Neutral Citation Number: [2010] IEHC 237

THE HIGH COURT

2007 121 COS

IN THE MATTER OF SWEDEX WINDOWS & DOORS LIMITED

(IN LIQUIDATION)

APPLICANT

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2006

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 15th day of June 2010

1. Mr. Michael McAteer, chartered accountant, was appointed official liquidator of Swedex Windows & Doors Ltd. (in liquidation) ("the Company") by the High Court on 16th April, 2007, having previously been appointed provisional liquidator on 23rd March, 2007.

2. In the current motion, Mr. McAteer seeks a declaration that he "being a person not disqualified by sections 300 or 300A of the Companies Acts 1963 (as amended) is entitled to continue to act as liquidator of the Company.

3. The application raises an issue as to the proper construction of S. 300A of the Companies Act 1963 (as amended) and the effect a winding up order and appointment of an official liquidator on the appointment of an auditor which does not appear to have been the subject of judicial decision. The application is on notice, *inter alia*, to Ralph and Charlotte Gervais who are respondents to an application (presently in the Commercial List) brought by Mr. McAteer, as official liquidator, pursuant to sections 297A and 298 of the Companies Act 1963 (as amended) and s. 204 of the Companies Act 1990, seeking to make them personally liable for all or part of the debts and liabilities of the Company and other related reliefs. Mrs. Gervais was a director of the Company at the date of winding up and has sworn an affidavit in opposition to the application of Mr. McAteer on behalf of herself and her husband. The Commercial Court proceedings are set down for hearing in October 2010.

4. The present application is brought for two reasons. The first (in importance, but not in point of time) was a letter written by the solicitors for Mr. and Mrs. Gervais on 19th April, 2010, contending that by reason of a series of mergers of accountancy firms to which I refer below, that Mr. McAteer became a partner of an auditor to the Company in November 2008, and thereby became disqualified for appointment as liquidator, pursuant to s. 300A(1)(c) of the Companies Act of 1963, and is required to vacate his office, pursuant to s. 300A(3) of the Companies Act of 1963. Secondly, Mr. McAteer became aware of a potential claim from Bank of Scotland (Ireland) limited against RSM Robson Rhodes, who acted as auditors of the Company, arising out of work done in relation to the Company and in respect of which Grant Thornton advised their insurers of the possibility of a claim in relation to "a predecessor firm" as so described by Mr. McAteer in his affidavit of 27th November, 2009.

5. The factual basis of the contention that Mr. McAteer is now disqualified by reason of s. 300A of the Companies Act of 1963 is not in dispute on the affidavits of Mr. McAteer and Mr. O'Grady of Matheson Ormsby Prentice, his solicitors, and Mrs. Gervais. The following relevant facts appear to be undisputed.

6. RSM Robson Rhodes ("RSM") acted as auditors to the Company from 2002 to the commencement of the winding up. Mr. Colin Feely, a partner of RSM, acted as the audit engagement partner for the Company. In addition, Mr. Ian Burns, who was also a partner in RSM, provided general business advisory and corporate finance services to the Company during the period 2001 to May 2007. Mr. Burns resigned from his position in RSM on 31st May, 2007.

7. In July 2007, two English limited partnerships, RSM Robson Rhodes LLP and Grant Thornton UK LLP merged. This is not directly relevant but is the cause of the fact that in July 2007, a number of the Irish partners of RSM Robson Rhodes LLP joined Grant Thornton in Ireland, which is described as "an independent Irish firm which is part of the international Grant Thornton network". RSM Robson Rhodes LLP was not the auditor to the Company. The appointed auditor appears to have been an Irish firm, RSM Robson Rhodes chartered accountants.

8. Colin Feely joined Grant Thornton as a partner in or about July 2007. Ian Burns did not join Grant Thornton as he had retired as a partner of RSM on 31st May, 2007.

