

THE HIGH COURT

[2010 No. 181 COS]

IN THE MATTER OF MPS GLOBAL LIMITED (IN LIQUIDATION), AND IN THE MATTER OF SECTION 139 OF THE COMPANIES ACT 1990

BETWEEN:

MYLES KIRBY

AS OFFICIAL LIQUIDATOR OF MPS GLOBAL LIMITED

(IN LIQUIDATION)

APPLICANT

AND

PARAIC MULDOWNNEY

RESPONDENT

JUDGMENT of Mr. Justice Barrett delivered on the 30th day of May, 2014

1. The key issue arising in this case is whether it is just and equitable that an individual be required to pay up an amount of money equal to that which was paid to him by way of a purportedly fraudulent disposition of company funds.

Facts

2. On 2nd July, 2007, the sum of €760,000 was transferred from a bank account of Muldowney Property Services Limited to a bank account of Mr. Jas Kalsi, then a director of the company. This money was paid directly from funds that had come into the company's possession from members of the public availing of a property investment opportunity that Muldowney Property Services had touted around the time of the transfer. On the same date, two onward transfers were made from the initial account of Mr. Kalsi to a second account in his name. The combined value of these transfers, some €103,500, was then paid to Mr. Paraic Muldowney, the subject of the present application. Mr. Muldowney claims that these monies were used to settle certain outstanding personal loans that were made on certain dates over the years 2005 to 2007 by Mr. Muldowney and various of his family members to Mr. Kalsi. The name of the company from which the repayments ultimately derived might suggest that Mr. Muldowney was somehow connected with it. However, notwithstanding that it operated from premises apparently owned by Mr. Muldowney's wife, issued promotional literature featuring Mr. Muldowney's photo, and on 1st October, 2007, entered into a signed agreement with Mr. Muldowney whereby he agreed to invest certain monies for the company and to guarantee the investment made, Mr. Muldowney avers in his affidavit evidence that Muldowney Property Services Limited was "[a] venture in which I had absolutely no involvement". It is impossible for the court to accept this averment when it is confronted with the foregoing evidence, including the signed and witnessed investment and guarantee agreement of 1st October, 2007, between Mr. Muldowney and Muldowney Property Services Limited, an agreement that is signed for the company by Mr. Kalsi. Mr. Muldowney has sought to explain away this agreement by suggesting that it involved some manner of fraud upon him. Presented with an agreement that appears on its face to be valid and a claim that Mr. Muldowney has been the hapless victim of a fraud done at the initiative of individuals other than Mr. Kalsi, the court concludes that the agreement is what it purports to be and thus that there was a closer commercial relationship between Mr. Muldowney, Muldowney Property Services Limited and Mr. Kalsi than Mr. Muldowney has sought to portray in his evidence. There is suggestion in that evidence that when Mr. Padraic Muldowney became aware of Mr. Kalsi's business and, in particular, the name under which it was operating, he made complaint to the Financial Regulator, as the regulatory arm of the Central Bank and Financial Services Authority of Ireland, now the Central Bank of Ireland, was then known, and that this resulted in the company name being changed to MPS Global Limited at the behest of the Regulator. No mention is made in the affidavit evidence as to when these last events transpired but even accepting them as true, albeit curious, they do not explain away the agreement of 1st October 2007, nor suggest that the conclusions drawn by this Court from the fact of that agreement and the various other facts referred to above are mistaken. So when Mr. Muldowney avers in his affidavit evidence that the cheque by which the outstanding loan monies were paid "was a personal cheque drawn on Mr. Kalsi's personal account...[and] I had no reason to believe nor did I know at the time that these monies ultimately came out of Mr. Kalsi's company", the court is not persuaded, given the history of involvement between Mr. Muldowney, Muldowney Property Services Limited and Mr. Kalsi, that this is in fact so. In the present proceedings, the liquidator of MPS Global Limited seeks: a declaration that the sum of €103,500 received by Mr. Padraic Muldowney from MPS Global Limited was a fraudulent disposition pursuant to section 139 of the Companies Act 1990; and a related order that Mr. Muldowney pay the sum of €103,500 to the liquidator.

Section 139

3. Section 139 of the Companies Act 1990 provides as follows:

"(1) Where, on the application of a liquidator, creditor or contributory of a company which is being wound up, it can be shown to the satisfaction of the court that –

any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and the effect of such disposal was to perpetrate a fraud on the company, its creditors or members, the court may, if it deems it just and equitable to do so, order any person who appears to have the use, control or possession of such property or the proceeds of the sale or development thereof to deliver it or pay a sum in respect of it to the liquidator on such terms or conditions as the court sees fit.

(2) Subsection (1) shall not apply to any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company to which section 286(1) of the Principal Act applies.

(3) *In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have bona fide and for value acquired an interest in the property the subject of the application.*"

4. Section 139(2) is not relevant to the present case as there is no suggestion that Mr. Muldowney was ever a creditor of MPS Global Limited or a surety or guarantor for the debt due to such a creditor and thus there appears to be no basis on which the fraudulent preference provisions of section 286 of the Companies Act 1963 could apply.

