

THE HIGH COURT

2004 No. 48 COS

**IN THE MATTER OF CMC (IRELAND) LIMITED
(IN VOLUNTARY LIQUIDATION)
AND**

IN THE MATTER OF SECTION 152 OF THE COMPANIES ACT 1990

BETWEEN

GARY CAROLAN AND NIALL COSGRAVE

APPLICANTS

AND
KEN FENNELL

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan delivered 24th October, 2005.

1. On 4th March, 2005, the High Court (Clarke J.) made a declaration of restriction pursuant to s. 150 of the Companies Act, 1990 (as amended) in respect of each of Gary Carolan and Niall Cosgrave, the applicants herein.
2. By notice of motion issued on 22nd April, 2005, the applicants brought an application pursuant to s. 152 of the Companies Act, 1990, seeking relief from the terms and conditions of the Order of the High Court of 4th March, 2005. The applicants were directors of CMC (Ireland) Limited (in voluntary liquidation) ("the Company"). The application under s. 150 of the Act of 1990 was brought by Ken Fennell, the liquidator of the Company. He is named as the respondent to the application under s. 152 of the Act of 1990.
3. By a notice of motion issued on 19th August, 2005, the Director of Corporate Enforcement ("the Director") brought an application to be added as a notice party to the application under s. 152 of the Act of 1990. This judgment is given in that application of the Director.
4. Counsel for the Director submits that this Court has jurisdiction to join the Director as a notice party pursuant to O. 15, r. 13 of the Rules of the Superior Courts, 1986 or otherwise; is not precluded from doing so by s. 152(4) of the Act of 1990 and by reason both of the statutory role and functions of the Director, the facts relied upon by the applicants and the matters which the Director considers should be brought to the attention of the Court that it is a proper application in which to exercise the Court's discretion to join the Director.
5. The applicants oppose the application of the Director. Counsel on their behalf relies on s. 152(4) as prohibiting the appearance on an application of any person other than those named therein.
6. The liquidator did not participate in the hearing of the Director's application. The Court was informed that the liquidator is not consenting to the application under s. 152 but does not propose putting any evidence before the Court in relation to the application.

Statutory Framework

7. Section 152 of the Act of 1990 provides:

"152.-(1) A person to whom *section* 150 applies may, within not more than one year after a declaration has been made in respect of him under that section, apply to the court for relief, either in whole or in part, from the restrictions referred to in that section or from any order made in relation to him under section 151 and the court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit.

(2) Where it is intended to make an application for relief under *subsection* (1) the applicant shall give not less than 14 days' notice of his intention to the liquidator (if any) of the company the insolvency of which caused him to be subject to this Chapter.

(3) On receipt of a notice under *subsection* (2), the liquidator shall forthwith notify such creditors and contributories of the company as have been notified to him or become known to him, that he has received such notice.

(4) On the hearing of an application under this section the liquidator or any creditor or contributory of the company, the insolvency of which caused the applicant to be subject to this Chapter may appear and give evidence.

(5) Any liquidator who contravenes *subsection* (3) shall be guilty of an offence and liable to a fine."

8. Counsel for the applicants relies upon the maxim "*expressio unius est exclusio alterius*". Maxwell, *The Interpretation of Statutes* 1969 explains the maxim at p. 293 as follows:

"By the rule usually known in the form of its Latin maxim, mention of one or more things of a particular class may be regarded as silently excluding all other members of the class."

9. It is not disputed that it is appropriate to apply this rule as an aid to statutory construction. It was, for example, referred to by Keane C.J. in construing s. 223A of the Fisheries Consolidation Act, 1959 (inserted by s. 9 of the Fisheries (Amendment) Act, 1978, amended by s. 4 of the Fisheries (Amendment) Act, 1983) in *Browne v. Ireland* [2003] 3 I.R. 205.

10. Counsel for the applicants also referred to my decision in *Re Document Imaging Systems* (Unreported, High Court, 22 July, 2005) in which I concluded that the Oireachtas by the insertion of sub-s. (4A) to s. 150 of the Act of 1990 as provided in s. 41 of the Company Law Enforcement Act, 2001, intended that applications under s. 150 be brought by persons named in s. 150(4A) and not by any other person. Whilst I made no reference to the Latin maxim as such, I construed s. 150 of the Act of 1990 (as amended by s. 41 of the Act of 2001) in accordance with the rule as explained by Maxwell on *The Interpretation of Statutes*.

11. It is undisputed that the High Court in any proceedings before it has a discretion under its inherent jurisdiction or O. 15, r. 13 to join a person "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter ...". It is also common case that this discretion is a wide discretion. The jurisdiction is, of course, subject to the proviso that there is no specific rule of law excluding the joinder of the additional parties to the particular proceedings.

12. The first issue which I have to decide is whether s. 152(4) of the Act of 1990 excludes the joinder of persons other than those set out in the sub-section to an application under s. 152.

13. Section 152(4) of the Act of 1990 gives to the persons named therein, i.e. the liquidator or any creditor or contributory of the company, a statutory right to appear and give evidence at the hearing of an application under s. 152. However, it does not appear to me that s. 152(4), by the words used and in the context of the statutory scheme created by the entire of s. 152 and the other provisions in Chapter 1 of Part VII of the Companies Act, 1990, means that the Oireachtas intended to specify exhaustively therein the persons who might appear and give evidence at a hearing under s. 152 and thereby exclude the jurisdiction of the court to add as parties to the application such persons as it might consider necessary or desirable in the interests of justice.

