Neutral Citation No. [2006] NICh 3

Ref: **DEEH4687.T**

Ruling: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **19/1/2006**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

DANIEL McATEER

Plaintiff;

and

JOHN JOSEPH MULLAN AND MARIA MULLAN

Defendants.

RULING

DEENY J

[1] As indicated at the earlier hearing I accepted the submission of Mr Ciaran McCollum, who appeared for Mr McAteer, that the issue of whether or not he was a director was not properly before the court, but that the preliminary point had been confined in its presentation, at least in writing, to the issue of whether or not he was a shareholder. It was indicated to me and I accept that an early ruling would be in the interests of justice and that it may effect a number of other applications and so I give that ruling now which is obviously to an extent extempore.

[2] There are two bases on which Mr McAteer may be a shareholder and may have been a shareholder in JJ Mullan Ltd. The first was that on his case Mr & Mrs Mullan transferred two shares to him on 2 August 2004. The second basis was that they allotted two shares to him on 10 August 2004. The company was subsequently wound up on the presentation of a petition by a secured creditor which was presented on 13 August 2004.

[3] Dealing with those in a chronological order, I commence with the purported transfer. For the purposes of this issue I consider it proper to accept the contention of Mr McAteer that he had a binding legal agreement with Mr & Mrs Mullan for the transfer of two shares on 2 August, although I note that they dispute that that was the case. However, the indisputable evidence is, even if there was an agreement to transfer such shares, that was not registered in the company register and that is a mandatory provision under Article 32(2) of the Companies Order (Northern Ireland) 1986 which defines a member. Article 32(2) reads:

> "Every other person who agrees to become a member of a company and whose name is entered in its registered members is a member of the company."

That simply never happened here. Mr McCollum said that was because either the Mullans or their accountant, Mr Heaney, avoided registering the shares. That may or may not give rise to a claim against those persons, but I do not consider that it can alter the legal status of Mr McAteer.

[4] Mr Coyle's submissions in that regard were reinforced by citation of three authorities, Halsbury, Volume 7 (1) at page 534, Palmers Company Law, Volume 2 at paragraph 7.004 and Brown on Companies at paragraph 34.2 and I will quote from the last briefly:

> "In a winding up by the court any transfer of shares or alteration in the status of members made after the commencement of the winding up is void unless the court otherwise orders: Section 127 of the 1986 Act. No transfer can be effected without registration of the transfer in the company's Register of Members and under Section 148 even as qualified by Rule 41(9)(vi) of the Rules this cannot be done without the court's approval.
>
> The equitable rights arising as between vendor and purchaser are not effected by Section 127. However, the purchaser can claim through his vendor any payments made in the liquidation in respect of the shares. The vendor may, when calls are made, enforce his right to indemnity."

But that obviously is a separate matter. It seems clear in this case that there will not be any payment to shareholders. Whether Mr McAteer wants to

contribute, if there is any call by the liquidator, is not something for me to decide.

[5] Mr McCollum sought to rely on Article 126(2) of the Insolvency Order (Northern Ireland) 1989 in support of his contention to the contrary, namely that:

> "If it appears to the High Court that it will not be necessary to make calls or adjust the rights of contributories, the Court may dispense with the settlement of a list of contributories."

He suggested that this power generally could be used to find that Mr McAteer was a shareholder. I do not consider that would be a proper use of the power under Article 126 and particularly not in the light of Article 126(3) which says:

> "In settling the list, the High Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others."

I think that is clearly where it is contemplated that the contributories would contribute. I do not think it is a power that I can use for an extraneous purpose.

[6] I also have to take into account Article 9 of the Articles of Association of the company. It is a general principle, of course, that the directors of companies act within the powers of the Articles of Association and Memorandum of the Company. Article 9 of these Articles reads:

> "The directors may, in their absolute discretion and without deciding any reason therefore, decline to register any transfer of any share, whether or not it is a fully paid up share."

I am informed, and it is not disputed, that in fact consideration did not pass for these shares. But, leaving that aside, therefore, even if Mr & Mrs Mullan in their capacity as shareholders had agreed to transfer shares they have an absolute discretion not to register that transfer subsequently. That might not relieve them of a claim for damages if there are any damages under any legal agreement they entered into to transfer their shares, but it does mean that they are perfectly entitled to do what Mr McAteer complains of, ie decline to register the shares. So in that independent ground too I find, therefore, that the plaintiff in the substantive action, Mr McAteer, is not a shareholder.

[7] I address the issue of Article 107 of the Insolvency Order. It reads:

> "In a winding up by the High Court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the Court otherwise orders, void."

Now that must be read with Article 109(2) which provides that, apart from a situation that does not apply here:

> "… the winding up of a company by the High Court is deemed to commence at the time of the presentation of the petition for winding up."

So referring that back, it is indisputable that the company had not registered the alleged transfer of shares of 2 August and, therefore, that that transaction under 107 is void.

