Neutral Citation: [2014] IEHC 184

THE HIGH COURT

[2008 No.371 COS]

IN THE MATTER OF SHELLWARE LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990

AND IN THE MATTER OF SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001

BETWEEN

DECLAN TAITE

(OFFICIAL LIQUIDATOR OF SHELLWARE LIMITED)

APPLICANT

AND

EOGHAN BRESLIN

RESPONDENT

JUDGMENT of Mr. Justice Barrett delivered on the 1st day of April, 2014

1. This is an application for a restriction order under s. 150 of the Companies Act 1990, as amended, in respect of Mr. Eoghan Breslin. There is a related application for an order extending the time for the making of this application.

2. Mr. Breslin is a former director of Shellware Limited, a company that designed and manufactured exhibition and presentation stands and also engaged in the interior design and fit-out of public houses. The company was incorporated on 24th June, 1999, commenced trading on 24th June, 1999, ceased trading on 7th January, 2009, and was a subject of a winding-up order by the court on 12th January, 2009. The company was one of the many victims of the sudden contraction in the Irish economy that occurred in 2008. Indeed the swiftness of Shellware's decline is testament to just how quickly the nation's economy declined at that time: the company yielded its best ever financial results in the year ended June, 2007; its sources of business began to dry up in 2008; and by start-2009 an order for its winding-up had issued.

3. Under s. 150 of the 1990 Act, the court must grant the declaration sought in these proceedings unless satisfied that any of a variety of circumstances identified in s. 150(2) pertain, the relevant circumstances in this case being that Mr. Breslin has acted (a) honestly and (b) responsibly in relation to the conduct of the affairs of Shellware and (c) there is no other reason why it would be just and equitable that he should be the subject of an order made under s. 150. In the course of the proceedings before the court it became apparent, and the court finds, that there is no issue as to Mr. Breslin's honesty and, apart from the issue of whether he acted responsibly in relation to the conduct of the affairs of Shellware, there is no other ground on which a s. 150 declaration should issue. Thus the only substantive issue that survives for the court to consider from as. 150 perspective is whether Mr. Breslin acted responsibly in relation to the conduct of the affairs of Shellware.

Principles to be applied

4. There is, if anything, a possible surfeit of judicial guidance on the criteria that are relevant in determining a s. 150 application. An early but significant contribution was made by Shanley J. in *La Moselle Clothing Limited (in liquidation) v. Soualhi* [1998] 2 I.L.R.M. 345, his observations having since been described by Hardiman J. in *In the Matter of Tralee Beef & Lamb Limited* [2008] 3 I.R. 347 at 358, as being, at least at that time, of "*near canonical status*". Shanley J.'s observations had previously been affirmed and expanded upon by the Supreme Court in *Re Squash (Ireland) Ltd.* [2001] 3 I.R. 35, the court holding, *inter alia*, that it is important, in as. 150 application, to have regard to the entire tenure of an individual as director of a company. In his judgment in *La Moselle*, Shanley J. had, at 352, mentioned that the extent to which a director has or has not complied with the Companies Acts is a relevant factor when determining a s. 150 application. In the High Court decision in *Kavanagh v. Delaney* [2005] 1 I.L.R.M. 34 at 41, Finlay Geoghegan J. suggested that compliance by a director with the common law obligations of a director is also a relevant factor. In his above-mentioned judgment in what is now often referred to as the *Tralee Beef* case, Hardiman J., at 358, indicated that he did not disagree with this 'amplification' by Finlay Geoghegan J., though he was concerned that no injustice should be wrought in that case as a result of the amplification being sounded therein for the first time. In truth it is somewhat difficult to see how a director could be held to have acted responsibly where he or she has complied with the Companies Acts but is in breach of his or her common law duties, though equally it is difficult offhand to see how a director could breach his or her common law duties where he or she is not guilty of any breach of, or exposed to any penalty under, the detailed and comprehensive code established by the Companies Acts. Be that as it may, the jurisprudence appears in any event to have further evolved, with Fennelly J. signalling in *Re Mitek Holdings Limited* [2010] 3 I.R. 374 at 396 that it is important not to adopt a formulaic, standardised, 'tick the box' approach to determining s. 150 applications. Thus Fennelly J. emphasises "*the need to identify the issues that are important in the particular case*" and then continues:

> *"I would not be disposed to limit the matters to which regard should be had or to substitute standardised judicial criteria for the general words of the statute."*

Section 150 enjoins the court to have regard to whether an affected person has acted "*honestly*" and "*responsibly*" and also to consider whether there is any other reason why it would be "*just and equitable*" that as. 150 order should issue. All of the quoted terms bear their ordinary meaning. As mentioned above, there are no 'honesty' or 'just and equitable' grounds arising in this case. In deciding whether Mr. Breslin has acted responsibly the court may of course have regard to his obligations as director, to general commercial practice and to prior case-law but perhaps more to anchor than to determine any decision of the court as to the responsibility or otherwise of Mr. Breslin's actions.

