibility of directors in a modern business'. I respectfully agree."

Conclusion

18. The Court must, in accordance with the above, consider the entire tenure of the respondents as directors of Abington. This tenure commenced in 1999 and ended, respectively, in 2012 and 2011. It is important that during that period, there is no complaint of non-compliance by Abington with its formal obligations under the Companies Acts, including keeping of books and records, making returns, etc. The Liquidator has made no complaint in relation to the books and records and has exhibited a copy of a company report from the Companies Office which discloses that at the date of commencement of the winding up, the prior relevant annual return had been filed and the next annual return was not due until later in 2012.

19. On the facts before the Court, it does not appear that the respondents can be considered responsible, either for the insolvency of the company or the net deficiency in assets of the company. It is not in dispute that they kept their principal creditor informed of the trading and financial difficulties of Abington, who, nevertheless, in what it perceived as its interests, encouraged the respondents to continue trading with Abington. The relatively low level of debts due to other trade creditors and minimal revenue debts at the date of the commencement of the winding up indicate appropriate commercial management during the final period of trading of the company.

20. Whilst Mrs. O'Callaghan incorporated Garage Doors Direct and must have taken steps prior to April 2012 in relation to finding a supplier so as to enable it commence trading, on the facts, which I have accepted, as set out above, there is no evidence of any improper use by the respondents of any asset of Abington for the benefit of Garage Doors. In those circumstances, it does not appear to me that the respondents were in breach of the obligations identified in *Re Frederick Inns* [1994] 1 I.L.R.M. 387 and referred to by Clarke J. in *Swanpool* in the extract above. Hence, it does not appear to me that those facts preclude this Court from finding that Mrs. O'Callaghan acted responsibly in relation to the conduct of the affairs of Abington, having regard to the entire period of her directorship and the positive features of same to which I have already referred.

21. Similarly, whilst Mr. O'Callaghan, in particular, as a continuing director, in April 2012, undoubtedly made an error of judgment in the inclusion of the unsustainable claim for rent in the amount allegedly due to the directors, and also in failing to agree on 10th April, 2012, to the appointment of a liquidator, it appears to me that that should be considered by the Court as an error of judgment and does not, in accordance with the principles set out, preclude the Court finding that, having regard to his overall tenure as a director of Abington, that he acted responsibly in relation to the conduct of the affairs of the company.

22. Accordingly, I will dismiss the application pursuant to s. 150 of the Companies Act 1990, against each of the respondents.