

THE HIGH COURT

[2014 No. 231COS]

IN THE MATTER OF ZUCCINI CAFÉ AND RESTAURANT LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

PATRICK MCCOY

AS LIQUIDATOR OF THE COMPANY IN THE WITHIN PROCEEDINGS

APPLICANT

AND

GERARD COURTNEY AND PATRICIA COURTNEY

RESPONDENTS

JUDGMENT of Mr. Justice Barrett delivered on the 25th day of July, 2014.

Background to application

1. This is an application made under s.150 of the Companies Act 1990, seeking a declaration that each of Mr. Gerard Courtney and Ms. Patricia Courtney be restricted in acting as company directors. It is perhaps a somewhat unusual application. On the one hand, there is a single affidavit from the liquidator in which he sets out several grounds on which a declaration under s.150 might be merited but then immediately proceeds to identify a lengthy set of mitigating factors. On the other hand, the court has before it a letter from Mr. Gerard Courtney indicating that he has no objection to a declaration being made against him under s.150. The court does not have before it a similar letter from Ms. Courtney; her principal plea appears to be that she was merely a 'helpful spouse' who agreed to be a so-called passive director so as to satisfy the requirement that Zuccini Café and Restaurant Limited have at least two directors and who consequently ought not to be the subject of an order under s.150. This is the first case in which this Court has been presented on the one part with a liquidator who, admirably, states that in his professional opinion there are significant mitigating factors, and, on the other part, with respondent directors, one of whom is satisfied that the s.150 declaration petitioned for in these proceedings should issue against him and the other of whom considers that she ought not to be the subject of any such order.

Applicable law

2. There is, if anything, a possible surfeit of judicial guidance on the criteria that are relevant to determining a s.150 application. An early but significant contribution was made by Shanley J. in *La Moselle Clothing Limited (in liquidation) v. Soualhi* [1998] 2 I.L.R.M. 345, his observations having since been described by Hardiman J. in *In the Matter of Tralee Beef & Lamb Limited* [2008] 3 I.R. 347 at p.358, as being, at least at that time, of "near canonical status". Shanley J.'s observations had previously been affirmed and expanded upon by the Supreme Court in *Re Squash (Ireland) Ltd.* [2001] 3 I.R. 35, the court holding, *inter alia*, that it is important, in a s.150 application, to have regard to the entire tenure of an individual as director of a company. In his judgment in *La Moselle*, Shanley J. had, at p.352 mentioned that the extent to which a director has or has not complied with the Companies Acts is a relevant factor when determining a section 150 application. In the High Court decision in *Kavanagh v. Delaney* [2005] 1 I.L.R.M. 34 at p.41, Finlay Geoghegan J. suggested that compliance by a director with the common law obligations of a director is also a relevant factor. In his judgment on appeal in what is now sometimes referred to as the *Tralee Beef* case, Hardiman J., at p.358 of his judgment, referred to above, indicated that he did not disagree with this 'amplification' by Finlay Geoghegan J., though he was concerned that no injustice should be wrought in that case as a result of the amplification being sounded therein for the first time. In truth it is somewhat difficult to see how a director could be held to have acted responsibly where he or she had complied with the Companies Acts but was in breach of his or her common law duties, though equally it is difficult offhand to see how a director could breach his or her common law duties where he or she was not guilty of any breach of, or exposed to any penalty under, the detailed and comprehensive code established by the Companies Acts. Be that as it may, the jurisprudence appears in any event to have further evolved, Fennelly J. signalling in *Re Mitek Holdings Ltd.* [2010] 3 I.R. 374 at p.396 that it is important not to adopt a formulaic, standardised, 'tick the box' approach to determining section 150 applications. Thus Fennelly J. emphasises "the need to identify the issues that are important in the particular case", and then continues:

"I would not be disposed to limit the matters to which regard should be had or to substitute standardised judicial criteria for the general words of the statute."

