Neutral Citation No. [2005] IEHC 63

THE HIGH COURT

[2002 No. 438 COS]

IN THE MATTER OF
MITEK HOLDINGS LIMITED
(FORMERLY KNOWN AS ANTIGEN HOLDINGS LIMITED)
MITEK PHARMACEUTICALS LIMITED
(FORMERLY KNOWN AS ANTIGEN PHARMACEUTICALS LIMITED)
CASTLEHOLDING INVESTMENT COMPANY LIMITED
MITEK LIMITED (FORMERLY KNOWN AS ANTIGEN LIMITED)
(ALL IN LIQUIDATION)
AND IN THE MATTER OF
MIZA IRELAND LIMITED (IN LIQUIDATION), A RELATED COMPANY
AND IN THE MATTER OF
THE COMPANIES ACTS, 1963 – 2001,
AND IN THE MATTER OF
SECTION 150 OF THE COMPANIES ACT, 1990, AND
SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001,

BETWEEN

TOM GRACE, LIQUIDATOR

APPLICANT

AND
JACK KACHKAR, ROBERT McCLELLAN CARRIGAN AND
MARY BUCKLEY

RESPONDENTS

Judgment of Ms. Justice Finlay Geoghegan delivered on the 21st day of February, 2005.

1. The applicant is the official liquidator of each of the companies named in the title. He was so appointed by order of the High Court made on the 11th December, 2002. Prior to that he had been examiner, appointed by the High Court, of each of those companies.

2. This judgment relates to his application under s. 150 of the Companies Act, 1990, for a declaration of restriction in respect of each of the first and second named respondents, Mr. Kachkar and Mr. Carrigan.

3. It is undisputed that each of Mr. Kachkar and Mr. Carrigan were directors of each of the companies named in the title within twelve months of the date of commencement of the winding up. It is further undisputed that each of the companies is insolvent and accordingly s. 150 of the Act of 1990 applies to each of the companies and to Mr. Kachkar and Mr. Carrigan.

4. The liquidator made reports to the Director of Corporate Enforcement under s. 56 of the Company Law Enforcement Act, 2001, and was not relieved of his obligations to bring these applications.

Background facts

5. Miza Ireland Limited is the holding company of the other four companies ("the Irish Miza Group"). The Irish Miza Group was a manufacturer of branded and non-branded generic pharmaceutical products. All products were manufactured by Mitek Pharmaceuticals Limited.

Miza Ireland Limited is a wholly owned subsidiary of Miza Pharmaceuticals Inc. ("Miza Inc.") a company incorporated and registered in Canada.

6. The companies in the Irish Miza Group (other than Miza Ireland Ltd.) were formerly part of the Antigen Group along with a least three other Irish companies. The Antigen Group had similarly manufactured in Ireland branded and non-branded generic pharmaceutical products. The additional companies had responsibility for the sale and distribution of generic and branded pharmaceutical products manufactured by the Antigen Group worldwide.

7. The former Antigen Group companies were required to upgrade their Irish manufacturing processes in order to comply with standards required by the Irish Medicines Board. This necessitated the closure of the pharmaceutical production facility in July 2000 with consequent adverse effects on revenue. It would appear, as a direct result of this, the High Court was petitioned in May 2001 for the appointment of an examiner to the Antigen Group. On the 9th May, 2001, Mr. Jason Sheehy ("the Examiner") was appointed interim examiner and his appointment was subsequently confirmed on 28th May, 2001.

8. A scheme of arrangement was formulated by the Examiner and put before the creditors in August 2001. It provided for the payment in full to the creditors of the principal sums over a period of time ranging from 3 months to 30 months. The investor for the scheme of arrangement was a joint venture between Miza Inc. and Goldshield. In essence they (or their subsidiaries) were to provide a total of approximately IR£24m for the purpose of funding the acquisition of the Antigen Group from Mr. George Fasenfeld, the shareholder in Antigen Holdings Limited, for the sum of IR£6.7m and to fund the creditors in the scheme of arrangement amounting to IR£17.3m. The above scheme of arrangement was approved by the creditors. It was to be implemented by a complicated series of agreements and transactions.

9. The scheme of arrangement was approved by the High Court on the 8th November, 2001. Thereafter the agreements already entered into commenced to be implemented and certain further agreements were entered into. The effect of these agreements and their preliminary implementation may be summarised as follows for the purposes of this application.

