

THE HIGH COURT

2011 266 COS

IN THE MATTER OF NALTO CONSTRUCTION LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 - 2009

Judgment of Miss Justice Laffoy delivered on 22nd day of June, 2011.

1. The application

1.1 This application was initiated by a petition presented on 10th May, 2011 by the Collector General of the Revenue Commissioners (the petitioner) seeking an order pursuant to s. 311(8) of the Companies Act 1963 (the Act of 1963), as amended, restoring Nalto Construction Ltd. (the company) to the Register of Companies. The petition was served on, *inter alia*, the directors of the company, Rosaleen Fitzgerald and Patrick Fitzgerald, and on the secretary of the company. It was responded to by Mr. Fitzgerald.

1.2 Section 311(8), insofar as is relevant for present purposes, provides as follows:

"If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court, on an application made ... by the company or member or creditor ..., may, if satisfied that the company was at the time of the striking off carrying on business or otherwise that it is just that the company be restored to the register, order that the name of the company be restored to the register"

2. The circumstances of strike off/application to restore

2.1 The company was incorporated on 2nd June, 1982. Its last annual return (Form B1) was made up to 14th June, 2010 and, according to the Company Printout exhibited in the grounding affidavit filed on behalf of the petitioner, was registered on 26th June, 2010.

2.2 On 12th October, 2010 the Companies Registration Office (CRO) received a request for voluntary strike-off (Form H15), which was dated 16th June, 2010 and signed by Mr. Fitzgerald, in which Mr. Fitzgerald requested that the company be struck off the register pursuant to s. 311 of the Act of 1963 on the basis that it was not carrying on business. Mr. Fitzgerald confirmed that the company had no assets "or outstanding liabilities, including contingent or prospective liabilities". According to the Company Printout the company was listed for strike-off on 24th October, 2010 and was struck off on 9th January, 2011.

2.3 The lodgment of the form H15 in the CRO was accompanied by a letter of no objection from the Revenue Commissioners. That letter was dated 6th October, 2010. It stated that, based on the information then currently available, and without prejudice, the Revenue Commissioners had no objection to the company being struck off the register. The position of the petitioner is that the letter was issued due to inadvertence and oversight. At the time it was issued, the Investigation and Prosecution Division of the Revenue Commissioners had obtained directions from the Director of Public Prosecutions (DPP) in relation to prosecuting the company for certain alleged Revenue offences and this was flagged on the internal central Revenue system at the time, but, notwithstanding that, by mistake the letter of "no objection" was issued by the Companies Unit of the Revenue Commissioners.

2.4 On 4th November, 2010 three applications were made on behalf of the DPP to the District Court to issue three summonses alleging criminal offences against the company and three summonses were issued, in each case returnable on 2nd February, 2011. The offences alleged related to the making of an incorrect return, delivering incorrect accounts and knowingly or wilfully claiming a repayment of corporation tax to which the company was not entitled contrary to s. 1078(2) and (3) of the Taxes Consolidation Act 1997, as amended by s. 111 of the Finance Act 1999. In each case, the alleged offence related to the tax year ending on 31st March, 2000. The criminal proceedings have been adjourned pending the determination of this application.

2.5 The position of the petitioner is that he is a contingent creditor of the company on the basis that the company has an undischarged liability to the Revenue Commissioners arising from what the Revenue Commissioners believed to have been the fraudulent claiming by the company of a repayment of corporation tax to which the company was not entitled. The petitioner has quantified the liability of the company to the Revenue Commissioners at €152,166, comprising €49,710 for tax, a 100% penalty of €49,710 and interest amounting to €52,746. In broad terms, the contention of the Revenue Commissioners is that there was a fraudulent abuse of a self-administered pension scheme set up by the company for the benefit of Mr. Fitzgerald, who was a director of the company, and who was the sole member of the pension scheme.