9. On 1st November, 2008, a number of the partners in Foster McAteer, including Mr. McAteer, the official liquidator herein, joined the partnership of Grant Thornton. As of 1st November, 2008, Mr. McAteer became a partner of Colin Feely in the partnership of Grant Thornton.

The law

10. Section 160(1) (2)and (9) of the Companies Act 1963 (as amended) provides:

> "(1) Subject to subsection (2), every company shall at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that until the conclusion of the next annual general meeting.
>
> (2) Subject to subsection (3), at any annual general meeting a retiring auditor, however appointed, shall be re-appointed without any resolution being passed unless -
>
> *(a) he is not qualified for re-appointment; or*
>
> *(b) a resolution has been passed at that meeting appointing somebody instead of him or providing expressly that he shall not be re-appointed, or*
>
> *(c) he has given the company notice in writing of his unwillingness to be re-appointed.*

. . .

(9) The appointment of a firm by its firm name to be the auditors of a company shall be deemed to be an appointment of those persons who shall from time to time during the currency of the appointment be the partners in that firm as from time to time constituted and who are qualified to be auditors of that company."

11. On the facts before me, whilst it is not expressly stated that Mr. Colin Feely, who acted as the audit engagement partner for the Company, was a person who himself would be qualified to act as auditor of a company, I am so presuming, for the purposes of this judgment. I assume he would not have been appointed as the audit engagement partner unless he was so qualified. Upon that assumption, as a partner of RSM he was one of the persons deemed to be appointed as auditor to the Company, pursuant to s. 160(9) by reason of the appointment of the firm RSM.

12. Section 300A(1)(3) of the Companies Act of 1963 (as amended) provides:

"(1) None of the following persons shall be qualified for appointment as liquidator of a company-

(a) a person who is, or who has within 12 months of the commencement of the winding up been, an officer or servant of the company;

(b) except with the leave of the court, a parent, spouse, brother sister or child of an officer of the company;

(c) a person who is a partner or in the employment of an officer or servant of the company;

(d) a person who is not qualified by virtue of this subsection for appointment as liquidator of any other body corporate which is the company's subsidiary or holding company or a subsidiary of that company, or would be so disqualified if the body corporate were a company.

References in this subsection to an officer or servant of the company include references to an auditor . . .

(3) If a liquidator becomes disqualified by virtue of this section he shall thereupon vacate his office and give notice in writing within 14 days to -

(a) the court in a court winding up,

(b) the company in a members' voluntary winding up,

(c) the company and the creditors in a creditors' voluntary winding up,

that he has vacated it by reason of such disqualification."

13. There is no suggestion that Mr. McAteer was disqualified for appointment as liquidator on 23rd March or 16th April, 2007. What is submitted on behalf of Mr. and Mrs. Gervais is that he became so disqualified on 1st November, 2008, when he became a partner in the partnership of Grant Thornton and, as such, a partner of Mr. Feely, who, as auditor of the Company, was an officer of the Company for the purposes of section 300A(1).

Submissions

14. On behalf of Mr. McAteer, it is submitted that s. 300A(1)(c) is in the present tense and must be construed as disqualifying a person who, at the relevant time, is a partner of a person who is then an officer of the Company. Counsel drew attention by contrast to s. 300A(1)(c) which disqualifies a person who has been an officer within twelve months of the date of commencement of the winding up. Accordingly, it is submitted that construing sections 300A(1)(c) and (3) together, that a liquidator only becomes disqualified if he becomes a partner of a person who is, at that time, an officer of the Company. It is submitted that Mr. Feely was not an officer of the Company in November 2008 when Mr McAteer became his partner.

15. On behalf of Mr. and Mrs. Gervais, it was submitted that the section should be construed as meaning that a liquidator becomes disqualified if he becomes a partner of a person who acted as auditor of the Company prior to the commencement of the winding up. It was further submitted that even if not disqualified, that he should not continue to act by reason of the potential conflict of interest.