10. Goldshield through a subsidiary, Startville Limited, acquired the shares in three companies then owned by Antigen Holdings Limited concerned with the marketing, distribution and sale of the pharmaceutical products. Startville Limited paid IR£6.7m for the product licences, authorisations, goodwill and finish stock of Antigen Pharmaceuticals Limited and certain equipment of Antigen Limited. This sum was paid to Antigen Holdings Limited which in turn loaned it to Miza Ireland Limited which used it to acquire the shares held by George Fasenfeld in the Antigen Group.

11. A manufacturing and supply agreement was entered into between Miza Ireland Limited, Goldshield Group plc and Miza Inc. pursuant to which the Irish Miza Group was to sell and Goldshield was to purchase all of its production. Gross margins were provided for under the agreement.

12. There is a difference on the affidavits between the liquidator and Mr. Kachkar as to the true meaning and import of the agreements in relation to the provision of the funding by Miza Inc. and its subsidiaries on the one hand and Goldshield on the other for the sums due to creditors under the scheme of arrangement. The liquidator contends that the agreements required the sums to be provided on an equal basis by Miza Inc. and Goldshield through its subsidiaries whereas Mr. Kachkar essentially takes the view that in accordance with a KPMG report done in November 2001 the sums due under the scheme of arrangement should have been capable of being financed out of the monies to be paid by Goldshield for the product manufactured by the Irish Miza Group with the addition of a small asset-based loan of approximately IR£1.5m. It is not necessary for me for the purposes of this application to determine the precise contractual obligations.

13. Notwithstanding the agreements put in place in November 2001 there appears to have been a delay in the implementation of the new relationships and production arrangements in the first quarter of 2002. Mr. Kachkar appears to blame this at least in part on Goldshield and again I need not resolve this.

14. The first payment under the scheme of arrangement to creditors was due on the 12th February, 2002. The Irish Miza Group defaulted in paying the full amounts then due. Difficulties arose between the Irish Miza Group and Goldshield in relation to the production agreement and cashflow in the Irish Miza Group deteriorated.

15. It appears from the facts set out in the affidavit that at the same time Miza Inc. was involved in a major financing initiative in Canada. It appears that this was intended to fund worldwide operations and capital investments of the Miza Group including those in Ireland. Preliminary confirmation of financing was received from Genstar Capital in the US in the summer of 2002 which with Genstar's consent was notified to Miza's creditors.

16. Following the Genstar commitment CCL Industries Inc. ("CCL") a Miza Inc. shareholder agreed to provide Miza companies with interim financing of $3m. Of this Miza Inc. made available to the Irish Miza Group a total of approximately $1m in two tranches of €795,832.29 and €201,481.81 respectively at the end of July 2002. However, over the following month approximately the Irish Miza Group appear to have transferred out €501,526 to Miza Inc. and Miza U.K. In August 2002 Genstar decided not to proceed with the financing. There were continuing disputes between Miza Inc. and Goldshield. The perilous state of the Irish Miza Group was recognised by the directors at latest in early September 2002. The first meetings of directors of which minutes were produced were held on 9th and 10th September, 2002.

17. Subsequently in September 2002 attempts appear to have been made by the then Irish management of the Irish Miza Group (who were not directors of any of the companies named in the title) and representatives of Goldshield and CCL to procure investments/funding for the Irish Miza Group. Relations between Mr. Kachkar and Mr. Carrigan on the one hand and the Irish management on the other appear to have broken down at this time and pursuant to a request made by the Irish management with the support of representatives of Goldshield and CCL Mr. Kachkar and Mr. Carrigan resigned as directors on the 9th October, 2002.

18. On the 29th October, 2002, the liquidator was appointed as interim examiner on the petition of the Bank of Ireland and the Bank of Scotland (Ireland) Limited and on the 11th December, 2002, following an unsuccessful examinership, he was appointed official liquidator of each of the companies.

Issues

19. On the facts set out in the affidavits filed herein no issue arises as to the honesty of Mr. Kachkar and Mr. Carrigan in relation to the conduct of the affairs of each of the five companies in the Irish Miza Group whilst they were directors of same. This is acknowledged by the liquidator pursuant to his investigations and I am so satisfied. The liquidator, in accordance with the practice direction in relation to applications under s. 150 has raised matters for consideration by the court under four headings which he submits mean that Mr. Kachkar and Mr. Carrigan cannot discharge the onus placed on them by s. 150 of the Act of 1990 of establishing to the satisfaction of the court that they acted responsibly as directors of the companies.