2.6 Mr. Fitzgerald, in his replying affidavit sworn on 3rd June, 2011, disclosed that summonses have been issued against him personally, which he intends to fully defend. He has averred that there is no substance to the allegations made against the company. He has disclosed that he has been aware of an investigation commenced by the Revenue Commissioners in July 2004 on foot of which, in August 2004, the Revenue Commissioners sought and obtained a substantial volume of the company's business records. However, no notice of assessment was raised against the company or claim made for the alleged outstanding tax prior to his request for voluntary strike off, which was acceded to six and a half years after the Revenue Commissioners' investigation commenced.

2.7 On this application letters of consent to the restoration of the company from the CRO (dated 17th May, 2011) and Chief State Solicitor on behalf of the Minister for Finance (dated 24th May, 2011) have been exhibited in an affidavit filed on behalf of the petitioner on this application.

3. The authorities

3.1 The Court was referred to two authorities by counsel for the petitioner and counsel for Mr. Fitzgerald, which I propose to consider in chronological order.

3.2 The earliest is a decision of the High Court (Kenny J.) in *In Re Nelson Car Hire Limited* (1973) 107 ILTR 97. That decision concerned an application under s. 310(1) of the Act of 1963, which provides that, where a company has been dissolved, on an

application being made for that purpose "by the liquidator of the company or by any other person who appears to the court to be interested", the Court may make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void. The company in question had been wound up pursuant to a members' voluntary winding up and dissolved on 19th September, 1967. Before dissolution the Revenue Commissioners had been interested in the company and, in particular, in property transactions which it had engaged in and, as Kenny J. put it, the Revenue Commissioners "became much more interested" in 1968 after the company was dissolved. In July 1969 the Revenue Commissioners issued a petition seeking an order under s. 310(1). Kenny J. in his judgment (at p. 101) contrasted the wording of s. 310 with s. 311 stating:

"The expression 'any other person who appears to the Court to be interested' has a wider meaning than member or creditor of the company. The words themselves have this effect but it is also shown by comparison of s. 310 with s. 311 which deals with the power of the registrar to strike off companies which are not carrying on business off the register. If the register (*sic*) does this, sub-s. (8) provides that if a company or any member or creditor thereof feels aggrieved by the company having been struck off, the court may restore the name of the company to the register. I think that the Revenue Commissioners are persons interested within s. 310 if they establish that they have a reasonable prospect of success in a claim for tax against the company if it is restored to the register and an assessment is made on it. The Court has a discretion in granting the application and the decisive matter must be whether the claim, which it is sought to make against the company, is one which might succeed. ..."

Having stated that he did not propose to express a final view on the question whether the company was liable for tax of any kind on the property transactions in question because that was a matter to be decided in other proceedings, Kenny J. stated that there was "much to be said" for the proposition being advanced by the Revenue Commissioners. He concluded his judgment by stating (at p. 102):

"[Counsel for the respondent] says correctly that there is no liability for income tax or corporation profits tax until the assessment becomes final and that the Revenue are not, therefore, creditors and so cannot succeed on this application. This, however, is not a good answer to the contention that the Revenue Commissioners are persons interested and so entitled to the order sought. In my opinion the company should be restored to the register and there will be an order declaring that the dissolution of the company was void. The cost of this application will be reserved: if the claims for duty which the Revenue wish to make are unsuccessful, those who oppose the order will be awarded their costs of these proceedings on a solicitor and client basis."

3.3 The judgment of Kenny J. was considered in the later authority, the decision of the Supreme Court in *Re Deauville Communications Worldwide Limited* [2002] 2 I.R. 32. That case concerned an application to have a company restored to the register pursuant to s. 12B(3) of the Companies (Amendment) Act 1982 which, insofar as is relevant for present purposes, provides:

"If any member, officer or creditor of a company is aggrieved by the fact of the company's having been struck off the register under section 12(3) or 12A(3) of this Act, the court, on an application ... by the member, officer or creditor, ... may, if satisfied that it is just that the company be restored to the register, order that the name of the company be restored to the register"

So much of s. 12B(3) as is quoted above is very similar to so much of s. 311(8) as has been quoted earlier, one difference being that the rather peculiar reference to the struck off company being an applicant in the earlier provision is not replicated.

