Neutral Citation: [2013] IEHC 544

THE HIGH COURT

[2010 No. 205 COS.]

IN THE MATTER OF CONGIL CONSTRUCTION LIMITED (IN LIQUIDATION) AND IN THE MATTER OF S. 150 OF THE COMPANIES ACT 1990 AND S. 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

DECLAN V. MANNION

APPLICANT

AND

PADRAIC CONNOLLY AND DELIA CONNOLLY

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 28th day of November 2013

1. By order of the High Court of the 26th April, 2010, Congil Construction Limited ("the Company") was ordered to be wound up on the petition of a creditor and the above named applicant was appointed liquidator. Having reported to the Director of Corporate Enforcement as required by s. 56 of the Company Law Enforcement Act 2001, and not having been relieved by the Director of his obligation in that regard, the liquidator now brings an application under s. 150 of the Companies Act 1990, before the Court by way of application for an order restricting the respondents in accordance with the requirement of subs. (1) of that section.

Introduction.

2. From its commencement of business in 1996, until sometime prior to its being wound up, the Company carried on business as a building contractor and construction company. The respondents, who are husband and wife, were the sole directors of the company at all material times.

3. In a manner typical of such operations in this jurisdiction in recent times, the affairs of the Company as a building contractor were closely bound up with a number of related companies under the control of common directors. The Company was a wholly owned subsidiary of Wolverlife Investments Limited ("Wolverlife") and a sister company of two other such subsidiaries Club Atlantic Westport Limited (CAWL) and City Limits Entertainment Centre Limited (CLECL). Briefly stated, the Company carried out building contracts and construction projects for the related companies, for the respondents and for third parties. The lands upon which the building works were carried out were invariably in the ownership of the other contracting parties and were mortgaged by those parties as security for bank borrowings used to finance the development projects and the construction works. For each project undertaken by the Company funds would be advanced to it by the respondents or the related company involved with the intention that such advances would be repaid by the Company out of the proceeds of the building contract. This had the consequence that at any given time one of the most valuable assets of the Company was its work in progress (WIP) under such contracts with the result that this asset was effectively caught by the charges in favour of the banks when the construction and financial downturn intervened. That has been one of the central concerns which has caused the liquidator to bring the present application. At the times which have been the particular scrutiny of the liquidator, the Company had been engaged in two particular projects in Westport and in Claregalway as well as in the construction of a private residence for the respondents.

Companies Act 1990 Section 150.

4. As is frequently remarked in the judgments involving application of s. 150 over the years, the High Court is placed in the somewhat unsatisfactory position that it is obliged to apply a full five year restriction obligation upon directors of a company shown to have been unable to pay its debts when it was wound up, unless the Court is satisfied that the directors concerned have "acted honestly and responsibly" in relation to the conduct of the affairs of the company and that there is no other reason why it "will be just and equitable that" they should be so restricted. Although it is possible for a person who has been subjected a restriction order to apply for relief from the restriction after a period of one year, the court dealing with the application at the outset has no discretion to adjust the five year period in the light of its assessment of the degree of culpability or lack of responsibility apparent in a given case.

5. In presenting this application to the Court, counsel for the liquidator very properly and with good reason recognised that the particular circumstances of this Company and of the respondents did not give grounds for an accusation of dishonesty. The Court entirely agrees. The issue at the heart of this application involves an appraisal of the extent to which it might be said that the respondents failed to act responsibly in the conduct of the affairs of the Company from a point in time at which they knew or ought to have known of and recognised the implications for them of the deep collapse that was taking place in the construction sector and the consequences which that would have had for this Company having regard particularly to the financial relationships it had with the respondents' private interests and those of the related companies and the degree to which those interests were beholden to the lending banks.

