Neutral Citation No. [2005] IEHC 59

THE HIGH COURT

[Record No. 2004/48COS]

IN THE MATTER OF CMC (IRELAND) 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

KEN FENNELL

APPLICANT

AND
GARY CAROLAN AND NIALL COSGROVE

RESPONDENTS

Judgment of Mr. Justice Clarke delivered the 4th day of March, 2005

1. In these proceedings the applicant as liquidator of CMC (Ireland) Limited seeks a declaration that both of the respondents ("the respondent directors") should be subjected to the orders specified in s. 150 of the Companies Act, 1990 (as amended) restricting their activities in relation to companies for a period of five years.

2. The facts of this case are, however, somewhat unusual. The circumstances in which CMC (Ireland) Limited went into liquidation are set out fully in the report of the liquidator. It seems clear therefrom that as a result of the loss of a major customer the company was placed in very considerable difficulties. Protracted negotiations in relation to a rescue plan followed which reached an advanced stage but ultimately proved to be fruitless. In the circumstances the company went into liquidation. While a number of matters were investigated by the liquidator it seems clear from his report and from the arguments addressed in the course of the hearing that he did not consider that the manner in which the business of the company was conducted up to the time of its liquidation would warrant the making of orders under s. 150 in relation to any of the persons who may have been directors. That this view was shared by the Director of Corporate Enforcement may be gleaned from the fact that the Director relieved the liquidator of his obligation to bring an application under s. 150 in respect of each of the other directors of the company. There has been no suggestion that the respondent directors had any larger role in the conduct of the affairs of the company prior to its liquidation than those directors who were so relieved (indeed if anything the converse is the case).

3. It is important in that context to note that the liquidator has expressed the view that the company appears to have kept proper books and records and was up to date with its statutory returns. The liquidator has also given evidence to the effect that the directors kept their taxation returns up to date, which fact enabled him to complete returns that were outstanding at the date of his appointment. It seems clear that the only basis upon which the liquidator and the Director considered it appropriate to bring this application before the court stemmed from certain matters that occurred in the course of the winding-up and after the company had gone into liquidation. Both respondent directors have adopted identical positions in their evidence to and arguments at this hearing.

4. Before turning to the specific matters raised I should comment briefly on an issue which is the subject of a large volume of evidence in the significant number of affidavits filed before the court. It concerns the question as to whether the respondent directors had in fact resigned as directors sometime prior to the company going into liquidation. It is not contended that any such resignation was such as to exclude them from having been directors within the twelve months period ending at that date specified in s. 150. The point does not, therefore, have any relevance to the jurisdiction of the court to consider making an order under s. 150 because it is conceded on behalf of the respondent directors that they were directors within the relevant period. There is a clear conflict of evidence in relation to whether they resigned. Their accountant has deposed to the fact that he prepared the appropriate Companies Office documentation to evidence such a resignation. Both respondents have deposed to the fact that they placed that document (being the appropriate B10 form) on the desk of Mr. Ernest McDonald, secretary of the company. Mr. McDonald has denied that such occurred. It is not possible to resolve that conflict of fact at a hearing which was conducted on affidavit alone. In the circumstances, and by virtue of the fact that it is only of marginal importance to the considerations in the case, I would propose considering the matter on the basis of the high point of the respondent directors' case, that is to say on the basis that they did in fact resign as they contended.

5. It is also necessary to consider the legal position in relation to actions of directors in the post liquidation period in the context of whether such actions provide a basis for the making of an order, in an appropriate case, under s. 150. While the judgment of Shanley J. in *La Moselle Clothing Limited (in liquidation) and Rosegem Limited (in liquidation) –v- Jamel Soualhi* [1998] 2 ILRM 345 is most often referred to for the analysis of the criteria which the court should adopt in determining the "responsibility" of a director for the purposes of s. 150 (as set out at p. 352 of the judgment), Shanley J. went on at p. 353 to state the following:-

> "Apart from satisfying the court that he as a director acted honestly and responsibly the director must also satisfy the court that there are no other reasons why it would be just and equitable to restrict him from acting as a director of a company. It is to be noted that acting honestly and responsibly relates to 'the conduct of the affairs of the company' and arguably as such bears no relation to any period after the commencement of a winding up or receivership of the particular company where the person may not be involved any further in the conduct of the affairs of the company. That the director must satisfy the court that there is no other reason why it would be just and equitable to restrict the director, allows the court to take into account, in my view, any relevant conduct of the director after the commencement of the winding up or the receivership (for example, any failure to cooperate with the liquidator or receiver) in deciding whether or not to make an order under s. 150(1) of the Companies Act, 1990."

6. Therefore, unusually, this case is not concerned with the question of whether the respondent directors may be said to have acted honestly and responsibly but rather whether, by virtue of relevant conduct after the commencement of the winding up it is just and equitable to make an order under the section.