5. Having regard to the facts as outlined above, the court does not consider that Mr. Muldowney can be treated as having acted "*bona fide*" in accepting the payment of the €103,500 indirectly from MPS Global Limited. The level of his involvement with MPS Global Limited and Mr. Kalsi is such that the court does not consider he could neither have known nor suspected the ultimate source of the repayment monies. Notwithstanding this level of involvement, it is not clear to the court that Mr. Muldowney had actual knowledge of the ultimate source of the monies that were paid to him by Mr. Kalsi. However, the court is satisfied on the basis of the facts as proved before it that Mr. Muldowney was affected with constructive notice of the type detailed by Henchy J. in *Somers v. W* [1979] I.R. 94 at 108:

"In earlier times the tendency was to judge a purchaser solely by the facts that came to his knowledge. In the course of time it came to be held in the Court of Chancery that it would be unconscionable for the purchaser to take his stand on the facts that had come to his notice to the exclusion of those which ordinary prudence or circumspection or skill should have called to his attention. When the facts at his command beckoned him to look and inquire further, and he refrained from doing so, equity fixed him with constructive notice of what he would have ascertained if he had pursued the further investigation which a person with reasonable care and skill would have felt proper to make in the circumstances."

6. It appears to the court that the interaction between Mr. Muldowney, MPS Global Limited and Mr. Kalsi was such that it would be unconscionable for Mr. Muldowney, knowing all that he did, to claim successfully that he should be judged by reference to the facts as they ostensibly appeared to be, i.e. a repayment by Mr. Kalsi of a personal loan from personal monies. Ordinary prudence, circumspection or skill should and must have called to his attention that this sudden flush of money came at a time when Mr. Kalsi, previously a man who had required cash injections by way of ad hoc loans, was now successfully raising funds from the public. This last fact is something of which, it appears to the court, Mr. Muldowney could not have been unaware given the extent of his involvement with MPS Global Limited and Mr. Kalsi.

Relevant case-law

7. There is relatively limited case-law on section 139 of the Companies Act 1990. In *Le Chatelaine Thudichum (In liq.) Ltd. v. Conway* [2010] 1 I.R. 529, Murphy J. considered, *inter alia*, the nature of the transactions that constitute a disposition, as well as what comprises fraud for the purposes of section 139. Thus, per Murphy J., at 535:

"Insofar as the meaning of the term disposition is concerned, the section is drafted in very broad terms apt to encompass almost any kind of transaction",

and, at 539:

"The final question I have to address in determining whether a fraudulent disposition occurred is whether the effect of that disposition occurred is whether the effect of that disposition was to perpetrate a fraud on the company, its creditors or members. While this question does not seem to have been judicially considered, assistance can be drawn from commentators on the area. It has been suggested that...the fraud criterion in s. 139 of the Companies Act 1990, merely requires that the company, its creditors or members be deprived of something to which it is, or to which they are, lawfully entitled...I would adopt this proposition as a correct statement of the law."

8. Turning for a moment to the transaction impugned in the present proceedings, it is clearly a disposal, here an indirect disposal or 'disposition', within the wide meaning given that term by Murphy J in *Le Chatelaine*. Moreover, given that it involved the unauthorised and improper use of company funds to settle the private debts of a company director, it was clearly a fraud on MPS Global Limited within the meaning of section 139, as expanded upon by Murphy J.

9. In *Devey Enterprises Ltd. v. Devey* [2012] 1 I.R. 127, Laffoy J. was confronted with a situation not unlike that pertaining in the present proceedings, where certain company monies had either been paid gratuitously to, or used to discharge the personal liabilities of, the respondent directors of the company. In the course of her judgment, Laffoy J. stated, at 137:

"[I]n reality, the respondents procured a gratuitous disposition of the company's money in their own favour. I am satisfied that the effect of the making of the payments identified by the liquidator, which were made by the company to the respondents or in discharge of the respondents' liabilities, was to perpetrate a fraud on the company and its creditors...It seems to me that it is just and equitable that the respondents, who procured benefits from the depletion of the assets of the company to the extent assessed by the liquidator, should be directed to repay an equivalent sum to the liquidator on behalf of the company in liquidation."

10. In the instant proceedings, unlike in *Devey*, the beneficiary of the fraudulent disposal was not a director of the company against which the fraud arising was perpetrated. However, there is no requirement in section 139 that this should be so: it suffices merely that there was a fraudulent disposal of the company's assets. Having regard to the above case-law and to the facts of the case before the court, there clearly was in this case an indirect disposal, within the meaning of section 139(1)(a), to Mr. Muldowney of certain property of MPS Global Limited, the effect of which was to perpetrate a fraud on MPS Global Limited, its creditors or members within the meaning of section 139(1)(b) of the Companies Act 1990. This being so, the sole remaining issue for this Court to decide is whether it is "*just and equitable*" to order that Mr. Muldowney pay the sum of €103,500 to MPS Global Limited, being a person who, ostensibly, "*appears to have the use, control or possession of such property or the proceeds of the sale or development thereof.*"

"Just and equitable"

11. Case-law affords some guidance on the meaning of what is encompassed by the phrase "*just and equitable*". In *Re Murph's Restaurants Ltd.* [1979] I.L.R.M. 141, McWilliam J. considered the meaning of the phrase as utilised in section 213(f) of the Companies Act 1963 and quoted with approval from the judgment of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Limited* [1973] AC 360 at 379 to the effect that:

"The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising

between one individual and another, which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way”.

