THE HIGH COURT

2005 No. 277 COS

IN THE MATTER OF NEW AD ADVERTISING COMPANY LIMITED
AND
IN THE MATTER OF THE COMPANIES ACTS, 1963 – 2003

Judgment of Miss Justice Laffoy delivered on 14th November, 2005.

1. New Ad Advertising Company Limited (the Company) was incorporated on 11th March, 1998. On 22nd January, 1999 the Company was struck off the Register of Companies for failure to deliver annual returns for the years from 1994 onwards.

2. On this application, Vincent Kelly (the petitioner) seeks an order pursuant to s. 12B(3) of the Companies (Amendment) Act, 1982 (as inserted by s. 46 of the Companies (Amendment) (No. 2) Act, 1999) restoring the Company to the Register of Companies. The petitioner makes the application in his capacity as a member and a creditor of the Company. It is not in issue that the petitioner is a member of the Company. However, it is disputed by George McNulty, who is a notice party to the application, that he is a creditor of the Company. On the evidence before the court I am satisfied that he is a creditor of the Company on foot of two orders of this court made in s. 205 proceedings in relation to the Company brought by the petitioner (Record No. 1995 No. 143 COS), namely:

> (1) an order dated 6th November, 1995 made by McCracken J. in which the respondent in the s. 205 application, which was identified as the Company, was ordered to pay the petitioner's costs of the motion on foot of which the order was made, when taxed and ascertained; and
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> (2) an order made by Geoghegan J. on 25th March, 1996 in which the respondent, again identified as the Company, was ordered to pay the petitioner's costs of the motion on foot of which the order was made, when taxed and ascertained.

3. Accordingly, I am satisfied that the petitioner has *locus standi* to bring this application, both as a member of the Company and as a creditor of the Company.

4. The petitioner contends that he was not a director of the Company when it was struck off. He acknowledges that he was a director of the Company when it was originally incorporated in 1988, but he has averred that when Mr. McNulty acquired a 50% shareholding in the Company later in 1988, he ceased to be a director. The electronic record of the Companies Registration Office (CRO) still records him as a director of the Company. However, the most recent annual return submitted by the Company to the CRO, which related to the year ended 31st December, 1993, showed Mr. McNulty and Alex Wilson as the only directors. That return was signed by both Mr. McNulty and Mr. Wilson. Mr. Wilson became a director in February, 1992 in place of one Martin Barry, who was removed as a director according to the Form B10 (Notice of Change of Directors), which was lodged in the CRO in June, 1992. The Form B10 was signed by both Mr. McNulty and Mr. Wilson. On the basis of the evidence before the court, for the purposes of this application, I am assuming that the petitioner is not a director of the Company.

5. The reason why the petitioner wants to have the Company restored to the Register is to enable him to prosecute the s. 205 application. Those proceedings have had a chequered history. The petition was presented on 15th June, 1995. It eventually came on for hearing on 24th and 25th June, 1997 before Costello P. There was no appearance on behalf of the Company or on behalf of Mr. McNulty. On 1st July, 1997 Costello P. made an order in favour of the petitioner, declaring, inter alia, that the petitioner was a 10% shareholder in the Company and directing Mr. McNulty to purchase the petitioner's shares in the Company for the sum of IR£67,200. Mr. McNulty appealed the order of Costello P. to the Supreme Court and, by order made on 26th March, 1998, the Supreme Court allowed the appeal and discharged the order of the High Court. It was further ordered that Mr. McNulty should be joined as a notice party to the proceedings.

6. In February, 1999 the s. 205 proceedings were reconstituted in this court and an amended petition and amended points of claim were filed. Mr. McNulty, as notice party in the s. 205 proceedings, delivered points of defence on 1st November, 1999. It is alleged by Mr. McNulty that there has been delay on the part of the petitioner in prosecuting the s. 205 application. The matter was listed for hearing on 19th November, 2003. However, the hearing was adjourned by consent because Mr. McNulty was indisposed. The matter was listed again for hearing on 6th July, 2004. At the call over of the list on the previous Thursday, 1st July, 2004, counsel for the notice party informed the court that the Company had been struck off the Register in January, 1999. On that occasion, I directed that the proceedings could not proceed because the Company was no longer registered. I adjourned the matter to enable the petitioner to have the Company restored to the Register. The hearing is now listed for 13th December next.

