Neutral Citation: [2014] IEHC 370

THE HIGH COURT

[2014 No. 230 COS]

IN THE MATTER OF MINT 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 the second such application against Mr. and Ms. Courtney in which the court is giving judgment today. Like the other application brought against Mr. and Ms. Courtney, it is perhaps somewhat unusual. 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 passive second director so as to satisfy the legal requirement that Mint have at least two directors and who consequently ought not to be the subject of an order under s.150. Thus this Court is presented on the one part with a liquidator who, admirably, states that in his professional opinion there are significant mitigating factors which may justify no s.150 declaration being made, and, on the other part, with two respondent directors, one of whom is satisfied that a s.150 declaration should issue against him and the other of whom considers that no liability should attach to her.

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 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 s.150 application. In the High Court decision in *Kavanagh v. Delaney* [2005] 1 I.L.R.M. 34 at 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. There are no 'just and equitable' grounds alleged in this case, nor do they in any event appear to the court to arise. In deciding whether each of Mr. and Ms. Courtney has acted honestly and responsibly the court may of course have regard to their respective 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 Mint Restaurant Limited (in voluntary liquidation). Mint was incorporated on 24th October, 2003, ceased trading on 19th April, 2009, and was placed in liquidation on 5th May, 2009. During its lifetime, Mint's primary activity was the operation of a restaurant in Ranelagh, County Dublin. The principal factor that led to its demise was the dramatic economic downturn in Ireland in 2008, following which Mint suffered from the greatly diminished spend that afflicted so-called 'high-end' restaurants from that time onwards.

Grounds for instant application

5. The liquidator identifies the following grounds on which a s.150 declaration might be merited. First, a failure by Mint to discharge certain tax liabilities and make certain tax payments towards the end of its existence. Second, a deficiency in Mint's company books and records. Third, a repayment of certain loan monies owed by Mint to the directors. Fourth, use of a company credit card to make non-business related purchases. Fifth, 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.*
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> *26. From my investigations it appears that the creditor deficits identified above began to accrue only when the company faced the unprecedented financial difficulties created by the recession which was beyond the Respondents control. In addition, the largest creditors of the Company by far were the Respondents themselves who invested over €400,000 to keep the Company afloat and also faced the calling in of personal guarantees of the Company's loans and overdraft facilities. The Respondents ultimately settled those liabilities by way of a further personal loan with AIB bringing their total losses to a figure in excess of €472,000.*
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> *27. On the basis of my initial discussions with the first named Respondent in particular, it would appear that the sudden and unforeseen difficulties created 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.*
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> *28. 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.*
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> *29. 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 the court, 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 by Mint to discharge certain tax liabilities and make certain tax payments towards the end of its existence. It seems to apply almost without failing in respect of any insolvent company that there will have been late or non-payment of taxes, perhaps coupled with a failure to make tax returns. This Court has recently considered in *Van Dessel v. Gill and Another* [2014] IEHC 317 (Unreported, High Court, Barrett J., 30th May, 2014) the issue of whether such a failure is to be treated as evidence of irresponsibility and does not propose to re-examine the question in detail in this judgment. Taxes due ought of course to be paid. However, on the facts before it, the court does not see that there is anything more than that "*limited failure over a period*" to comply with tax requirements which Finlay Geoghegan J. identified in *In the Matter of Digital Channel Partners Limited (in voluntary liquidation)* [2004] 2 I.L.R.M. 35 as insufficient in and of itself to justify a s.150 declaration. There was not here a total disregard of revenue obligations. Moreover, while a failure to meet tax liabilities can in one sense always be considered as, to quote from para. 40 of Finlay Geoghegan J.'s above judgment, the "*use [of) taxation liabilities for the purpose of financing a company*", there appears to be no suggestion that there has in this case been the deliberate decision to deploy such liabilities to the advantage of Mint in the manner that that Finlay Geoghegan J. appears to contemplate in her observations in *Re Digital Channel Partners.*
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> - second, the deficiency in 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 indicated 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".* On the strength of this averment the court concludes that in this case the actions of Mr. and Ms. Courtney in this regard were unwise and reproachable but were not irresponsible. Were it not for this last-quoted averment of the liquidator the court might well have concluded otherwise.
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> - third, the repayment of certain loan monies owed by the company to the directors. The liquidator notes repayments by Mint between 1st January, 2008, and 3rd April, 2009, of circa. €23,000 of an almost half-million euro loan previously made to it by the directors. 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.
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> - fourth, 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 explanation the court considers that it has no choice but to conclude that the relevant purchases evidence, at the least, a want of responsibility on the part of Ms. Courtney in her capacity as a director of Mint, and thus that a s.150 declaration is required 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.
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> - fifth, 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, even the liquidator is prepared to make allowances for any such non-

cooperation as occurred. The 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, and 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 legal requirement that a private company has at least two directors but who does nothing as director, *i.e*. the point that Ms. Courtney has sought to invoke in these proceedings and which is touched upon in para. 29 of the extract from the liquidator's affidavit quoted above, the court does not consider that this issue requires to be considered in the present 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 arising 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. Courtney; (ii) the court is satisfied that a declaration under s.150 of the Companies Act 1990 must issue in respect of Ms. Courtney and hereby issues such declaration on the terms contemplated by that provision.