Neutral Citation: [2014] IEHC 573
2013 No: 149 COS

THE HIGH COURT
IN THE MATTER OF JPM CAD DESIGN LIMITED (IN LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

Between

MARTIN KELLY

Applicant

AND
JASON P. MONSON AND TRACEY A. MONSON

Respondents

Judgment of Mr. Justice Max Barrett delivered on 9th December, 2014.

1. The key issue in this case is whether the payment of excessive director remuneration at a time of overall decline in a particular company's financial performance has the present effect that a declaration of restriction must now issue against either or both of Mr. Jason P. Monson and Ms Tracey A. Monson pursuant to s.150 of the Companies Act, 1990, as amended.

Background facts.
2. JPM CAD Design Limited was incorporated on 20th December, 2006, and ceased trading in or around 31st March, 2013. The objects for which the company was established were to carry on the business of architectural and engineering activities and related technical Consultancy work, and any pursuit incidental thereto. Although both respondents were directors of the company, Mr. Jason Monson was its prime operator. His wife, Ms Tracey Monson, does not appear from the evidence before the court to have played any significant part in the running of the company's business, nor was she remunerated as a director. The company was tax compliant up to about the second half of 2010; thereafter it was not. From about the end of 2010, the liquidator contends that the company was insolvent and should have been wound up. The liquidator avers in his affidavit evidence that "*the difficulties encountered by the Company derived significantly, if not entirely from the decisions taken by the company's directors in regard to director remuneration*", albeit that the general economic downturn in the national economy also played a part. The director remuneration paid by the company makes for startling reading. It is outlined in *Table 1* overleaf.

Year End	Turnover	Director Remuneration	Percentage increase in director remuneration	Director remuneration as percentage of Turnover
2009	€59,546	€37,366	n/a	63%
2010	€66,022	€51,146	13.7%	77%
2011	€39,841	€53,548	4.7%	134%
2012	€48,936	€85,870	60.4%	175%

Table 1

3. As the company was trading at a slight loss in 2009 and a more significant loss in 2011 and 2012 (the company appears from the liquidator's averments to have turned a small profit in 2010), it seems that throughout a period of general decline in the company's financial performance, and a shorter period of non-compliance with the tax code, director remuneration was increasing significantly. This is in contrast to the position that one sometimes sees in companies in decline where the first persons to 'take a hit' remuneration-wise are board members. The liquidator is critical of the director remuneration arrangements that pertained within JPM CAD, observing that "*Notwithstanding ...poor trading performance, when it might be expected that there would be at least a commensurate reduction in Directors Remuneration, the directors remuneration actually increased year on year by significant amounts*." The court cannot but conclude, having regard to *Table 1*, that the amount of director remuneration paid as a percentage of turnover, and the percentage increases in director remuneration effected, by JPM CAD during a period of overall decline in its financial performance, were excessive.

Legal background.
4. It is an unpleasant truth that companies often become insolvent. Sometimes as they go through the liquidation process, director misbehaviour is identified. Directors guilty of such misbehaviour can be prevented at law from acting in the future as directors or otherwise in relation to a company. One of the means by which this is achieved is through s.150 of the Companies Act, 1990, as amended. In a nutshell, s.150 requires the court to declare that a former director of an insolvent company be restricted from acting as a director or secretary of a company or otherwise being involved in the formation of a company, save in certain instances. Such an order need not be made if, for example, the court is satisfied that the former director acted honestly and responsibly in relation to the affairs of the relevant insolvent company and there is no other reason why it would be just and equitable for him or her to be restricted as proposed. There is more to the provision than that. However, the foregoing captures its essence, at least insofar as the present proceedings are concerned. The logic of the provision is simple: people who misbehave as directors of one company ought not lightly to be entrusted with stewardship of another. But a page of history is worth a volume of logic, and history suggests that s. 150, though possibly unassailable in theory, suffers from some weaknesses that arise in practice. Some of these are considered hereafter.

