Neutral Citation Number: [2005] IEHC 468

THE HIGH COURT

[2004 No. 267 COS]

IN THE MATTER OF CLUB TIVOLI LIMITED
(IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF SECTION 150 OF THE
COMPANIES ACT, 1990
AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT
ACT, 2001

BETWEEN/

BRENDAN FOSTER AS LIQUIDATOR OF THE COMPANY
IN THE WITHIN PROCEEDINGS

APPLICANT

AND
PAUL DAVIS AND PETER MAY

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 21st day of December, 2005.

1. In these proceedings the applicant seeks a declaration that the respondents, being persons to whom Chapter 1, Part VII of the Companies Act, 1990 applies, shall not for a period of five years be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless that company meets the requirements set out in sub-s. (3) of s. 150 of the Companies Act, 1990 (as amended).

2. On 19th May, 2003, it was resolved pursuant to s. 251 of the Companies Act, 1963, that Club Tivoli Limited ("the Company") be wound up. At an adjourned meeting of the creditors of the Company held on 3rd June, 2003, the applicant herein was appointed to act as liquidator.

3. The first and second named respondents named in the title hereof were directors of the Company at the time of the commencement of the winding-up of the Company. It is unnecessary for the purposes of this application to deal with the position of the second named respondent whose position has already been considered by the courts.

4. At the time of its winding-up the Company was unable to pay its debts within the meaning of s. 214 of the Companies Act, 1963.

Background
5. The Company was set up in February, 2002 by Mr. Chris Kelly and Mr. Brendan Kelly. While the first named respondent (who will hereinafter be referred to as "the respondent") had an involvement at the outset, he did not become a director until the month of July, 2003. At that stage, Chris Kelly and Brendan Kelly resigned as directors and were replaced by Paul Davis and Peter May, the respondents herein. Both Chris Kelly and Brendan Kelly transferred their shares in the Company to the respondents. In return it was agreed that approximately €285,000 would be paid to Chris Kelly and his group of companies with an immediate payment of €60,000 and the balance in staged payments.

6. The total deficit due to the creditors of the Company as stated in the directors' estimated statement of affairs presented to the creditors' meeting of 3rd June, 2003 was €698,499.26.

7. In the course of the conduct of the company's affairs it is stated a number of issues arose, all of which had a bearing upon the accumulation of the debt aforesaid.

8. There is one particular feature which must act as a backdrop to these considerations. Mr. Tony Byrne, who was the owner of the Tivoli Theatre, applied for a renewal of his liquor licence in February, 2003. Apparently to some surprise, An Garda Síochána objected to the licence renewal on the basis that the licence agreement dated 4th March, 2002, under which the respondents were operating, was in breach of licensing laws. As a result, the club was forced to cease operations on 5th April, 2003. From that date until 31st April, 2003, the night club was open only sporadically and not on a constant basis. In an attempt to deal with the licensing issues, the Company was represented by a leading senior counsel in the licensing area who appeared before the District Court on 16th April, 2003. The Company ceased all operations on 31st April, 2003, thereafter special resolution aforesaid was passed.

The issues in the case
9. In pursuance of his application the liquidator relies on three essential issues. These are:

i. The alleged failure to wind-up the Company and the growth in its deficit.

ii. The alleged failure on the part of the Company to make revenue returns and to pay revenue liabilities.

iii. The alleged failure on the part of the respondent to co-operate with the applicant. The first named respondent's tenure as a director of the Company began in July of 2002. At that time it is acknowledged that the Company was in a state of indebtedness.

10. For the purposes of this judgment it will be convenient to consider the conduct of the affairs of the Company in a number of different periods. The first of these runs from July of 2002 to the end of September of that year. At that point, the monthly statement of assets and liabilities of the Company demonstrated that the Company had a net deficit of €34,205.72 with trade creditors of €94,670.41.

July – September 2002
11. An essential point of reference is that the business in question was being run as a night club. Accordingly, there are particular points which will assist as a guide to the manner in which the affairs of the Company were conducted and also as indicators as to what the directors knew, or ought to have known, at any particular point.