6. Indeed, the circumstances in which the Company found itself in the years 2008 and 2009 and the fate which ultimately befell it in April 2010 could well stand as a textbook exemplar of the fate that befell a very large number of enterprises in the sector at the time. Each case must, of course, be assessed on the basis of its particular facts and each appraisal of the responsibility or lack of responsibility of company officers must be made in the context of the finances of the company; of the particular way its affairs are shown to have been conducted; of the transactions which are under scrutiny; and, where applicable, the extent to which a deterioration in the financial state of a company can be shown to have been worsened by unjustified risk-taking; by neglect of proper or reliable book keeping or by an unjustified failure to face up to trading realities. The Court must also, however, be wary to avoid a temptation after the events to impose exacting standards of responsibility based upon the benefit of hindsight. As was said by Murphy J. in *Business Communications Limited v. Baxter and Another* (Unreported, High Court, 21st July 1995):

> "Of course one must be careful not to be wise after the event. There must be no "witch hunt" because a business failed as businesses will. . . . . To obtain exemption from the restraint which must otherwise be imposed by virtue of s. 150 . . .

all that is required is the exercise of a suitable degree of responsibility. Ordinarily responsibility will entail compliance with the principal features of the Companies Acts and the maintenance of the records required by those Acts. The records may be basic in form and modest in appearance, but they must exist in such a form to enable the directors to make reasonable commercial decisions and auditors (or Liquidators) to understand and follow the transactions in which the company was engaged. . . . However, it does to seem to me that the most important feature of the legislation is that it effectively imposes a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attaches to them as a result of either dishonesty or irresponsibility."

The Context to the Application.

7. It seems to the Court that these words of caution are now particularly relevant when considering the conduct of directors of any company which was involved in the construction sector in what will probably be seen in the future as the unprecedented collapse which took place over the years in 2007 - 2010. As is abundantly illustrated by the long procession of cases which have come before the Commercial Court in recent years, the downturn in the sector first began to appear during the year 2007. It gathered pace and depth in 2008 and manifested its devastating consequences throughout 2009. No doubt many individuals who had run successful businesses as contractors, subcontractors and trades people in the sector and who had given their careers to it, initially expected or hoped that the downturn would be temporary and short lived. They hoped somehow to make ends meet and to keep things turning over until recovery in the sector came about.

8. This is, in effect, the situation in which the first named respondent found himself and it forms part of his answer to the complaints raised by the liquidator. He points to the fact that he had built up a very successful company and associated businesses over fourteen years. The Company had achieved a turnover in excess of €80 million in the four years to the 30th April, 2008, and had retained profits of €3,757,138.00. With particular significance he points to one feature of the final financial position of the Company which has weighed heavily against any suggestion of dishonesty namely, that of the estimated deficiency of €21 million, he personally was owed €10.3 million and he has lost a further €4.6 million being the amount owed to the parent company of which the respondents were effectively sole proprietors. In addition to answering the liquidator's specific complaints, Mr. Connolly asserts:

> "The financial infirmity of the Company was caused solely by the global recession and the complete collapse of the building industry which was also accompanied by the virtual collapse of the Irish banking sector. It was the combination of these factors that created the insurmountable financial difficulties for the Company and ultimately led to the winding up of the Company."

9. It is in that context, accordingly, that it is necessary to evaluate the specific complaints made in relation to the conduct of the affairs of the Company by the liquidator and particularly his criticisms of the discrepancy between the financial position of the Company as given in the Company's final financial statements for the years ending the 30th April, 2008 and 2009 and the statement of affairs presented at the commencement of winding up. In essence, the liquidator identifies the respondents' irresponsibility as their failure to recognise and accept that the Company was insolvent by at least the latter half of 2008; and that instead of winding it up at that point they permitted it to continue trading and to undertake particular transactions relating to properties which represented substantial asset value to the Company as work in progress, but which inured to the benefit of the secured creditors of the parent and related companies and of the respondents. In this connection it is worth noting that in answering the liquidator's complaint that after the financial difficulties commenced, Company assets were used by the respondents to generate rental income, while no benefit accrued to the Company as a result, Mr. Connolly frankly describes the position he was in as follows:-

> ". . . as the market for buyers had dried up, everyone including Government (by giving VAT rulings/concessions), bankers, developers and builders were looking for ways to limit the damage that was occurring across the whole building sector. Banks were dictating what should be done and with their imprimatur, the letting of properties was common across the sector. What was positive with regard to the developments I was working on at that time was that in the main, I had sufficient finance in place to finish off all the projects on the various sites. Therefore, with the agreement of all of the interested parties, I commenced rentals so that I could achieve cash flow in order to maintain some working relationship with the Company's banks. The amounts involved in my view were not material. I may have initially made an error in how I apportioned the rents between the construction company and the land owning entity/company. I regret any error in this regard. However, the banks were in the main approving all of my actions and nothing was done without their consent and in most instances was done at their request."

