**THE HIGH COURT**

**2005 5 COS**

**IN THE MATTER OF SWANPOOL 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**

**EUGENE McLAUGHLIN AS LIQUIDATOR OF THE COMPANY IN THE WITHIN PROCEEDINGS**

**APPLICANT**

**AND**
**RAYMOND LANNEN AND DEIRDRE LANNEN**

**RESPONDENTS**

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

**BETWEEN**

**EUGENE McLAUGHLIN AS LIQUIDATOR OF THE COMPANY IN THE WITHIN PROCEEDINGS**

**APPLICANT**

**AND**
**RAYMOND LANNEN AND DEIRDRE LANNEN**

**RESPONDENTS**

**Judgment of Mr. Justice Clarke delivered the 4th November, 2005.**

**1. Introduction**
1.1 In both of these cases the liquidator seeks a declaration that both respondents should be subjected to the order as specified in s. 150 of the Companies Act 1990 (as amended) restricting their activities in relation to companies for a period of five years. The two companies concerned were involved in the tannery and hide business with Swanpool Limited ("Swanpool") trading as a tannery from the latter part of 1990 and Travelodge ("Travelodge") trading in the purchase and sale of hides and skins mainly for the export market from February 1987.

1.2 Both of the respondents were directors of both companies. The second named respondent is the daughter of the first named respondent.

**2. Facts**
2.1 There are certain unusual features to this case. Firstly it should be made clear no suggestion is made of any lack of honesty on the part of either of the directors. Secondly the liquidator has not brought to the attention of the court any suggestion that the books and records of the company were not properly kept or that the company was not generally conducted in accordance with the requirements of the Companies Acts. Nor is it suggested that the circumstances that led to the companies becoming insolvent reflect adversely on either respondent. In substance it would appear that as a result of the high cost base in Ireland, manufacturing facilities in the industry were being relocated to low cost economies in the developing world most especially China. This gave rise to doubts about the long term profitability of the business being run by Swanpool. Similarly in respect of Travelodge increased competition gave rise to doubt about the long term profitability of its business.

2.2 It is accepted that at the time the companies ceased trading there was good reason to believe that each of the companies would have been in a position to meet all of its liabilities. The last remaining asset of Swanpool was a premises at Clondra Mills Co. Longford. It had been intended to develop that site as a residential development. The initial indications were that the property would realise approximately €2 million which would not only have been sufficient to pay off any remaining creditors of either company but would have allowed for the return of a surplus to the shareholders of both companies. A notice of intention to grant planning permission for such a development had been given by the local authority. Unfortunately for the company an appeal was taken to An Bord Pleanála which was successful and a second application for planning was also refused on the grounds that the lands were contaminated by industrial waste. The company then sought separate independent valuations and sold the site for €475,000.

2.3 It therefore appears to be clear that up and until the time that the planning process suffered a significant reversal from the company's perspective there was every reason for the directors to believe that the companies would be wound up on a solvent basis.

2.4 In those circumstances the liquidator brings to the court's attention only three matters which he believes should be considered in determining whether it is appropriate to make orders under s. 150. In fairness it should be indicated that the first two matters were not pressed by counsel on behalf of the liquidator with any great force.

2.5 The first of those lesser matters is that the eventual proceeds of sale of the property at Clondra Mills was lodged into the bank account of Travelodge even though the property itself was owned by Swanpool. However it is clear that, while trading, both companies operated separate bank accounts and furthermore it does appear that it was, at all times, possible to identify the sale proceeds in the relevant account. While it is undoubtedly the case that the moneys should not have been lodged in the way in which they were it does not appear to me that, in all the circumstances of this case, any significant weight should be attached to this issue.

