

THE HIGH COURT

[2013 No. 398 COS]

**IN THE MATTER OF CITYWEST HIRE LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2012
AND IN THE MATTER OF AN APPLICATION BY MYLES KIRBY UNDER SECTION 139 OF THE COMPANIES ACT 1990 AND SECTION
298 OF THE COMPANIES ACT 1963**

BETWEEN

MYLES KIRBY (AS LIQUIDATOR OF CITYWEST HIRE LIMITED) (IN LIQUIDATION)

APPLICANT

AND

PETROLO LIMITED AND JEFFREY STOKES

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 26th day of May 2014.

Background

1. The applicant was appointed Official Liquidator of Citywest Hire Ltd. ("Citywest") by order of the Court made on 23rd September, 2013, pursuant to a petition presented by the Revenue Commissioners.
2. Citywest traded a restaurant known as Il Segreto from a leased premises on Merrion Row, Dublin 2, from March 2011 until 9th June, 2013. The second named respondent, Jeffrey Stokes ("Mr. Stokes"), together with Giorgio Casari ("Mr. Casari") were directors of Citywest.
3. Petrolo Ltd., the first named respondent ("Petrolo"), is a company which traded the Unicorn Restaurant from June 2013, in succession to Vino Classico Ltd. (in liquidation). The Liquidator was appointed Official Liquidator, also, of Vino Classico Ltd. by order of the High Court of 24th September, 2013, pursuant to a petition also presented by the Revenue Commissioners. Ms. Pia Bang-Stokes, the wife of Mr. Stokes, is a director and the sole shareholder of Petrolo. At the date of commencement of this application, Petrolo continued to trade the Unicorn Restaurant.
4. This judgment is given on an application by the Liquidator for orders against Petrolo and/or Mr. Stokes pursuant to s. 139 of the Companies Act 1990 that it and/or he deliver up a sum of €63,048.25 to the Liquidator. The Liquidator also seeks declarations that Mr. Stokes has been guilty of misfeasance and/or a breach of duty within the meaning of s. 298 of the Companies Act 1963, and an order that he pay the said sum pursuant to s. 298 to Citywest.
5. The application was heard on affidavit evidence of the Liquidator, Mr. Stokes and one affidavit from Mr. Casari. The affidavits make clear that there was a significant falling out between Mr. Casari, on the one hand, and Mr. Stokes and his wife, on the other, some time prior to the events giving rise to this application, notwithstanding that they had previously worked together in the restaurant business for approximately twenty years. The affidavits canvass a number of factual matters which are not directly relevant to the determination of the Liquidator's present application. The Court is not making any finding of fact in relation to the disputes between Mr. Casari and Mr. Stokes and Ms. Bang-Stokes.
6. The Liquidator, in his affidavits, has also made reference to the role of Mr. Stokes' sons, Christian Stokes and Simon Stokes, who were employed as restaurant managers of the Il Segreto Restaurant and who are the subject of orders made by this Court in January 2012 pursuant to s. 160 of the Companies Act 1990. No application is made against Mr. Christian Stokes or Mr. Simon Stokes, and in reaching its determination herein, the Court has not taken into account matters referred to by the Liquidator concerning any prior activity of either Mr. Christian Stokes or Mr. Simon Stokes.
7. There are certain facts which do not appear to be in dispute which are central to the present application. In summary, they are as follows.
8. By May, 2013, Mr. Stokes and Mr. Casari were in dispute.
9. Citywest maintained a Current Account with AIB. It used two credit card machines in the Il Segreto Restaurant. The credit card transactions were linked to the AIB Current Account. Citywest sales were recorded on till receipts printed off on a daily basis in the restaurant and a cash control sheet prepared each day for the purpose of reconciling total takings *per* the till receipts against the cash and credit card lodgements.
10. No credit card or cash sales were lodged to Citywest's AIB Current Account from 30th May, 2013, to 9th June, 2013. On 10th June, 2013, the landlord of the Il Segreto Restaurant repossessed the premises and Citywest ceased trading the restaurant.
11. Subsequent to the appointment of the Liquidator, the landlord handed over to him a credit card machine he had found on the premises on 10th June, 2013. This was a credit card machine of Petrolo.
12. The Liquidator ascertained from the records of Citywest delivered to him in November 2013 that cash sheets of Citywest in relation to Il Segreto commencing on 30th May, 2013, record cash and credit card sales "lodged to Petrolo No. 1 account".
13. The Liquidator, from the records of Citywest, conducted an analysis of the cash sheet totals to bank lodgements for the period from 28th May, 2013 to 10th June, 2013, which is exhibited as MK10 to his grounding affidavit. This discloses a net sum of €63,048.25 lodged from the till takings of Il Segreto to the Petrolo account between 30th May, 2013 and 10th June, 2013.