12. It is of particular relevance that a statement of account from Guinness UDV Ireland indicates that the sum of €16,881.19 was owed to this particular creditor at the end of September. A further pointer is that the sum of €4,000 was owed to Independent Newspapers for advertising purposes. While there were indeed other creditors, particular emphasis may be laid on the identity of these

two because of the nature of the business being run by the respondents. Clearly, publicity was a prerequisite for the running of the night club. A supply of alcohol was an important element in its affairs. Moreover, no VAT returns were made to the Revenue Commissioners during this time.

13. It has been submitted that the period in question would be a slow time for a night club. It was expected that come the autumn, there would be an increase in revenue. But by 22nd October, 2002, the assets and liabilities prepared by the Company demonstrate that the Company's net asset deficiency had grown by over €110,000 to €142,684.13 at that point. The trade creditors' balance had increased by over €60,000 to €158,942.77. The debt owed to Guinness UDV Ireland had grown by €9,804.56 to €26,685.75. Thus is may be seen that the coming of autumn and the expectation of increased revenues had done little to increase the profitability of the Company.

October – December 2002
14. It is relevant then to look at the period from 22nd October, 2002 to 31st December, 2002. At this point it might be considered that the Company would be at its most profitable. However, any increase in turnover does not appear to have rendered the Company profitable. The debt due to Guinness UDV Ireland Limited further increased by €7,323.59 to reach €34,009.34. Furthermore, despite the respondents having been a director of the Company for five months, no VAT returns had been made to the Revenue Commissioners.

January 2003 – May 2003
15. By the time that the Company was put into liquidation on 19th May, 2003, the total deficit of the Company was €698,499.26, with unsecured creditors owed €562,012.06, secured creditors owed €86,265.00 and preferential creditors owed €65,772.00.

Submissions
16. On behalf of the respondents, Mr. Garry McCarthy B.L. in his able argument draws attention to the following features.

17. In the first instance, counsel draws attention to the fact that the principal reason for the Company ceasing to trade was the loss of its venue, that is the Tivoli Theatre. Mr. McCarthy draws attention to the fact that in a letter to the Office of the Director of Corporate Enforcement of 1st December, 2003, the applicant accepts that the reason for the liquidation of the Company was due to the loss of the venue.

18. It is secondly submitted that the directorship of the respondents was for a very short period of time. It was only in February, 2003 that it came to light that the Garda Síochána intended to object to the granting of the licence. In order to deal with the licensing issue the Company was represented by leading senior counsel in the licensing area, who appeared before the District Court on 16th April, 2003. Unfortunately, the advice given by senior counsel was that the objections of the Garda Síochána were well-founded and that the application was not successful.

19. Accordingly therefore, Mr. McCarthy urges the court to look at the tenure of the respondents as being from 19th July, 2002 until 5th April, 2003, being a period of approximately eight months.

20. It is further submitted that the court should judge the actions of the first respondent from the date upon which it became apparent to that respondent that there were difficulties with the licence agreement dated 4th March, 2002. Such difficulties, it is submitted, were evident only in February, 2003. Therefore, Mr. McCarthy contends that one should look at the actions of the directors during the period February, March and April, 2003 for the purposes of considering the extent to which such actions over that shorter period contributed to the insolvency of the Company, or demonstrate a lack of commercial probity or lack of proper standards.

21. With regard to the earlier period, that is before February, 2003, counsel submits that it was not irresponsible for the directors to trade in a Company that is merely under-capitalised and fails to make a profit. Counsel submits that there are many companies in this position, particularly in the start-up phase in the high technology industry. He contends that it is self-evident that companies in such a position will undoubtedly incur losses initially. This is especially so, having regard to the fact that at the commencement of the Company's business it inherited an obligation to pay a sum of approximately €230,000 to Christopher Kelly and Brendan Kelly, which monies were spent on refurbishing the premises in which the night club operated. Moreover, the Company had agreed to pay this sum of to Christopher Kelly and Brendan Kelly or their associated companies, over a period of time in consideration of the transfer of the shares of the Company.