10. At the heart of the liquidator's case, accordingly, is the argument that the directors failed to act responsibly by not standing up to the banks and by failing to recognise the distinct position of this Company and its own creditors and to appreciate the impact which would result for them from acquiescence in the dictates of the banks. The issue before the Court on the present application, accordingly, is whether in the particular circumstances that prevailed for the respondents in the Company especially in the twelve or eighteen months immediately preceding the winding up, this manner of conducting the affairs of the Company on the part of the directors constitutes a sufficient failure to act responsibly as to require the Court to impose the five year restriction. It is on that basis that it is necessary to examine the particular transactions which form the basis of the liquidator's principal concerns. In what follows the Court has not found it necessary to set out all of the details of every complaint because, as stated later in the judgment, the issue which arises is dependent not so much on particular instances of alleged wrongdoing as on an appraisal of the cumulative picture that emerges of the way in which the affairs of the Company were conducted especially during the years 2008 and 2009.

The Specific Complaints.

11. In essence, the liquidator identifies a number of particular aspects of the conduct of the affairs of the Company by the respondents prior to winding up as evidence of the lack of responsibility which warrants the imposition of the restriction. These will be examined in the order in which they have been put forward.

Losses on Work in Progress

12. As already indicated, the complaint made here is that expenditure was incurred by the Company in constructing units for the respondents or related the companies on lands owned by them which had been mortgaged by them to banks on terms which had the effect of capturing the value of WIP belonging to the Company under the securities. This placed the banks as creditors in a position to effectively appropriate the Company's assets (the value of the work in progress) upon the realisation of the security. When the units in question were sold and the proceeds were remitted to the banks, the amount of borrowings exceeded the value of the security including the WIP. Thus, the proceeds of sales reduced the borrowings of the parent company and of the respondents without any appropriate or commensurate benefit accruing to the Company and its creditors.

13. The liquidator's case is that once the decline in the property market became apparent in mid-2007, the Company should have

begun to make substantial provisions in its accounts against the valuation of WIP because the net realisable value of WIP was deteriorating. He points to the fact that the WIP was valued in the accounts of the Company at year ending the 30th April, 2009 (which were signed off by the directors on the 21st January, 2010) at €28.419 million but valued at nil as of the date of the statement of affairs on winding up. At para. 14 of the grounding affidavit he says:

> "It appears that Congil would not directly receive any cash from the sale of its WIP. These transactions would be recorded in Congil's books as a reduction in WIP and a reduction in the amounts due to the respondents and Wolverlife, reflecting the fact that the monies owed to those parties after each such sale was reduced. Any amounts realised from the sale of WIP in excess of the net amounts it owed to the directors and Wolverlife would be recorded as amounts due from the respondents and Wolverlife, effectively replacing the credit balances owed with debit balances owed by these parties. Such debit balances were effectively worthless because of the inability of both the respondents and Wolverlife to repay debit balances. Congil's work in progress required significant provisions. I say and believe that Congil did not make any provisions for such expected losses."

14. Based on this analysis the liquidator contends that the Company was "balance sheet insolvent" as of its Y/E 30th April, 2007, and 30th April, 2008, because that is the result that would have obtained had proper provision been made for the deteriorating value of the WIP. As of the 30th April, 2007, it had "a balance sheet deficiency", it is claimed, of €7 million but had €370,000 in cash which the directors ought to have then conserved in the interest of the creditors of the company.

15. As counsel for the respondents has, not without some justification submitted, this issue as with some of the others in the case, can ultimately be seen as an issue of accounting treatment and opinion or, as he put, a" battle between accountants". The first named respondent replies to the allegations that inadequate provision was made against WIP by challenging the liquidator's basis of valuation. In particular, he challenges the fact that the liquidator has placed a nil value on one particular block in the Westport development and thereby ignored its value of €10 million. He also asserts that the liquidator has failed to take account of the real peak in valuations of property in early 2008 or the fact that on the site in question sales were achieving €250 per square foot and more as late as May 2008. (The particular contract was apparently rescinded because of a planning issue, but reliance is placed upon the fact that this was the price that had been achieved and was therefore realistic).