> 1. As directors of Miza Ireland Limited (to which they had been appointed on 2nd November, 2001) they put up to the High Court a scheme of arrangement which was dependent on investment from Miza Inc. when they had not in place funding for Miza Inc. which would permit such investments to be made.
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> 2. Mr. Kachkar and Mr. Carrigan either permitted or directed the payment from the Irish companies of significant sums of money and assets in the order of €2.8m. It is contended that these were transferred on the basis of inter-company charges but with no real basis for same, that the companies were insolvent at the time the transfers were made and also at the same time unable to make the payments due to the scheme creditors.
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> 3. Mr. Kachkar and Mr. Carrigan procured that the Irish companies give two sets of securities at a time when they were insolvent: firstly, a composite guarantee and mortgage debenture between the Irish companies and Miza Inc. on 11th December, 2001 and, secondly, a composite guarantee and mortgage debenture between the Irish companies and CCL Industries Inc. on 13th September, 2002.
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> 4. Mr. Kachkar and Mr. Carrigan permitted the Irish companies to continue to trade whilst insolvent and it is submitted that it was irresponsible to permit the continued trading after February 2002. It is contended that the creditors of the companies have been adversely affected in that there has been an increase of approximately IR£9m between the amount due to creditors under the scheme of arrangement and that due at the commencement of the winding up.

Applicable law

20. Section 150 of the Act of 1990 imposes a mandatory obligation on the High Court to make a declaration of restriction unless the court is satisfied "as to any of the matters specified in sub-s. (2)". The relevant matters to this application are "that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company . . .".

21. An application such as this brought by a liquidator under s. 150 (4) pursuant to his obligation under s. 56 of the Act of 2001, is not a normal *inter partes* adversarial application. The onus of establishing that he/she acts responsibly rests on the director. Whilst in practical terms a director may primarily seek to address the matters raised by the liquidator, pursuant to the practice direction referred, the director is not relieved of the general onus established by s. 150 of the Act of 1990.

22. The matters to which the court should have regard in determining the responsibility of a director for the purposes of s.150(2)(a), as set out by Shanley J. in *La Moselle Clothing Limited v. Soualhi* [1998] 2 I.L.R.M. 345 and as approved by the Supreme Court in *Re*

Squash (Ireland) Limited [2001] 3 I.R. 35, are:

> "(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.
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> (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.
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> (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.

23. In a judgment given in the matter of *Tralee Beef and Lamb Limited (In Liquidation),* Unreported, High Court, Finlay Geoghegan J., 20th July, 2004, I concluded that the court under para. (a) above should also have regard to the duties imposed on a director at common law. Further, in that case I agreed with the general formulation of the duty of an individual director as stated by Jonathan Parker J. in *Re Barings plc. and Ors. (No.5)*; *Secretary of State for Trade and Industry v Baker and Ors* [1999] 1 BCLC 433 in the following terms:

> "Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them."

24. In a judgment given in the matter of *360atlantic (Ireland) Limited (In receivership and liquidation)*, Unreported, High Court, Finlay Geoghegan J., 21st December 2004, I considered albeit on a very different factual basis the possibility of differing principles applying to persons who were directors of wholly owned Irish subsidiaries within a worldwide group and at the same time directors of other companies within the group. In that judgment I made the following observations which appear relevant to the issues I have to consider herein:-

> "The fact that the Company is a wholly owned subsidiary within a worldwide group does not appear to alter the legal principles applicable to the duties of directors but rather to create a particular factual scenario which must be taken into account when considering the discharge of those duties."
>
> ["…"]
>
> . . . it would appear totally permissible and indeed a proper exercise of the duties of directors in the interests of the [Irish] Company for the directors to fully take into account and indeed even to follow the policies adopted for the entire group when managing the business of the Irish Company."
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> ["…"]
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> Accordingly it appears to me that where a group corporate structure exists, such as in the present case, and the issue under s.150 of the Act of 1990 is whether a director of the wholly owned Irish subsidiary company acted responsibly in the sense of discharging the minimum common law duties, he must be able to establish at a minimum that he did inform himself about the affairs of the Irish subsidiary company as distinct from any other company within the group and together with his fellow directors that he did take real steps to consider and take decisions upon at least significant transactions to be entered into or projects undertaken by the Irish subsidiary company. There must be evidence of a real consideration by the directors of whether significant transactions or operations to be undertaken were desirable in the interest of the Irish subsidiary company or could be said to be for the benefit of the Irish subsidiary company. I readily recognise that in many instances the interests of the Irish subsidiary company may be so intertwined with the affairs of the group as a whole that the answer may be obvious. However, the fact that the answer is obvious does not appear to absolve the directors from at least addressing the question.
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> If the issue of the responsibility relates to the nature of decisions taken (which it does not on the facts of this application) as distinct from the absence of any decisions different and further considerations may apply. It is not necessary to consider those on the facts of this case."

