Neutral Citation: [2014] IEHC 366

THE HIGH COURT

[2011 No.302 COS]

IN THE MATTER OF GLENEAGLE WOODCRAFTS 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

NEIL HUGHES

APPLICANT

AND

PETER CAFFREY & PATRICIA CAFFREY

RESPONDENTS

JUDGMENT of Mr Justice Barrett delivered on the 22nd 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. Peter Caffrey and Ms. Patricia Caffrey be restricted in acting as company directors.

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] 21.L.R.M. 345, his observations having since been described by Hardiman J. in *In Re Tralee Beef & Lamb Limited (in liquidation); Kavanagh v. Delaney* [2008] 3 I.R. 347 at 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. 11, mentioned that the extent to which a director has or has not complied with the Companies Acts is a relevant factor when determining a s.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 s.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. It appears to the court that there are no 'honesty' or 'just and equitable' grounds for restriction arising in this case. In deciding whether Mr. and Ms. Caffrey have acted 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. Caffrey were each directors of Gleneagle Woodcrafts Limited (in liquidation). Gleneagle was incorporated on 19th July, 1990, and specialised in the manufacture of solid pine furniture. It ceased trading sometime in 2008 and an examiner was appointed in 2011. The principal factors that led to its demise were the presence of cheap imports on the Irish market and a change in consumer spending habits that resulted in a dramatic decrease in the demand for solid pine furniture by 2008. The liquidator identifies the following grounds on which a s.150 declaration might be merited: first, a failure to take appropriate steps in respect of a company from the time it ceased trading in 2008 until the decision was taken to appoint an examiner in April, 2011; second, a failure to file an annual return and abridged accounts with the Companies Registration Office for the year ended 31st October, 2009; and third, allowing a significant debt to arise with a related company.

Role of liquidator in s.150 proceedings

5. During the course of these proceedings an issue arose as to the respective roles of a liquidator and the respondent director/s in an application such as that now before the court. In such proceedings, the liquidator must establish that the relevant company is one to which s.150 applies and that the respondent directors are qualifying directors. Thereafter, the liquidator's role is primarily one of information provision. It has previously been asserted by the court that the effect of s.150(2) of the Companies Act 1990 is to place a burden on a respondent director to establish that he or she acted honestly and responsibly and that there is no other reason why it would be just and equitable to make a declaration of restriction. The constitutional propriety of requiring respondent directors to prove a negative proposition was questioned by Hardiman J. in *Tralee Beef* but no definitive finding was made by the Supreme Court in this regard. Thus, at this time, it seems safe to assert that, to use a phrase from the world of theatre, when it comes to the burden of proof in s.150 proceedings the spotlight falls on the respondent director/s. However, there is no suggestion in the applicable case‖ law that insofar as a liquidator is concerned he or she can simply identify certain facts, make unreasoned assertions about a

respondent director and then 'exit stage left'. It appears to the court that if a liquidator is to discharge his or her role of information provider fully and properly, the information provided to the court by such liquidator must be of meaningful assistance to the court in discharging its role under s.150. Consistent with this principle, it does not appear sufficient to the court that a liquidator should merely raise points of alleged concern about a director's behaviour without also informing the court, however briefly, why those points mean that the relevant director's behaviour ought, for example, to be held to be less than responsible. A bald assertion that certain stated behaviour is, in the liquidator's view, dishonest or less than responsible or otherwise deplorable, without any accompanying explanation as to why the liquidator considers this to be so, is not of meaningful assistance to the court by way of information. The duty of liquidators as information providers applies in all cases but becomes especially significant in a case such as that presented by the instant proceedings where affidavit evidence that was not entirely relevant to the issues arising was filed by the second-named respondent, with both of the respondents appearing in person, unrepresented by counsel, and seeking as best they could to explain their actions. The court was impressed by both Mr. and Ms. Caffrey in what they said. However, it is perhaps inevitable in a case where non lawyers are forced by circumstance to represent themselves that they may not appreciate the niceties and nuances of the law in the same manner or to the same extent as do counsel experienced in company law. In such cases, consistent with the role of liquidator as information provider, the court, in discharging its functions under s.150, seems likely to require even more information from a liquidator as information provider than might otherwise be sought. The court in amplifying so on the role of liquidators under s.150 is not in any way shifting the burden of proof as it is presently perceived to exist in s.150 proceedings. It is merely recognising the fact that there are two sides before the court in s.150 proceedings, the liquidator and the respondent director/s, that in accordance with the constitutional right to fair procedures each has a role to play, and that liquidators in their capacity as information providers must do more than identify certain facts and then make bald assertions about director behaviour without also informing the court as to the basis for such assertions.