16. There is thus, upon the basis of the evidence, a clear dispute between the respondents and the liquidator as to the basis upon which these values have been calculated. In effect, the respondents rely upon their understanding of what appears to have been realisable in the market at the time, while the liquidator is seeking to impose values derived with the benefit of hindsight as to what had happened to the market in the interim. It should be added that this application has been heard on affidavit and neither side has sought to have these disputes as to valuation or opinion determined by the Court by plenary hearing and expert evidence.

17. In response to Mr. Connolly's explanation, the liquidator points to the fact that Accounting Standard IAS 10 requires that when information is received after a reporting period indicating that an asset is impaired at the end of the previous period, must be adjusted in the financial statements for that previous period must be adjusted accordingly. As a result, the 2009 accounts signed off by the directors on 21 January 2010 should have reflected the significant post-balance sheet events which had brought about material reductions in WIP values in the year preceding April 2010. The liquidator investigated the movements on WIP and the transactions between the Company, Wolverlife and the respondents in preceding years. A schedule of WIP provided by the accountants who had prepared the financial statements of the Company in 2009 and the statement of affairs, indicated that the reduction in value was explained by a sale of WIP to the respondents for €5.807m which had been off-set against their directors account and by a drop in value of the WIP at the Westport, Athenry and Claregalway sites of €22.7m between April 2009 and April 2010. He maintains that the directors are implying that the loss in value of WIP of €22.7 million occurred between the dates upon which the directors signed the 2009 accounts on the 21st January, 2010 and the winding up on the 26th April, 2010. He asserts that there is "no evidence to support a decrease of 100% in the value of WIP" in that three month period and claims that the decrease was brought about by the excess of the borrowings secured on the sites over the values of the properties in question.

18. In response, Mr. Connolly strongly rejects the liquidator's claim that the value of the lands and property was greatly exceeded by the bank borrowings charged upon the lands in question. He says:

> "The market value of the lands and the property peaked in early 2008 with significant net worth in the lands relative to the bank debt. . . . The financial infirmity and subsequent insolvency of the Company was due solely to the complete collapse of property prices and the economic recession which commenced in early to mid 2008 and thereafter gained momentum. . . . The Company would normally receive a portion of the monies pertaining to its construction agreement and would use these monies, in the ordinary course of its business, to pay down the bank debt which it owed and which related to the cost of the construction."

19. He challenges the liquidator's reliance upon estimations and projections as the basis for reaching his opinion that the Company was insolvent from at least 2008. He maintains that throughout the period the Company had the support of its bankers:

> "These banks were happy to deal with me in the full knowledge of the prevailing land value and projected values of the finished development product (ie. the values of the finished apartments and completed buildings). Moreover, all of the banks were willing to provide bank finance in the full knowledge of the structure and *modus operandi* according to which sales were being organised and arranged."

20. He claims that:

> "With regard to provisioning and write downs of work in progress, there were constant reviews in order to take account of write downs and the Company's accounts made provision for work in progress. This was the position both with regard to the Westport site regarding apartments and the Claregalway site regarding warehousing."

21. At para. 14 of his replying affidavit, Mr. Connolly challenges particularly the analysis set out by the liquidator in his exhibit DVM8 which constitutes the basis of his estimate of the expected losses on work in progress which was prepared from a position sheet for each bank showing the value of the assets secured against the loans in question and the shortfall between the amount of those loans and the total value of the assets. As mentioned above, Mr. Connolly points out that the liquidator appears to have placed a nil value on one of the blocks of apartments in the Westport development, thereby ignoring approximately €10 million in value. The liquidator has, he claims, failed to take account of the actual peak valuations for the properties in early 2008. In the Claregalway site, values/sales of €250 per square foot were achieved. A price of €285 per square foot was achieved in May 2008, but the signed contract was rescinded because of a planning issue. At the time some 130,000 square feet of the building had been completed and when the Company's accounts were prepared these values were "seriously discounted". He points to the liquidator's estimated values

of all of the properties in the Claregalway site as being between €10 million and €11 million. He maintains that in 2009, the Claregalway site had a conservative value of approximately €38 million" and this was "post-provisioning and write downs". He says that while the liquidator appears to value the Claregalway sites at €150,000 each, in fact prices in the region of €1.5 million to €2.5 million per acre were being negotiated at the time of the collapse in the property market.