25. On the facts of this case it may be that the nature of the decisions taken may arise. Further consideration is given to this below.

Conclusions

26. I have considered the entire tenure of Mr. Kachkar and Mr. Carrigan as directors of Miza Ireland Limited and other companies within the Irish Miza Group as I am bound to do in accordance with the decision of the Supreme Court in *Re Squash (Ireland) Limited* [2001] 3 I.R. 35. Each were directors of each of the companies for a period of between ten and eleven months. Each were appointed directors of the five companies named in the title on varying dates in November and December 2001 and each resigned as directors of all the companies in October 2002.

27. I have also taken into account the fact that each of Mr. Kachkar and Mr. Carrigan were executive directors of other companies within the worldwide Miza Group. Each have stated on affidavit, and I accept, that they were under obligations to all the companies within the Miza Group and had to "ensure that each company within the Miza Group succeeded". In accordance with the above principles it appears appropriate that this fact should be taken into account.

28. I have also taken into account that fact that Mr. Kachkar and Mr. Carrigan were the only executives within the Miza Group to be directors of the Irish Miza Group. The only other director of four of the companies named in the title was Ms. Buckley who was a non-executive director. She was invited to become a director to fulfil the requirement of an Irish resident director. She appears to have been introduced through her brother who acted as consultant to the Miza Group in Canada. Mr. Kachkar and Mr. Carrigan have very properly accepted on affidavit that they were more familiar with the detailed affairs of the Miza Group and the Irish Miza Group and in particular the financial matters than Ms. Buckley.

29. I must also take into account the fact the Mr. Kachkar and Mr. Carrigan were appointed as directors of the Irish Miza Group at a time when that company was coming out of examinership and had obligations under a scheme of arrangement which had been put to

and approved by the High Court with their support. Whilst I do not consider that their support for the scheme without funding available to Miza Inc. would preclude the court finding they acted responsibly as directors of the Irish Companies it is a relevant fact in considering their actions as directors of the companies named in the title hereof in the subsequent period. The Irish Miza Group were companies in straitened financial circumstances at the end of 2001 and dependent upon the success of the proposed scheme of arrangement and joint investment from Miza Inc. and Goldshield for their survival. Even on Mr. Kachkar's view of the joint investment arrangements he envisaged that in addition to monies coming from Goldshield pursuant to the production agreement the Irish Miza group would need a loan of about £1.5m.

30. I do not consider that the continued trading after February 2002 of itself precludes the Court from finding that Mr. Kachkar and Mr. Carrigan acted responsibly as directors as submitted by the liquidator. As previously decided, the court must be very careful not to judge such decisions made by directors with the benefit of hindsight. The delay in the resolution of issues with Goldshield and approaching finality and perceived improvements in production probably justified continued trading. However, the precarious financial position of the Irish Miza Group after February 2002 must be taken into account when considering the appropriate control and supervision of the financial affairs of the Irish Miza group required of the directors to discharge their common law duty of care.

31. I have concluded on the facts set out in the affidavits that Mr. Kachkar and Mr. Carrigan have failed to discharge the onus on them to satisfy the court that as directors of each of the five companies named in the title to these proceedings they acted responsibly in relation to the conduct of the affairs of such companies.

32. I wish to make clear that this Court is only considering whether Mr. Kachkar and Mr. Carrigan have satisfied the Court that they acted responsibly in relation to the conduct of the affairs of the five Irish Miza Group companies. The Court is not considering their actions as directors or senior executives of any other companies within the Miza Group. It is only taking those positions into account in the limited sense of giving rise to what may have been from time to time competing obligations.

33. There are significant disputes between Mr. Kachkar and Mr. Carrigan on the one hand and Mr. Michael Cormack on the other, in relation to facts pertaining in particular to transfer of monies from the Irish Miza Group to Miza companies in Canada, US and UK and the basis for same. However, even on the picture of financial control and management which emerges from the affidavits of Mr. Kachkar and Mr. Carrigan and in particular relating to intra-group corporate charges and transfers out of Ireland to other Miza Group companies and the granting of security in September 2002 to CCL Industries the Court could not be satisfied that they acted responsibly in relation to the control and supervision of the financial affairs of the Irish company.

