Neutral Citation: [2014] IEHC 365

THE HIGH COURT

[2014 No. 141 COS]

IN THE MATTER OF WALFAB ENGINEERING LIMITED AND IN THE MATTER OF R.P.B. PRODUCTS LIMITED AND IN THE MATTER OF SECTION 160 OF THE COMPANIES ACT 1990

BETWEEN/

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

BRENDAN WALSH AND CATHERINE WALSH AND PATRICK WALSH

RESPONDENTS

JUDGMENT of Mr. Justice Barrett delivered on the 23rd day of July, 2014.

1. This is yet another case that arrives before the courts following the economic downturn that beset the nation in 2008 and continued in the years following. In this case the Director of Corporate Enforcement is seeking, pursuant to s. 160(2)(h) of the Companies Act 1990, as amended, a disqualification order in respect of each of the respondents. A disqualification order is a severe measure that prevents an affected person from having any involvement whatsoever in the promotion, formation or management of any company for the duration of the disqualification period. So what did the respondents do that the Director of Corporate Enforcement considers them to merit such censure? They were respectively the directors of one or more companies that got into financial difficulties post-2008 and which they allowed to be struck off the register of companies instead of going through a formal liquidation process. The relevant 'strike off process is available to the registrar of companies under s.12 of the Companies (Amendment) Act 1982, as amended, which provides that:-

> *"(1) Without prejudice to the generality of section 311 of the Principal Act, where a company does not, for one or more years, make an annual return required by section 125 or 126 of the Principal Act, the registrar of companies may send to the company by post a registered letter stating that, unless all annual returns which are outstanding are delivered to him within I month of the date of the letter, a notice will be published in the Companies Registration Office Gazette with a view to striking the name of the company off the register.*
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> *(2) If the registrar of companies either receives an answer to the effect that the company is not carrying on a business, or does not within 1 month after sending the letter receive all annual returns which are outstanding, he may publish in the Companies Registration Office Gazette a notice stating that, at the expiration of 1 month from the date of that notice, the name of the company mentioned therein will, unless all outstanding returns are delivered to the registrar, be struck off the register, and the company will be dissolved.*
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> *(3) Subject to subsections (1) and (2) of section 12B of this Act, at the expiration of the time mentioned in the notice, the registrar of companies may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Companies Registration Office Gazette and on the publication in the Companies Registration Office Gazette of this notice, the company shall be dissolved."*

2. In essence, s. 12(1) establishes a process whereby the registrar may strike off a company that is in breach of its annual return requirements. This may seem a venial transgression, certainly by reference to some of the abuses that one sees reported in the company law arena. However, such a strike-off has a particular significance for the creditors of an insolvent company, as was noted by Finlay Geoghegan J. in *Re Clawhammer Limited; Director of Corporate Enforcement v. McDonnell and others* [2005] 1 I.R. 503 at p.510, when she stated that:-

> *"There is potential prejudice to creditors of an insolvent company if the directors, by default, permit it to be struck off the register rather than taking steps to wind it up. In such circumstances such assets of the company as remain are not applied, as a matter of course, in the discharge of creditors according to statutory priorities. Even directors who seek to discharge liabilities of the company may do so in accordance with their own preferences and possible perceived future commercial needs or future commercial intentions or to escape liabilities under guarantees. It also may be of benefit to the directors in the sense of escaping the scrutiny of their conduct of the company's affairs which might follow an investigation by a liquidator including the possibility of being fixed with persona/liability for liabilities of the company in circumstances where same is mandated by the Companies Acts. Accordingly, I accept the submission made on behalf of the Director that the Oireachtas regards the fact that directors may have permitted a company to be struck off the register as a result of their failing to make annual returns as more than a technical breach of their obligations of the Companies Acts."*

3. Finlay Geoghegan J. delivered her judgment in *Clawhammer* in early-2005, some years in advance of the financial maelstrom that afflicted the State from late- 2008 onwards. While her observations are as true now as they were then, the practical context in which s.160 applications fall to be considered has changed utterly. In this regard it is worth noting that the courts do not administer justice blinkered from general facts of which they are entitled to take judicial notice such as the collapse of the national economy around 2008, the protracted financial downturn that followed, and the adverse financial consequences that all of this has entailed for many people, including the respondents and indeed the creditors of the companies of which they were directors.