14. Section 152(4) of the Act of 1990 sets out the classes of persons who are given a statutory right to appear and give evidence on an application under s. 152 of the Act of 1990. It follows logically from the notice provisions of ss.152(2) and 152(3). It does not either expressly or by necessary implication limit the court's jurisdiction to allow persons appear before it on an application under s.152. Nor does the section, either expressly or by necessary implication provide that the only person who might appear on such an application is a person with a statutory right to do so.

15. The position is quite different from that pertaining to s. 150(4A) of the Act of 1990, considered by me in *Re Document Imaging Systems*. The jurisdiction conferred on the High Court by s. 150 of the Act of 1990 is a new statutory jurisdiction. In our legal system a jurisdiction conferred on the courts has to be invoked by an application or other commencement procedure made by a person or persons. Section 150(4A) of the Act of 1990, as inserted by s. 41 of the Act of 2001, now specifies the persons who may invoke the court's jurisdiction under s.150. For the reasons set out in that judgment I concluded that the Oireachtas intended only those persons listed in s. 150(4A) to bring applications before the High Court under s. 150 of the Act of 1990.

16. However, in relation to a pending application or proceedings the Court has a well-established jurisdiction to permit persons to be added as parties. There is nothing in s. 152(4) which indicates an intention to limit that jurisdiction. Rather it seeks to give to certain persons, who the Oireachtas considered may have an interest in appearing, a statutory right to appear and give evidence. Accordingly, I have concluded that the Court is not precluded by the terms of s. 152(4) of the Act of 1990 from joining the Director as a notice party if it considers it necessary or desirable in the interests of justice to do so on the facts of this application.

17. I have also concluded that it is both necessary and desirable to join the Director as a notice party on the facts of this application. In reaching this conclusion, I have taken into account the fact that the Director was not the applicant (as he might have been) under s. 150(4A) of the Act of 1990. However, it does not appear to me that this fact should preclude the Director now being joined.

18. My reasons for joining the Director as a notice party are as follows. The discretion conferred on the court under s. 152(1) is a wide discretion. The court may grant relief from the declaration of restriction made "if it deems it just and equitable to do so" and it also may grant such relief "on whatever terms and conditions it sees fit". Those general criteria must, of course, be construed in the context of the purpose and scheme of Part VII of the Companies Act, 1990. Nevertheless, it is a very wide discretion.

19. The jurisdiction intended to be exercised by the court under s. 152(1) is not confined to the facts pertaining to the company in liquidation nor the facts considered in the application for the declaration of restriction under s. 150. It is not in any sense an appeal from the decision making the declaration of restriction. Rather it is a consideration of the issue as to whether, notwithstanding the declaration of restriction, there are other facts pertaining to the applicants which make it just and equitable to grant them relief (either in whole or in part) from the restrictions imposed by the declaration of restriction and on whatever terms and conditions as the court sees fit.

20. The liquidator in this application quite understandably has indicated to the Court that he does not propose offering any evidence to the Court on the application under s. 152 of the Act of 1990. To participate in such an application and either oppose it or even seek to be represented and put before the Court matters which he thinks the Court should take into account can only be done at a cost to the liquidation. Even if there are funds in this liquidation (about which I am not aware) it is doubtful that the creditors would appreciate such funds being expended in response to an application under s. 152. At present in this application there is no person with a right to appear who intends testing the evidence or submissions of the applicants.

21. Amongst the facts relied upon by the applicants herein are that they are directors of three other trading companies employing approximately seventeen people and that, if they were required to invest approximately €190,000 in the companies to enable them remain directors, it would place a considerable financial burden on those companies and a third investor in the business.

22. The Director submitted that in an application such as this, the following factual matters are, *inter alia*, relevant:

"(a) How have the applicants behaved with regard to other companies, particularly other companies of which they are seeking to be, or remain as, directors? Are such companies compliant with company law, tax and other obligations? Are such companies solvent? Do the governance structures of such companies address the matters giving rise to the applicants' Restriction?

(b) Have the applicants established a need for relief? What are the financial situations of the applicants? What is the financial situation of the companies of which they seek to become or remain as directors? Are such companies adequately capitalised having regard to their businesses? How can it be said that the capitalisation requirements of Part VII would pose an excessive or intolerable burden on those companies and/or the Applicants and/or their backers or associates?"

23. The Director submits that he is in a position to put before the court relevant evidence and make submissions pertinent to such issues. The Court was informed, that he has written an open letter to the applicants outlining a number of matters which he considers should be put before the court in relation to the companies referred to in the applicants' affidavits. The Court has not been furnished with this letter at this stage.

24. Without wishing to decide that the precise issues raised in the above submission on behalf of the Director are necessarily relevant to the s. 152 application, I am satisfied that in s. 152 application such as this it will be relevant for the court to consider matters relevant to the applicants' positions as directors of the other companies referred to by them and their entitlement to relief, having regard to the facts relied upon and to the purpose of s. 150 of the Act of 1990. It is desirable in our adversarial system of justice that there is a party before the court who is either opposing the application or at minimum has an interest in examining with the benefit of relevant facts and expertise, the validity of the application and making relevant submissions to the court. This is particularly so where, as in an application under s. 152, the court is exercising a wide discretion. The Director appears an appropriate

person to put before the Court by way of admissible evidence, facts which the Court should take into account and to make relevant submissions.

25. In deciding to join the Director in this application I wish to make clear that I am not deciding that he should be joined in all applications under s. 152 of the Act of 1990. The Oireachtas has not specified that he is a person to whom notice must be given by the liquidator under s. 152(3). Also, the Oireachtas has created a class of persons with an automatic right to appear and give evidence in s. 152(4). Whether the Director should be joined in any particular application will depend on the relevant facts and the court determining that it is necessary or in the interests of justice to do so.

26. Accordingly, there will be an order that the Director be joined as a notice party to the s. 152 application.