22. While not disputing the individual debts, there are a number of factors to which the respondent's counsel draws particular attention relating to the earlier period. These are:

> i. The respondent personally lent the Company the sum of €35,400 in order to secure the compliance of the agreement of 18th July, 2002 and a company which he beneficially owned provided funds for approximately €78,000.
>
> ii. The respondent recognised at an early stage that the Company required working capital in order to run effectively, therefore he took steps to secure such additional capital.
>
> iii. The respondent obtained a loan from AIB Dame Street in the sum of €80,000, backed by a personal guarantee given by the respondent. These monies were used to fund the working capital of the Company.
>
> iv. The respondents (that is including the second named respondent) sold 26% of the shareholding in the Company to one Brian Donoghue in consideration of that person providing a working capital loan to the Company of €80,000 to be paid over a phased period of time.
>
> v. Pursuant to this agreement, the said Brian Donoghue agreed to provide management consultancy services in the form of advices regarding the strategic direction, cost control and administration of the Company. It was acknowledged in that agreement that the respondent would implement the advices of Brian Donoghue on a day to day basis. However, the first named respondent, because of his background in event management, booking and promotion of artists, was to retain this area of specialty to himself.
>
> vi. The respondent states that as a considerable number of persons expressed interest in the Company, it had "enormous potential" and was set to become a leading venue for events in the country.

23. Mr. Andrew Fitzpatrick B.L., on behalf of the applicant, also succinctly drew attention to a number of important features as an adjunct to the issue of the Company's trading figures. Put briefly, he says that the trading deficit was such that either the

respondent knew or ought to have known of the parlous financial state of the Company. If the management accounts of the Company did not accurately portray this, then they masked the extent of the losses. If, on the other hand, the accounts accurately portrayed the position, then the respondents knew, or ought to have known, as to the state of the Company's loss making and were irresponsible in their failure to wind the Company up earlier. Attention is specifically drawn to the contention that the Company's accounting system did not properly record certain transactions and that bank and cash reconciliations were not carried out. A further deficiency in the Company's accounts was the failure to record certain cash dispersals made to members of staff. An examination of the accounts demonstrates that this is so. Failure to record these payments led to discrepancies between the P35 forms submitted to the Revenue Commissioners and the amounts recorded under staff wages in the Company's accounts. This in turn led to an underestimation of the Company's liability to the Revenue Commissioners.

24. One turns then to a number of specific headings of complaint.

The relationship between the Company and the Revenue Commissioners
25. During the tenure of the first named respondent as a director, the Company failed to make any VAT returns. The only return made to the Revenue Commissioners at all, a P35 form dated 31st December, 2002, recorded gross wages substantially less than those recorded in the Company's accounts for the period ending 31st March, 2003. Specifically, the P35 form records gross wages of €81,043, whereas the accounts recorded gross wages of €217,745. It is contended, moreover, that the failure to make VAT returns at all resulted in a gross underestimate of the liability due to the Revenue Commissioners. The statement of affairs prepared by the first named respondent recorded a VAT liability of €40,000. However, a review of the Company's accounts for the period ending 31st March, 2003, indicated a VAT liability which, in the view of the applicant, was in excess of €200,000.

Failure to co-operate with the applicant
26. The applicant states that he found the first named respondent unco-operative during his investigation of the affairs of the Company. He was difficult to reach by telephone on a number of occasions. When a response emanated from him, it was issued in writing by the first named respondent's solicitor and not by him personally. The applicant further states that when the first named respondent did meet with him, on both occasions he found him to be unco-operative in that he did not offer any detailed information in relation to, nor was he fully conversant with, the financial affairs of the Company. Finally, the applicant states that he has been unable to obtain certain documents and items of information from the first named respondent's advisers. The applicant's contention in this regard is set out in his affidavit of 18th June, 2004, wherein he states that both the first and second named respondent failed to co-operate with him in the progress of the liquidation. The applicant, however, did not elaborate further at that point, or distinguish between the position of either of the respondents. In the course of that affidavit he did not advert to the fact that a number of meetings were held and that the respondents' solicitor and accountant met with him.

