

JACKSON

THE HIGH COURT

1986 No.20Sp

IN THE MATTER OF MONT CLARE HOTELS LIMITED (In Liquidation)
AND IN THE MATTER OF THE COMPANIES ACTS 1963-1983
AND IN THE MATTER OF AN APPLICATION BY THE LIQUIDATOR

RAY JACKSON

v

PAULINE MORTELL, BRIAN MORTELL AND ANTHONY HUSSEY

TRANSCRIPT OF JUDGMENT

DELIVERED BY THE THE HONOURABLE MR JUSTICE DECLAN COSTELLO
ON 2ND DECEMBER 1986

These proceedings have been brought by the Liquidator of Mont Clare Hotels Limited under section 298 of the Companies Act. Mont Clare Hotels Limited went into liquidation on 26th May 1982 and it was known at the time, knowledge that was confirmed later, that in 1973 Mont Clare Hotels Limited had made a loan of £20,000 to a company called Cluney Construction Limited.

It was in relation to the loan to Cluney Construction Limited that the section 298 proceedings were instituted, and the Liquidator has raised for determination by the Court whether or not the directors named as the respondents in these proceedings were guilty of misfeasance arising out of, firstly, the making of the loan and, secondly, its non-enforcement at later dates.

The loan was made in the year 1973 by Brian Mortell who was, with his mother, effectively running Mont Clare Hotels Limited. Although the loan was referred to in a minute of the directors of the company of 17th April 1973 as having been made as of that date, I am satisfied from the evidence that the loan had been made to Cluney Construction Limited prior to this at Mr Mortell's instigation. The relevance of that is in relation to the claim made against Mr Hussey, who was and is a solicitor and was acting as solicitor to the company, and who was a director of the company and held shares in the company but was not beneficially entitled to them.

The position is that prior to the meeting of 17th April 1973 this loan had been made to Cluney Construction Limited. It was made in a very informal way. There was no security or nothing in writing for it but there was agreement to pay interest at the rate of 10 per cent, or that is what was minuted on 17th April 1973, and it is not denied that there was a liability on Cluney Construction Limited to pay interest at that rate.

The first point in this case arose under the Statute of Limitations. It was urged by Mr Landy on behalf of Mr Hussey, and the submission was adopted by Mr Foley on behalf of Mr Mortell and his mother, that the claim, in so far as it related to wrongful acts in the year 1973, is statute barred. The position seems to be clearly established by the Lands Allotment Company case [1894] 1 Ch. 616, to which Mr Landy

referred, that the Statute of Limitations applied in relation to allegations of misfeasance and breach of trust made against a director. Notwithstanding the fact that these proceedings could not be instituted until after the liquidation, which was more than six years after the wrongful act occurred, the authorities indicate that it is not open to a liquidator to claim that an act of misfeasance can now result in a claim under section 298 after six years. In these circumstances I am satisfied that the reliance on the Statute was permissible in that connection.

I should say that I was referred to section 44 of the Statute of 1957 which provides that no period of limitation fixed by the Act is to apply to an action against a trustee where "(b) the claim is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his own use." I do not think that this avails the Liquidator because the money paid to the account of Cluney Construction Limited has not been "retained" by any of the Defendants.

That brings me to say a few words about Cluney Construction Limited. This company was established and run by Mr Mortell, one of the directors of Mont Clare Hotels Limited, in association with a Mr Power. Mr Mortell had the power of signing cheques for the company but the company was mainly run by Mr Power who had some expertise in the construction industry, but not a great deal of expertise, Mr Mortell having none.

Cluney Construction Limited started developing in Newbridge and later in Bray but the company did not prosper. The company met very great difficulties in respect of its activities in Newbridge and its bankers insisted on obtaining the funds generated on the sale of its houses. The result of this was that the company was unable to repay the loan given to it by Mont Clare Hotels Limited, and it is in that connection that the second claim of misfeasance arises, a claim which may not be subject to the Statute.