[8] Mr McCollum ingeniously argued that the words "unless the Court otherwise orders" in Article 107 altered the position, ie that the court could give relief from this. However, I conclude that this does not assist his client here. First of all I note there is no such application before this court nor any application for leave to bring such an application, nor was it pleaded at an earlier stage, but apart from those technical matters I do not consider it a realistic prospect that seventeen months after the alleged transfer, a court would contemplate registering the transfer when the company has since been subject to a Compulsory Winding Up Order. Nor do I see any point in this unless in theory Mr McAteer could prove the company is not insolvent. I know he feels that. It may well be that Mr McAteer if he had been present or if the winding up petition had not been presented in August 2004 that he might have turned the company round. I am not in a position to rule on that, which is a possibility, but one has to recognise the events that have taken place in the interval. It seems to me inconceivable that a court would exercise its discretion in the way that Mr McCollum contemplated.

[9] It is clear in any event that other actual and substantive creditors with the means and motive to test the insolvency of the company are in existence and are represented in the Creditors' Committee. If there is any remedy, it is a remedy in equity against the Mullans. As has been pointed, and it is relevant, Mr McAteer is not a creditor of the company. I rule on the preliminary point that he is not a shareholder by virtue of transfer.

[10] I can deal quite expeditiously with the second submission made on his behalf, namely that two shares were allotted to him on 10 August. The Articles of Association of the company address this issue also. In Article 4 there is a power of allotment as one would expect, but at Article 6 one finds the following:

> "The authority conferred on the directors by Article 4 shall expire on the day preceding the fifth anniversary of the date of incorporation of the company."

It is common case that that date had preceded 10 August 2004. The date of the Articles is 23 July 1997 so that would have comfortably been the case. There could have been an extension of that time limit, but no such resolution had ever been passed so Mr & Mrs Mullan simply had no power to allot at that time and as I have said already, the directors' powers in a company stem from the Articles of Association. One can refer to Article 90, inter alia, of the Companies Order in that regard.

[11] I accept Mr McCollum's contention that Article 90(8) of the Companies Order does not assist the Mullans here. The purpose of it is, I think, ambiguous. I do not necessarily accept it means exactly what he intends, but it certainly does at 90(8)(6) refer to fines and I think there is a degree of ambiguity there and I do not rely on it.

[12] I have already dealt with Articles 107 and 109. It will be noted there that the reference in Article 107 is to any transfer of shares so that does not appear to apply to allotment. It does refer to alteration in the status of a company's members, but then as I have already found Mr McAteer was not a member at that time and I do not think that can assist. In any event, as I say, I do not think a court would make any order so I find, therefore, that in law he was not a shareholder by virtue of allotment.

[13] That leaves that final argument which Mr McCollum put forward at the conclusion of his remarks and which Mr Coyle was then given an opportunity to reply to and that is based on Article 8 of the Insolvency (Northern Ireland) Order 1989 which I will read:

> "**Member of a company**
>
> **8.** For the purposes of any provisions in Parts II to VII *[that is of this Order]*, a person who is not a member of a company but to whom shares in the company have been transferred, or transmitted by operation of law, is to be regarded as a member of the company, and references to a member or

> members are to be read accordingly." *[own emphasis]*

[14] Mr Coyle, in his skeleton argument and in his oral submissions, has sought to invite the court to say that this is contrary to the purposes and objects of the Act and to give it a purposive interpretation. That is often important where there is some ambiguity or uncertainty in the interpretation of a statutory provision. However, it seems to me that the wording of Article 8 here is so plain that it cannot be disregarded by the court even if I were minded to do so. Despite, therefore, the arguable inconsistency with Article 107 where it says that such transfer is void. I do not ignore the plain words. As I indicated, I think the solution is in the words in Article 8 that such a person, which covers Mr McAteer here, who says, subject to one point that he had such a transfer, that such a person "is to be regarded" as a member of the company under the Insolvency Order. So where there is some issue as to whether a member of a company is entitled to make representations or attend the meeting under the Insolvency Order somebody who has its shares transferred to him, which were not registered, is to be regarded as a member of the company, but that is all that that means. It does not make him a shareholder in the company.

[15] I further observe that in any event the benefit of Article 8 can only be enjoyed by somebody who has had such a transfer and at the present time that is disputed because the Mullans dispute there was any valid transfer, albeit unregistered to Mr McAteer. He has to win his action to prove that there was such a transfer so as to allow him to be regarded as a member of the company. So that he has that possibility in the future, I have to say it seems to me to be of absolutely no benefit to him and I accept the arguments in that regard. But, to exercise his rights as a member of the company he would have to satisfy the company that shares in the company had been transferred to him. That is what he is seeking to do as I understand it by his action against Mr & Mrs Mullan, but that has not come to trial. Therefore, I find he is not a shareholder at the present time although if he proved that there was an agreement binding in equity to transfer the shares to him he would have to be regarded as a member of the company under Article 8 of the Insolvency Order.