Neutral Citation: [2013] IEHC 31

THE HIGH COURT

[2010 No. 187 COS]

HIGGINS CIVIL ENGINEERING AND CONSTRUCTION LIMITED (IN LIQUIDATION) AND

IN THE MATTER OF S. 150 OF THE COMPANIES ACT 1990 AND S. 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

CONOR BOYLE

AS LIQUIDATOR OF THE COMPANY IN THE WITHIN PROCEEDINGS

APPLICANT

AND

GARY HIGGINS AND LAURA HIGGINS AND RORY O'MARA

RESPONDENTS

JUDGMENT of Mr. Justice Herbert delivered the 30th day of January 2013

1. The affidavit evidence establishes the following sequence of events relevant to the determination of this application for an extension of the consequence free period allowed by s. 56(2) of the Company Law Enforcement Act 2001, to the applicant for making an application to this Court for an order pursuant to s. 150 of the Companies Act 1990.

- 15th April, 2008, the applicant was appointed liquidator in a Resolution for the voluntary winding up of the company named in the title hereof.

- 13th October, 2008, the applicant furnished to the Director of Corporate Enforcement a report on the insolvent company, as required by s. 56(1) of the Act of 2001.

- 23rd January, 2009, by a letter of this date the Director advised the applicant that he was not relieving him of the obligation to make an application to this Court pursuant to s. 150 of the Act of 1990 with respect to the respondents named in the title hereof, being directors of the company at the date of or within twelve months prior to the commencement of the winding-up.

- 27th January, 2009, the applicant instructed solicitors to prepare the application papers. Later on this same day, these solicitors contacted the applicant by telephone and advised him that he had omitted to enclose with his instructions his report to the Director and, that a copy of that report was required to assist counsel in preparing the application papers.

- 8th April, 2009, the report to the Director was not sent by the applicant to his solicitors until this date and, the applicant avers that this was due to an oversight on his part.

- 4th July, 2009, on this date the application papers, settled by counsel, were sent by his solicitors to the applicant by email. The applicant avers that due to an accident these were deleted as "spam".

- 18th August, 2009, the applicant's solicitors sent a reminder to the applicant.

- 26th March, 2010, the motion pursuant to s. 150 of the Act of 1990 was issued after "various communications between myself and my solicitors and between my solicitors and counsel with regard to approving and settling the application".

2. Section 56(2) of the Company Law Enforcement Act 2001, provides that:-

> "A liquidator of an insolvent company shall, not earlier than 3 months nor later than 5 months (or such later time as the court may allow and advises the Director) after the date on which he or she has provided to the Director a report under subsection (1), apply to the court for the restriction under section 150 of the Act of 1990 of each of the directors of the company, unless the Director has relieved the liquidator of the obligation to make such an application."

3. The term "month" is not defined in the Act of 2001. Accordingly, by virtue of the provisions of s. 21 and Schedule Part I of the Interpretation Act 2005, it means a "calendar month". Section 18(h) of the Interpretation Act 2005, dealing with the reckoning of periods of time, provides that where time is expressed in an enactment to begin or to be reckoned from a particular date, that day shall be deemed to be included in the period. In the absence of a statutory definition, it has long been the position at common law that when the period within which an act is to be done, is expressed to be a number of months "after" a specified day, the specified day is excluded and the period commences on the day after the specified day. (See *Zoan v. Rouamba* [2000] 1 W.L.R. 1509 C. of A. at 1516 per. Chadwick L.J.). Therefore, the consequence free period within which the s. 150 application may be made expired in the present case on the 14th March, 2009.

4. In the case of *Re. E. Host Europe Limited (In Voluntary Liquidation) Coyle v. O'Brien and Others* [2003] 2 I.R. 627 at 632, Finlay Geoghegan J. in considering the exercise by this Court of the discretion vested in it by s. 56(2) of the Act of 2001, to extend the consequence free period within which a liquidator of an insolvent company may make an application pursuant to the provisions of s. 150 of the Act of 1990, held as follows:-

"Discretion of Court:

In the light of the conclusion I have reached above, the only effect of the extension of time, if granted by a court under s. 56(2) of the Act of 2001 is to relieve the liquidator from being considered guilty of an offence under subs. (3). It does not affect the entitlement of the liquidator to pursue the application against the directors. Any entitlement of directors to preclude the application being pursued against them by reason of delay would have to be considered in accordance with the principles referred to by Fennelly J. in his judgment in *Duignan v. Carway* [2001] 4 I.R. 550. These would not arise on the facts of this case. Accordingly, it appears that the courts should not consider the position of the directors in an application for an extension of time under s. 56(2) of the Act of 2001. It should consider the matters put forward by or on behalf of the liquidator grounding the application for an extension of time in the context of the very clear intent expressed by the Oireachtas in s. 56(2) of the Act of 2001, that the liquidator must within the specified time bring the application before the court and if he fails to do so is to be considered guilty of an offence. It appears to be that the grounds must be such that they warrant the court, in fairness and justice, relieving the liquidator from the intended statutory consequences of a failure to act within the specified time."

5. Adopting, as I do, this judgment of Finlay Geoghegan J. as correctly stating the law, it appears to me that in considering in the present case whether or not to exercise this discretion and enlarge the time, I should have regard to the following matters.