34. Mr. Cormack was the financial controller of Mitek Pharmaceuticals Limited, the only trading company in the Irish Miza Group. Both Mr. Kachkar and Mr. Carrigan seek to distance themselves from any control of Mr. Cormack. In the Miza worldwide group structure he appears to have reported directly to Mr. John Van Scheppen, the chief financial officer of Miza Inc. Mr. Van Scheppen held no position in the Irish Miza Group. Notwithstanding this it appears that he was the person who primarily gave directions to Mr. Cormack in relation to financial matters in the Irish Miza Group. Mr. Kachkar and Mr. Carrigan as directors of the companies in the Irish Miza Group do not appear between February 2002 and August 2002 to have taken steps to supervise and control the financial affairs of the Irish Miza companies particularly in relation to transfers of monies from it to other companies within the Miza worldwide group. There is no evidence that Mr. Kachkar and Mr. Carrigan as directors of the Irish companies took any decision in this period as to the appropriateness of the transfers being directed having regard to the then financial situation of the Irish companies. There are limited examples of Mr. Kachkar directing Mr. Cormack to make such transfers but these appear to relate to the needs of other companies within the Miza Group.

35. In February 2002 the Irish companies failed to discharge the full amount due, at that date, to the creditors under the scheme of arrangement. There also had been delay in finalising the segregation of the manufacturing and marketing arms of the business in accordance with the agreements with Goldshield. This delay and alleged lack of funding by Goldshield is blamed for some of the financial difficulties of the Irish Miza Group in this period. I am prepared to accept that these factors may have contributed to the difficult financial situation then pertaining in the Irish Miza Group. However, if anything this increased the obligations on Mr. Kachkar and Mr. Carrigan as directors of the Irish companies to control and supervise the financial affairs of those companies. I am satisfied as a matter of probability that monies or debts aggregating approximately €2.8m were transferred out of the Irish Miza Group to Miza companies in the UK, US and Canada between February 2002 and August 2002. Against this there were loans made at the end of July 2002 of approximately €1m from Miza Inc.

36. Much of the dispute in the affidavit centred on whether or not the Miza Group applied a system of corporate charges to the Irish Miza Group in 2002. I accept on the affidavits that as a matter of probability at Mr. Van Scheppen's direction there were included in the budget and accounts for the Irish Miza Group corporate charges to other Miza companies. However even if the work done by executives of other Miza companies for the Irish Miza Group was such as to justify the imposition of corporate charges there is a quite separate question as to the appropriateness of the Irish companies making payments to meet such charges in the period between February 2002 and August 2002 when the Irish companies were unable to pay the amounts due to the creditors under the scheme of arrangement and were under very considerable financial pressure from its own suppliers. There is no evidence in this period of Mr. Kachkar and Mr. Carrigan either considering or taking a decision as to whether such payments at the relevant times were appropriate and justified in the interest of the Irish Miza Group. Even if there were competing demands from other Miza companies to which they had obligations, at minimum they must be considered to be under an obligation to consider the issue as directors of the Irish companies. Further there is no evidence that they considered the amount of such charges from the perspective of the Irish Miza Group.

37. By the beginning of September 2002 Mr. Kachkar and Mr. Carrigan were properly concerned about the ability of the Irish Miza Group to continue trading. Notwithstanding this, on the 13th September, 2002, a debenture creating security over the Irish Miza Group was given in favour of CCL Industries Inc. This is justified as being based on an earlier contractual commitment. Such commitment appears to have been a commitment by Miza Inc. There is no real explanation offered by Mr. Kachkar and Mr. Carrigan as to how they considered it proper to issue a debenture in favour of CCL Industries Limited on the 13th September, 2002, in the light of the very proper discussions which appear to have taken place between the full board (via telephonic meeting) on the 9th and 10th September. In the absence of very clear explanations the Court could not be satisfied that Mr. Kachkar and Mr. Carrigan had acted responsibly in issuing the debenture.

38. Not being satisfied that Mr. Kachkar and Mr. Carrigan acted responsibly as directors in relation to the conduct of the affairs of the companies named in the title hereof, the Court is bound to make the declarations sought.