Neutral Citation Number: [2006] IEHC 198

THE HIGH COURT

[2003 No. 459 COS]

IN THE MATTER OF THE COMPANIES ACT, 1963 – 2001
AND IN THE MATTER OF DOHERTY ADVERTISING LIMITED (IN LIQUIDATION)

Judgment of Mr. Justice McGovern delivered on the 16th day of June, 2006

1. This matter comes before the court on foot two notices of motion. The first is dated 13th May, 2005 and the second, 11th July, 2005. It has been agreed between the parties that the applicant, Mr. James M. Guerin, is only proceeding with items 1, 6, 7 and 8 on the first notice of motion and upon all matters in the second notice of motion.

2. The motion proceeded by way of affidavit and in addition the applicant, Mr. Guerin, and the liquidator were cross examined on foot of their affidavits pursuant to notices of cross examination served by each of the parties.

3. I propose dealing with each of the items in the two notices of motion in the order in which they are presented.

> 1. The first relief sought by the applicant is an order determining whether or not the liquidator can pursue repayment of any monies paid to him by Doherty Advertising Limited (In Liquidation) from an A.I.B. bank account which contained money which did not belong to the company and has since been repaid to its rightful owners.

4. The relief sought is connected to some extent with an order made in this matter on 16th December, 2004, by Finlay Geoghegan J. In that order the Court approved pursuant to s. 231(1) of the Companies Act, 1963, a proposed settlement between the official liquidator and the applicant on the terms set forth in his affidavit subject to the applicant entering into a binding agreement with the official liquidator to pay to the credit of the winding up the sum of €38,000 together with interest thereon at the rate of 4% per annum from the 15th day of July, 2004, down to the date of payment in full and final settlement of intended proceedings against the applicant. Although the order refers to "the proposed settlement" it is contended on behalf of the liquidator that all that was required was for the agreement already reached between the parties to be set out in solemn form. The applicant on the other hand contends that no agreement has been reached between him and the liquidator and that, in particular, any agreement between them was subject to two conditions, not expressed in the correspondence, namely that the agreement would be confidential and that if the money connected to the A.I.B. account was repaid by the directors then he would have no liability. He also maintains that the agreement was subject to a formal written agreement being signed by both parties at the receipt of appropriate legal advice. (See para. 32 of the applicant's affidavit, filed 12th May, 2005).

5. There is extensive correspondence between the liquidator and the applicant from which I am satisfied that the applicant agreed to settle the liquidator's claims against him on the basis that he would pay a sum of €38,000 in full and final settlement of the liquidator's claim against him and that the sum would be paid over a period of time with interest payable at 4% commencing on 14th July, 2004. A letter to this effect was written by the liquidator to the applicant on 14th September, 2004. On 29th October, 2004, the applicant's solicitors wrote to the liquidator's solicitors confirming what they understood to be the terms and heads of agreement. While the terms included the payment of €38,000 in full and final settlement of all claims by the receiver and liquidator against their client and for stage payments it did not provide for interest. On 4th November, 2004, the liquidator's solicitors wrote to the applicant's solicitors referring to their letter of 29th October "purporting to set out the terms of agreement between our clients". The letter proceeded as follows:-

> "As your client is aware, the terms agreed ('the Agreement') between our clients are in fact as set out below.
>
> > 1. Your client will pay the sum of €38,000 in full and final settlement of all claims by the liquidator against your client.
> >
> > 2. The term of repayment is to be three years from the date of Court approval.
> >
> > 3. The settlement figure of €38,000 is to be subject to interest at a rate of 4% per annum, running from 15th July, 2004."

6. The letter later went on to say:-

> "The Agreement will be subject to the approval of the High Court."

7. The applicant was asked to confirm within seven days that it was in order to proceed to the High Court for the approval of the agreement in those terms. On 11th November, 2004, the applicant's solicitors replied in a short letter which said simply:-

> "Dear Sirs
>
> > We refer to the above and would be very much obliged if you would let us know when you have received the approval from the High Court.
>
> We look forward to hearing from you."

8. This, at the very least, suggested that they were not taking issue with anything in the terms proposed by the liquidator's solicitors.

9. On 16th November, 2004, the liquidator's solicitors wrote to the applicant's solicitors in the course of which they said:-

> "Can you please formally confirm that the terms set out in our letter of 4th inst. are in fact agreed by your client. When we receive confirmation of this will be in a position to apply to the High Court for approval."

10. On 29th November, 2004, the applicant's solicitors wrote saying:-

> "We refer to your previous correspondence and confirm agreement of the terms set out in your letter of 9th November, 2004."

11. As no letter of 9th November, 2004, was referred to in the affidavits or in the course of the application I assume that the reference to the "9th November, 04" should be a reference to the 4th November.

12. The application to the court took place on 16th December, 2004 and on 12th January, 2005, the liquidator's solicitors wrote as follows:-

> "Dear Sirs
>
> > We refer to the above matter and to recent correspondence resting with your letter to us dated 29th November, 2004, confirming agreement of the terms of settlement between our clients in our letter of 4th November, 2004.
> >
> > On 16th December, 2004, the High Court approved inter alia, the settlement agreed between our clients but directed that your client execute a Settlement Agreement reflecting the terms agreed. To that end we enclose a Settlement Agreement in duplicate for your attention.
> >
> > Can you please arrange to have your client execute both documents and return to us. We will of course forward you a copy of one of the documents duly executed by our client in due course.
>
> We look forward to hearing from you.
>
> Yours faithfully,
>
> O'Donnell Sweeney".

