Neutral Citation Number: [2010] IEHC 112

THE HIGH COURT

2010 57 COS

IN THE MATTER OF SECTION 371 AND 371A OF THE COMPANIES ACT 1963

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2005

AND

IN THE MATTER OF MURRAY BROWNE MULCAHY LIMITED

BETWEEN

KEVIN MURRAY, PAUDIE MURPHY AND ALAN BROWNE

APPLICANTS

AND

DONAL MULCAHY

RESPONDENT

Judgment of Miss Justice Laffoy delivered on the 12th day of April, 2010.

The application

1. On this application, on foot of the notice of motion dated 28th January, 2010, the applicants seek an order pursuant to s. 371(1) of the Companies Act 1963 (the Act of 1963) directing the respondent to make good his default as set out in a statutory notice dated 10th June, 2009. Although s. 371A of the Act of 1973 is invoked in the title to the proceedings, it is of no relevance because it applies to an application by the Director of Corporate Enforcement (the Director).

2. The application was grounded on the affidavit of Paudie Murray, who described himself as the second named applicant, which was sworn on 20th January, 2010. I assume that there is an error in the title to the proceedings and the second named applicant should be named as Paudie Murray rather than Paudie Murphy. The order of the Court will include rectification of the title of the proceedings.

The company

3. The company was incorporated on the 7th July, 2005 as a company limited by shares with the principal object of carrying on the trade or business of auctioneers, estate agents and suchlike. The applicants were directors of the company, as was the respondent and also John Butler, who is not a party to these proceedings.

4. The company was dissolved on 17th April, 2009 for failure to file annual returns in the Companies Registration Office (CRO). According to a CRO search dated 25th January, 2010 exhibited in the grounding affidavit, the last annual return was filed on 7th January, 2007 and the last accounts filed were to 30th June, 2006. The search gives the registered address of the company as "Main Street, Macroom, County Cork", although I note from the search that on the 27th March, 2008 the CRO received a Form B2 dated 3rd September, 2007 giving notification in the change in the situation of the registered office of the company. There is an apparent conflict on the evidence as to where the registered office of the company is located, the applicants' contention, which coincides with the record in the CRO, is that it is at the respondent's address at Main Street, Macroom, County Cork, whereas, according to a letter dated 18th June, 2009 from the respondent's solicitor, in reply to the s. 371 notice, the respondent's position was that it was at 85, South Mall, Cork. In his replying affidavit, the respondent has averred that, when the company was incorporated, the registered office was 85, South Mall, Cork, the address from which the second applicant traded as Cork Mortgage Centre. None of the deponents adverted to the Form B2 lodged on 3rd September, 2007.

The section 371 notice and the response thereto

5. In the s. 371 notice, which was dated 10th June, 2009 and was sent by the applicants' solicitors, on their behalf, to the respondent, the respondent was required to make good his alleged default in complying with the provisions of the Companies Acts, with fourteen days after the service of the notice by:

> (a) making available to the applicants "inspection of all books of accounts of [the company]" and allowing copies to be taken of all such books of account; and
>
> (b) making available to the applicants "inspection of the Register of Members, Register of Directors, and the Register of Directors' and Secretary's interests in shares in [the company]".

6. There was a formal response from the respondent's then solicitors dated 18th June, 2009 to the, notice in which the respondent's position was set out as follows:

> (a) All books of account were then currently with the respondent's accountant for the purpose of preparing trading accounts for the years ended June 2008 and June 2009 and those documents would be made available to the applicants

together with a copy of the trading accounts as soon as the exercise had been finalised.

(b) The documents listed at (b) in the notice were not, and never had been, in the possession of the respondent, whose view, as I have stated, was that the registered office of the company was at 85, South Mall, Cork and that all company documentation had been sent to that address either for the attention of the third applicant or the first applicant.

In the letter of 18th June, 2009, it was stated that the documents referred to at (a) were being furnished under duress, on the basis that the respondent's position was that the applicants had no entitlement to them because, it was alleged, they, along with Mr. Butler, had agreed to resign as directors of the company in August 2007. That is disputed by the applicants. However, it is common case that after August 2007 the applicants had little or no input into the operation and management of the company or running its business and the respondent had complete control of the company's books and records. There is a dispute, however, as to when the company ceased trading. The position of the respondent is that it ceased trading early in 2008 and that in April 2008 he incorporated another company under the name of "Donal Mulcahy Auctioneers Ltd." for the purpose of carrying on an auctioneering business. The position of the second applicant was that the company "traded up to recently" before he swore the grounding affidavit. That conflict is one of many conflicts on the evidence, which is replete with conflicts on extraneous issues which are not really relevant to the issue the Court has to determine. For instance, the issue of the propriety of a payment of €26,000 out of the company's account to "R. Mulcahy" and the acceptability of the respondent's explanation for it is not a matter which requires to be resolved on this application.