12. In *La Moselle Clothing Ltd (in Liquidation) v. Soualhi* [1998] 2 I.L.R.M. 345, Shanley J. considered the equivalent phrase in section 150 of the Companies Act 1990. Per Shanley J., at 354:

“[T]hat the director must satisfy the court that there is no other reason why it would be just and equitable to restrict the director, allows the court to take into account, in my view, any relevant conduct of the director after the commencement of the winding up or the receivership...”.

13. In *Re Connemara Mining Company plc* [2013] IEHC 225 (Unreported, High Court, Laffoy J., 10th May, 2013), Laffoy J., commenting on section 213(f), stated, at para. 41, that:

“In the case of paragraph (f), the just and equitable ground, which is frequently invoked in conjunction with paragraph (g) and s.205 of the Act of 1963, the Oireachtas clearly intended that the Court should have a broad discretion.”

14. In *Re Dublin Cinema Group Limited* [2013] IEHC 147 (Unreported, High Court, Charleton J., 25th March, 2013), Charleton J. made apparent the very wide ambit of discretion that the phrase “just and equitable”, as employed in section 213(f) of the Companies 1963 entails; in that case it included considering whether an order under another provision of the Companies Acts would be more just and equitable.

15. Commenting on the section 213(f) jurisdiction in *The Law of Private Companies* (3rd edition, 2012), the learned author, Dr. Courtney, states, at para. 23.092:

“A jurisdiction that is driven by what is ‘just and equitable’ is the very essence of what is dynamic. The practice of law has an uncanny tendency to present factual situations which differ from established authorities, and so other situations which do not fit neatly into the foregoing categories may still merit the winding up of a company on just and equitable grounds.”

16. In short, the thrust of the foregoing case-law and commentary is that the phrase ‘just and equitable’ affords the court something of a *carte blanche* to do, within the constraints of the law, what is right by reference to the actions of the parties. In the present circumstance, having regard to the fraudulent use of company monies that was effected by Mr. Kalsi and what the court has concluded is Mr. Muldowney’s constructive notice of the tainted source of the monies that were paid to him by Mr. Kalsi, it appears to the court, having regard both to law and equitable principles, that it would be just and equitable in this instance to order the restoration of those monies to the company by Mr. Muldowney.

Some procedural points arising

17. In the closing arguments before the court a number of procedural points were made on behalf of Mr. Muldowney. It was contended that: the applicant liquidator had failed to identify the appropriate order pursuant to the Rules of the Superior Courts upon which the instant proceedings were brought; the notice of motion had not been served on Mr. Muldowney in compliance with the Rules of the Superior Courts; and the proceedings ought to have been brought by way of originating notice of motion or by way of fresh petition. It was also suggested that the application comprised in these proceedings was merely an application for summary judgment. The court considers each of these contentions to be without merit. To begin with, they ignore the adage that ‘the rules of court are the servants of Justice, not her master’. More particularly, it has never been the law that it is invariably fatal to proceedings that they fail to identify a rule of court on which they are grounded. Any deficiencies in service have been cured by the fact that Mr. Muldowney has participated fully in the proceedings with the benefit of legal counsel and representation. There is no deficiency in the form of the proceedings. And, lastly, the court does not consider that these proceedings are covert proceedings for summary judgment: they are a separate and different form of proceeding contemplated by statute. The principles applicable to the granting of leave to defend judgments were recently re-considered by this Court *inter alia* in *Harrahill v. Swaine* [2014] IEHC 94 (Unreported, High Court, Barrett J., 28th February 2014) and the court does not propose to consider them afresh at this juncture. However, even if they were applicable, it is, to paraphrase the judgment of Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, very clear that Mr Muldowney has no case that would merit this matter being considered anew at a full plenary hearing. This is because it has been proved before this court that there was a fraudulent disposal of company property of MPS Global Limited in favour ultimately of Mr. Muldowney and the court is satisfied that it is just and equitable, for the reasons stated above, that Mr. Muldowney, as the beneficiary of that fraudulent disposal and a person who, at the least, had constructive notice of the ultimate source of the monies paid to him, should be required to repay to the liquidator of MPS Global Limited a sum equivalent to that paid to Mr. Muldowney by Mr. Kalsi on 2nd July, 2007.

Conclusion

18. The court declares that the sum of €103,500 received by Mr. Muldowney from Mr. Kalsi on 2nd July, 2007 involved a fraudulent disposition of the property of MPS Global Limited within the meaning of section 139 of the Companies Act 1990. Pursuant to section 139(1) of that Act, the court considers it just and equitable to order, and hereby orders, that Mr. Muldowney pay forthwith the sum of €103,500 to the liquidator of MPS Global Limited.