16. Having regard to the express use of the present tense in s. 300A(1)(c), it appears to me that the subsection must be construed as disqualifying a person who, at the relevant time, is a partner of a person who is then an officer of the Company. It appears to follow that a liquidator only becomes disqualified by reason of s. 300A(3) when read in conjunction with s. 300A(1)(c) if, at the time he becomes a partner of a particular person, that person is then an officer of the Company.

17. The resolution of the issue, therefore, appears to turn on the question as to whether or not Mr. Feely was an officer of the Company in November 2008. This, in turn, depends on whether or not he was deemed to be auditor to the Company in November 2008.

Conclusions

18. I have concluded that Mr. Colin Feely was not an auditor of the Company in November 2008, and hence, was not an officer of the Company for the purposes of s. 300A(1) at that time. The firm, RSM, were auditors to the Company prior to the commencement of winding up. The last audit conducted by it was of the financial statements for the year ended 31st December, 2005. On 11th July, 2006, they reported, as auditors, on the financial statements for the year ended 31st December, 2005, to be laid before the Annual General Meeting. Whilst no specific evidence was given of the Annual General Meeting held by the Company in July 2006, the directors' report, which forms part of the accounts filed, indicates that "RSM Robson Rhodes have expressed their willingness to continue in office in accordance with the provisions of s. 160(2) of the Companies Act 1963". I am assuming, as a fact, for the

purpose of this judgment, that consequent on the Annual General Meeting held in July 2006, either RSM were expressly reappointed as auditors or were deemed to be reappointed, pursuant to s. 160(2) of the Companies Act 1963 (as amended). In accordance with s. 160(1), that appointment was to hold office from the conclusion of the 2006 AGM "until the conclusion of the next Annual General Meeting". This section must now be read, subject to the right of auditors to resign, pursuant to s. 185 of the Companies Act 1990, and the right of the Company to remove an auditor by ordinary resolution at a General Meeting held in accordance with s. 160(5) of the Companies Act 1963. As partner of RSM Mr Feely was deemed to be one of the persons appointed auditor to the Company for this period.

19. The Companies Acts contain no express provision as to the effect of the making of a winding up order upon an auditor holding office in accordance with section 160(1). There is a surprising dearth of legal analysis of the impact of a winding up order upon appointment of an auditor, whether in judicial decision or by learned authors of Company Law and Insolvency textbooks. Whilst auditors are normally appointed by resolution of the company at the Annual General Meeting, it is commonplace for there to be in place a contract of engagement between the company and the auditor. No evidence was adduced of the terms of any such contract between the Company and RSM.

20. An auditor's duties arise from statute, his contract of engagement and the common law. His primary duty is now that expressly stated in s. 193 (1) of the Companies Act 1990, to "make a report to the members on the individual accounts examined by them, and on every balance sheet and profit and loss account or income statement, and all group accounts, laid before the company in general meeting during their tenure of office". The obligation to report presupposes an examination of the financial statements of the company prepared by the directors of the company. The Companies Act 1990 includes certain other duties, the reporting or failure to keep proper books of account, the disclosure of directors' emoluments if they do not appear in the accounts, and to report suspected indictable offences. The common law duties primarily relate to the manner in which the auditor must carry out the duties now imposed by statute.

21. As appears, the duties of auditors relate to a company which is continuing to be governed and managed by its board of directors who must keep proper books and prepare annual accounts and where an obligation to hold an Annual General Meeting exists. It is well settled law that the effect of the appointment of an official liquidator by the Court is that the board of directors of a company become *functus officio* and its powers are assumed by the liquidator, see, for example, *In Re Union Accident Insurance Company Ltd*. [1972] 1 W.L.R. 640. The Companies Acts do not impose any obligations on an auditor in relation to the winding up of a company by the liquidator, nor in relation to any continuing obligation of the directors of the company in relation to its accounts. Section 224 of the Companies Act 1963 requires the filing in court of a statement of affairs of the company by the directors and secretary (or other person specified by court order) unless the court otherwise orders. The section does not require the examination of such statement of affairs by the auditor nor envisages any role for the auditor in the preparation in the statement of affairs. I am aware that in practice, from time to time, auditors may assist directors, particularly of smaller companies, in preparing statements of affairs. However, this is only pursuant to individual arrangements reached and not pursuant to any general statutory obligation.