Some weaknesses in the operation of s.150.
5. *Parity of sanction*. Section 150 applies the same sanction to any former director of an insolvent company who is found guilty of a want of honesty or responsibility or whom justice and equity suggest to be worthy of restriction from acting as a director. Anyone who falls foul of its provisions is subject to the same five-year restriction. Logic may suggest such equality of treatment to be fair; the experience of this Court is that it is not, certainly not always. It is this Court's repeated experience that it is presented with individuals who fall foul of s.l50, yet whose behaviour does not appear to the court to merit the parity of sanction which that provision imposes. It is, of course, the right of the Oireachtas to determine when enacting legislation that parity of sanction is merited. However, it is the respectful duty of the court to sound a cautionary note when it finds that it is encountering circumstances in practice where the application of this parity of sanction is yielding results that seem to it to be unfair. In the present case this is an issue which would have affected Ms Monson in particular, had the court not concluded below that it is not in any event required to issue a s.150 declaration against her.

6. *Non-contested applications*. It is the experience of the court that many affected directors choose not to contest s.150 applications. It is clear to the court from some of the submissions that have been made to it in this regard that this is not always, if ever, because directors are satisfied that their alleged wrongdoings are such that they merit sanction under s. 150. Rather, having seen their small or family business 'wiped out' -for some reason it seems more often than not to be small business operators who are brought before the court - and having often been reduced to dire financial straits, affected former directors are simply not in a position, whether financially or otherwise, to fight the application made against them. Their difficulties are compounded in this regard by the fact that it has long been held that s.150 effectively imposes a burden on affected former directors to establish that no blame attaches to them as a result, for example, of either dishonesty or want of responsibility. (See in this regard *Business Communications Ltd. v. Baxter and Parsons* (21st July, 1995, unreported), High Court (Murphy J.)). The decision in *Business Communications* cannot perhaps be flawed as a matter of law. Yet that decision and, it would seem, s.150 of the Act of 1990, have the practical consequence that at the very moment when former directors are most vulnerable, they are required to discharge a difficult burden of proof, generally in circumstances when they cannot afford to be legally represented, are confronted by counsel who are expert in company law, and must 'fight their corner' in the daunting setting of a courtroom through the unfamiliar medium of 'legalese'. Such a combination of factors, when they present, might perhaps be contended to have the consequence that s.150, in its practical operation but not its intended object, can involve a certain intrinsic imbalance that may be conducive to an unfairness of outcome, something to which the court must ever be alive.

7. Perhaps two further, incidental observations might be made by this Court at this time as regards non-contested applications:

> - *Attendance in court*. It is preferable that, as in the instant proceedings, affected directors should present themselves in court when a s.150 application against them comes to hearing. They know best how a company was operated, particularly in its waning days, and why. This Court has been struck in a number of cases by how different the truth of matters can appear to be when the insight and observations of affected directors are brought to s.150 proceedings, and has ruled accordingly. This is a people's court, funded by the people's taxes; people should be unafraid to come before it; if they have right on their side, right will prevail.
>
> - *Consent letters*. The court notes that it is regularly being presented in the course of s.150 applications with letters from affected former directors which run along the lines of '*I know that application under s.150 is being made against me. I am not contesting these proceedings. I consent to the issuance of a declaration under s.150 against me*.' It is not always clear to the court that, when it comes to such 'consent letters', it is being presented with informed consents, *i.e.* that the signatories know exactly what a s.150 restriction entails, that they appreciate how it might impact on their future earning potential, and are knowingly consenting to same. But who is to explain to affected former directors the impact of what they are doing when they may no longer have the benefit of independent legal advice? It does not seem to the court that liquidators or their lawyers should be required to do so and thereby run the risk of later being sued in negligence by disaffected former directors. In order that the court might continue to treat such 'consent letters' as involving an informed consent, it appears to this Court that such letters, as a matter of prudence, ought perhaps to contain text along the lines of the suggested text set out in the appendix to this judgment. The court notes that, in the present case, the affected directors, though in poor financial circumstances, were able to avail of at least some independent legal advice from a solicitor and thus the court accepts, as an informed consent, their letter of consent to the making of a s. 150 declaration against each of them on the grounds of want of responsibility, assuming the court considers such a declaration to be required.