Concerns arising
5. It has been suggested in the course of this application that there are essentially six grounds on which Mr. Breslin's behaviour could be categorised as other than responsible, *viz*. a failure to maintain adequate books and records, late/non-payment of certain taxes, the steps taken when the company was in financial difficulty, the making of payments to a related company, the use of company credit cards for personal expenses, and a claimed lack of cooperation with the liquidator.

6. *Failure to maintain adequate books and records*: Shellware maintained comprehensive accounts over the entirety of its existence. Its last audited accounts, for the year ended 30th June, 2006, were approved by the board of directors in June, 2007. After Shellware's business began to dry up in 2008, Mr. Breslin avers in his affidavit evidence that he considered it imprudent to pay the costs of an audit for the year 2007 when it was clear to him that liquidation in some shape or form of Shellware was imminent, the appointment of a liquidator eventually taking place later that year at the behest of the Revenue Commissioners. Mr. Breslin might be criticised for taking an unwise and inappropriate decision in this regard. However, to borrow from the phraseology employed by McGuinness J. in *Re Squash (Ireland)* at 42, albeit writing in a different context, while Mr. Breslin's actions in this regard may be open to criticism, the court does not consider that they are sufficient to be categorised as irresponsible.

7. *Late/non-payment of taxes*. It seems to apply almost without failing in respect of any insolvent company that there will have been late or non-payment of taxes and such is the case here. Is such a failure to be treated as evidence of irresponsibility? Finlay Geoghegan J. in *In the Matter of Digital Channel Partners Ltd. (in voluntary liquidation)* [2004] 2 I.L.R.M. 35 made the following useful observation in the context of a consideration of a company's failure to make tax returns and to pay taxes:

> *"The mere fact that a company is in breach for, as in this case, a relatively limited period will not of itself, it seems to me, indicate that the directors of the company have acted either dishonestly or irresponsibly in such a way as to preclude my concluding that overall they acted responsibly and honestly in relation to the conduct of the affairs of this company. Unfortunately and inevitably where companies are under significant financial pressure this may occur.*
>
> *It appears to me that in relation to tax liabilities there must be something more than a limited failure over a period to indicate that the directors have acted irresponsibly. This has been put in a number of different ways and certainly in so far as there may be evidence that there either has been selective distribution or selective payment of liabilities of a company or indeed a total disregard of obligations to the Revenue or even a decision to effectively seek to use taxation liabilities for the purpose of financing a company, that of itself will normally be indicative of the fact that directors have been acting at least irresponsibly."*

8. There is a history of late-payment and, towards the end of its existence, non- payment of certain revenue liabilities by Shellware. Indeed the eventual petition to wind up Shellware was brought by the Revenue Commissioners. There is no evidence to suggest that Shellware or, more particularly, Mr. Breslin ever avoided making a tax payment in order to keep the business of Shellware afloat. Thus it does not appear from such evidence as has been placed before the court that there are any of the criteria present which would transform the late/non-payment of taxes in this case from reproachable behaviour to irresponsible behaviour.

9. *Steps taken when the company was in financial difficulty*: Mr. Breslin took all the steps that one would expect of a company director when it became apparent that Shellware was in financial difficulty. He looked for new business, engaged with trade creditors, sought professional advice and liaised with the Revenue Commissioners. With the benefit of hindsight, it may be possible to view Mr. Breslin as guilty of misplaced optimism regarding Shellware's continuing trading prospects. However, it does not appear to the court that he was guilty of irresponsible behaviour.

10. *Making of payments to a related company*: This is perhaps the issue of greatest concern that presents in this case. Mr. Breslin was also the director of Nerano Bars Limited, trading as 'Ivory Bar', a public house in Dalkey, County Dublin. From 1st July, 2006, to 30th September, 2008, Nerano was Shellware's principal debtor. On 30th September, 2008, Nerano went into examinership. In the months prior to its examinership, Shellware continued trading with Nerano notwithstanding that it must have been apparent to Mr. Breslin, above all, that there was a reduced prospect of Shellware recovering its debts from Nerano; indeed Shellware later accepted a write down of certain of its debts as part of the scheme of arrangement of Nerano. Shellware also paid certain amounts owing by Nerano, though it was under no legal obligation to do so and it did the same for Birchport Limited, another company of which Mr. Breslin was a director and which operated the Ocean Bar at Grand Canal Dock in Dublin.