22. Similarly, the Companies Acts do not envisage any role for the auditor of the company in the performance by the liquidator of his duties in the winding up of the company.

23. Accordingly, I have concluded that notwithstanding any express statutory provision, that, in general, the effect of the making of the winding up order and the appointment of an official liquidator by the Court is to discharge an auditor from the office then held. I have deliberately said "in general" as an auditor might remain in office either by special contractual provision or by reason of special circumstances such as a winding up order made in the course of the carrying out of an audit and the liquidator decided that it was necessary, in the interests of the orderly winding up, that the audit be completed.

24. The determination by Hamilton P. in *Donnelly v. Gleeson* (Unreported, High Court, 11th July, 1978) as to the effect of the making of a winding up order on the contracts of employment between the company and its employees, and approved of by Murphy J. in *Evanhenry Ltd*. (Unreported, 15th May, 1986) appears by analogy to support the view I have taken on the effect of a winding up order on the appointment of an auditor.

25. *In Donnelly v. Gleeson*, Hamilton P., having considered certain earlier authorities, accepted, as their effect, that:

> "(a) A Court order for the winding up of a Company is in the ordinary case deemed to be a discharge of the Company's servants.
>
> (b) A servant can however be kept on in the same terms as his original contract by being specifically requested to do so, and
>
> (c) the effect of a winding up order as a notice of discharge can be waived."

26. Those principles were applied by Murphy J. in *Evanhenry Limited*.

27. It follows from the above conclusion that Mr. Feely, as a partner of RSM, ceased to be auditor to the Company on 16th April, 2007. Mr. McAteer only became a partner of Mr. Feely in November 2008, and consequently did not become a partner of an officer of the Company for the purposes of s. 300A of the Companies Act of 1963, and accordingly, did not become disqualified from acting as liquidator of the Company.

28. Even if Mr. McAteer is not disqualified, there is the further issue as to whether, by reason of his now partnership with Mr. Feely, a former auditor of the Company, a conflict of interest arises such that he should cease to act as official liquidator of the Company. Any such potential conflict of interest depends upon the particular facts of the liquidation. No submission was made that there was any action or inaction of RSM, as auditor of the Company, which required investigation by the official liquidator and which might give rise to any conflict of interest, having regard to his now partnership with Mr. Feely a former auditor. In the absence of any such concern, it does not appear to me that the current partnership is, of itself, a reason for which Mr. McAteer should not continue to act as official liquidator of the Company.

29. Mr. McAteer himself has drawn the attention of the Court to the fact that Bank of Scotland (Ireland) Limited (BOSI), wrote a letter dated 29th June, 2007, to the managing partner of RSM in relation to representations allegedly made by Mr. Ian Burns of RSM in relation to facilities afforded by BOSI to the Company. This came to light in the context of due diligence work on RSM carried out by Grant Thornton prior to merger of RSM with Grant Thornton. Grant Thornton insisted that RSM advise their insurers of a potential claim from BOSI and Grant Thornton advised its own insurers of the possibility of a claim from a predecessor firm. The potential claim is a claim by BOSI against RSM. Whilst it may relate to advice given to the Company, it is not a claim against the Company. BOSI were

notified of this application and indicated by letter that it had no objection to Mr. McAteer continuing to act as official liquidator. It does not appear to me that the existence of this potential claim gives rise to a conflict of interest which precludes Mr. McAteer from continuing to act as official liquidator of the Company.

30. I will make a declaration that Mr. Michael McAteer, is not disqualified by s. 300A of the Companies Act 1963 (as amended) from acting as official liquidator of Swedex Windows & Doors Ltd. (in liquidation) and is entitled to continue to act as official liquidator thereof.