Neutral Citation: [2015] IEHC 4

THE HIGH COURT

RECORD NO: 2014/452/COS

IN THE MATTER OF TADHG O'CONAILL HEATING AND PLUMBING LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963–2013 AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001
ANTHONY J. FITZPATRICK IN HIS CAPACITY AS LIQUIDATOR

Applicant

– and –
TADHG O'CONAILL & MARY O'CONAILL

Respondents

Judgment of Mr. Justice Max Barrett delivered on 13th January, 2015.

Facts

1. Mr. O'Conaill is a plumber from Cork. After serving his time as an apprentice, he established how own plumbing business in 1992. For about eight years, he operated as a sole trader. Then, on 7th March, 2000, he incorporated Tadhg O'Conaill Heating and Plumbing Limited. For a time the company was a success. At its peak, in 2006-2007, it employed about 75 employees. It will not have escaped the sharp-eyed that this roughly coincided with the peak of the housing boom of that time and that plumbing was a line of business which benefited directly from that boom. The crash in our national economy came in 2008; Mr. O'Conaill's business traded profitably until 31st July, 2009. A year later, it was trading at a significant loss. This sudden decline in performance was substantially caused by bad debts arising solely due to the wider down-turn in the construction industry. Mr. O'Conaill made attempts to collect the debts due to his company but his efforts, perhaps not surprisingly given the times, were unsuccessful.

2. In an attempt to address the financial problems with which his company was faced, Mr. O'Conaill made strenuous efforts to reduce company overheads, including labour costs. By the time the company went into liquidation in June 2011, it was down to 20 employees. It is perhaps best to leave it to Mr. O'Conaill's own words to describe what happened when the end came. In an affidavit of 4th December, 2014, he avers that:

> *"[A]t all times when I was a Director of the Company I did my very best to act honestly and responsibly. I say it was the worst day of my life when it became clear that the Company had to go into voluntary liquidation and I felt desperately bad in telling my remaining employees that they no longer had jobs at the Company and would be made redundant. I say that I put roughly €1 million of my own money, money saved from when I was self-employed and also from my earnings through the company over the years, into saving the company but without success. I also sold two houses in 2008 and 2009 in an attempt to save the company. I worked 20 hour days and risked my personal health to keep the Company afloat. On the date that the Company was put into liquidation I say I had between €20,000 and €30,000 in my bank account and that this money was instantly frozen by the Bank…The Bank…have also entered into proceedings for the recovery of monies owed to them through the guarantees that I, and my wife, had given them in respect of our family home. I confirm that my wife and I, have reached agreement recently with the Bank to leave my family home in December of this year (2014) so that they can take possession of same."*

3. No-one could fail to be moved, many would no doubt be broken, by the scale of the financial disaster that has been visited on Mr. O'Conaill and his family since the collapse of the national economy and the consequent collapse of his company. Mr. O'Conaill continues his tale as follows:

> *"I say that I kept proper books of account for the Company at all times. I say that I fully co-operated with the liquidator when he was appointed, meeting him up to 40 times in the first year of his appointment both at my business address and at his. I have never done anything dishonest or irresponsible in all my time as Director of the Company. I would draw the Court's attention to the fact that despite an exhaustive liquidation process with which I cooperated fully, the Liquidator has indicated that no concerns arise in relation to my behaviour, competence or probity apart from the issue concerning the CWPS arrears…At no time did I seek to continue trading after the situation for the Company had become hopeless. I did not seek to prefer any creditor of the Company. While of course many creditors were left with debts due in the context of the business failure and liquidation of the Company, I strived at all times to deal with all creditors honestly and equally. In particular I did not seek to prefer any creditor to whom I had given a personal guarantee."*

4. It is the issue of the CWPS arrears that has led to the within proceedings being brought. The acronym 'CWPS' stands for 'Construction Workers' Pension Scheme'. It is the leading occupational pension scheme for workers in the construction industry in Ireland. Because of a deficiency in contributions made by Mr. O'Conaill's company to the pension scheme, the liquidator contends that a declaration of restriction ought to issue against Mr. O'Conaill pursuant to s.150 of the Act of 1990. Thus the liquidator avers in an affidavit of 24th September, 2014, that:

> *"[Tadhg O'Conaill Heating & Plumbing Limited] employed site based workers and were therefore registered with the Construction Workers Pension Scheme (CWPS). Up until September 2009 the Company was up to date with payment of contributions of the scheme. From that time onwards cash flow difficulties prevented the payment of contributions for several months. In August 2010 an instalment arrangement was agreed with the CWPS to clear arrears built up covering the periods to July 2010. It was a condition of this agreement that current payments would be made on time. While arrears payments due under the agreement were made up to March 2011 the Company was not in a position to pay the current payments as they fell due. As at the date of the liquidation the Company owed the CWPS a total of €61,959.92… These arrears cover the period May 2010 to June 2011. I say I believe that the directors were in breach of their obligations pursuant to Section 58A of The Pensions Act, 1990…I say that the 2 Directors of the Company did not act in an honest and responsible manner in relation to the conduct of the Company's affairs in that the Company failed to remit contributions to the CWPS within 21 days of the month end as required by the Pensions Act 1990 (as amended)…".*

5. What has Mr. O'Conaill to say about the deficiencies in the CWPS contributions? In his affidavit of 4th December last, he avers as follows:

> *"I accept that a figure of €61,959.92 was owed by the CWPS as at the date of the liquidation. I say that I did everything I possibly could in order to help the Company to pay the amount owing to the CWPS but, to my sincere regret, my efforts were without success. I say that once it became clear that the Company was falling into arrears in respect of CWPS payments, the Company entered into an arrears instalment agreement in an attempt to pay back the arrears together with the payments that were currently accruing. I say that the Company entered into said agreement in August 2010 and paid CWPS arrears payments to the total value of €41,714.44 between September 2010 and February*

2011. I accept that 'while arrears payments due under the agreement were made up until March 2011 the Company was not in a position to pay the current payments as they fell due.' I say that during the periods that CWPS fell due and were not paid, the Company attempted to survive by prioritising payments of wages to the employees as well as paying for supplies that would enable work to continue".

6. It appears from the averments that the contributions were fully paid up to September 2009, that they then went into arrears, that an instalment agreement was agreed with the CWPS in the August 2010, that payments were made in accordance with same through to February or March 2011, the company eventually going into liquidation in June 2011. So, full compliance with CWPS obligations to September 2009; non-compliance from September 2009 to August 2010; compliance with the instalment agreement from September 2010 through to February/March 2011; and non-compliance from then to June 2011. The monies represented by the deficiencies in the CWPS payments went towards employee wages and supply payments. What has Mr. O'Conaill to say to all of this? In his affidavit of 4th December, he continues:

"I say that while I understand that the Company failed to remit contributions to the CWPS within 21 days in breach of the Pension Act 1990, I say that I did everything within my power and control to pay those payments as they fell due but the surrounding economic circumstances meant that I and the Company were unsuccessful…I say I regret that circumstances have brought matters to this point but I have always endeavoured to be forthright and honest in my affairs and I deeply regret the loss to the CWPS. It was always my expectation that I and the Company would weather the storm, and in doing so would be able to repay the CWPS what was owed to it. This belief was honest and bona fide in the context of the very significant sums then due and owing to the Company. I say that my efforts and attempts to pay the arrears as per the agreement entered into to pay CWPS arrears are evidence of my intentions, as well as that of the Company, to repay the payments as soon as was ever possible. I did not adopt a head in the sand approach…I say that I and my co-director have at all times acted honestly and responsibly in the management of the Companies affairs and in the carrying out of our duties as directors. I put everything I had into this business and have now lost everything as a result of its failure, including my family home. I am financially devastated. I have not sought to evade in any way my own personal responsibilities. I say that the making of the Order would significantly undermine my attempts to get back into business following the end of the recession and would cause particular hardship to me. In the circumstances averred to herein, I therefore pray that the application be refused."

7. The court returns to the position of the "co-director" below. But first it turns to a consideration of some applicable law.

Applicable law

8. Non-payment of pension contributions is an insidious wrong. Its effects are typically not felt in the now but at a later stage when the victims of the non-payment are vulnerable. How does the law require that non-payment of pension contributions should be treated in the context of a s.150 application?