6. I should take no account of the position of the directors and must determine the application by reference to the grounds advanced by or on behalf of the liquidator. Objectively considered, these grounds must be such as would warrant the court in fairness and justice relieving the liquidator of the intended statutory consequences of his failure to apply within the specified period. Having regard to the primary purpose of s. 150 of the Act of 1990, identified by the Supreme Court in *Re. Squash (Ireland) Limited* [2001] 3 I.R. 35, as being to protect the public against the future conduct of companies by persons whose past record as directors of insolvent companies have shown them to be a danger to creditors and others and, having regard to the clear legislative intent that the application should be made within the specified period, I should not extend time, were I to conclude that there had simply been inaction on the part of the liquidator or his legal advisers. Having regard to the possible consequences for the liquidator arising from s. 56(3) of the Act of 2001 and s. 240 of the Companies Act 1990, should the time not be extended, I should strike a proportionate balance between the legislative intent and the length of the over-run. The greater the interval between the expiry of the period specified in s. 56(2) and the date of the s. 150 application the more cogent and meritorious must be the reasons advanced by a liquidator to explain his or her failure to apply within the specified time. A failure to appreciate that the application to this Court must be made within what is in effect a two month window can not provide a ground for extending the specified period: persons accepting appointments as liquidators of insolvent companies must be aware of the shortness of the period allowed and act accordingly. A liquidator must be pro-active in this regard and the Court should not extend the period simply because a liquidator has passively allowed the time to run-out awaiting a decision of the Director whether or not to relieve him or her of the statutory obligation to make the application.

7. In the present case, I am satisfied that the sole reason for the application not having been made prior to the expiry of the statutory period on the 14th March, 2009, was inaction, on the part of the applicant for a period of two months and eleven days between the 27th January, 2009 and the 8th April, 2009. Such inaction does not have to amount to a knowing and deliberate decision not to act or necessitate any finding of negligence or recklessness in omitting to act, it simply means, in the dictionary definition, a lack of action where some is expected or appropriate. The fact that the inaction may have been due to an unintentional failure on his part to notice that he had not responded to the telephone request from his solicitors for a copy of the report submitted by him to the Director of Corporate Enforcement on the 13th October, 2008, does not render it fair or just for me to extend the statutory period. No explanation at all is given in his affidavit to show how this stated "oversight" occurred, or how it came to continue, or why it came to be remedied on the 8th April, 2009. If the application had been made as a matter of the greatest urgency after the 8th April, 2009, it is probable that the amount of the time over-run would still, at this juncture, be at least almost 50 per centum of the total period allowed by s. 56(2) of the Act of 2001. In my judgment, even then, there were no grounds such as would warrant the court in fairness and justice to relieve the applicant of the possible consequences of his failure to apply within the specified period. However, this failure to act up to the 8th April, 2009, was unfortunately only the start of the inaction on the part of the applicant, which continued for an additional eleven and a half months thereafter, up to the 26th March, 2010.

8. After the applicant had sent the copy of his report to the Director of Corporate Enforcement to his solicitors on the 8th April, 2009, a further unexplained period of just short of three months elapsed before the application papers, after they had been settled by counsel, were sent by email to the applicant. This occurred on the 4th July, 2009. As the contents of the report to the Director dated the 13th October, 2008, are very similar to the matters deposed in the affidavit grounding the present application sworn on the 6th March, 2010, and, noting the absence of any difficult issues of fact requiring to be addressed, the only reasonable inference to be drawn is that despite the fact that the specified period had already been over-run by 24 days on the 8th April, 2009, no sense of the urgency of the matter appears to have penetrated to the applicant. As has been pointed out by this Court on many occasions in the past, a principal is not entitled to remain inactive in the face of delay on the part of his or her agent and, if he or she does so they will be visited with any unfortunate consequences of that delay.

9. Incredibly, when the application papers were sent by email by his solicitors to the applicant, it is averred that due to an accident they were deleted as "spam", - that is, as useless and irrelevant material, often referred to as "junk-mail". No explanation at all is offered by the applicant as to how this alleged accidental deletion occurred. It seems inconceivable that legal documents of this nature sent to the applicant by his solicitors could have been accidentally deleted by the agency of human error. It seems equally surprising that such documents could have been deleted by some automatic filter programme. In such cases also, filtered documents are usually not deleted immediately, but transferred to a "spam" folder, where they remain for a period of time before being deleted. It is therefore pertinent to enquire whether this occurred in the present case, and if so to further enquire why the "spam folder" was left entirely unscrutinised. This sort of purported explanation is entirely unsatisfactory in an application of this nature invoking the exercise by the court of its discretion in favour of an applicant and, is neither cogent nor meritorious.

10. After a further period of one and a half months had elapsed, a quite extraordinary interval in the circumstances then prevailing, the solicitors for the applicant sent an email to the applicant reminding him - I infer, because this is not stated in the grounding affidavit - that they had not heard from him in relation to the application. Despite this reminder an incredible further seven months and seven days elapsed before the s. 150 motion was issued.

11. The only account given - explanation would not be an appropriate description - for this lapse of time is that there had been various communications between the applicant and his solicitors and between those solicitors and counsel with regard to proving and settling the application. No details whatsoever of these communications are given in the grounding affidavit and not a single document of any kind is exhibited in support of this averment. Comparing the contents of the affidavit of the applicant grounding this application with that of his report to the Director of Corporate Enforcement exhibited in that affidavit, I am not satisfied that there

could be any justifiable reason for such extensive communications over such a prolonged period of time, particularly in the context of the already supportable dilatoriness in prosecuting the application.

12. I find that the applicant has failed to establish any grounds sufficient to warrant this Court in fairness and justice extending the period specified in s. 56(2) of the Act of 2001. I therefore refuse the application.