2.6 The second lesser matter relied upon (which concerns Swanpool only) relates to the fact that insufficient funds were retained to discharge the VAT payable on the sale of the property at Clondra Mills. The first named respondent has put forward an explanation as to the circumstances in which it was envisaged that funds would be available to meet the VAT liability. It was intended that the revenue liabilities would be repaid from the sale of the machinery that had been in use in Clondra Mills. Unfortunately due to the decline of the industry generally at that time, a demand for the machinery did not materialise and the company was, therefore, not in a position to discharge the Revenue debt. It is accepted on behalf of the directors that the decision taken may have involved an element of commercial misjudgement but it is submitted that it falls some way short of the type of irresponsible or grossly negligent conduct required to trigger s. 150. I agree with that submission.

2.7 However it is now necessary to turn to the third and most serious of the matters relied upon by the liquidator. Certain investors had placed money into Swanpool on foot of a business expansion scheme ("BES"). During the period when it was envisaged that the company would be in a position to meet all of its liabilities the first named respondent entered into an agreement with the managers of

the BES scheme which provided for the repayment of the investors funds. The investors would, of course, in the ordinary way have been entitled to receive payment at an appropriate stage on foot of option agreements which were the exit mechanism by which the BES investors were to receive back their funds. It is not suggested that it was inappropriate to enter into that arrangement at the time when it was agreed. However by the time the funds were actually paid over to the BES investors the planning reversals to which I have referred had occurred and it was, or at least ought to have been, clear to the directors at that stage that the payment in full of the BES investors entitlement would necessarily leave the companies in a position where they would be unable to repay all of their debts and in particular the obligations to the Revenue Commissioners.

2.8 It is accepted on behalf of the directors that the payment to the BES investors should not have been made. In mitigation reliance is placed on the evidence of the first named respondent to the effect that he was under considerable pressure to repay the moneys having entered into an agreement to repay in July 2002. The payment was actually made in April 2003. Secondly it is correctly noted that no personal benefit accrued to the directors or any person or body connected with them. Indeed it is clear that one of the consequences of the payment out of the moneys to the BES investors was that the first respondent himself, (in his capacity as a significant creditor of the companies) was put in a position where his own debt remained unpaid.

2.9 It does not appear that the directors took any advice from an insolvency expert at the relevant time although it does appear that from to time the directors had the benefit, previously, of advice from highly reputable legal and financial firms.

2.10 It seems to me therefore that the real issue in this case is as to whether the single incident to which I have referred can be said to be sufficiently serious so that it would warrant the making of an order under s. 150 notwithstanding the otherwise proper conduct of the company's business and affairs.

**3. The Law**

3.1 In in *Re Frederic Inns Limited* [1994] ILRM 387 the Supreme Court had to consider the question of the duties of directors in a situation where a company was being wound up or where any creditor could have it wound up on the ground of insolvency. Blayney J., in giving the judgment of the court, found that in such circumstances the directors owed a duty to the creditors to preserve the assets so as to enable them to be applied *pro tanto* in discharge of the companies liabilities. There can be little doubt, therefore, that amongst the important duties of directors is to ensure that, when it becomes clear that a company is insolvent, the assets are preserved and dealt with in the way in which the Companies Acts require. There would not seem to be any real doubt but that the directors in this case did not comply with that obligation.

3.2 A number of authorities were referred to in the course of argument which might give the appearance of some difference of opinion as to the relative weight that should be attached in applications of this type, to, on the one hand, conduct in the period immediately surrounding the insolvency of the company and, on the other hand, the general way in which the directors concerned had conducted the business and affairs of the company over a more significant period of time.