13. It was subsequent to this correspondence and the hearing in December, 2004, that the applicant raised the issue of the agreement being subject to two conditions which were not reflected in the document sent to him for signature. I have already referred to these conditions contended for, namely that there was to be a confidentiality clause and that if the monies concerned had been paid by the directors of the company the applicant would have no liability.

14. In making this case it seems to me the applicant is attempting to repudiate what was a clear agreement made by him with the liquidator which contained no such conditions. I hold that the applicant is not entitled to repudiate the agreement which he has reached and that he is seeking to import terms which were never agreed. The liquidator arranged for detailed notes to be taken at meetings held between him and the applicant. Mr. Tom Murray of the liquidator's firm was present at three of these meetings and has sworn an affidavit in which he says the contents of these notes are true and accurate. The applicant took no notes at such meetings. There is nothing in these notes which supports the conditions contended for by the applicant. I note that on 15th July, 2004, the applicant wrote to the managing editor of Independent Newspapers. In that letter he refers to his dispute with the liquidator and says:-

> "I met with the liquidator today and have reached an agreement with him in respect of this matter. My solicitors are presently completing this agreement and because of the nature of his appointment it will require High Court approval which is just a formality…"

15. The end result is that all matters between us have now been fully resolved and either side is taking no further action. The matter is now closed.

16. I advise you of this by way of information only but also so that you are aware that these issues will never be the subject matter of any hearing."

17. In an affidavit the respondent confirms that he sent this letter but says that because of his desire to honour the confidentiality clause he did not refer to any of the terms of the agreement which included a clause that if the stolen money was repaid then he would have no further liability. I find this explanation unconvincing and reject it. I also reject the applicant's contention that his solicitors advised against his signing the agreement as it did not include the two clauses concerning the confidentiality agreement and the clause concerning the repayment of monies by the directors. This flies in the face of the correspondence between the applicant's solicitors and the liquidator's solicitors. A letter dated 14th March, 2005, from the applicant's solicitors to the liquidator's solicitors suggests that upon discovering that no other parties were being pursued in respect of similar monies that their client "…reserves the right to revisit the agreement you allege has been agreed between the parties". This appears to be a different basis for disputing the agreement than is contended for by the applicant.

18. In all the circumstances I am satisfied that the applicant entered into an agreement with the liquidator and that the terms of the agreement were clear and unambiguous. I hold that the liquidator is entitled to pursue the applicant in respect of those monies.

19. The applicant also seeks an order requiring the Liquidator to disclose the name of the party who alleged that he received "wads of cash in a restaurant".

20. The liquidator has been appointed by the court and is answerable to the court for his actions. No authority has been advanced for the proposition that the liquidator is obliged to disclose to a party in the position of the applicant such information and I refuse that application.

21. The applicant seeks an order removing the liquidator from office.

22. Section 228(c) of the Companies Act, 1963, provides that a liquidator appointed by the court "may resign or, on cause shown, be removed by the court". Counsel for the liquidator says that the applicant has no *locus standi* to apply to have the liquidator removed. A number of authorities were opened on this issue including *Deloitte & Touche AG v. Johnson* [2000] 1 BCLC 485. In that case it was held by the Privy Council that the proper person to make an application would be a person interested in the outcome of the liquidation. It was observed that a contributory who was not a creditor could not apply to have a liquidator removed. The question before the court is whether a debtor or an alleged debtor could apply for the removal of a liquidator in whom the creditors and contributories of a company appear to have confidence on the ground that the liquidator was subject to a conflict of interest. The court held that the applicant would have to show that he was a person qualified to make the application and that he was a proper person to make the application which meant not that he had an interest in making it but rather that he had a legitimate interest in the relief sought. It was held that on the facts of that case the appellants were strangers to the liquidation and their interests were adverse to those of the creditors in the liquidation.

23. From the authorities opened to the court and the articles referred to I am satisfied that the applicant is not a person qualified to

make the application for the removal of the liquidator in this case. While it could be said that the applicant may become a creditor if he repays the monies alleged to have been improperly obtained by him he is, at the time of this application, and for the purposes of this application, challenging the liquidator in a manner which puts his interests adverse to those of the creditors in the liquidation. I therefore hold that the applicant is not a person entitled to bring this application.

24. But, in any event, the applicant has not shown sufficient cause for the removal of the liquidator in this case. The burden of proof is on the applicant to have a liquidator removed. I am not satisfied that the applicant has discharged this burden by showing unfitness of the liquidator to act in this matter.

25. The applicant seeks an order declaring the liquidator to be in contempt of court by alleging that an order was made against the applicant for which he was liable to be attached and committed for contempt when no such order existed. Although the notice of motion refers to the order of 7th February, 2005, it is agreed between the parties that this should be a reference to 16th December, 2004.

26. The liquidator accepted in the course of cross examination that in a letter of 8th March, may have not been entirely accurate. The most that could be said about that letter is that it was somewhat heavy handed and contained a mistaken date by referring to 7th February, 2005, when the reference should have been to an order of 16th December, 2004. In any event the claimant was legally represented at the time and he was in a position to seek legal advice about the matters raised I therefore reject the application to declare the liquidator to be in contempt of court.

27. Insofar as the notice of motion dated 11th July, 2005, is concerned I hold that the applicant is not entitled to the information sought as the liquidator is not answerable to the applicant but to the court.

28. In the circumstances I reject the application brought on foot both notices of motion and declare that the applicant is not entitled to the relief sought.