3.4 The company in the *Deauville* case had been struck off for failure to file annual returns. The petitioner claimed to be a creditor of the company. After the company was struck off, but before the petition to restore was brought, the petitioner had instituted proceedings against the company in the Supreme Court of Bermuda for conspiring with others to cause a breach of a licence agreement in relation to a patent. In his judgment, Keane C.J., with whom the other Judges of the Supreme Court concurred, stated (at p. 41):

"Unless there were authority to the contrary, I would be inclined to the view that the word 'creditor' in s. 12B(3) should be read as extending to contingent or prospective creditors. It would seem unjust that the question whether a person is entitled to have the company restored to the register for the purpose of recovering a judgment against him, should be determined by whether his claim against the company is for a liquidated sum – in which case he would unarguably be a 'creditor' – or takes the form of a claim for unliquidated damages.

Happily, however, there is authority which supports that view."

3.5 In the *Deauville* case the respondents had argued that the proceedings in Bermuda were not being *bona fide* maintained or, at the least, that there had been insufficient evidence before the High Court to enable it to reach a conclusion that the proceedings were being *bona fide* maintained, in reliance of the decision of Kenny J. in *Re Nelson Car Hire Limited*. Having pointed out that the application before Kenny J. was an application pursuant to s. 310(1) of the Act of 1963, Keane C.J. observed (at p. 45):

"Kenny J., while holding that the Revenue Commissioners were not creditors of the company within the meaning of s. 310, as no assessments had been raised while the company was still on the register, was satisfied that they would be 'persons interested', within the meaning of the section, if they established that they had 'a reasonable prospect of success' in a claim for tax against the company if it was restored to the register and an assessment made on it."

On the argument advanced by the respondents in the case before him, he stated:

"Assuming that the test adopted by Kenny J. in that case is also appropriate where a court is deciding whether 'it is just' that the company should be restored to the register, I have no doubt that it was satisfied by the applicant in this case."

4. Conclusion

4.1 I do not think it would be correct to interpret the final passage from the judgment of Keane C.J. in the *Deauville* case quoted above as a recognition that the "reasonable prospect of success" test should be applied in determining whether the petitioner, who petitions as a contingent or prospective creditor and seeks to have a company restored on the ground that it is just to do so, has standing under s. 12B(3) or the analogous provision, s. 311(8), to seek such an order. In circumstances such as the circumstances which prevail on this application, where the DPP proposes to pursue criminal proceedings against the company if it is restored, it would be clearly inappropriate to express a view on the prospect of the Revenue Commissioners being successful in recovering the amount claimed if an assessment was raised on the basis of the same factual foundation as underlines the proposed criminal

prosecution. On the other hand, where a petitioner who is a creditor invokes the Court's discretionary statutory jurisdiction to make a restoration order on the ground that "it is just" to do so (which is the ground relied on in this application, because there is no suggestion that the company was carrying on business at the time of strike off), clearly the Court must be satisfied that the petitioner is pursuing the claim against the company *bona fide* and not in a frivolous or vexatious manner.

4.2 In this case I am satisfied on the evidence that the Revenue Commissioners are acting *bona fide* in seeking to pursue a claim for the tax alleged to be due by the company together with interest and penalties. I consider it is just to restore the company to the register, so that the Revenue Commissioners can pursue that claim and so that the DPP can prosecute the criminal proceedings against the company.

4.3 It was the mistake on the part of the Revenue Commissioners in issuing the "no objection" letter which paved the way for the strike off of the company. If that letter had not issued, this application would not have been necessary. I think it was not unreasonable for Mr. Fitzgerald to contest this application, having regard to all of the factual circumstances. Therefore, I am of the view that on the making of a restoration order the petitioner should be liable for Mr. Fitzgerald's costs of the application on a party and party basis.

4.4 Accordingly, there will be an order pursuant to s. 311(8) that the company be restored to the register. The order will contain the usual provision that it will lapse in the event of a copy of the perfected order not being delivered to the registrar of companies within three months from the date on which the order was pronounced. Further, there will be an order that the petitioner pay the costs of Mr. Fitzgerald, as respondent, on a party and party basis, the costs to be taxed in default of agreement.