22. In essence, therefore, the respondents' answer to this key element in the liquidator's concern that there had been irresponsibility in the management of the affairs of the Company throughout 2008 and 2009 is that the conclusion is based primarily upon application of estimated retrospective values with the benefit of hindsight. The respondents argue that on the contrary, they had good reason to consider that completed works had substantially higher values throughout 2008 and as they had the continuing support of the banks, their attempts to obtain the best value possible for the assets even in a falling market did not amount to irresponsible conduct. Mr Connolly points out that the banks at the time had their own independent experts reporting to them on the values of work done on the projects and the banks were in regular contact with the Company's auctioneers and sales agent whose advice and valuations formed the basis of asset valuations in the Company's accounts.

Undervalue Transactions with Respondents and Wolverlife

23. According to the Liquidator the Company did not earn any profit from building work done for the respondents as directors because the work was billed at material and subcontractor cost with no allowance for overheads incurred by the Company. Based on the figures in 2008, overheads amounted to 3% as a percentage of sales. Based on a sales-related apportionment, the value of the overheads not charged for this work amounted to €523.199 so that the Company lost that amount in 2008 and 2009 on work done for the benefit of the respondents.

24. Similarly, no charges for overheads were billed in respect of assets acquired by the parent company Wolverlife. The Liquidator estimates that on the same basis the Company lost €702,269 in the two years in question on this work. Insofar as the first named respondent answers these complaints he relies upon the fact that the Company had made substantial profits as described earlier in the affidavit but he does not deny the essential point made by the Liquidator, namely that building works done for the directors and the parent company were billed at cost without seeking to cover the overheads which the Company had incurred and which ought properly to have been apportioned to the activity in question.

Wolverlife's Acquisition of Assets

25. Under this heading the Liquidator has examined a series of transactions in respect of works carried out by the Company in a development at Altamont Street, Westport, being Blocks B, C and E. Block A of the development had apparently been completed and sold at an earlier stage. The construction work had been carried out on land owned by the sister company CAWL and which had been mortgaged in favour of KBC Bank. In transaction No.1 the Company invoiced CAWL for ground works and WIP executed prior to the 30th April, 2008, in the sum of €15,344,000. In transaction No.2 the company owed Wolverlife €22,377,269 for sums advanced to the Company by Wolverlife for the construction work at Westport. At the 30th April, 2008, the company was owed €16,203,180 by CAWL for those units.

26. In transaction No.3, at the 30th April, 2009, CAWL, instead of paying the debt owed to the Company, transferred the sum of €14,273,073 of the amount it owed to the Company to a new balance owed to Wolverlife and cancelled its debt to the Company. Wolverlife then set off the amount of €14,273,073 and against the debt due to it by the Company and replaced it with an amount it was owed by CAWL. The Company reflected these transactions in its books by reducing the amount owed to it by CAWL in that sum and reducing the amount it owed to Wolverlife in the same amount.

27. Finally, in transaction No.4, on the 30th April, 2009, the Company invoiced Wolverlife for a final sum of €8m for completion of Blocks B, C and E and this was set off in the books of the Company against the amount due by it to Wolverlife.

28. The Liquidator maintains that these transactions had the result that CAWL and Wolverlife were effectively preferred over other creditors of the Company because the Company was insolvent at the 30th April, 2009, and a debt due to a connected party was thus reduced. Prior to the transactions the Company owed Wolverlife €26,540,470: and after them the debt was reduced to €4,264,235. According to the Liquidator these reductions amounted to an acquisition of these assets by a connected party within two years prior to the date of liquidation and at a time when the Company was insolvent.