3.3 In *Re Gasco Limited* (Unreported, High Court, McCracken J. 5th February, 2001) attention was drawn to the fact that s. 149(2) of the Companies Act 1990 applies the restriction provisions to any person who is a director of the relevant company at the date of, or within 12 months prior to, the commencement of its winding up. On that basis McCracken J. said the following:-

> "I think it is quite significant that no restrictions can attach to somebody who has ceased to be a director of the company more than 12 months before the winding up. This seems to me to indicate that the primary aim of s. 150 is to deal with directors who have behaved irresponsibly or dishonestly during the last 12 months of the life of the company, and that the actions of a director who is subject to s. 150 are to be looked at primarily in the light of his actions during that period. This indeed has a considerable practical logic, as it is presumably intended to focus attention on the behaviour of the directors in the period leading up to the winding up, and to try ensure that they deal responsibly with creditors when a company is in difficulties. In my view, therefore, there should be particular scrutiny of the actions of directors during the final months before winding up".

3.3 In an oft quoted passage from the judgment of *Shanley J. in La Moselle Clothing Limited v. Soualhi* [1998] 2 ILRM 345 the particular matters to which the court should have regard under s. 150 were expressed in the following terms:-

> "(a) the extent to which the director has or has not complied with any obligation imposed on him by the Companies Act 1963-1990
>
> (b) the extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility
>
> (c) the extent of the directors responsibility for the insolvency of the company
>
> (d) the extent of the directors responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter
>
> (e) the extent to which the director in his conduct of the affairs of the company has displayed a lack of commercial probity or want of proper standards".

3.4 That passage was approved by the Supreme Court in Re *Squash (Ireland) Limited* [2001] 3 I.R. 35. However in that case McGuinness J. went on at (p. 41) to say the following:-

> "The court should look at the entire tenure of the director and not simply at the few months in the run up to the liquidation. It appears from the history of the company that the appellants have always acted responsibly and honestly and have put the interests of the company in the forefront of their minds even insofar as losing their own money in an effort to assist in the continuation of the company".

3.5 McGuinness J. also quoted with approval a passage from the judgment of Browne-Wilkinson VC in In Re *Lo-Line Motors Limited* (1998) Ch. 477 to the following effect:-

> "What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the cases to which I have been referred is probably 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 extreme case of gross negligence or total incompetence disqualification could be appropriate".

3.6 It is also worthy of note that in excusing a failure to write up the books and records of a company for a relatively short period towards the end of the life of the company concerned Murphy J. in In *Re Costello Doors Limited* (High Court, Unreported, Murphy J. 21st July, 1995) took into account the fact that appropriate books and records had indeed being kept and written up until a period some three to four months prior to the liquidation.

3.7 It does, however, seem to me that the differences in approach identified in those authorities are more apparent than real. The approach of the court in any case under s. 150 will necessarily differ depending on the type of acts or omissions which are under scrutiny. In broad terms there would seem to me to be three types of situation which the court is typically required to consider in such applications. They are:-

> 1. Issues involving compliance by the company with its formal obligations under the Companies Acts including keeping books and records, making returns, holding meetings and the like;
>
> 2. The commercial management of the company most particularly at the period when the company was insolvent or heading in that direction; and
>
> 3. Compliance by the directors with the obligations identified in *Frederic Inns* to ensure that once the company was facing insolvency its assets were dealt with in a manner designed to ensure the proper distribution of those assets in accordance with insolvency law.

3.8 The considerations that will apply will necessarily be different depending on the sort of issues that the court is considering. In the first category it is of course particularly important to have regard to the entire history of the involvement of the directors concerned with the company. For the very reason identified by Murphy J. in *Costello Doors* it would be difficult to make a finding of irresponsibility where there is a relatively short term failure to comply with formal obligations in the light of an historical compliance with such obligations over a much longer period. On the other hand a failure to comply with formal obligations which might be said to have contributed either to the insolvency or to the knowledge of parties dealing with the company of the likelihood of that insolvency will necessarily be regarded more seriously.

3.9 Where commercial management issues arise different considerations apply. As was pointed out by Murphy J. in *Business Communications v. Baxter and Parsons* (High Court, Unreported, Murphy J. 21st July, 1995):-

> "Of course one must be careful not to be wise after the event. There must be "witch hunt" because the business failed as businesses will".