6. In this case the liquidator averred as follows in his affidavit evidence:

> "I believe that the following are the factors which I consider should be brought to the attention of the Court for the purposes of determining whether each of the Respondents has acted honestly and responsibly in relation to their conduct of the affairs of the Company and whether there are any other reasons why it would be just and equitable to restrict the Respondents:
>
> ***i. Failure to have Company wound up***
>
> *The Company ceased trading in 2008 with significant liabilities and although a decision was made to appoint an examiner in April 2011 I believe it was irresponsible of the directors not to take measures in relation to the Company at an earlier stage.*
>
> ***ii. Failure to file returns with Companies Registration Office***
>
> *Although the Company had ceased to trade there was a requirement for the Company to file an annual return and abridged accounts with the CRO for the year ended 31st October 2009 and this was not completed.*
>
> ***iii. Related Company Debtors***
>
> *One of the reasons for the insolvency of the Company was the level of related company debtors ...The directors would obviously have been aware of the ability of this related company to discharge this debt and should not have allowed this level of debt to accumulate."*

7. As mentioned above, the sole question arising for this Court in the instant proceedings is whether the director behaviour referred to in the above-quoted text was less than responsible. As regards ground (i), there is no information provided by the liquidator as to why such a delay ought necessarily or on the facts of this case to be considered irresponsible. Mr. Caffrey indicated to the court that the reason for the delay was that efforts were being made to save the company throughout the relevant time. This seems a reasonable explanation for the director behaviour. Faced with a dearth of information from the liquidator as information provider and an ostensibly reasonable explanation from Mr. Caffrey, the court cannot but conclude that neither Mr. Caffrey nor Ms. Caffrey acted less than responsibly in this regard. As regards ground (ii), directors must of course exercise their stewardship of companies in such a way that those companies comply with the requirements of the Companies Acts. However, the court was not informed by the liquidator as to why he considered that a failure to file a single annual return for the financial year following that in which Gleneagle ceased trading crossed the line from reproachable behaviour, and it is reproachable, and became less than responsible behaviour. Nor does the court consider that there is any reason why such a lapse should necessarily or in this instance be viewed as involving less than responsible behaviour. In this regard it appears to the court that the same comment might be made in respect of the behaviour of Mr. and Ms. Caffrey as was made by McGuinness J. in the Supreme Court decision in *Re Squash Ireland*, at p.39, namely that:

> *"[S]ome criticisms of the directors may be made. Commercial errors may have occurred; misjudgements may well have been made; but to categorise conduct as irresponsible I feel that one must go further than this."*

8. As regards ground (iii), here the liquidator does offer some useful information as to the concern that he believes the facts to present. However, the court has to be careful in exercising '20-20' hindsight to historical occurrences. In this regard, it is worth noting that all businesses take a gamble to some extent as to whether debt incurred or allowed will ever be re-paid. Directors must of course act lawfully and properly. However, they are not soothsayers and the court must be careful not to apply a retrospective standard which has the effect that they should have predicted the future with complete accuracy. On the facts as known to the court, there does not appear to be any issue presenting that would justify the court finding that the relevant director behaviour was less than responsible. In point of fact, given that risk-taking is so inherent a part of business life, there is nothing in the facts, at least as known to the court, why such risk-taking as arose on the part of the respondent directors in this case should even be considered reproachable.

Passive director

9. Ms. Caffrey claimed that she acted as the second-named director of Gleneagle solely to satisfy the minimum two-director requirement under the Companies Acts, and that in truth she played no role in relation to its affairs. Counsel for the liquidator made mention, in this regard, of the decision of the court in *Re Hunting Lodges Limited (in liquidation)* [1985] I.L.R.M. 75, in which Carroll J. stated, at p.85, that:

> *"In relation to Mrs. Porrit, the case has been made on her behalf that she played no part in the running of the company. The day has long since passed since married women were classified with infants and persons of unsound mind as suffering from a disability so far as responsibility for their acts was concerned, or since a married woman could escape*

criminal responsibility on the grounds that she acted under the influences of her husband. Mrs. Porrit cannot evade liability by claiming that she was only concerned with minding her house and looking after her children. If that was the limit of the responsibilities she wanted, she should not have become a director of the company, or having become one she should have resigned.

