Neutral Citation: [2014] IEHC 317

THE HIGH COURT

[2012 No.158 COS]

IN THE MATTER OF ACCESS CLEANING SERVICES LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS, 1963 TO 2009 AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT, 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001

BETWEEN

DAVID VAN DESSEL

APPLICANT

AND

CHRISTOPHER GILL AND MARTIN GILL

RESPONDENTS

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

1. This is an application for a restriction order under s.150 of the Companies Act 1990, as amended, in respect of Mr. Christopher Gill and Mr. Martin Gill. At the hearings, the application focused on the failure of Access Cleaning Services Limited, the company of which Messrs. Gill were directors, to meet certain of its tax liabilities.

Facts

2. Mr. Christopher Gill and Mr. Martin Gill are former directors of Access Cleaning, a company that provided industrial cleaning services whereby its staff would attend offices and industrial premises and carry out cleaning duties. Mr. Martin Gill was the principal moving force within the company. Mr. Christopher Gill is his father. Access Cleaning traded between the date of its incorporation on 1st April, 2008, and the date of the making of the winding-up order in respect of Access Cleaning on 16th April, 2012, at which time it had an impressive 15 employees. As of 31st May, 2009, Access Cleaning incurred a loss of €41,974. Between 1st June, 2009 and 31st May, 2010 it incurred a further loss of €67,603. In the following year to 31st May, 2011, it made a profit of €2,680. So by any measure, in its last full year of trading before winding-up, Access Cleaning experienced a considerable turnaround. At the time of its winding-up, Access Cleaning had outstanding revenue liabilities of €57,433. These appear to have accrued from about December 2009 and the liquidator, in his affidavit evidence, offers his professional opinion "*that the day to day operations of the Company were in all probability part financed by the arrears of taxes owing to the Revenue Commissioners*."

3. Notably, however, its operations were also funded by a €35,000 capital injection that Mr. Martin Gill injected into the company in or about 2010 and which was, it seems, due to be followed by a further €30,000 that he was seeking to raise at the time that the company went into liquidation, at which time it apparently had a healthy order and ledger book with an amount of approximately €50,000 owing to it from debtors. These last two sums would likely have significantly reduced the liabilities of Access Cleaning to the Revenue Commissioners. Belatedly, but again notably, Mr. Martin Gill of his own volition, engaged with the Revenue Commissioners, in or about February 2012, offering to deal with the outstanding revenue debt on an instalment basis over two years. Perhaps surprisingly, this proposal was rejected by the Revenue Commissioners, though in fairness they had apparently sought on several previous occasions to deal with Access Cleaning regarding its tax liabilities. In the end the company was wound up at the behest of the Revenue Commissioners.

4. 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. Christopher Gill and Mr. Martin Gill have acted (a) honestly and (b) responsibly in relation to the conduct of the affairs of Access Cleaning and (c) there is no other reason why it would be just and equitable that either of them should be the subject of an order made under s.150. It appeared to the court at the hearing of this application that there were and are two issues arising in respect of Mr. Christopher Gill and Mr. Martin Gill, namely whether they acted honestly and responsibly in relation to the conduct of the affairs of Access Cleaning, in particular as regards the discharge by the company of its revenue liabilities. It does not appear to the court that there is any other reason why either gentleman would be the subject of a section 150 order.

Principles to be applied

5. 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 *Re 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 a s.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."

6. 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 a s.150 order should issue. All of the quoted terms bear their ordinary meaning. As mentioned above, there are no 'just and equitable' grounds arising in this case. In deciding whether either or both of Mr. Christopher Gill and Mr. Martin Gill have acted responsibly the court may of course have regard to their respective obligations as directors, 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 their respective actions.

Late/non-payment of taxes

7. 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 invariably as evidence of dishonesty or irresponsibility? In *Duignan v. Carway* (Unreported, High Court, 23rd January, 2002), McCracken J. was confronted with a company that appeared to have traded on monies that were due to the Revenue Commissioners. Per McCracken J:

"[I]t is clear that at least from the beginning of 1993 this Company was being kept alive by the fact that it was in effect trading on monies due to the Revenue, and allowing huge arrears to build up, together with the attendant interest. Quite astonishingly…[counsel] attempted to justify this situation by arguing that if a company is temporarily short of funds, it may be justified in not paying the Revenue and in effect taking a loan on interest to keep the company going. P.A.Y.E. and P.R.S.I. are monies which a company pays to the Revenue on behalf of its employees, and constitutes its employees tax and its employees social insurance. To try to justify trading by using what is in effect its employees money without their knowledge or consent, is to me a quite bizarre and totally irresponsible attitude. This appears to have been a policy of the Board of Directors, and this is not something which can be attributed to any one particular director. On this ground alone I have no doubt that the directors must be restricted under Section 150."