9. *General approach to be adopted*. In its general approach to deciding this case, the court is mindful of the decision of the Supreme Court in *Re Mitek Holdings* [2010] I.R. 374. In his judgment in that case, Fennelly J. identifies the type of exercise in which a court ought to engage in determining s.150 applications. The key complaint concerning the respondent directors in that case was that at a time when various group companies were insolvent they had permitted the transfer of almost €3m from the group and granted security to a related company. This eventually resulted in declarations of restriction against the directors. The directors appealed these restrictions unsuccessfully to the Supreme Court, Fennelly J. noting in his judgment, at p.396, that:

"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. The judgments of Murphy, Shanley, McGuinness and Clarke JJ. [which Fennelly J. considers] show that compliance with statutory requirements may be relevant. On the other hand, whether in that respect or in respect of common law duties, it is not every criticism that enables one, in the words of McGuinness J., 'to categorise conduct as irresponsible'."

10. The thrust of the last-quoted remark is that it is important not to adopt a formulaic, standardised, 'tick the box' approach to determining s.150 applications. It is important, as Fennelly J. observes at an earlier point in p.396 to that just quoted, "*to identify the issues that are important in a particular case*". Having done so, the court must then proceed with its analysis of those issues by reference to precedent and the ever-present prism of context. When it comes to the issue of context, the court has been particularly alive to the following issues, which it considers in further detail at a later point below, *viz*. the scale of Mr. O'Conaill's company as a trading enterprise, the length of the respondents' tenure as directors, and the bleak trading environment that followed the collapse of our national economy in 2008. The court returns to each of these factors elsewhere below. However, it now turns to consider the analogy that can be drawn between non-payment of pension contributions and non-payment of taxes, and the lessons to be drawn from s.150 applications that have focused on the latter issue.

11. *Non-payment of pension contributions and non-payment of taxes*. There is a clear analogy between the non-payment of pension contributions and the non-payment of taxes. Notably, since at least the early 'noughties' the courts have taken a quite nuanced approach to the link between non-payment of company taxes and the subsequent restriction of company directors. A decision often cited in this regard is the decision of Finlay Geoghegan J. in *Re Digital Channel Partners Limited* [2004] 2 I.L.R.M. 35. Digital Channel was an e-business that unfortunately failed when it was still in the start-up stage. It commenced trading in July 1999, was in a difficult financial position by April 2001, and ultimately went into liquidation in March 2002. In the s.150 application that followed the liquidator relied, *inter alia*, on the failure by the company to make certain tax returns, and thus to discharge certain tax liabilities, to the Revenue Commissioners. In the course of her judgment, Finlay Geoghegan J. observed, at p.4, that:

"The mere fact that a company is in breach for, as in this case, a relatively limited period will not of itself, it seems to me to indicate that the directors of the company have acted either dishonestly or irresponsibly in such a way as to preclude my concluding that overall they acted responsibly and honestly in relation to the conduct of the affairs of this company. Unfortunately and inevitably where companies are under significant financial pressure this may occur.

It appears to me that in relation to tax liabilities there must be something more than a limited failure over a period to indicate that the directors have acted irresponsibly….[I]n so far as there may be evidence that there either has been selective distribution or selective payment of liabilities of a company or indeed a total disregard of obligations to the Revenue or even a decision to effectively seek to use taxation liabilities for the purpose of financing a company, that of itself will normally be indicative of the fact that directors have been acting at least irresponsibly."

12. More recent decisions of the court in *Re Access Cleaning Services Limited* [2014] IEHC 317 and *Re Shellware Limited* [2014] IEHC 184, have adopted a not dissimilar line of reasoning.

13. It is never the correct option to seek to trade on pension contributions but it does not appear from the evidence before the court that Mr. O'Donaill ever resolved to do so. During the times of plenty all required CWPS payments were made. By the liquidator's own account, it was cash-flow difficulties that caused the first gap in payments. Thereafter good-faith efforts were made to address the arrears, an instalment arrangement was agreed with the CWPS, but the continued declining performance of the company frustrated its efforts to pay off the monies owed. Yes, the monies that were not paid to the CWPS were used for other purposes but clearly monies not paid across as taxes or pension contributions will inevitably serve some other purpose; that was the case in *Re Digital Channel* and that was the case here. Notably, and significantly in the court's view, the non-payment of the CWPS monies only occurred in the waning days of Mr. O'Donaill's company, after the national economy had collapsed and the company's trading figures were tumbling.