7. In that context four matters were relied upon:-

> 1. The respondent directors took and kept possession of certain property of the company, viz. a forklift truck, for a period of some months after the liquidation. The liquidator originally wrote to the respondent directors on 12th March, 2003 requesting information on the whereabouts of the assets of the company. They were written to again on 3rd July, 2003 and on 6th August, 2003, specifically in relation to the forklift. There was no response to those letters. However, in November, 2003, subsequent to the report by the liquidator to the Director of Corporate Enforcement pursuant to s. 56 of the Company Law Enforcement Act, 2001, the machine was returned to the liquidator. In their response both have indicated that they accept that they were wrong in so doing but that as soon as they received advice that they should

return the forklift truck to the liquidator they did so. Their actions were, in the course of the hearing, described as being in the nature of "self help" arising from their contention that the company owed them money.

> It is axiomatic that the duties of persons who have served as directors include an obligation to be of any assistance which they can to the liquidator in the conduct of the liquidation. The rights of the creditors of a company are likely to be compromised not only by the fact that a company is insolvent and unable to pay its debts as of the date of liquidation but also such rights can be further compromised where, due to inappropriate action or inaction on the part of directors or former directors, the liquidator is prevented from being in a position to effectually get in the assets of the company for the purposes of discharging the liabilities due to the creditors to the greatest extent possible and as soon as possible. In the circumstances I am satisfied that the court is entitled to take into account any conduct on the part of directors or former directors which amounts to an inappropriate retention of the companies assets subsequent to the commencement of the winding up.

2. Secondly it is complained, on a similar basis, that the respondent directors failed to cooperate generally with the liquidator and declined, for a considerable period of time, to meet with him. The history of the liquidator's attempts to meet with the respondent directors is set out at paras. 7(g) and (h) of the grounding affidavit. It was not until 1st March, 2004, virtually one year after it was resolved that the company be wound up and that the liquidator be appointed, that the respondent directors first met with him. The correspondence seeking the assistance of the respondent directors had commenced with a letter to them from the liquidator of 12th March, 2003. The initial meeting, therefore, occurred after these proceedings were commenced on 2nd February, 2004.

> Again these facts are accepted by both of the respondent directors but it is offered in mitigation that their view of their obligations was, at least in part, coloured by their understanding that they had resigned and that, as with the forklift truck, as soon as they received advice as to their obligations they sought to cooperate. If that be the case, it should be said that the obtaining of earlier advice would have been prudent, especially in a case where it was not intended to comply with the requests of the liquidator. For similar reasons to those expressed above I am satisfied that the failure to cooperate at all with the liquidator is a matter which the court can and should take into account. As was pointed out by counsel for the liquidator anything which places a significant barrier in the way of the efficient conduct of the liquidation is likely to lead to a diminution in the extent to which the creditors of the company will be paid. Even if there is no ultimate failure to recover the assets of the company, delay in their recovery can effect the legitimate interests of the creditors not least because an elongation of the liquidation is likely to mean greater costs which all have to come out of the same pool which ought, properly, be available for the creditors.

3. An issue arose between the liquidator and the respondent directors concerning proceedings brought by the liquidator on behalf of the company in the Courts in the Netherlands seeking to recover monies loaned by the company. In those proceedings both of the respondent directors filed what appeared to have been in the nature of witness statements which were supportive of the case of the defendant and thus against the interests of the company. It should, of course, immediately be noted that it would be wholly inappropriate to imply an obligation on the part of any director or former director a duty not to give truthful evidence in any court in any jurisdiction even if the effect of that evidence would be to the disadvantage of the company. However, the complaint which the liquidator makes is more subtle. I am satisfied on the basis of the evidence tendered by the liquidator that the statements made by both of the respondent directors were at variance with the records of the company. I am also satisfied that the respondent directors did not seek to check the records of the company prior to furnishing their statements. While there is no evidence upon which it would be appropriate to contest their *bona fides* it does seem to me that the obligations of a director in the course of a winding up at least extend to exercising care when taking action which may be contrary to the interests of the company. If he does so in a careful fashion he should not be subjected to any criticism. However, if, as here, without any regard to what may be contained in the books and records of the company he intervenes in proceedings against the interests of the company he may well be said to do so at his peril.

4. The final matter complained of concerns an assertion on the part of the liquidator that he has found it difficult to collect sums due to the company from particular debtors who are now customers of the respondent directors (in a new business which they have established) and who were, while they were customers of the company, clients who were the responsibility of the respondent directors. However, I am not satisfied that there is any evidence which would support the view that there were any inappropriate actions on the part of the respondent directors under this heading and I would not propose to consider it further.

Conclusion

8. In the light of my findings at 1-3 above I am satisfied that each of the respondent directors engaged in activity which, at least taken cumulatively, amounts to a sufficient departure from the reasonable standards that can be expected of a director or former director during a winding up so as to make it just and equitable to make an order under s. 150.

9. In conclusion I should state, lest the matter become relevant in the event that either or both of the respondent directors make an application to the court under s. 152 for relief, that in my view the actions of both respondent directors, while being sufficiently serious to make it just and equitable to make the order under s. 150, nonetheless were on the lower end of the range of seriousness of such actions.