29. In response, Mr. Connolly again asserts that the Company was not insolvent in 2008 and that when the total value of a contract for Tesco on the site is taken into consideration, the initial figures indicated that profits in the region of €15m were to be achieved overall on the site.

Fraudulent Disposition of Assets to Wolverlife

30. Between May 2006 and October 2007, Wolverlife lent the company €9.8m for the construction of the Ard Oran office block in Oranmore, Co. Galway. These funds had been borrowed by Wolverlife from Anglo Irish Bank. After the borrowing had been drawn down, the bank discovered that the land in question was not owned by Wolverlife but by the two directors and the bank redesignated the loan as an amount owed to it by them. The Liquidator points out that this redesignation was not corrected in the books of the Company which continued to show the borrowing owed to Wolverlife. On completion, an invoice was raised as of the 30th April, 2008, against the directors with a further invoice on the 28th February, 2010 and the total sum of €12.25m was debited by the Company to the directors account and set off against amounts the Company owed to them. The transactions had the effect of reducing the directors' account in the company from €22.5m to €10.4m. According to the Liquidator, if the erroneous denotation of the loan had been corrected in the books of the Company as of the 30th April, 2008, it would have shown a debt due to Wolverlife of €12.9m and to the directors of €21.6m. After the transactions for the period of May 2008 to April 2009 were recorded the correcting of the error would have the effect that the Company would have owed the directors €25.5m and Wolverlife €55m. Instead the books showed that Wolverlife was owed €4.4m on the 30th April, 2008 and that the directors were owed €15.7m. Wolverlife had a deficiency of assets of €13.7m in its balance sheet at the 30th April, 2009, so that the debt of €5.5m owed to the Company as at that date was not collectable and accordingly was a bad debt in the books of the Company.

Acquisition of Assets by the Respondents

31. The Liquidator maintains that from documents available to him assets amounting to a value of €16.282m were acquired by the respondents in the period from the 26th April, 2008 to the 26th April, 2010. The assets in question are the respondents' dwelling house, the "Cisco building" built by the Company, a stud farm and a development site at Bohermore. The values of these assets are given at €17.911m and the net figure put forward by the Liquidator is that sum less the funds amounting to €1.629m advanced to the

Company by the respondents. Again, the Liquidator maintains that the respondents have been thus preferred over other creditors by the reduction in their debt as connected parties within two years prior to the winding up.

32. The first-named respondent strongly repudiates this implication of serious wrongdoing and points out that he had made advances of €2.250m to the Company which he had financed by mortgaging his own house, three weeks before the dates relied upon by the Liquidator in his analysis. The Liquidator accepts that the respondents had deposited this amount into their directors' loan account with the Company. The private residence built for them by the Company cost €2.351m.

Causes of the Insolvency

33. The Liquidator identifies a number of reasons why the Company became insolvent:

(1) It had very low profits on sales between 2006 and 2009 and generated no cash surplus;

(2) It used monies advanced by the directors and the parent to construct assets for them above their realisable value in a falling market;

(3) Write downs in the value of WIP were required but not made and the resulting loss is not reported;

(4) Works were carried out on lands owned by the respondents as connected parties, the cost of which exceeded the resale value and were not for the commercial benefit of the Company;

(5) During 2007 – 2010 the decrease in property values was in the order of 50% thus reducing the value of WIP.

34. Mr. Connolly disagrees with these as causes of the insolvency. The Company, he maintains, had accumulated profits of €3.3m and its difficulties arose only after 2009. Provisions and write-downs were made when they were considered necessary and all transactions were carried out at prevailing market prices. In fact, the drop in property prices was greater than the figure given by the Liquidator and could not have been foreseen by the respondents at the time.

Reckless Trading

35. The Liquidator maintains that the Company was insolvent by the 30th April, 2007, but was permitted to continue trading until the winding up in April 2010. The directors, given their knowledge and experience, ought to have known that their conduct would weaken the finances of the Company and cause loss to its creditors and he submits the respondents were thereby knowingly a party to the carrying on of the business in a reckless manner and had no reasonable grounds for believing the company would be able to pay the debts incurred when they fell due. Mr. Connolly again rejects these contentions and points out that a statement of affairs of all his personal and company assets at the time shows that his net worth was €50.326m as at the 1st December, 2008m, even allowing for significant write downs. The Liquidator points out that they exhibited a personal statement of affairs, some supported by valuations.