8. *The 'crash' of 2008*. The court notes that numerous cases coming before it concern small or medium-sized enterprises whose insolvency is attributable in some shape or form to the economic 'crash' of 2008. In this regard, the court notes that legislation, as Oliver Wendell Holmes once famously observed, is the skin of a living thought and may vary in colour and content according to the circumstances in which it is used. It is this Court's view, as previously expressed in its judgment in *Director of Corporate Enforcement v. Walsh and Ors* [2014] IEHC 365, that given the desperate circumstances in which many companies and company directors were placed around 2008, when sales collapsed and revenue disappeared with a swiftness that had to be experienced to be believed, when income evaporated but families still had to be provided for and mortgages paid, and when hard-pressed directors sought to preserve their own jobs and those of their employees in the face of often insuperable odds, that the court must sometimes be prepared to countenance, as legitimate behaviour, that which at another time and in another context might fall to be treated, say, as wanting in responsibility, or to offer a basis on which it would otherwise be just and equitable to issue a declaration of restriction pursuant to s. 150. That said, the present case is not a case where a company collapsed as a result of the crash of 2008, albeit that the general downturn in the economy did not assist. To quote the liquidator once more, "*the difficulties encountered by [JPM CAD]...derived significantly, if not entirely from the decisions taken by the company's directors in regard to director remuneration*".

9. *'Ties of affection'*. This is yet another case in which the court is confronted with the issue of how to treat a spouse who, as the liquidator has averred, "*does not appear to have participated actively in the running of the business*." In the circumstances presenting to the court, it seems that Ms Monson was primarily motivated by 'ties of affection' when she agreed to act as the required second director of a company in which her husband was the principal actor. The court has previously considered the issues that such an amalgam of facts presents, and relevant precedent, in its judgment in *Director of Corporate Enforcement v. Slattery* [2014] IEHC 363 at paras. 15-16. In that case the court had particular regard to the decision in *Re Hunting Lodges Limited (in liquidation)* [1985] I.L.R.M. 75, in which Carroll J. effectively indicated, in a different but analogous context, that a married female director cannot escape liability as a director by reference, for example, to some sort of subservience to husbands that may have existed before the modern age of equality between the sexes. It is important, however, to recognise the true ambit of what Carroll J. stated in *Re Hunting Lodges*:

> - first, by way of general remark, it is perhaps worth noting that Carroll J.'s observations were made solely in relation to a married woman who embarks upon a passive company directorship. In our contemporary society where there are many couples in which the wife is the principal commercial actor, and there are many unmarried and same-sex couples, there seems no reason why Carroll J.'s comments should not be considered to apply by analogy to any spouse or indeed to any romantic partner, male or female, heterosexual or homosexual, or any person who, motivated primarily by virtue of ties of affection, agrees to act as a passive director in a company so as to satisfy the minimum two-director requirement that arises under current company law.
>
> - second, Carroll J. did not say that a married female director can never escape liability as a director where she embarks upon a directorship primarily out of ties of natural affection and never does anything of substance in relation to the company of which she is director. That would place so great a premium on legal reality above practical reality as to be almost certain to result in injustice in some instances, an outcome which Carroll J. undoubtedly did not intend.
>
> - third, Carroll J. does not dismiss the possibility that a passive or 'nominal' director may be excused liability in some

circumstances. Indeed she cites one instance, at p.85 of her judgment, that of where a passive director "*reasonably endeavoured to keep abreast of company affairs and had been deceived"*, in which it might be possible to excuse such director from liability.

- fourth, Carroll J. does not indicate that there are no other instances in which a nominal director might be so excused. She establishes as the litmus-test of personal liability in respect of such a director that there should, as a matter of necessity, be some "*real moral blame*" attaching to her before personal liability should arise.