14. *Overall commercial management of company*. In approaching this case, the court has been mindful of the decision of Clarke J. in in *Re Swanpool Limited* [2005] IEHC 341. In that case certain investors had placed money into Swanpool on foot of a business expansion scheme or 'BES'. There was nothing wrong with that transaction. However, by the time the investors came to be repaid, the company had suffered a serious reversal of fortune in that company premises which it had hoped to sell for about €2m had eventually been sold for a quarter of that price after certain planning difficulties arose. The payment of monies owed to the investors was perceived to involve a preferment of the BES investors over the Revenue Commissioners, albeit a preference that did not benefit any of the directors or any connected person and in fact resulted in an eventual financial loss to one of the directors who was himself a significant, and ultimately disappointed, creditor of Swanpool. In the course of his judgment, Clarke J. states, at p.7, that:

> *"One of the most important obligations of any director is to ensure that when a company is facing an insolvency situation, its assets are dealt with in accordance with law….While understanding the pressures which may have been on the directors it does have to be noted that all directors in insolvent circumstances are likely to be subjected to significant pressure. It is their job to resist such pressure and to ensure that the company's assets are properly dealt with. Any significant failure in that regard has to be taken as demonstrating a level of irresponsibility sufficient to warrant making an order under [s.150]….In that respect this case is not like one where, for example, a single (though perhaps significant) commercial misjudgement is made in the dying days of a company which had otherwise been managed in an entirely proper way. In those circumstances unless the misjudgement was of a very serious type indeed it is unlikely that the court would judge the overall commercial management of the company as displaying a sufficient degree of irresponsibility to warrant making the order."*

15. It seems to the court that the misjudgement that Mr. O'Conaill manifested in permitting a non-payment of CWPS contributions to arise is serious. However, in every other respect his company appears to have been properly run, not least in that CWPS contributions were always paid when times were good. Moreover, even when times were bad, and following the collapse of the national economy in 2008 they were generally very bad, Mr. O'Conaill tried to get on top of the arrears that had arisen, agreeing an instalment arrangement with the CWPS that ultimately failed, not for want of effort, but for want of company income. The court considers that this singular, if serious, error of judgement comes within that class of misjudgement to which Clarke J. makes reference in the above-quoted extract, being an egregious but singular occurrence that, in the circumstances of this case, does not display the irresponsibility that would require a declaration of restriction to issue pursuant to s.150 of the Act of 1990.

Some factors of relevance

16. In its judgment in *Re Mitek* the Supreme Court pointed to the need to identify the issues that are important in a particular case. As mentioned above, the court considers that in the within proceedings the following issues are among the issues of relevance, viz. the scale of Mr. O'Conaill's company as a trading enterprise, the length of the respondents' tenure as directors, and the bleak trading environment that followed the collapse of our national economy in 2008.

17. *Scale of enterprise*. Business is a human endeavour. It would be easy to lose sight of this human dimension in the clinical ambience of a courtroom. At its peak, Mr. O'Conaill's company had 75 employees; even at the point of its liquidation there were 20 employees. That is a lot of wage-slips, a lot of families being supported, a lot of home mortgages being paid. That is a tremendous responsibility for a director to bear. Any rational director would be cognisant of the responsibility owed to so many people when confronted with the financial meltdown that confronted Mr. O'Donaill's company following the collapse of our national economy in 2008. The court considers that when looking to Mr. O'Conaill's misjudgement as regards CWPS payments, and misjudgement there was, it must be mindful of the entirety of the responsibilities that he bore and his attentiveness to resolving the difficulties arising, as well as to the scale and swiftness of the financial downturn that affected his company following the collapse of the national economy.

18. *Length of respondents' term as directors*. The court has had regard to the fact that the respondents were directors of Mr. O'Conaill's company from 2000 onwards. In the course of the within proceedings no adverse comments were made regarding their stewardship of the company other than during the period that is the focus of this application, being roughly July 2009 to June 2011. This near decade-long period of good behaviour is a factor to which, consistent with the decision of the Supreme Court in *Re Squash (Ireland) Ltd.* [2001] 3 I.R. 35 at p.41, the court can have, and has had, regard when determining the within application.

