No Redaction Needed

2013 IEHC 111

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 612 J.R.]

BETWEEN

ARNAUD D GAULTIER

APPLICANT

AND

THE REGISTRAR OF COMPANIES

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered the 8th day of March 2013

The applicant herein was the "director – chairman" and former employee of a company called Loire Valley Limited (the company). The company was dissolved on the 6th April, 2012, in accordance with the provisions of the Companies Act 1963 to 2009 in circumstances where the company's annual return for 2010 and 2011 were not filed in compliance with the requirements of s. 125 of the Companies Act 1963.

The applicant has sought a number of declarations and other reliefs by way of judicial review, the purpose of which is to have the decision to dissolve the company voided. The reliefs sought are set out in the statement required to ground the application for judicial review. The applicant was not legally represented at any stage in these proceedings and it is, perhaps, for that reason that the statement required to ground the application for judicial review is not in the form one expects to see. The overall aim of the applicant is, as I have said, to have the decision to dissolve the company voided, postponed or delayed on the basis that there was misfeasance, malfeasance, nonfeasance, obstruction to the administration of justice and a breach of

duty in and around the circumstances in which the company was dissolved. Relief has been sought by the applicant in the form of a series of declarations and the applicant has sought a number of other reliefs by way of *mandamus*. Some of those reliefs are so far removed from what would be appropriate to be considered in judicial review proceedings that I propose to say very little about them, except to say that they are not matters which can be dealt with by the court. For example, the relief sought at para. (T.) in the statement required to ground the application for relief is set out in the following terms:-

> "An order of mandamus for the respondent to issue letters of apologies to both the applicant and "the company" for all inconvenience suffered, letters to be translated and published in Le Courrier de l'Ouest, a French regional newspaper and La Vigne, a French national professional magazine at the respondent's expense."

Clearly, it is inappropriate to seek such an order in proceedings of this kind.

The grounds relied on by the applicant are to be found set out in the verifying affidavit sworn by him on the 3rd July, 2012. I will refer to these shortly.

By way of background, the company was involved in the importation of wine. In 2006, some 22 pallets of wine were detained and seized by the Revenue Commissioners. This had an adverse effect on the business of the company. It appears from a letter from the Revenue Commissioners of the 13th August, 2008 that this was an error on the part of the Revenue Commissioners for which they apologised. The Revenue Commissioners paid the sum of €25,000 to the company by way of recompense for the full value of the wine and tendered a further amount in the sum of €80,000 at a meeting on the 6th August, 2008, between officials of the Revenue Commissioners and the applicant herein. It appears from what was said in

court that the latter cheque was never cashed by the company or by the applicant on its behalf.

In 2008, the company was in default in relation to the obligation to file annual returns but although the company was placed on the strike off list by the Companies Registration Office (hereinafter referred to as the CRO) it was removed from that list and temporarily blocked from enforcement measures at the request of the company, by reason of its dispute with the Revenue. Ultimately, the necessary returns were filed; that of 2006 was filed on the 16th January, 2009, that of 2007 was filed on the 2nd February, 2009, and the 2008 annual returns was filed on the 12th January, 2009. Finally, the annual returns for 2009 were filed on the 12th January, 2010.

Subsequently, the annual returns for 2010 and 2011 were not filed. Letters were sent to the company and the applicant and fellow director, together with reminders advising of the failure to file the annual returns for 2010, pointing out the consequences. Similarly, given that there was a default in relation to the annual returns for 2011, further letters were sent out by the CRO.

There was correspondence between the applicant and the CRO arising from the failure of the company to file the annual returns and the commencement of the strike off process in 2012 and thereafter. The applicant did not furnish a reason for the failure to file annual returns but did refer to the ongoing dispute with the Revenue Commissioners. The applicant indicated that he proposed to commence proceedings against the Revenue later in the year and before the Statute of Limitations ran out. He did not give a direct written response to the CRO as to why various legal proceedings involving the company prevented the filing of the annual returns. Insofar as he provided an explanation, he stated in an email of the 17th February, 2012:-

"Regarding the query of your office about how the seizure of a full shipment of wine (worth in excess of €50,000) might have prevented me from filing my annual returns, I am quite speechless for finding words to explain that a business interruption in excess of five years may have such consequences (more especially financial from a company point of view)."

For completeness, I should add that the applicant in the course of the hearing before me, blamed the failure to file annual returns on two matters, one, the lack of money available to the company and the second being the fact that his brother, who was then a co-director of the company, was in France and was not able to sign the annual returns by the deadline required. Ultimately, the company was dissolved in accordance with the procedures provided for under the Companies legislation on the 6th April, 2012.