27. It may be observed however that in fact the respondent attended a number of meetings with the applicant to assist him with information he required. Moreover, it appears that the applicant had consulted with Mr. Neil Hughes of Hughes and Associates, Accountants, who clarified various issues in relation to the operation of the Company.

28. In particular, the applicant criticises that the response received to a letter of 21st November, 2003, was from the respondent's solicitor, Mr. Lyons. However, given the fact that the letter of 21st November, 2003 contained allegations that the respondent acted dishonestly and irresponsibly in relation to the conduct of the affairs of the Company and, moreover, an allegation that the respondent had used corporate monies for his own benefit, it is hardly surprising that a response was received from the respondent's solicitor.

29. In fact Mr. Hughes, the respondent's accountant, met with the applicant at his offices at 11.30 a.m. on 18th December, 2003 in response to a letter of 11th December, 2003. Mr. Hughes states that at that meeting he said that if he could be of any further assistance regarding the internal books and control of the Company, he would be happy to assist. He states he was never contacted. I note in particular that the exchange between Mr. Hughes and the applicant ends with a letter from Mr. Hughes of 18th December, 2003 in which he states, "If I can be of further assistance in relation to this case please do not hesitate to give me a call".

30. I do not consider these allegations are made out.

The financial position of the Company as of December, 2002/January, 2003: Findings
31. Some idea of the extent of the problems facing the Company can be gleaned from identifying a number of the debts owing coming in to the New Year of 2003. First, there existed a debt to FM 104 Radio's parent company, wherein civil bill proceedings had been issued for the recovery of €20,000. Second, Independent Newspapers had issued a civil bill for the recovery of €4,000. advertising costs for the period June to August, 2002. Third, The Star newspaper were seeking the sum of €5,082 for the period October, 2002 up to January, 2003. Fourth the Guinness debt stood at €61,369. Fifth there had been breaches of the Company's overdraft limits with the bank. This had given rise to correspondence and the re-imposition of a rigid overdraft limit. This limit, set on 16th October, 2002, had been substantially breached and as of December, 2002, the Company's indebtedness to AIB stood at €124,000. Sixth it appears that there were a number of unpaid cheques. A number of cash disbursements were not adequately recorded. Straight cash payments were being made to a number of employees without deduction at the emergency rate. Independent contractors appeared to have been paid without the identification of VAT registration numbers. The system of recording, of management of accounts and financial administration of the Company was inadequate.

32. More profoundly, the Company was chronically under-funded. In correspondence the respondents' accountants state that at the commencement of its operation under the respondents' directorship the Company was technically insolvent. The debt which the respondents faced to the previous shareholders was substantial. The validity of the cash input from another company of which the respondent was director, Influx Limited, of €78,000 is disputed by the applicant. Such debt has not been fully substantiated in the liquidation.

33. In summary, therefore, at the turn of the year the Company's position may be thus summarised:

> i. The directors' hopes and expectations of a turnaround in profitability commencing in the autumn/winter of 2002 were unfulfilled.
>
> ii. In particular, the hoped-for increase in turnover in December, 2002 had done little to enhance the profitability of the Company although it is contended that in certain weeks the turnover of the business was in the region of €40,000 to €60,000.
>
> iii. The entire transaction wherein the respondents had taken on the management of the Company, had undertaken payments to the Kellys and also undertaken refurbishment of the premises, was clearly imprudent, almost to the point of

improvidence.

iv. The financial state of the Company was therefore in a highly perilous position.

v. While it may have been that further capital injections might take place, no such investment did occur at that point.

vi. Finally, but not then known to the directors, was the fact that the licence or contract under which they operated, and the intoxicating liquor licence stood on the brink of being revoked. Where did the statutory obligations of the directors lie in such circumstances?

Legal principles

34. It is now necessary to turn to the legal principles applicable in an application of this type.

35. Section 150(2)(a) of the Companies Act, 1990, identifies the issues as to which the first named respondent must satisfy the court so as to avoid a restriction order being imposed:

> "(a) that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this section."