14. It is not in dispute for the purposes of this application that the said sum of €63,048.25 was the property of Citywest and was lodged to the Current Account of Petrolo.

15. The Liquidator has also ascertained that on 21st May, 2013, the Revenue Commissioners put an attachment order on the AIB Current Account of Citywest for an outstanding sum of €21,879.04. Those monies were paid to the Revenue Commissioners from the AIB Current Account on 30th May, 2013. The Revenue Commissioners also served a final demand letter dated 21st May, 2013, on Citywest seeking payment within seven days of unpaid PAYE/PRSI in the sum of €136,728.19.

16. When the landlord re-entered the premises in which Citywest traded as the Il Segreto Restaurant on 10th June, 2013, the employees of Citywest transferred to Petrolo and Petrolo, thereafter traded the Unicorn Restaurant, which is around the corner from Il Segreto. The Unicorn Restaurant had previously been traded by Vino Classico Ltd., now in liquidation.

17. Whilst it is not in dispute that €63,048.25, the property of Citywest, was paid in to the Current Account of Petrolo, both the motive and reasons for the use of the Petrolo account and the subsequent use to which the monies were put are in dispute. Prior to considering the factual disputes, I propose setting out the applicable law.

Section 139 of the Companies Act 1990

18. Section 139 provides:

"139.—(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—

(a) 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

(b) 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."

19. As pointed out by Laffoy J. in *Devey Enterprises Ltd. v. Devey* [2011] IEHC 340, [2012] 1 I.R. 127, it is a section which has given rise to only a small number of judgments. In that judgment, Laffoy J. cites the annotation on s. 139 contained in McCann & Courtney, Companies Acts 1963 to 2009 (Dublin, 2010) which refers to an observation, albeit *obiter*, of the Supreme Court in *Re Comet Food Machinery Company Ltd. (In Liquidation)* [1999] 1 I.R. 485, to the effect that the section could be invoked if it were established that assets had been diverted with a view to frustrating a judgment against the company, and the decision in the High Court of Murphy J. in *Le Chatelaine Thudichum (In Liquidation) Ltd. v. Conway* [2008] IEHC 349, [2010] 1 I.R. 529. In that judgment, Murphy J., at p. 539, para. 35, accepted the submission that the fraud criterion in s. 139 of the Act of 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".

20. Counsel for both parties relied upon the High Court decisions in *Le Chatelaine Thudichum* and *Devey Enterprises* and no submission was made that the Court should depart from the approach of Murphy J. in *Le Chatelaine Thudichum*.

Conclusion

21. On the evidence adduced by the Liquidator herein, I find that he has established that €63,048.25, which was the property of Citywest, was disposed of by way of transfer to Petrolo, by the lodgement of both credit card receipts and cash to the Current Account of Petrolo. I am further satisfied that the effect of the lodgement of these monies to the account of Petrolo was to deprive Citywest of monies to which it was then entitled, being receipts from its business. Hence, the effect of the transfer of the monies was to perpetrate a fraud on Citywest within the meaning of s. 139(1)(b), and it is unnecessary for me to consider whether, on the facts herein, the transfer of the monies should also be considered as perpetrating a fraud on the creditors of the Company.

22. In accordance with s. 139(1), the finding that there was a disposal of €63,048.25, being property of the Company, the effect of which was to perpetrate a fraud on Citywest is to give the Court, *inter alia*, jurisdiction to make an order against "any person who appears to have the use, control or possession of such property" to pay a sum in respect of it to the Liquidator if the Court deems it just and equitable to do so.

23. The application is against Petrolo and Mr. Stokes. On the facts found, Petrolo is a company which appears to have had both the use and possession of the monies transferred. It is contended that Mr. Stokes had the control of the monies transferred. Whilst Mr. Stokes is not a director of Petrolo, he is a director of Citywest, and he made the replying affidavits on behalf of Petrolo and produced the relevant documentation from Petrolo, including its bank accounts. No submission was made on behalf of the respondents seeking to distinguish the position of Petrolo and Mr. Stokes in relation to the orders sought. On the facts before the Court, I am satisfied that Mr. Stokes is a person who appears to have had, at minimum, control over the monies transferred from Citywest into the bank account of Petrolo, and accordingly, is a person in respect of whom the Court may make an order that he pay to the Liquidator a sum in respect of the monies transferred if the Court deemed it just and equitable to do so. The Court is expressly directed by s. 139(3) of the 1990 Act in determining whether it is just and equitable to make an order under the section to 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.