3. Section 150 enjoins the court to have regard to whether an affected person has acted "*honestly*" and "*responsibly*" and also to consider whether there is any other reason why it would be "*just and equitable*" that a s.150 order should issue. All of the quoted terms bear their ordinary meaning. There appear to be no 'just and equitable' grounds alleged in this case, nor do they in any event appear to the court to arise. In deciding whether Mr. and Ms. Courtney have acted honestly and responsibly the court may of course have regard to their obligations as directors, to general commercial practice and to prior case-law but perhaps more to anchor than to determine any decision of the court as to the responsibility or otherwise of their respective actions.

Facts

4. Mr. and Ms. Courtney were each directors of Zuccini Café and Restaurant Limited (in voluntary liquidation). Zuccini was incorporated on 13th September, 1999, ceased trading in July, 2008, and was placed in liquidation on 5th May, 2009. During its lifetime, Zuccini's primary activity was the operation of a restaurant at Blackrock Shopping Centre in County Dublin. There appear to have been two principal factors that led to its eventual demise. The first was its inability to discharge amounts found to be owing to the Revenue Commissioners following an audit which uncovered an under-declaration of tax. The second was a significant ongoing reduction in turnover due to the opening and subsequent success of a rival shopping centre in Dundrum, County Dublin.

Grounds for instant application

5. The liquidator identifies the following grounds on which a s.150 declaration might be merited. First, a failure to discharge tax liabilities. Second, a deficiency in the company books and records. Third, a deficiency in documentation pertaining to an assignment of the lease at Blackrock Shopping Centre and certain company assets. Fourth, repayment of certain loan monies owed by the company to the directors. Fifth, use of a company credit card to make non-business related purchases. Sixth, a degree of non-cooperation with the liquidator. Having identified these grounds, the liquidator then avers as follows:

"25. Whilst it is acknowledged that the Respondents appear to have made errors of judgment in relation to the conduct of certain affairs of the Company, particularly in building up a large deficit to the Revenue Commissioners and other creditors, I believe that there are significant mitigating factors in this case which merit analysis by the Court in reaching its decision as to the responsibility of the Respondents.

26. On the basis of my initial discussions with the first named Respondent in particular, it would appear that the sudden and unforeseen difficulties created both by the Revenue audit and the worsening economic climate at the time resulted in enormous strain for the Respondents who became unable to manage the insurmountable problems the company faced. I believe that this strain significantly contributed to the way in which the business was managed during the relevant period and I understand that the Respondents also experienced significant personal difficulties at the time which, while not excusing the lack of co-operation I received later in the liquidation, does go some way toward explaining the difference in the level of co-operation and engagement I encountered.

27. Also relevant to my initial decision to seek relief from the Director was my view that the failure to maintain appropriate books and records and lack of co-operation by the Respondents did not in any way worsen the position of the creditors of the Company in the liquidation and I believe that had I received a full set of books and records for the Company, the realisations for the creditors are unlikely to have been any higher.

28. With regard to Ms Patricia Courtney, the second named Respondent, I say that she appears to have been a non-executive director with no direct involvement in the running of the business of the Company. Moreover, Ms. Courtney appears to have been appointed as a director purely to assist her husband, Mr. Gerard Courtney, in maintaining the statutory minimum requirement of two directors in a company and entirely delegated her duties as a director of the Company to Mr. Courtney who had primary responsibility for managing its affairs. For those reasons the second named Respondent was arguably not in a position to assist me any further in relation to my enquiries."

6. The court will always have careful regard to the views of competent professionals such as the liquidator in proceedings such as those now before it, and has had the most careful regard to the averments quoted above. Turning to the various grounds raised by the liquidator as to why a s.150 order might issue:

- first, the failure to discharge tax liabilities. There is nothing before the court to suggest that the under-payment of tax was deliberate. It appears that a Revenue audit discovered that more tax ought to have been paid; this could happen to even the most upstanding of individuals or entities and there is nothing in this *per se* that would suggest either of the respondents was dishonest or less than responsible.