36. No allegation has been made on the evidence that the respondent has not acted honestly. Thus the issue for decision is whether or not the respondent has acted "responsibly".

37. The appropriate standard to be used in determining whether directors have acted responsibly was considered by the Supreme Court in the case *of Re Squash (Ireland)* [2001] 3 I.R. 35 in which McGuinness J. emphasised:

> "In the case of all companies which become insolvent it is likely that some criticisms of the directors may be made. Commercial errors may have occurred; misjudgements may well have been made; but to categorise conduct as irresponsible I feel that one must go further than this."

38. In deciding whether a director is unfit McGuinness J. quoted a passage from the English case of In Re Lo-Line Motors Limited [1998] B.C.L.C. 698, 703, a decision of Browne-Wilkinson Q.C., which was also quoted by Shanley J. in the case of *La Moselle Clothing Limited v. Soualhi* [1998] 2 I.L.R.M. 345;

> "The approach adopted in all the cases to which I have referred is broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past record as directors of insolvent companies has shown them to be a danger to creditors and others … Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

39. Thus a director complying with his obligations under the provisions of the Companies Acts and acting with a degree of commercial probity during his tenure will not be restricted on the grounds that he has acted irresponsibly. In the case *of Re Colm O'Neill Engineering Services Limited* (ex tempore judgment, 13th February, 2004) Finlay Geoghegan J. stated:

> "What is also clear from the decisions to date is, firstly, that simply bad commercial judgment does not and will not be considered by the court to amount to a lack of responsibility by directors. Further, that the courts must be careful in considering applications under this section not to, as was described in one judgment, permit the conducting of witch-hunts against directors and, perhaps more importantly from the court's perspective, not to view the matter with the inevitable benefit of hindsight which arises in the course of the liquidation. This latter observation is sometimes difficult to observe and (a misprint for "in") practice as the actions or inactions of the directors which it is being suggested may indicate a lack of responsibility are inevitably considered by a liquidator with the benefit of hindsight and it is, perhaps, difficult for the court to avoid looking at it on occasion from that perspective."

40. The primary source for the applicable principles to be considered in determining whether a director acted "honestly and responsibly" are to be found in the decision of the late Shanley J. in the case of *La Moselle Clothing Limited v. Soualhi* in which he set out the five well known criteria to which the court should have regard:

> a) the extent to which a director has complied with the obligations imposed by the Companies Acts;
>
> b) the extent to which the director's conduct could be regarded as so incompetent as to amount to irresponsibility;
>
> c) the extent of the director's responsibility for the insolvency of the company;
>
> d) the extent of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter; and
>
> e) the extent to which the director displayed a lack of commercial probity or want of proper standards.

41. To these tests have been added one additional test identified by Finlay Geoghegan J. in *Kavanagh v. Delaney* (re Tralee Beef and Lamb Ltd) (High Court, 20th July, 2004) where she supplements Shanley J.'s first test set out at (a) by an additional test, that is the extent to which a director has or has not complied with any obligation imposed on him/her not only by the Companies Acts but also with duties imposed by common law.

42. In the course of *re Costello Doors Limited* (Unreported, High Court, 21st July, 1995) Murphy J. stated that the maintenance of proper books and records in such a form as to enable directors to make reasonable commercial decisions, and the employment of appropriate experts went a long way towards proving that a director had acted reasonably. Similarly, in the case of *Business Communications v. Baxter* (21st July, 1995) Murphy J. opined:

> "Ordinarily 'responsibly' 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 as to enable the directors to make a reasonable commercial decision and auditor (or liquidators) to understand and follow the transactions in which the company was engaged."

Application of principles to the facts of the case

43. In the application of these principles I am cognisant of the fact that under s. 150(2)(a) of the Act of 1990, the onus lies upon the respondent to satisfy the court that he has acted honestly and responsibly in relation to the conduct of the affairs of the Company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by the section.