7. The attitude of the State authorities who are statutory notice parties on this application is as follows:

> (1) The Registrar of Companies has no objection to the restoration application made by the petitioner as creditor of the Company, strictly subject to a provision pursuant to s. 12B(6) being included in any order of the court.
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> (2) The Minister for Finance, through the Chief State Solicitor, has no objection to the Company being restored to the Register. However, the Minister supports the position of the Revenue Commissioners.
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> (3) The position of the Revenue Commissioners is set out in an affidavit sworn by Pat Carey on 5th October, 2005. In essence, the Revenue Commissioners do not object provided the court makes an order directing the directors of the Company to deliver outstanding tax returns to the Revenue Commissioners within one month of the making of the restoration order. The returns in question are outstanding returns up to the date of the cessation of trading by the Company. Mr. McNulty's solicitor has averred in an affidavit filed on this application that the Company ceased trading in or about 1993.

8. It is the notice party, Mr. McNulty, who disputes the petitioner's entitlement to a restoration order. Mr. McNulty was joined as a notice party because, as the application has been treated by the Registrar as an application by a creditor, and as the Registrar and the Revenue Commissioners are pressing for orders directed to the directors to comply with their obligations to make statutory returns under the Company Law code and their obligations to make returns under the Revenue code, the directors were necessary parties.

9. Aside from contending that the petitioner does not have *locus standi*, which is a contention I reject, it was submitted on behalf of Mr. McNulty that it would not be just the Company be restored and that the court should not exercise the discretion it has under s. 12B(3) in favour of the petitioner.

10. In broad terms, two grounds were advanced on behalf of Mr. McNulty for the proposition that it would not be just to restore the Company.

11. The first ground advanced was the personal circumstances of Mr. McNulty: that he is elderly and living in retirement in France; that he has health problems, as does his wife; that he has a medical condition that prevents him travelling by air; and that he is of limited means.

12. The second ground was that the sole purpose of the application is to enable the petitioner to prosecute a s. 205 application. It was submitted that there is no other reason for the restoration of the Company. It ceased trading almost twelve years ago. It has no creditors, apart from Mr. McNulty, although at the hearing there was belated recognition that the petitioner was a creditor on foot of the costs orders to which I have referred.

13. The affidavit sworn by Mr. McNulty's solicitor in response to the application set out to demonstrate that the s. 205 application is unmeritorious. In my view, it would be wholly inappropriate to form, or express, any view on the merits of the s. 205 application, which is not before the court, and I have neither formed a view on it nor do I express any. It was also submitted that, having been over ten years pending in the court, the s. 205 application is "stale" litigation. Any issue that has arisen in relation to the manner in which the plaintiff has prosecuted the s. 205 application could have been addressed in those proceedings. As a general observation, on the basis of the evidence before me, I could not form the view that, if one were apportioning blame for the length of time it has taken to have the issues in the s. 205 proceedings resolved, it would be appropriate to conclude that the petitioner is more blameworthy than any other party.

14. In *Goode v. Philips Electrical (Ireland)Ltd*. [2002] 2 I.R. 613, the Supreme Court held that restoration of a company is primarily a matter between the petitioner, the regulatory authority having the duty to ensure compliance with the Companies Acts, and the Minister for Finance in whom the assets of the company would vest as *bona vacantia*. In that case, the notice party whose standing was questioned was a company, unconnected to the company the subject of the application for the restoration order, which was being sued by the latter. Nonetheless, the Supreme Court held that it was within the discretion of the High Court to treat the former as a notice party to the proceedings in the circumstances which prevailed in that case. The factual circumstances here are different. Here Mr. McNulty was a member and an officer of the Company before its dissolution. If it is restored, depending on the orders the court makes on this application, it will fall to Mr. McNulty to comply with the orders. In the circumstances, I have no doubt that Mr. McNulty was entitled to be heard on this application. However, the submissions made on his behalf, in my view, do not establish that it would not be just to accede to the petitioner's application to have the Company restored. On the contrary, it would be unjust to make it impossible for the petitioner to pursue the remedies he seeks in the s. 205 application. Therefore, I propose making an order restoring the Company to the Register.