10. Looking to the context and features of this case, it does not appear from the facts before the court that Ms Monson played any part in the running of the company. Notably, she did not even draw a salary from the company. One will search in vain to find that "*real moral blame*" on Ms Monson's part which the decision in *Re Hunting Lodges* effectively posits as the litmus test of personal liability in these instances. The court finds that Ms Monson's behaviour was not wanting in honesty or responsibility and it does not consider that any other reason arises why it would be just and equitable that she should be the subject of a declaration of restriction under s.150 of the Act of 1990. Ms Monson, frankly, did no more and no less than many or most, perhaps even all, spouses placed in her position would do for her (or, as appropriate, his) partner. She agreed to be the required second director in what was, in effect, her husband's company; thereafter, the division of labours between Mr. and Ms Monson was such that Mr. Monson ran the company and Ms Monson derived an indirect benefit from the company's operations but played little or no active part in its operation. The court does not consider that the Oireachtas, when it enacted the Act of 1990, intended that a spouse or person in like relationship should be sanctioned for so acting, and without the court having any regard to either context or motive. To read the Act otherwise would be to import a policy that goes beyond its intended ambit and to divorce the law from reality. This does not mean that it is 'closed season' as regards bringing s.150 applications against, for example, husband-and-wife directors or persons in like relationships. All it means is that just as it did not suffice for the female director in *Re Hunting Lodges* to claim that she should be excused from liability as a director because of her status as spouse, neither does statute or case-law require the imposition of liability on a person regardless of the fact that it may be primarily 'ties of affection' that drove such person to assume what is in practice, albeit not in law, a nominal directorship. Neither in wording nor effect does the Act of 1990 disavow the fundamental precept that the demands of law must ever yield to the supplications of context.

Conclusions.
11. The court finds that Mr. Monson, as the managing director of JPM CAD Design Limited, evinced a lack of commercial probity and/or a want of proper standards in allowing director remuneration to increase as it did, and for those increased amounts to be paid as they were, during a period of overall decline in the financial performance of JPM CAD from 2009 through to 2012.

12. For the reasons outlined above, the court does not consider that it is required to issue any declaration in respect of Ms. Monson pursuant to s.150.

APPENDIX

Suggested text of consent letter

"TO WHOM IT MAY CONCERN

Re: Proposed or pending application for declaration of restriction under section 150 of the Companies Act, 1990, as amended.

1. I am aware that application has been commenced or will be commenced against me before the High Court of Ireland seeking that a declaration of restriction issue against me under section 150 of the Companies Act, 1990, as amended.

2. I do not wish to contest the said application and hereby consent to the making against me of the declaration that has been sought, subject to the High Court being satisfied that it is required to make such declaration.

WARNING
BY SIGNING TIDS LETTER, YOU MAY MAKE IT MORE LIKELY THAT A COURT WILL ISSUE A DECLARATION AGAINST YOU UNDER S.150 OF THE COMPANIES ACT 1990, AS AMENDED. IT IS PREFERABLE THAT YOU SEEK INDEPENDENT LEGAL ADVICE BEFORE SIGNING TIDS LETTER.

CONSENT
3. I have read all of the above text, including the warning set out above and the important notes that follow*, and am satisfied to sign this letter of consent:

Signature Date

Name [CAPS]:

Address:

***IMPORTANT NOTES**
(1) *What is the legal result of a declaration being made against you under s.150?*

Any such declaration will have the effect that you will not, for a period of ***five years*** from the date of the declaration, be able to be appointed or to act in any way, directly or indirectly, as a director or secretary of a company or take part in the promotion or formation of a company unless that company meets certain capital/shareholding requirements. (In certain instances you can be relieved from the five year limitation upon application being made by you within one year of the restriction being imposed).

(2) *What is the practical result of a declaration being made against you under s.150?*

Perhaps the most significant result of such a declaration is that it may make it difficult for you to continue in business, at least through the medium of a company.

(3) *Why would a declaration issue against you under s.150?*

Typically a declaration would issue on the basis that you have not acted (a) honestly or (b) responsibly in relation to the conduct of the affairs of a now insolvent company of which you were formerly a director. A declaration may also issue because the court considers it otherwise just and equitable that such a declaration should now be made. You may consider that (i) your actions as director of the relevant insolvent company were honest and responsible and (ii) there is no other reason why it would be just and equitable that a declaration should issue against you. If so, you should think very carefully before signing this letter.

(4) *Why would you ever sign a letter consenting to an order being made against you?* Because, for whatever reason, you do not wish to contest the application being made against you.

(5) *Your right to be heard.*

You are entitled to be heard by the court when the application for a declaration is made. If you sign this letter and later wish to contest the application, you should try to communicate this in advance to the party bringing the application. If you cannot communicate this in advance, you should still come to court on the day of the hearing so that your views may be heard. If you engage a professional advisor he or she can advise you further about your right to be heard.