4. The respondents were, between them, the directors of two companies, Walfab Engineering Limited and R.P.B. Products Limited. Walfab was a metal fabrication and manufacturing company. R.P.B. primarily imported and installed prefabricated stairways. It appears that the three respondents were the directors of Walfab, whereas only Messrs. Brendan and Patrick Walsh were the directors of R.P.B. Walfab started trading in 1992 and was steadily more successful until the effective collapse of the construction industry in

2008. At its height it had an impressive 13 full-time employees. In the period after 2008, as a result of the economic downturn and the consequent reduction in business, as well as various voluntary staff departures, the number of Walfab employees decreased, so that by the time the company ceased trading on or about 1st October, 2011, there were only three employees left, all of whom departed at that time. RPB suffered a similar fate to Walfab post-2008.

5. On 22nd May, 2011, Walfab was struck off the register of companies pursuant to s. 12(1) of the Companies (Amendment) Act 1982. R.P.B. was struck off on the same basis on 301h September, 2012. For the reasons mentioned by Finlay Geoghegan J. in *Re Clawhammer* and referred to above, such a strike-off has the potential to engender unfairness for creditors. It is also a matter to which the Oireachtas clearly attaches some seriousness, making such a strike-off a basis for the possible issuance of a disqualification order under s.160 of the Act of 1990. However, the Oireachtas also clearly recognises in the Companies Act 1990 that there may be instances in which, amongst other matters, a company is struck off, rather than being liquidated, but in which a disqualification order need not follow or a shortened disqualification order might be imposed. It does this through the expedient of entrusting to the discretion of the High Court the decision as to whether a disqualification order should be imposed and, if so, for how long. Insofar as is relevant to these proceedings, s.160 provides, at ss.(2), that:-

> *"Where the court is satisfied in any proceedings or as a result of an application under this section that ...*
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> *(h) a person was a director of a company at the time of the sending, after the commencement of section 42 of the Company Law Enforcement Act 2001, of a letter under subsection (1) of section 12 of the Companies (Amendment) Act 1982, to the company and the name of which, following the taking of the other steps under that section consequent on the sending of that letter, was struck off the register under subsection (3) of that section ...*
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> *the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit." [Emphasis added].*

6. That s. 160(2) establishes a discretionary jurisdiction on the High Court was made clear by Murphy J. in *Business Communications Ltd. v. Baxter* (Unreported, High Court, 21st July, 1995), when he stated, at p.12, that *"Section 160 confers a discretion on the Court by the use of the word 'may' (rather than the word 'shall' ...) with regard to the imposition of a disqualification order"*. Likewise, McCracken J. in *Re Newcastle Timber Limited* [2001] 4 I.R. 586 at p.589 notes that *" ...the use of the word 'may' in section 160 gives the court a discretion*". When it comes to the exercise of this discretion, the consequences of a disqualification order are so severe for the person against whom it is issued that the courts, historically, have not tended lightly to issue such orders. Thus in *Business Communications*, Murphy J. stated, at p.13, that *"there is a substantial burden to be discharged before the court has jurisdiction to make the appropriate order"*. In a similar vein, the Supreme Court in *Cahill v. Grimes* [2002] 1 I.R. 372 accepted in principle that there is a heavy onus on an applicant in s.160 cases. Continuing in a not dissimilar vein in the much more recent case of *Re Kentford Securities Limited; Director of Corporate Enforcement v. McCann* [2011] 1 I.R. 585 at p.601, O'Donnell J. writes that:-

> *"[G]iven the penal consequences of a disqualification order for any director or other officer, a court must feel a high degree of confidence before making any such disqualification order."*

7. It was accepted by the respondents in these proceedings, and it was in any event established by the Director of Corporate Enforcement, that the facts which underpin the proceedings are such that it is open to this court to make an order against any or all of the respondents under s.160(2). In *Re Kentford*, O'Donnell J. refers, at p.600, to the "two stage structure" of s. 160(2). In the course of this *two-stage structure*, the court must look first to whether conduct falling within any of the sub categories of s.160(2) is established as a matter of fact and then to whether it should exercise its discretion in favour of or against making a disqualification order. In this case, the court finds as a matter of fact that the situation posited in s.160(2)(h) arises in respect of each of the respondents and thus that each is exposed to a disqualification order being made against him or her. The court turns now to the issue of how it ought to exercise its discretion under s.160, having especial regard to the factors considered hereafter.