15. However, Mr. McNulty had another "string to his bow". It was submitted on his behalf that, if the court was disposed to make an order under sub-s. (3) of s. 12B, the court should regard the application as one made by a member or officer of the Company, rather than an application by a creditor of the Company, so that sub-s. (5), rather than sub-s. (6), of s. 12B would apply. The distinction between the two sub-sections, it was submitted, is that, whereas sub-s. (6) mandates the courts, when making an order under sub-s. (3) on the application of a creditor, to direct that one or more of the members or officers of the company shall within a specified period deliver all outstanding annual returns or all outstanding tax returns, as the case may be, depending on whether the strike off was under s. 12 or s. 12A, sub-s. (5) gives an element of discretion where an order is made under sub-s. (3) on the application of a member or officer of the company. Sub-s. (5) provides that the court shall, unless cause is shown to the contrary, include in an order under sub-s. (3) which is made on the application of a member or officer of the company, a provision that the order shall not have effect unless within one month from the date of the order the relevant returns are delivered to the Registrar or the Revenue Commissioners, as the case may be.

16. The basis on which it was contended on behalf of Mr. McNulty that the court should exercise its discretion not to make the restoration of the Company conditional on outstanding returns being delivered was that there are practical difficulties in relation to filing the outstanding returns. There is uncertainty as to the identity of the directors, this being a reference to the petitioner's contention that he is not a director. Mr. Wilson, the other acknowledged director, is elderly and Mr. McNulty has not been in contact with him for over ten years. There having been contention between them bore that, Mr. McNulty might not be able to procure the necessary two directors to "sign off" on the outstanding returns. The cost of preparation and auditing of the outstanding accounts was also cited as a reason, given Mr. McNulty's limited means. It was also averred in the replying affidavit that, following the conclusion of the Supreme Court appeal in the s. 205 proceedings, records of the Company were put into storage in 1998 and about five years ago the records were destroyed when there was a fire in the premises in which they were stored. Therefore, it would be impossible to deliver the outstanding returns because the vast majority of the records are no longer available to enable the returns to be made.

17. There was no appearance by Mr. Wilson who was also named as a notice party. There is before the court an affidavit of the service of the proceedings on Mr. Wilson at the address recorded in the Registrar's e-record in relation to the Company. However, that address does not correspond to the address given in the last annual return filed, to which I have referred earlier. In the circumstances, I am not satisfied that Mr. Wilson was properly served.

18. In my view, a very limited discretion is given to the court in sub-s. (5). The court is mandated to make the effect of the restoration order conditional on the outstanding returns being delivered "unless cause is shown to the contrary". The obvious situation in which cause is shown to the contrary is where, before the matter is heard in court, the outstanding returns have been delivered and there is confirmation from the relevant State authority that such is the case. In my view, it would be erroneous to assume that sub-s. (6) is more rigorous than sub-s. (5). The contrary, is, in fact, the case because under sub-s. (5) the effect of the order is postponed until delivery of the outstanding returns within the period of one month, whereas in the case of sub-s. (6) the order takes effect immediately, although there is an ancillary direction to the members or officers of the company to deliver the outstanding returns within a time period stipulated by the court. The reason for the different approach in the two sub-sections is because almost invariably a creditor petitioner will not be in a position to deliver returns on behalf of the company. In relation to both sub-sections, the legislative intent is clear. It is to ensure that the striking-off mechanism as a deterrent against breach of company law and tax law is not devalued. It would be devalued if a company could be restored to the Register without the breach which gave rise to its striking-off being remedied.

19. Here, the petitioner is both a creditor and a member of the Company. On the evidence, it would appear that, as a member, he is not in a position to file annual returns on behalf of the Company. In the circumstances, I propose treating this as the application of a creditor, which is what the Registrar has sought. I propose making an order under sub-s. (6) that Mr. McNulty deliver the outstanding returns to the Registrar of Companies within three months from the date of this judgment.

20. As I understand the position, this is a case in which the Company was struck off under s. 12, rather than s. 12A. In the circumstances, the court is not mandated to make an order under sub-s. (6) in relation to the outstanding tax returns. Given the averment by Mr. McNulty's solicitor that the Company ceased trading in or about 1993, exercising the court's discretion, I do not

propose to make any direction for submission of outstanding tax returns.