The complaints of the applicant in respect of the decision of the CRO and in particular the respondent to dissolve the company can be summarised as follows:-

1. He complains that when the company was previously put on the strike off list it was given the opportunity to file annual returns and he contrasts that position with the fact that he was not given the same opportunity on this occasion. He queries the interpretation of the words contained in s. 12(3) of the Companies (Amendment) Act 1982 (1982 Act) which concerns the power of the Registrar to strike off the register, companies who fail to make a returns provides as follows: "Subject to subsections (4) and (5) of this section, at the expiration of the time mentioned in the notice, the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in Iris Oifigiúil [the

Companies Registration Office Gazette] and on the publication in Iris Oifigiúil [the Companies Registration Office Gazette] of this notice, the company shall be dissolved."

In effect he complains of the fact that the Registrar of Companies did not give leeway or exercise discretion provided for in the section in favour of the company.

2. He complains that the effect of the dissolution of the company is that the assets of the company vest in the Minister for Finance in circumstances where the CRO were aware that the main asset of the company was the offer of settlement from the Revenue, therefore from the Minister for Finance, and he describes this as *malfeasance*.

3. The fact that the company has been dissolved with the necessary consequences for his litigation was described by him as an obstruction to the administration of justice. He suggests that the respondent "may have made an unfair and partial decision in collusion with the Revenue and the Minister for Finance".

4. A number of other complaints of "*nonfeasance*" are made by the applicant.

5. In addition he has referred to a number of statutory provisions apart from s. 12(3) of the 1982 Act and in particular he has referred to the provision of s. 310 of the Companies Act and s. 311(a) of the Companies Act. To a certain extent, it appears that the applicant in referring to those sections is making submissions on the use of those provisions as opposed to challenging the decision to dissolve the company by reference to those provisions. For example, he seeks a declaration "on the possibility of use of either 'judicial

review' or 's. 310 of the Companies Act 1963 to 2009' *by ex parte* application, whenever applicable, especially for dissolution under s. 18(sic)(3) of the CAA 1982".

In dealing with this matter in his written submissions he explains that "the reasons behind such an application is that having endured the refusal of the respondent of using such leeway, I had come to the conclusion of a need for such declaration in order to (re-)establish and preserve the balance of power in the public and general interest".

Submissions

I have had the benefit of submissions from the applicant as I have indicated and on behalf of the respondent. I have read those submissions together with the relevant affidavits. I should note that the applicant herein had served a notice of motion prior to the hearing seeking to have the Registrar of Companies cross-examined on her affidavit. That motion was adjourned to the hearing before me, but was not pursued before me. In effect, what the applicant appears to be seeking is, as described in his written submissions, orders "to reinstate the company by all means, at all costs as soon as possible, and to protect it."

In the course of submissions on behalf of the respondent, reference was made to the decision in *Star Homes (Midleton) Limited v. Pensions Ombudsman and Anna Szeffs* [2010] I.E.H.C. 463, in which Hedigan J. stated:-

> "The respondent points out that the applicant bears the burden of proof in a judicial review. The applicant cannot seek to use judicial review proceedings to challenge the merits of the decision that was made. In other words, this court cannot act as a court of appeal or seek to second guess the decision reached. . . ."

That statement requires little elaboration from me as it neatly encapsulates the function of the court in judicial review proceedings.

I was also referred to a number of passages from the decision in the case of *Ryanair Limited v. Flynn* [2003] I.R. 240, in which Kearns J. reviewed a number of authorities including the *State Keegan v. Stardust Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R 39 and went on to say at p. 259:-

"The applicant must prove that the decision 'plainly and unambiguously flies in the face of fundamental reason and common-sense'.

As Finlay C.J. stated in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, at p. 71, by way of alternative formulation of the high standard:-

'The circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare.'

Finlay C.J. continued:-

'The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that:-

(a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or

(b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.' . . .

As stated by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at p. 72:-

'I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene

> and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision.'"

Both parties referred to a number of other passages in the course of that judgment. Reference was made to a passage quoted by Kearns J. from the decision in *Bailey v. Flood* (Unreported, High Court, Morris P., 6th March, 2000) at p. 27 where it was stated:-

> "The function of the High Court on an application for judicial review is limited to determining whether or not the impugned decision was legal, not whether or not it was correct. The freedom to exercise a discretion necessarily entails the freedom to get it wrong; this does not make the decision unlawful. Consideration of the alternative position can only confirm this view. The effective administration of a tribunal of inquiry would be impossible if it were compelled at every turn to justify its actions to the High Court."

Kearns J. went on to state at p. 265:-

"It seems clear to me on the authorities that a very high threshold must be met, at least in this jurisdiction, before the court can or should intervene."