8. Neither of the directors in this case has sought to justify the non-payment of Access Cleaning's revenue liabilities in the manner described above. Nor were the revenue arrears arising, though not insignificant, ever of a scale that they could, to use the phraseology of McCracken J. in *Duignan*, be described as "*huge arrears*". Moreover it is notable in this case that, however belatedly, a genuine attempt was made to address the issue of revenue liabilities at a time when the company had begun to return to profit, when an injection of fresh capital appears to have been imminent, and when the company apparently had a healthy order and ledger book, a combination of factors that would have strengthened its capacity to meet the very revenue liabilities that it was seeking to settle. Every effort was made to turn the company from loss-making to profit-making and these succeeded. If the actions of the directors of Access Cleaning were reproachable, and they most certainly were, they do not appear to the court to be as flagrant as the actions of the directors in the *Duignan* case, they do not appear ever to have been justified by reference to the type of logic that McCracken J. in his judgment describes as "*bizarre and totally irresponsible*", and they do not appear to entail the dishonesty or irresponsibility necessary to place the directors in breach of section 150.

9. In *In the Matter of Digital Channel Partners Ltd. (in voluntary liquidation)* [2004] 2 I.L.R.M. 35, Finlay Geoghegan J., at 40ff., 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."

10. Taxes due should be paid. Yet in her judgment, Finlay Geoghegan J. appears to adopt a less condemnatory view to the non-payment of tax liabilities than was evinced by McCracken J. in *Duignan*. She countenances that there are situations where the non-payment of taxes may not of itself preclude a finding that a director has acted responsibly and honestly. She looks for other circumstances to justify such a finding, such as a total disregard of revenue obligations or a positive decision to seek effectively to use tax liabilities for the purpose of financing a company. In the present case, there was not a total disregard of revenue obligations by Access Cleaning: those obligations appear to have been met to around end-2009 and, belatedly but voluntarily, Mr. Martin Gill sought to put an instalment agreement in place with the Revenue Commissioners whereby the company would discharge its accrued revenue liabilities over time at a time when it appears that Access Cleaning was, or was close to being, in a position to pay such instalments. Moreover, rather than there being a conscious decision, if there was indeed a decision, to use revenue liabilities to finance Access Cleaning, Mr. Martin Gill had invested a substantial sum of money into Access Cleaning and was looking to raise another, all of which suggests that there was a deep level of personal commitment to keeping the company in operation from entirely legitimate sources of capital. It is worth noting too that Finlay Geoghegan J. at no point suggests that there are no mitigating factors which might allay the need for a section 150 order, even in the circumstances she describes as otherwise justifying a finding that a director acted irresponsibly and dishonestly, factors such as an eventual, voluntary effort to meet the tax obligations arising and a sustained effort to fund a company from entirely legitimate sources of capital, all of which factors are present here. Again, the behaviour of Mr. Christopher Gill and Mr. Martin Gill appears to the court to be highly reproachable in this regard, yet not to be dishonest or irresponsible.

Refusal of declaration

11. 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. Christopher Gill or Mr. Martin Gill, and declines to do so.

Proceedings brought out of time

12. The applicant liquidator avers that he made his first report to the Director of Corporate Enforcement on 16th October, 2012. His notice of motion grounding the present proceedings issued on 8th January, 2013, just over a week short of three months from the date that report was made. Pursuant to s.56(2) of the Company Law Enforcement Act, 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 liquidator has relieved the liquidator of the obligation to make such an application."

13. The position as regards bringing section 150 proceedings early is qualitatively different from bringing them late. This is because the court has power under s.56(2) to extend the period for the bringing of proceedings to a later time but has no power to extend the period so that it encompasses an earlier time. A question might perhaps be raised as to why legislation would contemplate tolerating the tardy, yet seek invariably to punish the prompt. Regardless of this, however, insofar as the validity of the instant proceedings is concerned, the court respectfully agrees with the view proffered by Finlay Geoghegan J. in *Coyle v. Hughes* [2003] 2 I.R. 627, that the bringing of proceedings outside the timeframe, in this instance before the timeframe, contemplated by section 56(2), does and did not, as was contended by Mr. Martin Gill, require a dismissal of the instant proceedings or, indeed, otherwise invalidate them.