7. On 22nd September, 2009 the respondent furnished unaudited "financial statements" together with an accountant's report dated 16th September, 2009 to the applicants. The accountants, McSweeney & Partners, stated that they had prepared, without carrying out an audit, financial statements from the accounting records of the company and the information and explanations supplied by the respondent. The position of the second applicant in his grounding affidavit was that the financial statements, which related to the year ended 30th June, 2008, were insufficient to enable the applicants to make proper returns to the CRO. That was the state of play when the notice of motion was issued.

8. After the notice of motion was issued the respondent responded, through his solicitors, as follows:

(i) by letter dated 3rd February, 2010, in which the respondent's solicitors, *inter alia*, informed the applicants' solicitors that the position in relation to the documents referred to in paragraph (b) of the s. 371 notice was as stated in their letter of 18th June, 2009; and

(ii) by letter dated 5th February, 2010, in which the respondent's solicitors purported to furnish all documents which the respondent held "in relation to" paragraph (a) of the s. 371 notice.

9. Following receipt of the documentation furnished by the respondent's solicitors, the second applicant swore a supplemental affidavit on 15th February, 2010 commenting on the documentation and contending that it was "scant and wholly inadequate for the purposes of preparing proper accounts". The second applicant dealt in some detail with the deficiencies in the documentation furnished and also recorded a range of documentation and records which had not been furnished, including VAT returns, PAYE returns, invoices received and raised and suchlike.

10. A replying affidavit was sworn by the respondent on 26th February, 2010. The affidavit dealt with extraneous issues which are not material to the issue the Court has to decide on this application, save as regards credibility. The assertion by the respondent that the applicants' motivation for bringing this application is not to have the company reinstated and the company's affairs wound up but rather is motivated by a personal dislike of the respondent because of the existence of the Circuit Court proceedings brought by the respondent against the second applicant is not constructive. Neither is it appropriate, given that the respondent is being sued as an officer of the company, which has been dissolved by reason of failure to comply with the Companies Acts and the respondent, like the applicants, is responsible for such non-compliance, but, unlike the applicants who made a complaint about the respondent to the Director in January 2009, appears not to be taking steps to remedy the non-compliance.

11. The only matters in the respondent's affidavit which might classify as an explanation of his conduct are the averments in relation to the involvement of the company's first accountants. The respondent has averred that Mr. Eamon O'Shaughnessy of O'Shaughnessy & Co., Chartered Accountants, was appointed accountant of the company at the behest of the applicants and that Mr. O'Shaughnessy filed the accounts for the year ended 30th June, 2006, and that Mr. O'Shaughnessy remained the company accountant up to and including early 2008, when, the respondent averred, "he removed himself from any other dealings" with the applicants because of a disagreement with them. The respondent further averred that he understood that at that time possession of all files held by Mr. O'Shaughnessy on behalf of the company was taken by the applicants. The respondent contested the second applicant's contention that he could not file proper accounts, stating his belief that, at the time, Mr. O'Shaughnessy was in the process of finalising the accounts for the year ended 30th June, 2007. At the hearing of the application on 22nd March, 2010, counsel for the respondent submitted that any further documentation for the years of 30th June, 2007 and 30th June, 2008, which had not been handed over by the respondent in February 2010, would be with Mr. O'Shaughnessy, and that the respondent had written to Mr. O'Shaughnessy but had received nothing by way of response. It is rather strange that if such correspondence exists it was not exhibited in the respondent's affidavit. The respondent has averred that he has been seriously constrained in relation to the preparation of accounts for the years 2007 and 2008 because he has "been denied access to all documentation as removed from" O'Shaughnessy & Co. by the applicants.

12. The respondent has also sworn and filed what is described as an "affidavit of discovery" in this matter on 26th February, 2010. In the second schedule thereof, documents which the respondent has averred he has not now and never has had in his possession are described as "All/any document as requested by the Company accountant Eamon O'Shaughnessy … for completion of annual accounts for the year ending 2007". It is difficult to reconcile that averment with the overall picture which emerges from the affidavits, the correspondence exhibited, in particular, a letter of 1st December, 2008 from the respondent's former solicitors to the applicants' solicitors, and the submissions.

13. In the final affidavit sworn on this application, the affidavit of the second applicant sworn on 4th March, 2010, the second applicant has disputed many of the matters averred to by the respondent. In relation to the affidavit of discovery, the second applicant has averred that the documents listed as categories 1 to 4 had already been furnished and that the documents listed as categories 5 to 7 are "piecemeal, incomplete and useless for the purpose of preparing accounts". The second applicant has also averred that the applicants did not take any files from Mr. O'Shaughnessy or from his offices and that they are not now, nor have they ever been, in possession of the records and accounts necessary to compile the accounts of the company for 2007 onwards.