44. Did the applicant in this case act "responsibly"? The first issue to be considered under this rubric is that of the financial position of the Company at the time of the share purchase in July, 2002. In correspondence from the respondent's solicitor the Company is referred to as being "technically insolvent" at that time.

45. The word "insolvency" may be used in two different contexts.

46. The first is where a company is, in a commercial sense, "not financially viable." This is referred to as "commercial insolvency". This may be the case either where such company is unable to pay its debts as they fall due (the cash flow test) or where its liabilities (including the value, in practical terms of its contingent and perspective liabilities) exceed the realisable value of its assets (the "balance sheet" test). The two tests are interrelated. The company which is commercially insolvent in the cash flow sense only is generally heading towards insolvency in the balance sheet sense also. This is because the adverse cash flow is eating into its capital base. Conversely a company which is commercially insolvent in the balance sheet sense only is generally heading towards insolvency in the cash flow sense also because the cash flow will need to be used sooner or later to meet the balance sheet deficiency. The second context in which the term "insolvency" is used is where a commercially insolvent company is actually the subject of a pending statutory insolvency scheme. It is unnecessary for the purposes of this determination to reach any conclusion as to whether the Company was, at the time of the share purchase insolvent in either sense. As has been demonstrated above however, there is significant evidence that the Company was apparently unable to pay its debts as they fell due. Whether its liabilities exceeded the realisable value of its assets is a matter upon which there is insufficient evidence to reach a determination.

47. But the issue of accruing debts is one of which the respondent should have been acutely aware, particularly so in the light of the nature of the business which the Company was carrying on and also having regard to the nature of the creditors. It requires no special knowledge to be aware of the fact that advertising, and the supply of alcohol are two important parts in the running of a discotheque of this type.

48. Added to this there were other matters to which the directors should or ought to have specifically turned their mind. A particular instance here is the pattern or breaches of the bank overdraft limits giving rise to the debt which it accrued by the end of December, 2002.

49. It is clear that in this case one must have regard to balancing features. The court must have regard to the fact that the respondent and his company had both apparently guaranteed debts of the Company and invested sums of money therein. The respondent had taken steps to obtain further investment therein. It is contended that there were weeks where the turnover of the business approximated to between €40,000 and €60,000, although this does not appear to be reflected in any of the statements of account or documentation to which the court has been referred. Indeed it is striking that despite the difficult financial position of the Company the documentary evidence as to the accounting procedures which has been adduced in evidence appear to be meagre.

50. Finally the court must have regard to the failure of the Company to pay Valued Added Tax at any stage during its trading history. This is to be coupled with the evidence that there was a failure to apply proper tax procedures to employees of the Company during its trading history.

51. In this connection I do not accept that the situation in the instant case is comparable to that set out in Re: *First Class Toy Traders Limited* (Unreported) Finlay Geoghegan J. 9th July, 2004.

52. In the course of that judgment that judge stated:

> "It is envisageable on uncertain facts that for directors to set out with an under capitalised company and to commence trading with limited liability and incur significant debts may raise questions about a commercial probity or want of proper standards.
>
> On the facts [of] this case I am satisfied however, that there was no such lack of commercial probity or want of proper standards.
>
> I am satisfied that the first two respondents were experienced businessmen and the third named respondent had significant experience of financial and accounting matters. Whilst they did start trading through an under capitalised company there was no suggestion that they were properly attempting to avail of limited liability. Rather they appear to have organised the financing for this company in a way in which the first two respondents using their existing business profile would be able to obtain loan finance for the company which they then personally guaranteed.

53. I am satisfied that they genuinely anticipated and believed that whilst this would be a loss making company in its initial stages that it had the potentiality to be a successful venture…".

54. But do such considerations apply in the instant case? Having regard to the factors which have been outlined above I do not consider that the facts of the instant case are comparable to *First Class Toy Traders*. There has been no evidence that the respondent herein had any particular skill in the business in which he was then engaging. This was distinct from the business in which he was previously involved both in nature and extent. Event promotion is a distinct business from the running of a discotheque on a day by day basis. No evidence has been adduced that the respondent has significant experience of financial or accounting matters. While it is true that efforts were made to obtain new investment, while respondent furnished personal guarantees, the pattern of events demonstrates that from the very outset it was necessary to stave off creditors and that debts were not being paid as they became due.