Any person who becomes a director takes on responsibilities and duties, particularly where there are only two ...A director who continues as director but abdicates all responsibility is not lightly to be excused. If she had reasonably endeavoured to keep abreast of company affairs and had been deceived (and there is no such evidence) it might be possible to excuse her.

Mrs. Porrit was concerned with the concealment of £148,000 all of which has been recovered, therefore no loss arises. In deciding whether to make Mrs. Porrit liable for debts where nothing was lost through her actions, it is necessary that there should be 'real moral blame ' attaching to her. In my opinion this does arise because Mrs. Porrit took all of the advantages and none of the responsibilities connected with the company."

10. By way of initial remark, the court notes that Carroll J.'s observations in the above-quoted text were made solely in relation to a married woman who embarks upon a passive company directorship. However, in our contemporary society where (i) there are many couples in which the wife is the principal commercial actor, and (ii) 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 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. It is important also to recognise the limits of what Carroll J. stated in *Re Hunting Lodges*. In effect she intimated 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 modem age of equality between the sexes. However, Carroll J. did not say that a married female director can never escape liability as a director where she embarks upon a directorship through ties of natural affection and never does anything 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. Notably, Carroll J. states that *"A director who continues as director but abdicates all responsibility is not lightly to be excused".* She does not, however, dismiss the possibility that such a passive director may be excused in some circumstances. Indeed she gives one instance, 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. Neither expressly nor impliedly does Carroll J. assert that there are no other instances in which a passive director might be so excused. Carroll J. 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. In *Re Hunting Lodges*, the purportedly passive director, Mrs. Porrit, had been party to fraudulent trading that included the opening of a building society account under a false name, with the mandate documents for that account being signed by herself and her husband under false names. As a consequence of this behaviour, Mrs. Porrit would likely have struggled to persuade any judge that no moral blame attached to her. However, later case-law presents with instances in which, though it is reiterated that non-executive or passive directors cannot simply wash their hands of responsibility, in fact such responsibility is not visited upon them because they are not guilty of specific wrongdoing. In the present case, the court considers that in any event no liability should attach to either of the respondents under s.150 of the Act of 1990 and thus the court is not required to render judgment on the contention made in respect of the second-named respondent that she was in effect only a passive director of Gleneagle who never played any role in relation to the activities of same and thus ought not to be exposed to liability under s.150. Were it required to do so, however, the court does not see on the evidence before it any *"real moral blame"* on the part of Ms. Caffrey which so taints her behaviour as to place it in one or more of the categories of behaviour in respect of which a s.150 declaration would be required to issue.

11. 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 declaration should issue. As mentioned above, it appears to the court that there are no grounds for restriction arising in this case either on the basis of a want of honesty on the part of either of the respondents or because such restriction would be just and equitable. Moreover, for the reasons stated above, the court does not consider that either Mr. or Ms. Caffrey has acted other than responsibly, albeit that certain of their actions were undoubtedly reproachable. The court is not therefore satisfied that it is required to make a declaration under s.150 of the Companies Act 1990 in respect of either of the respondents and declines to do so.

Application for extension of time

12. The liquidator has, pursuant to s. 56(2) of the Company Law Enforcement Act 2001, as amended, sought an order extending the time for the making of the instant application. It is worth noting that the liquidator was only three days out of time in bringing these proceedings and that this delay was attributable to a clerical error in the stamping of a document which led to that document being refused when presented at the Central Office on a Friday and then accepted, when re-submitted with the correct stamping fee, on the following Monday. The court considers that no conceivable purpose would be served by declining the liquidator's application for an extension of time given the brief nature of the delay arising, the cause that underpinned it, and the fact that such a delay in the bringing of s.l50 proceedings does not, as was noted by Finlay Geoghegan J. in *Coyle v. Hughes* [2003] 2 I.R. 627 at p.632 *et seq.*, impact on the validity of related s.150 proceedings, unless the delay arising is objectionable by reference to such principles as those referred to by Fennelly J. in *Duignan v. Carway* [2001] 4 I.R. 550 and there is no suggestion that the delay in this case transgresses any such principles. The court therefore grants the extension sought.