24. The property in question in this application is monies which were the property of Citywest and which were transferred into the account of Petrolo. The facts do not support a proprietary claim, nor indeed was it made to the monies paid into the account. Rather, the issue for the Court is whether it is just and equitable on the facts before it to direct the respondents to pay a sum in respect of the monies transferred to the Liquidator.

25. The respondents contend that it is not just and equitable for the Court to make any such order. Whilst submissions were made as to the reasons for which the monies were paid into the Petrolo account, some of which were based upon facts which are disputed by

the Liquidator, the motivation does not appear directly relevant to the question as to whether it would now be just and equitable to make an order against the respondents to pay a sum of money to the Liquidator.

26. It is relevant, however, for the Court to consider the use to which the monies were put once paid into the Petrolo account. The respondents contend that the entire sum of €63,048.25 was paid out of the Petrolo account to discharge liabilities of Citywest. The alleged liabilities fall into two parts. Firstly, Mr. Stokes deposes that a sum of €32,233 was paid as salary to employees of Citywest. The Liquidator, in the analysis conducted by him, accepts as a matter of probability that sums aggregating €29,334.92 were paid to employees of Citywest by way of salary in the period between 30th May, 2013 and 10th June, 2013. The Liquidator disputes that the Court should even take this sum into account by reason of the fact that the employees were then transferred to Petrolo and contends that Petrolo may have had a liability to pay the wages of the employees under the Transfer of Undertakings Regulations.

27. Secondly, Mr. Stokes exhibits and deposes to payments made to creditors of Citywest, primarily, suppliers of its restaurant business between 24th May, 2013, and 18th June, 2013, in an aggregate sum of €30,871.31. The Liquidator disputes that there is proof that all the payments were made; disputes that the payments were made for the benefit of Citywest whilst trading the Il Segreto Restaurant and contends that many of the payments may have been made for the benefit of Petrolo and its trading of the Unicorn Restaurant. He points to the lack of proof and inconsistency between supplier statements received by him, as Liquidator, some of which he exhibits, and also the dates of invoices and payments. The Liquidator accepts proof of payment to creditors of Petrolo of €12,664.31.

28. Having considered carefully the evidence before the Court on affidavit, I have determined that the order which appears to me just and equitable now to make is an order that the respondents pay to the Liquidator a sum of €21,049.00. I have reached this conclusion for the following reasons.

29. On the evidence before the Court, the starting point of the Court's consideration must be the sum of €63,048.25 which was the property of Citywest and transferred to Petrolo. On the evidence before the Court, I find, on the balance of probabilities, that the sum of €29,334.92 was paid out of the Petrolo account to the employees of Citywest for the period up to and including 9th June, 2013, in which they were employed by and worked for the benefit of Citywest. It appears just and equitable that such sum should be excluded from any order for payment now to be made. I do not accept that the fact that the employees were subsequently transferred to Petrolo means the Court should not exclude this amount.

30. Similarly, on the facts before the Court, I find, on the balance of probabilities that a sum of €12,664.31 was paid to suppliers of Citywest in the period up to 10th June, 2013, for the purpose of the continued trading of Il Segreto Restaurant. Again, it appears just and equitable that this sum be excluded from any order for payment against the respondents. The total sum to be excluded is €41,999.23.

31. On the facts before the Court, I could not be satisfied that the respondents, upon whom the onus rests, have established as a matter of probability that additional payments were made out of the Petrolo account in June 2013, were for the exclusive benefit of Citywest trading as the Il Segreto Restaurant such that it would be just and equitable not to require payment to the Liquidator pursuant to s. 139(1) of the 1990 Act of a sum in respect thereof.

32. Accordingly, there will be an order that the respondents pay to the Liquidator the sum of €21,049 (the sum claimed of €63,048 less the excluded amounts of €41,999) pursuant to section 139(1).

33. I will hear counsel prior to fixing the date by which such payment should be made.

Section 298 of the Companies Act 1963

34. The Liquidator seeks, in the alternative or in addition, an order against Mr. Stokes pursuant to s. 298 of the Companies Act 1963. The motivation of Mr. Stokes and the reasons for which use was made of the Petrolo account in June 2013, are directly relevant to the determination of the application pursuant to s. 298 of the Companies Act 1963. It does not appear to me that the Court could fairly determine that application on affidavit evidence alone. However, I do not propose directing any further hearing or cross-examination on this issue as it is not warranted in the interests of the orderly winding up for the following reason. Even if the Court were to hold that Mr. Stokes was guilty of misfeasance and/or breach of duty within the meaning of s. 298 of the Companies Act 1963 (which I am not now determining), having regard to the findings made in relation to the use to which the monies transferred in the Petrolo account were put, it appears to me that the Court would not exercise its discretion to make any monetary order in excess of the sum of €21,049 against Mr. Stokes pursuant to s. 298(2) of the Companies Act 1963.