55. The fact of the matter is that in the light of the obligations incurred to Chris Kelly and Brendan Kelly, and in the light of the debts incurred in refurbishing the premises, the turnover figures were insufficient to generate profit, and certainly insufficient to pay off debts as they became due.

56. In so concluding, I do not consider that one is being "wise after the event" to apply the phrase used by Murphy J. in *Business Communications v. Baxter and Ors*. (Unreported, 21st July, 1995) nor may such conclusion be reached only with the benefit of hindsight (*see Colm O'Neill Engineering Services (In voluntary Liquidation)* Finlay Geoghegan J. 13th February, 2004. Even giving the respondent herein the benefit of viewing the conduct of the Company as a going concern, the plain fact was that by the end of the year 2002, it should have been crystal clear to the respondents that the writing was on the wall. The first named respondent has asserted that the quality of the accounting system maintained by him was such that he was at all times fully appraised of the Company's financial position. However the court must examine this claim in the light of the precarious financial state of the Company for the eight months of the first named respondent's tenure as a director. Despite the fact that the first named respondent was apparently fully aware of the hazardous nature of the Company's finances, no arrangements were made to wind up the Company until 13th May, 2003.

57. Alternatively, it may be thought that the first named respondent was unaware of the financial state of the Company. In either circumstances there appears no alternative to concluding that the first named respondent failed in his duty to make himself aware of the Company's affairs and with his duty under s. 202 of the Companies Act 1990. In particular, it is difficult to avoid the conclusion that the management accounts maintained by the Company were misleading in that quite plainly they masked the true extent of the losses of the Company, the Company's accounting system did not properly record certain transactions, and bank and cash reconciliations were simply not carried out. To this must be added the revenue and Value Added Tax concerns outlined earlier.

58. In re Digital *Channel Partners Ltd. (Kavanagh v. Cummins and Ors.)* [2004] 2 I.L.R.M. 35, Finlay Geoghegan J. held:

> "There are I think two ways of looking at the failures to make tax returns. The failures to make tax returns are clearly in breach of the relevant Taxes Acts. Similarly the failure to make the payments are in breach of the Taxes Acts. The mere fact that a company is in breach for as in this case a relatively limited period will not of itself, it seems to me, indicate that the directors of the company have acted either dishonestly or irresponsibly in such a way as to preclude my concluding that overall they acted responsibly and honestly in relation to the conduct of the affairs of this company. Unfortunately and inevitably where companies are under significant financial pressures this may occur." (Ibid at page 40).

59. But in this case the failure to comply with the duties to the Revenue Commissioners did not occur over a limited period of time having regard to the respondent's tenure as director. The failure to pay VAT dated to the very beginning of his directorship. The failure continued until 13th May, 2003, the date of dissolution of the Company. Moreover, there is nothing in the history of the Company or in its projected future which might in any way indicate that at some defined point in the future there existed a chance of generating revenues such as would remedy the situation.

60. While the court has been urged to have specific regard to the loss of the licence, this factor must be seen against the backdrop of the already accruing indebtedness of the Company. The loss of licence in February, 2003, and the reduction in trading thereafter were no more than the final step when the path to insolvency had already been well traversed. Moreover, one cannot disregard the fact that the ultimate decision of the directors to place the Company in liquidation only was arrived at on 13th May, 2003, and that apparently, on the basis of the accrued debts, the Company continued to trade, albeit it on a substantially reduced basis, in the months of March and April of that year.

61. Having regard to all the circumstances, the court has no alternative but to make a declaration in the terms of the notice of motion.

62. In the particular circumstances of the case this court cannot make any recommendation or order binding on another court. However, it may be that at the appropriate time having regard to the particular circumstances, the age of the applicant and the effect of the declaration upon him this may be an appropriate case for relief under s. 152 (1) of the Act from the restrictions referred to under s. 150.