Proper Books of Account

36. The Liquidator maintains that proper books of account were not kept because of the following deficiencies:

(1) The loan of €7.6m to Wolverlife was not recorded;

(2) Overstated work in progress was not recorded in the books;

(3) The Company's guarantee to KBC Bank of Wolverlife's loans was not recorded;

(4) There was an invalid off-set of directors' debit balances; and

(5) An invalid off-set of Wolverlife's debit balances.

37. Mr. Connolly replies that the loan to Wolverlife was an error which was rectified and the figures properly restated. As already indicated, he maintains that adequate provisions and write-downs were made in respect of WIP; that the set offs were correctly accounted for and that the exposure under the guarantees as contingent liabilities were properly noted in the notes to the accounts and did not require to be included in the balance sheet as debts.

Conclusion

38. It will be evident from this outline of the contentions advanced by the Liquidator and the answers given to them by the first-named respondent that apart from pointing to the above instances of alleged misconduct, the essential conduct identified by the Liquidator as irresponsibility consisted in the failure to recognise and address the dramatic impact of the down-turn in the construction sector on the Company at an earlier stage. There is, as counsel for the respondents indicated, a large degree of the reliance on the part of the Liquidator on a revaluation of the development and construction projects, of revision of the value of work in progress and of retrospective assessment of the market conditions particularly from 2008 onwards. But Mr. Connolly effectively concedes that a point came when sales of units effectively dried up (see paragraph 9 above,) and explains that he was merely doing what everyone else in the business tried to do at the time namely, to limit the impact of the down turn, by finding ways to generate some cash flow in order to keep the banks at bay.

39. While it may be questionable whether, as a test of irresponsibility, it is correct to describe the Company as "balance sheet insolvent" as early as April 2007, by retroactively attributing reduced values to assets in the manner suggested by the Liquidator, having regard to the apparent belief at the time in the realisable value of completed units, what is clearly evident, even on Mr. Connolly's own view of the deteriorating affairs of the Company, is that by the latter half of 2008 at least, the plight of the Company was evident. It will also be recalled that it was in September 2008 that the collapse of Lehman Brothers in the United States occurred and the Irish Government issued its banks guarantee. The general public and the construction sector in particular realised by then that a crisis had been reached. That was the point at which the collapse of the banking sector became evident and thus made unrealistic any belief that the slow-down of the construction sector would be temporary or short-lived.

40. The second feature of the situation that emerges from Mr. Connolly's account and from the inter-company transactions described in paragraphs 22 to 28 above, is that the respondents effectively considered the affairs of all of the companies together with their

own personal interests as one single business. This is, for example, inherent in Mr. Connolly's reliance upon his own net worth as indicated in the personal statement of affairs as a reason why it was justifiable to conduct the affairs of all of the companies in that way in order to meet the demands made by the banks. It is implicit also in the manner in which works were carried out for the respondents and the related companies at cost as described at paragraphs 22-23 above and inter-company transactions could be recorded and later readjusted. The Company was effectively regarded as a vehicle through which works could be carried out on their behalf such that when sales began to dry up its operations could be conducted to satisfy the demands being made on the respondents by the banks although the Company itself had no bank borrowing. It did on the other hand have its own distinct creditors apart from the respondents and the related companies. The Company had unsecured trade creditors in the amount of €3.629m at 30 April 2008. This figure was €5.113m 12 months later and was €5.129m at winding up.

41. It is therefore significant in the view of the Court that Mr. Connolly gives the explanation quoted from his affidavit in para. 9 above in this judgment. When sales of completed units ceased, he felt he still had sufficient finance in place to finish off outstanding projects on the different sites and for that reason he "commenced rentals, so that I that could achieve cash flow in order to maintain some working relationship" with the banks. He accepts that he made mistakes in apportioning the rents received between the Company and the other entities owners of the land. Nevertheless, the fact remains that at that point, the affairs of the overall business were being knowingly conducted "with the agreement of all interested parties" and with the approval of the banks and in most instances at their request. It is not suggested that "all interested parties" included the unsecured trade creditors of the Company. The sale and letting values of the properties were in part attributable to the works invested in them by the Company (which had a recorded value of over €8m) but none of the rental income accrued to the Company.