The evidence establishes that on 13th September 1977 Mr Mortell informed his co-directors that £6,000 would be paid back off the loan. This was not done. I am satisfied there was no fraud in connection with that statement. I am satisfied that Mr Mortell may well have been guilty of errors of judgment in relation to this whole transaction but that he was not guilty of any fraud in relation to it, and it has not been shown that he did not believe that what he said would come to pass. Unfortunately it did not come to pass.

On 27th February 1979 the minutes again record that Mr Mortell expressed the view that the loan was secured. Again, I am of the view that it has not been shown that this was said recklessly or fraudulently. It may well have been that Mr Mortell was being over-optimistic and it may well be an error of judgment on his part, but I do not think his statement in itself amounted to misfeasance.

On 14th February 1980 Mr Mortell expressed in writing to the bank, who were then lending money to Mont Clare Hotels Limited, that the loan was good and that it would be repaid in four instalments, as stated in the letter. Again, in my view it has not been shown that Mr Mortell acted fraudulently in signing this letter. Again, it may well be a case of misplaced optimism on his part.

The relevance of the evidence is this: It is said that there was misfeasance on the part of the directors of Mont Clare Hotels Limited in failing to enforce the obligation of Cluney Construction Limited to repay the loan.

In relation to Mr Hussey, I am quite satisfied that during this period Mont Clare Hotels Limited was apparently financially all right. There was no reason to doubt what he was being told by Mr Mortell and there was no reason to insist that proceedings be instituted against Cluney Construction Limited. I can exculpate him of any misfeasance for failing to urge, as a director of Mont Clare Hotels Limited, that proceedings be instituted against Cluney Construction Limited.

The same considerations apply to Mrs Mortell. There is no evidence to

suggest other than that she was merely acquiescing in what her son was informing her and accepting his assurances on their face value. In these circumstances there is no case of misfeasance on her part.

The question arises, however, as to whether or not Mr Brian Mortell was guilty of misfeasance in the way he dealt with this outstanding loan. This is not an easy question to decide but I have come to the conclusion on the authorities quoted by Mr Foley and Mr Fennelly that a case of misfeasance has not been made against him. It is not every error of judgment that amounts to misfeasance in law and it is not every act of negligence that amounts to misfeasance in law. It seems to me that something more than mere carelessness is required, some act that, perhaps, may amount to gross negligence in failing to carry out a duty owed by a director to his company. During this period I think Mr Mortell was genuinely hopeful that the difficulties of the construction company would be overcome.

Mr Mortell was not at this period - in 1977, 1979 and 1980 - in a position where his other company, Mont Clare Hotels Limited, was in serious financial difficulty. These difficulties arose later at a time when Cluney Construction Limited was unable to repay the money and when, in fact, he had to mortgage his own dwellinghouse in order to infuse some finance into Mont Clare Hotels Limited.

So it does not seem to me that it has been possible to establish that as a matter of law Mr Brian Mortell was guilty of misfeasance, as alleged, during the time that Cluney Construction Limited owed the money to Mont Clare Hotels Limited and no proceedings to recover the money were instituted or authorised by the directors.

It seems to me that it was proper for the Liquidator to institute these proceedings and he is entitled to his costs out of the assets. Mr Hussey is also entitled to his costs out of the assets and I will so order.

A question arises as to whether the first and second-named respondents are entitled to their costs. The view I take of Mr Foley's application

is this: It seems to me that Mr Mortell has himself to blame to a considerable extent for the fact that these proceedings were instituted; that the various actions which he took and the statements which he made, particularly as late as the statement made to the creditors, indicated to the Liquidator that there was a situation which justified him in bringing these proceedings. It is only now, when the matter has been considered on the oral evidence given by Mr Mortell, that it has been possible to determine that he was not guilty of misfeasance. In those circumstances he contributed, in my view, to the fact that these proceedings were instituted. I think it would be fair not to require him to pay the costs as he has succeeded technically so I will refuse the application that his costs be paid out of the assets.

MR FOLEY: Are you allowing costs in relation to Mrs Mortell, my Lord.

JUDGE: No.

I certify the foregoing to be a true and accurate transcript of the shorthand note taken by me.

Henry
Official Stenographer

Approach
JL

14.11.86