It is also clear from the passage from *Lo-Line Motors* referred to above that a mere commercial misjudgement will not of itself be sufficient. In assessing whether the directors might be said to have been guilty of the level of gross mis-management in the immediate run up to the company ceasing business necessary to justify making an order under s. 150 the court will necessarily focus, for the reasons identified by McCracken J. in *Gasco*, on that period. That is not to say that there may not be cases where it would also be appropriate to look at the way in which the company had been managed historically, most particularly where it is possible from a consideration of that history to assess more accurately the decisions taken at the crucial latter stages of the business.

3.10 It does seem to me that different considerations again arise in relation to the third category of case where it may be contended that the directors did not properly conduct the business of securing and distributing the assets of the company in an insolvent situation. Obviously the only actions of that type that the directors are ever involved in arise in the period immediately before and after its winding up.

3.11 The comments made in the cases cited above need to be seen in the context of the type of issues involved in each case.

3.12 Having identified the typical types of cases which the court is called upon to consider I should emphasise that directors are, of course, entitled to rely upon the fact that they have a clean bill of health under any one or more of those categories as a mitigating factor to be taken into account in the overall assessment of the case, and to be set against any failings which they might be shown to have been guilty of in respect of another category.

3.13 Finally it should be said that a key factor in any assessment must be the seriousness of the failure to act responsibly concerned, taken in conjunction with the number and frequency of any such failures. Clearly there are failures which, taken by themselves as a single instance, can justify the making of an order under s. 150. Similarly there are failures which are relatively minor but which if they be numerous and protracted could give rise to an overall finding of a level of irresponsibility sufficient to warrant the making of an order under the section.

**4. Application to this Case**

4.1 In this case I am required to consider a single failure which comes within the third category identified above and which has to be set against the fact that no significant adverse findings can be made in relation to the directors under either of the other two categories. It is clear therefore that one would have to take the view that the failure identified was of a serious and significant variety to warrant making an order under the section in those circumstances. I have come to the view that the failure can be so characterised.

4.2 One of the most important obligations of any director is to ensure that when a company is facing an insolvency situation, its assets are dealt with in accordance with law. For the reasons identified by McCracken J. in Gasco the actions taken at such a time must be subject to particular scrutiny. While understanding the pressures which may have been on the directors it does have to be noted that all directors in insolvent circumstances are likely to be subjected to significant pressure. It is their job to resist such pressure and to ensure that the company's assets are properly dealt with. Any significant failure in that regard has to be taken as demonstrating a level of irresponsibility sufficient to warrant making an order under the section. In that respect this case is not like one where, for example, a single (though perhaps significant) commercial misjudgement is made in the dying days of a company which had otherwise been managed in an entirely proper way. In those circumstances unless the misjudgement was of a very serious type indeed it is unlikely that the court would judge the overall commercial management of the company as displaying a sufficient degree of irresponsibility to warrant making the order.

**5. The Second Named Respondent**

5.1 The position adopted by the second named respondent on affidavit is that she "sought to maintain a broad familiarity with the affairs of both companies through contact with" her father and was guided by him in relation to the exercise of her directors powers. While it is appropriate that her conduct be assessed as a non executive director it must certainly be open to some doubt as to whether she played a sufficient role in the affairs of the company to meet her obligations as a director. However having regard to the view which I have taken concerning the payment to the BES investors it is unnecessary to consider whether the second named respondent might be properly criticised for her lack of involvement in the company as an additional ground for making an order in her case. Clearly the payment to the BES investors was a very significant action on the part of the company which she either knew about or ought to have known about and she must therefore bear her share of responsibility for that action.

**6. Conclusion**

6.1 In the circumstances I would propose making an order under s. 150 against both respondents. Lest any applications be made in the future I should, however, point out that in all the circumstances of the case I am of the view that the conduct of both respondents in this case is at the lower end of the spectrum of seriousness while nonetheless sufficient to meet the threshold for the making of an order.