Section 371 and its application

14. The only issue the Court has to determine is whether an order should be made against the respondent pursuant to sub-section (1) of s. 371, which provides as follows:

> "If a company or any officer of a company having made default in complying with any provision of this Act fails to make good the default within 14 days after the service of a notice on the company or officer requiring it or him to do so, or such greater period as may be specified in the notice, the court may, on an application made to the court by any member or creditor of the company, by the Director, or by the registrar of companies, make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order."

In subs. (4), the expression "officer of a company" is defined as including a director. The respondent is a director of the company and an order may be made under s. 371 directed to him. However, a number of issues, which were not addressed by the parties at the hearing, arise in relation to the application of s. 371 on the facts as deposed to by the second applicant.

15. First, in order to have standing to seek an order under s. 371, the applicant, other than the statutory bodies mentioned in subs. (1), must be either a member or a creditor of the company. While I am satisfied that the three applicants continue to be directors of the company, despite the respondent's assertions that they resigned, there is no evidence that all or any of them is a member of the company. In the absence of such evidence, the Court does not have jurisdiction to make the order sought.

16. Secondly, no effort has been made by the applicants or their legal representatives to identify the default in complying with the provisions of the Companies Acts for which they contend the respondent is responsible.

17. As regards paragraph (a) of the notice of 10th June, 2009, I assume it is a breach of s. 202 of the Companies Act of 1990 (the Act of 1990), which imposes an obligation on the company to keep proper books of account. Sub-section (8) of s. 202 provides:

> "A company shall make its books of account, and any accounts and returns referred to in subsection (6), available in written form in an official language of the State at all reasonable times for inspection without charge by the officers of the company and by other persons entitled pursuant to the Companies Acts to inspect the books of account of the company."

Sub-section (6) of s. 202 refers to –

> "…accounts and returns relating to the business dealt with in the books of account so kept as will disclose with reasonable accuracy the financial position of that business at intervals not exceeding 6 months and will enable to be prepared in accordance with the Companies Acts … the company's accounts … giving information which is required by the said Acts ...."

As was pointed out by this Court (Smyth J.) in *Brosnan v. Sommerville* [2007] 4 I.R. 135 (at para. 15), the failure to comply with the terms of s. 202 attracts serious legal sanctions, not only for the company but also for a director, because subs. (10) of s. 202 makes it an offence for "a person who, being a director of the company, fails to take reasonable steps to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder …".

18. In relation to paragraph (b) of the notice of 10th June, 2009, a variety of statutory provisions deal with access to Registers: s. 119 of the Act of 1963, in the case of the Register of Members; s. 195 of the Act of 1963, in the case of the Register of Directors and Secretary; and s. 59 and 60 of the Act of 1990, in the case of the Register of Directors' and Secretary's interests. The respondent's immediate response, in his solicitor's letter of 18th June, 2009, in relation to those books was that he did not have them and that he never had them. That has not really been challenged on this application, the focus of which has been on the production of the books of account to enable the applicants to file the annual returns and accounts with a view to getting the company restored to the Register. Primarily for that reason, I do not propose to make an order pursuant to s. 371 in relation to the Registers itemised at paragraph (b) of the notice of 10th June, 2009. A secondary factor is that I cannot resolve the registered office conundrum.

19. However, on the evidence, I am satisfied that the respondent is the person who has, or who is best in a position to generate, the documentation required to be made available in accordance with s. 202(8) of the Act of 1990. Further, I am satisfied that the respondent is in default of his obligation under that provision. Therefore, subject to the applicants proving that they have standing to bring an application under s. 371, I propose making an order under s. 371 directing the respondent to make good his default in complying with s. 202(8) of the Act of 1990 and to make available the books of account of the company and such accounts and returns relating to the business dealt with in the books of account so kept as will disclose with reasonable accuracy the financial position of the business of the company from 1st July, 2007 to date and will enable to be prepared, in accordance with the Companies Acts, the company's accounts giving information which is required by the said Acts for the years ended 30th June, 2007, 30th June, 2008 and 30th June, 2009 within eight weeks from 12th April, 2010, or such further period as may be allowed. The application will be adjourned to enable the applicants to provide proof that at least one of them is a member of the company.

20. The applicants cannot absolve themselves from liability to comply with the requirements of the Companies Acts. Therefore, insofar as is necessary, they should instruct their solicitors to take a constructive approach in assisting the respondent's solicitors to recover any records which may have been furnished to and are retained by the company's former accountants.

Time constraint

21. At the hearing on 22nd March, 2010 it was intimated by counsel for the applicants that the applicants were anxious to procure the restoration of the company to the register without having to incur the costs of an application to Court. However, the time limit within which an application may be made to the Registrar, as prescribed by s. 311A of the Act of 1973, will expire on 17th April, 2010. Even though I fully accept the *bona fides* of the applicants in their objective to have the company restored to the register, realistically, there was no prospect of achieving the objective of making an application to the Registrar rather than to the Court when this application only came on for hearing on 22nd March, 2010.