- second, the deficiency in the company books and records. It is very important that the company books and records that are required under the Companies Acts should be maintained. Fortunately for Mr. and Ms. Courtney the liquidator has averred in his affidavit that in his professional opinion, even had he *"received a full set of books and records for the Company, the realisations for the creditors are unlikely to have been any higher"*. Largely on the strength of this, the court concludes that in this case the actions of Mr. and Ms. Courtney in this regard were unwise and reproachable but were not dishonest or less than responsible. Were it not for this averment of the liquidator the court might well have concluded otherwise.

- third, a deficiency in documentation pertaining to an assignment of the lease at Blackrock Shopping Centre and certain company assets. This is not the first case in which this Court has been confronted with a situation in which a professionally qualified liquidator has pointed to deficiencies in documentation maintained by directors engaged in the hurly-burly of commercial life. In truth it is perhaps inevitable that there will often be something of a gap between the documentation trail that a professional practitioner would expect to see in a particular instance and the documentation trail that an entrepreneur might see fit to maintain. The court does not consider that the fact that there is such a gap of itself necessarily points to dishonesty or a lack of responsibility either generally or as regards the respondent directors in the instant case.

- fourth, repayment of certain loan monies owed by the company to the directors. The liquidator notes that between 28th February, 2008, and the issuance of the directors' statement of affairs on 9th April, 2009, there was a repayment by Zuccini to the Courtneys of about €15,000 of a €39,000 loan owed by it to them. In addition, various other payments of circa. €6,000 were paid by Zuccini to the directors between 1st March, 2008, and July 2008. There is nothing in the facts as known to the court that suggest that any such loan payments or repayments involved or were due to dishonesty or a lack of responsibility on the part of either director. Thus, while this ground gave the court considerable cause for pause, the court does not consider that in the circumstances of the case, as they appear to it, a s.150 declaration is required on this ground.

- fifth, use of a company credit card by Ms. Courtney to make non-business related purchases. A company, however small, is not the private purse of its directors. This Court views most seriously any improper use of company funds to benefit company directors. The fact that a company credit card is used to make certain non-business related purchases need not necessarily be objectionable. However, no explanation has been offered to the court by or for Ms. Courtney as to why or in what circumstances these purchases were made. In the absence of any such explanation the court considers that it has no choice but to conclude that the fact of the purchases evidences, at the least, a want of responsibility on the part of Ms. Courtney in her capacity as a director of Zuccini, and thus that a s.150 declaration is required to issue in respect of her. It does not appear that Mr. Courtney was party to the use of the company credit card to make the relevant purchases.

- sixth, a degree of non-cooperation with the liquidator. This was not canvassed at length at the hearings and the court notes that, in light of all the circumstances of this case, even the liquidator is prepared to make allowances for any such non-cooperation as occurred. This Court has noted previously that it is very important that the directors of a company in liquidation should extend the fullest cooperation to a liquidator. There is no reason why a s.150 declaration could not issue on the basis of such non-cooperation alone. However, the court does not consider that this is a case in which such

a declaration is merited: any failings of Mr. and Ms. Courtney in this regard are reproachable but do not appear to this court to have been irresponsible.

7. With regard to how the court ought to deal with a 'helpful spouse' who agrees to be a passive director so as to satisfy the requirement that a company has two directors but who does nothing as director, *i.e.* the point Ms. Courtney has sought to invoke in these proceedings and which is mentioned in para. 28 of the extract from the liquidator's affidavit quoted above, the court does not consider that this issue requires to be decided in this case. This is because Ms. Courtney directly involved herself in the company's operations to the extent of being a holder or user of a company credit card and proceeding to make private purchases with that card. Because of this the court has already concluded that a s.150 declaration must issue against her and thus it serves no purpose to consider whether she might escape liability through the invocation of the passive director rationale to which reference has just been made: such a defence in the circumstances presenting before the court in this case must fail.

Conclusion

8. For the reasons stated above, (i) the court is not satisfied that it is required to make a declaration under s.150 of the Companies Act 1990, in respect of Mr. Gerard Courtney; (ii) the court is satisfied that a declaration under s.150 of the Companies Act 1990 must issue in respect of Ms. Patricia Courtney and hereby issues such declaration on the terms contemplated by that provision.