Finally on p. 266 of his judgment, Kearns J. noted as follows:-

"The limits of the remedy of judicial review were cogently addressed by Murphy J. in *Devlin v. Minister for Arts* [1999] 1 I.R. 47 when he said at p. 58:-

> 'Judicial review is a valuable legal process. Over a number of years it has been invoked to correct some misunderstandings and occasional abuses in the exercise of statutory powers. The manner in which those

> powers must be exercised has been stated and restated by the courts in many cases a number of which were referred to in the judgment of the learned trial judge. The requirement that statutory powers (among others), even those expressed to be absolute, must be exercised in accordance with the requirements of natural and constitutional justice is well known and generally understood. Likewise it must be widely appreciated that the only function of the courts in relation to the exercise of such powers is to review the procedures in which they are exercised. In the absence of express statutory provision the courts do not have an appellate role by which they can reverse or review the actual decision taken. In these circumstances it may be expected that the need to invoke the remedy of judicial review in relation to public officials will diminish significantly. Certainly it would be regrettable if this procedure, which achieved so much good, was to be invoked unnecessarily or in such a way as to delay or defeat the proper exercise of administrative powers. Public officials may not be permitted to exercise their powers improperly: neither should they be impeded from exercising them properly.'"

I would endorse the view of Kearns J. in relation to that passage from the judgment of Murphy J.

There is a large volume of legislation which provides a self contained administrative code for the regulation of companies. Part of that code requires the filing of annual returns. Those who rely on the protection provided by the incorporation of a limited liability company in the conduct of business should not be surprised that with the benefit of the protection of conducting business behind the veil

of incorporation, comes the obligation of complying with the statutory regulation of such companies. The requirement of the filing of annual returns is part of the necessary regulatory machinery provided for in the extensive legislation in relation to companies.

In this case, the respondent in her affidavit has described in great detail all of the steps taken by the CRO in relation to the company prior to its dissolution. There was nothing in the conduct of the Registrar which could be said to fly in the face of reason or common sense.

It is undoubtedly the case that on a previous occasion the Registrar had allowed the company the opportunity to file the annual returns even though the company had been placed on the "strike-off" list as previously described. On this occasion, the same facility was not afforded to the company where in correspondence the applicant was asked on behalf of the company what prevented the filing of the annual returns. The response in the email of the 17th February, 2012, to which I have already referred, was hardly adequate, but in any event, the applicant told the court that the reason for the failure to file the annual returns was a lack of money and the fact that the company missed the deadline because the applicant's brother was out of the country and did not sign the necessary documents in time.

To a large extent, the complaint of the applicant is that on a previous occasion he was given leeway and he has referred in this context to the provisions of s. 12(3) of the 1982 Act, which says that the Registrar of Companies may, unless cause to the contrary as previously shown by the company, strike its name of the Register and he contends that cause has been shown which would have allowed the Registrar to exercise discretion not to strike off the company, namely, the company's potential litigation in relation to the Revenue Commissioners.

I have referred to a number of decisions and to the review of those authorities by Kearns J. in the case of *Ryanair Limited v. Flynn.* I repeat what has been said in a number of previous judgments which indicate clearly that it is not the function of this Court on judicial review applications to consider the merits of an impugned decision. It is and always has been clear that the function of the court is not to substitute its view of the appropriate decision for that taken, but is concerned to carry out a review of the process by which the decision was reached. There is nothing in the papers before me that discloses any deficiency in the actions of the respondent and I see nothing wrong in the process by which the company was dissolved.

Before leaving the issue as to the role of the court in judicial review proceedings, I should refer to one other matter raised by the applicant herein as to the bona fides of the respondent in these proceedings. He has suggested that the decision to strike off the company was made to obstruct the company in the proceedings it contemplated against the Revenue Commissioners. The State is a party to a vast proportion of the litigation that takes place in this country. Some of the parties in litigation involving the State in one form or another are companies. I have never before heard it suggested that a company was dissolved by reason of the fact that the Registrar of Companies was motivated improperly to dissolve a company or not to exercise a discretion in respect of the company, because that company was involved in litigation against one or other arm of the State. There is simply no evidence to support this allegation made by the applicant. It is a disgraceful and scurrilous allegation and one that should not have been made. The simple fact is that this company was dissolved in accordance with the provisions of the Companies Acts 1963 – 2012 for failure to file annual returns.

It is worth remembering that this is a case in which the applicant is still entitled to make an application for the restoration of the company to the Registrar of Companies. All that is required is the filing of the necessary annual returns.

The applicant herein has sought a number of other reliefs which require the respondent, *inter alia*, to grant audit exemptions and what have been described as additional orders, including "an antedated order of mandamus extending the time for the company for filing the annual returns for a period of two years . . ." These are orders that the court cannot make. There is no basis or jurisdiction to do so.

In all the circumstances of this case, I am refusing the reliefs sought by the applicant herein.

31 March 2013

A COPY WHICH I ATTEST

FOR REGISTRAR