8. *Scale of enterprise and qualifications of directors.* The courts in applying the law are of course sensitive to the personal circumstances and social background of persons who present before them. This is what makes our courts hallowed places in which, subject at all times to what the law requires, it is sought to dispense measured justice and avoid unmerited harshness of treatment. In the instant case Messrs. Brendan Walsh and Patrick Walsh are metal fabricators by trade and, though clearly commercially astute, they are not professional directors, do not possess professional qualifications, and have never served at the helm of large or quoted enterprises. Mrs. Catherine Walsh is married to Mr. Patrick Walsh and, it appears, largely because of that was appointed a director of Walfab Limited, a family enterprise, perhaps to satisfy the minimum two-director requirement that arises under law. Certainly she never took an active part in the operation of Walfab.

9. *Context in which director transgressions occur*. If justice can be tempered by reference to context, and it both can and should, then it follows that it must also be capable of being tempered by reference to the times, given that the times form a part of the context against which the facts of a case unfold. In this case the relevant facts unfolded in unprecedentedly turbulent times, when the respondents and the companies of which they were directors were confronted with economic challenges of such a scale and swiftness that customary practices such as the filing of returns may not have had the priority to some, the respondents among them, that legal requirements ought generally to have for all. The respondents' failure to make the necessary returns and their apparently complacent acquiescence in the strike-off process is undoubtedly reproachable but needs to be viewed in context, a context in which, as Mr. Patrick Walsh avers in his affidavit evidence:-

> *"Every step [was taken} to ensure the survival of a family business that ...was exposed to a period of acute market decline and its existence and survival had taken significant personal resources to establish and grow over the years. I say that the intentions of the directors were genuine, responsible, honest and reasonable at all material times and I say that the effect of the economic circumstances overwhelmed the Companies to the extent that survival of the Companies was not possible."*

10. In hindsight it may be that Messrs. Patrick and Brian Walsh (Mrs. Catherine Walsh appears to have been uninvolved) were unduly optimistic about their ability to navigate the companies of which they were directors through the economic tsunami that befell the State in 2008 and the years that followed. It may be, it almost certainly is, that they should have sought to put the companies into liquidation sooner and so ensured an orderly wind-up of the company's affairs in accordance with the law pertaining to company liquidations. However, it seems to the court that it was precisely to ensure that disqualification orders did not issue in circumstances where mitigating factors arise that the Oireachtas, in s.160(2), entrusts the court with a discretion as to whether and for how long a disqualification order should issue when an application is brought under that provision. To put matters colloquially, the present case is not one of 'Nero fiddled while Rome burned'; it is more a case of Nero leaving the fiddle unattended while he dashed into the burning city in a desperate bid to save what he could. One might criticise the respondents' behaviour in failing to file their annual returns as

foolish, unwise or reproachable. However, when put in context it is also to some extent understandable. It certainly does not appear to this court to be of such a nature as to require that the court must exercise its discretion so that a disqualification order now follows.

11. *Past behaviour of respondents.* Another factor that the courts will bear in mind in applications made under s.160 is the past behaviour of respondents. In *Re Kentford*, O'Donnell J. emphasised the importance of looking to this past behaviour, writing, at p.601, that:-

> *"In my view, it is clear from an analysis of the Act of 1990, that that Act directs attention to that past conduct as certainly the best, if not the only, guide to the necessity for disqualification."*

12. Apart from the failure as regards the submission of annual returns which led in turn to the eventual strike-offs, the court's attention has not been drawn to any other misbehaviour on the part of any of the respondents as directors during their relatively long tenure as directors. This long period of good behaviour is a relevant factor when deciding whether any of them should be exposed to the severity of a disqualification order and inclines this Court to the view that they should not. Neither in this nor in any other respect does it appear to this Court that the behaviour of any of the respondents to these proceedings comprises that egregious behaviour at which s.160 is aimed.