42. In the view of the Court, the first named respondent may well be correct in asserting that the "infirmity" of the Company was primarily caused by the global recession and the consequent collapse of the building industry and banking sector in this country in the sense that if these events had not occurred the fate of the Company might have been different. What is material, however, for the purpose of the present application, is whether the Court can be satisfied that the respondents acted responsibly in handling that situation in the Company once that infirmity became apparent.

43. In the judgment of the Court, even allowing for the uncertainty inherent in estimating the degree and speed of the drop in value of development projects during the years in question and even accepting that the first-named respondent may initially have had, like many other individuals in the same business at the time, a genuine belief that things could be worked out and that the downturn would be brief, it is nevertheless apparent that by at least the latter half of 2008, it must have been obvious that the Company and the other entities concerned were either already insolvent or facing imminent insolvency. It is not really in dispute that building activity came to an end in the latter half of 2008. Significantly, perhaps, it is admitted that no sales of units on the Claregalway site took place during 2008, and only one last sale of a unit in March 2009. The Court is accordingly satisfied that from at least the autumn of 2008, the respondents must have realised that the Company had no realistic prospect of trading out if its difficulties. By continuing with the transactions that were undertaken thereafter, they must or should have known they were running the risk of trading while insolvent and accordingly the point had been reached at which, acting responsibly, they were obliged to take steps to protect the distinct position of creditors of the Company.

44. In the judgment of the Court, while their conduct may fall short of what could be described as blatantly or grossly reckless, it nevertheless failed to reach the standard of suitable responsibility required of company directors in such circumstances. Essentially, the respondents can be blamed for failing to take steps to protect the position of the Company's creditors from the latter half of 2008 at the latest and in delaying until April 2010, to have the Company wound up. Because this is not a case in which dishonesty is alleged and because there is considerable room for second-guessing the values of the properties in question retrospectively to 2007 and 2008, this is possibly a border line case so far as the threshold of irresponsible conduct is concerned. However, the Court does not consider it necessary to analyse and appraise for culpability each of the instances of misconduct in the affairs of the Company suggested by the Liquidator and set out above. Once it is clear that the Court cannot be satisfied that the directors did act responsibly in the manner just described, the Court is obliged to apply the five-year restriction. Having regard to the possible wider implications of allegations of reckless trading and fraudulent disposition of assets, for example, the Court considers it undesirable to make any determination of culpability in that regard when it will serve no purpose. It is sufficient to say that the cumulative effect of the picture which emerges of the affairs of the Company from the Liquidator's analysis of those impugned transactions is to reinforce the conclusion that the respondents failed to act responsibly in relation to the particular affairs of the Company and its creditors largely as a result of their acquiescence in permitting its assets to be treated as an undistinguished part of the wider business for the ultimate benefit of the secured creditors of the parent and related companies and of the directors themselves.

45. As stated, the Court is required to impose the restriction unless it is satisfied that the respondents have acted responsibly in the conduct of the affairs of the Company. For all of these reasons the Court considers that it is not so satisfied and that explanations or excuses offered do not suffice to relieve the Court of that obligation under s. 150.

46. It will be noted that the opposition to the application has been that of the first named respondent only. The second-named respondent, his wife, has sworn no affidavit. The first-named respondent has explained that while she was "not indifferent" to the proper management of the Company, she was a co-director only to fulfil the legal requirement for two directors. She took no active part in running the Company and entrusted it entirely to him. It is well settled, however, that inactivity or non-involvement on the part of a director is no answer to an application for restriction under s.150. An individual who accepts a position of director of a company even if only fulfil the legal requirement must accept the responsibilities and potential consequences that go with it. A director who has played no part whatsoever in the conduct of the affairs of an insolvent company cannot claim to have acted responsibly in relation to them.

47. The Court must therefore apply the section by imposing the five year restriction required by subsection (1) on both respondents.