19. *The 'crash' of 2008 and its aftermath*. The decline and fall of Mr. O'Conaill's company took place in the bleak trading environment that followed the collapse of our national economy in late-2008 and the protracted economic decline that followed. This is a contextual dimension to the facts of this case that cannot be ignored. All of us who lived through the events of 2008 and the succeeding years remember vividly the speed and depth of the economic contraction that engulfed our nation at that time; even now, we are still living with the consequences. It would ill-become the courts not to remember what none of us who have lived through that period will quickly forget. It would ill-serve justice to interpret laws and apply case-law with an immutable constancy that, subject to the requirements of precedent, they do not themselves demand. Nowhere will one find the assertion that the criteria of reasonableness, justice and equity, as referred to in s.150 of the Act of 1990 and interpreted at one time, fall to be so construed for all time. To paraphrase Justice Oliver Wendell Holmes, words are but the skin of living thoughts and may vary in colour and content according to the circumstances in which they are used. Though Mr. O'Conaill no doubt appreciated, with a clarity that only the worst of declining sales figures can bring, that he was working through an unprecedented economic and financial maelstrom, he was not alone if he did not immediately apprehend just how bad matters were, how much worse they were to become, and how it was all but inevitable that the missed CWPS payments would never be paid. It is easy to be wise with hindsight but the courts have cautioned against undue application of hindsight in the context of s.150 proceedings. (See in this last regard the decisions of the court in *Business Communications v. Baxter* (Unreported, High Court, 21st July, 1995 (Murphy J.) and *Re The Computer Learning Centre Limited* (Unreported, High Court, 7th February, 2005 (Finlay Geoghegan J.)).

'Ties of affection'

20. Ms Mary O'Conaill is the first-named respondent's mother. Back in 2000, she agreed to be named as the necessary second director in his company. However, she never played any part whatsoever in the operation of the company. Nor did she derive a direct benefit from its operation. She was moved, it seems entirely, by maternal affection for her son into acting as she did. The court has

previously considered, in the context of husband-and-wife cases, how it ought to approach s.150 applications in which one director is motivated primarily by ties of affection into serving as a nominal director of a company that later goes into liquidation. In addressing this issue in its decision in *Director of Corporate Enforcement v. Slattery* [2014] IEHC 363, the court had particular regard to the decision of the court in *Re Hunting Lodges Limited (in liquidation)* [1985] I.L.R.M. 75. In that case, 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. That last category of person, in the court's opinion, includes a mother such as Ms O'Conaill acting as she did in this case from ties of affection and not out of any desire for material benefit.

- 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. It appears to this Court that the same observation applies, mutatis mutandis, to a mother acting as Ms O'Conaill did.

- 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.

21. Looking to the context and features of this case, it does not appear from the facts before the court that Ms O'Conaill played any part in the running of the company. One will search in vain to find that "*real moral blame*" on her part that the decision in *Re Hunting Lodges* effectively posits as the litmus test of personal liability in these instances. The court finds that Ms O'Conaill'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 O'Conaill, frankly, did no more and no less than many or most, perhaps even all, mothers placed in her position would do for her son. She agreed to be the required second director in her son's company; thereafter, she played no part in its operation. The court does not consider that the Oireachtas, when it enacted the Act of 1990, intended that a mother should be sanctioned for so acting, without the court having any regard to 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 mother-and-child directors. 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, the court finds that in this case it is, primarily 'ties of maternal 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
22. *Mr. Tadhg O'Conaill*. When it comes to the court's decision as regards Mr. O'Conaill, this was a close-run case. It is not acceptable that a company should default on payment of pension contributions. It is an invisible wrong the effects of which only become apparent at a later stage, but it is no less a wrong for that. Notwithstanding that the court has every sympathy for the predicament in which Mr. O'Conaill's company found itself as it teetered towards collapse, it cannot but conclude that Mr. O'Conaill was unwise and imprudent to allow the default in payment of the CWPS contributions to arise. Yet for the reasons stated, having due regard to applicable law and the particular circumstances presenting in this case, the court considers that his behaviour does not evince the irresponsibility or dishonesty that would require the issuance of a declaration of restriction against him. Nor does the court consider that it is otherwise just and equitable that such a declaration should now issue.

23. *Ms Mary O'Conaill*. Ms O'Conaill, in practical reality, is an entirely nominal director who, because she is Mr. O'Conaill's mother, agreed, back in 2000, to be named as the necessary second director of his company; she never played any part whatsoever in the operation of the company. The court has considered above the position of a person who primarily motivated by 'ties of affection' agrees to act as a 'nominal' director but never truly acts as director and only derives an indirect benefit, if any, from the continuing operation of that company. Having considered the law applicable to persons who are placed or place themselves in such a position, the court does not consider that any declaration of restriction is required to issue against Ms O'Conaill. However, even if the position were different and Ms O'Conaill fell to be treated like any other director, the court considers that the factors which determine that no declaration of restriction is required to issue against Mr. O'Conaill has the same result as regards her.