13. For the reasons stated above, and having regard to all of the factors mentioned, the court does not consider that it is appropriate in this case to issue a disqualification order against any of the respondents. Having so adjudged, the court is entitled under s. 160(9A) to make a restriction order under s.150 of the 1990 Act. Section 160(9A) provides that:-

> *"In considering the penalty to be imposed under this section, the court may as an alternative, where it adjudges that disqualification is not justified, make a declaration under section 150."*

14. The use of the word "*may*" in the above-quoted text points to the power under s. 160(9A) being a discretionary power; the reasoning of Murphy J. in *Business Communications* and McCracken J. in *Re Newcastle Timber*, considered above, appears to put this beyond doubt. The discretion arising, however, seems to be confined to the court's electing whether or not to consider if a s.150 disqualification falls to be made. Once the court goes down the path of considering whether a s.150 declaration falls to be made, it seems from the decision of McCracken J. in *Re Newcastle Timber,* at p.592, that the court is trammelled by all the requirements of s.150, most notably that if the criteria set by that provision are satisfied the issuance of a restriction order is mandatory, a perhaps surprising turn of the law given that s.160(9A) confers a power that, as stated, is ultimately discretionary. Under s.150 of the 1990 Act, the court must grant a restriction order unless satisfied that any of a variety of circumstances identified in s.150(2) pertain, the relevant circumstances in this case being that the respondents acted (a) honestly and (b) responsibly in relation to the conduct of the affairs of the company(ies) of which they were respectively directors and (c) there is no other reason why it would be just and equitable that any of them should be the subject of an order made under s.150. It does not appear to the court that there is any issue arising concerning the honesty of any of the respondents in these proceedings. Nor does it appear to the court that, apart from the issue of whether they each acted responsibly, there is any other reason why it would be just and equitable that any of them should be the subject of an order made under s.150. So the sole issue arising is whether they each acted responsibly. For the various reasons identified above as to why the court would not exercise its discretion to grant a s.160 order, the court finds that the behaviour of the directors in this case did not involve a lapse of responsibility. As the court noted above, the facts of this case unfolded in unprecedentedly turbulent times, when the respondents and the family companies of which they were directors were confronted with economic challenges of such a scale and swiftness that customary practices such as the filing of returns may not have had the priority for some, the respondents among them, that legal requirements ought generally to have for all. This is not a case of *"O temporal O mores!"* ('Oh the times! Oh the customs!'); subsisting law transcends time and compliance with its strictures is of course a matter of obligation, not custom. The court finds that the respondents' failure to make the necessary returns and their apparently complacent acquiescence in the strike-off process is reproachable. However, it appears to the court that such failure and acquiescence cannot but be viewed in context; when it looks to that context the court considers that the respondents' various actions are not of such a category as would merit their being described as less than responsible. The words of McGuinness J. in the Supreme Court decision in *Re Squash (Ireland) Limited* [2001] 3 I.R. 35 at p.39 seem to the court to apply with equal vigour to the respondents in this case:-

> *"[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."*

15. One of the points touched upon in these proceedings is the extent to which a married woman, who acts as the second-named director of a company solely to satisfy the minimum two-director requirement under the Companies Acts, and who in point of fact does nothing in relation to that company, can rely upon the passive role that she has consistently played to justify the non-issuance of an order against her under s.160 of the Act of 1990. As the court considers that in any event no liability should attach to any of the respondents, it is not necessary to render judgment on the contention made in respect of the second-named respondent that she was in effect only a passive director of Walfab and ought not to be exposed to liability as a consequence. That said, it does not appear that Ms. Catherine Walsh in her actions as director was or is tainted with that *"real moral blame"* to which reference was made by Carroll J. in the renowned case of *In Re Hunting Lodges Limited (in liquidation)* [1985] I.L.R.M. 75 at p.85 as the basis for imposing personal liability on a purportedly passive director.

16. Strike-off is not an alternative to liquidation and this judgment should not be construed or relied upon to suggest otherwise. However, in the very particular circumstances in which the strike-off in this case occurred, the court considers that no order under or pursuant to s.160 is merited and that no order under s.150 is required in respect of any of the respondents.