11. Cross-directorships within closely related companies seem almost certain to engender confusion and conflicts within individual boards of directors as to what is the best course of action for any one company. However, the court accepts that each of the boards of each of the companies just referred to may have taken the decisions they did in an abundance of prudence, with regard to that company's particular interests, and without any of the directors crossing the line from responsible to irresponsible behaviour; certainly there is no evidence before the court that any director, including Mr. Breslin, crossed that line in this regard.

12. *Use of company credit cards*: Mr. Breslin's remuneration and expenses were met by way of payments made on one or more credit cards issued to Shellware. Such an arrangement may or may not be unusual. However, the court finds that Mr. Breslin's use of the company credit card facilities was not irresponsible.

13. *Lack of cooperation with the liquidator*: There is suggestion in the pleadings that there was lack of cooperation with the liquidator. This was not canvassed at length at the hearing of this matter and the court in any event finds that Mr. Breslin did substantively cooperate with the liquidator.

Refusal of declaration
14. For the reasons stated above, the court is not satisfied that it is required to make an order under s. 150 of the Companies Act 1990, in respect of Mr. Breslin, and declines to do so.

Application for extension of time
15. The liquidator has, pursuant to s. 56(2) of the Company Law Enforcement Act 2001, as amended, sought an order extending the time for the making of the instant application. Under s. 56(1) of the 2001 Act, a newly-appointed liquidator is now required within six months after appointment, and at such intervals as required by the Director of Corporate Enforcement thereafter, to provide a report to the Director in the prescribed form. It appears that each report provided to the Director pursuant to s. 56(1) is "*a report*" for the purposes of s. 56. Under s. 56(2), a liquidator must bring a s. 150 application not earlier than three and not later than five months after the date on which "*a report*" under s. 56(1) is provided to the Director. Relief from the obligation to bring such application may be granted by the Director but, absent such relief, and absent any extension of the five-month timeline which the court may grant, that five month timeline applies. It is clear that the Oireachtas attached considerable significance to compliance by a liquidator with his obligations under s. 56(1) and (2) as, under s. 56(3), a breach of these obligations by a liquidator is a criminal offence. In *Coyle v.*

O'Brien [2003] 2 I.R. 627 at 633, Finlay Geoghegan J. noted in this regard that:

> *"[T]he court should consider the matters put forward by or on behalf of the liquidator grounding the application for an extension of time in the context of the very clear intent expressed by the Oireachtas in s.56(2) of the Act of 2001 that the liquidator must within the specified time bring the application before the court and if he fails to do so is to be considered guilty of an offence. It appears to be that the grounds must be such that they warrant the court, in fairness and justice, relieving the liquidator from the intended statutory consequences of a failure to act within the specified time."*

16. It does not seem to this Court that waiting to see if the Director of Corporate Enforcement will grant a liquidator relief from the need to bring a s. 150 application will always suffice to justify an extension by the court of the five-month timeline envisioned ins. 56(2). Notably, Finlay Geoghegan J. was sympathetic to the position of the liquidator in the *Coyle* case because the s. 150 application brought in that case was among the first batch of applications which followed the making of the first reports to the Director of Corporate Enforcement under s. 56. However, the *Coyle* case was decided more than a decade ago and liquidators and legal practitioners are now familiar with the 2001 Act. It seems to this Court that at this time an appropriate course of action for liquidators is that identified by Dr. Ahern in her text on "*Directors' Duties*" (Dublin, 2009) in which the learned author states, at 511, that:

> *"[I]t is possible that a less sympathetic judicial view [to that of Finlay Geoghegan J in CoyleJ may be taken should another such case arise although each case will turn on its own discrete facts. Rather than a liquidator being in ...[a} difficult position with the attendant criminal consequences, if there is likely to be a difficulty with the timing, it is sensible for a liquidator to make a pre-emptive application to the High Court for more time pursuant to section 56(2)."*

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,* albeit with the suggestion, at 633, that within the constraints of as. 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. In the present case, given that this Court has adjudicated on the s. 150 application that is the subject of these proceedings and found that no restriction order is merited, no purpose is served by declining the liquidator's application for an extension of time and thus the court grants the extension sought.