Neutral Citation No. 2005 IEHC 346

THE HIGH COURT
IN THE MATTER OF CAMOATE CONSTRUCTION LIMITED (IN LIQUIDATION) AND
IN THE MATTER OF THE COMPANIES ACTS 1963-2001 AND
IN THE MATTER OF AN APPLICATION UNDER SECTION 150 OF THE COMPANIES ACTS 1990 AS AMENDED AND SECTION 56 OF COMPANY LAW ENFORCEMENT ACT 1990

[2004 No. 101 COS]

BETWEEN

SIMON COYLE AND KEN FENNELL

APPLICANTS

AND
JOHN GERARD CALLANAN, MICHAEL HUGHES AND ANNAMI EIJA CALLANAN

RESPONDENTS

Judgment of the Honourable Mr. Justice O'Leary delivered on the 29th day of July, 2005

Background facts
1. The above-entitled company was incorporated in 11th October, 1999. The applicants were appointed liquidators of the company on 4th April, 2003. The respondents were directors of the company, the first-named for the complete period and the second and third-named respondents each for part of the period ending at the date of liquidation.

2. The applicants have brought this application seeking an order that the respondents should be restricted in the manner set out in section 150 Companies Act 1990 in respect of their involvement in companies under the Companies Acts for the period specified therein.

3. The respondents and each of them separately have resisted the applications.

4. The basis of the application is threefold as is normal in these cases:

1. An enquiry as to whether the respondents acted honestly in relation to the conduct of the affairs of the company.

2. An enquiry as to whether the respondents acted responsibly in relation to the conduct of the affairs of the company.

3. An enquiry as to whether there exists any other reason rendering it just and equitable to impose a restriction.

5. The above issues can be considered in respect of two headings or issues:

1. Were the directors honest and responsible in respect of their actions leading up to the insolvency,

2. Was a payment made by the company to the second named respondent made in a manner inconsistent with the duty of the directors and contrary to s. 60 Companies Act 1963 and if not were there extenuating circumstances.

Evidence
6. The evidence considered consists of the following:

1. Affidavits four in number sworn by the first named applicant.

2. Affidavits three in number worn by the first named respondent.

3. Affidavit four in number sworn by the second named respondent.

4. Affidavit of the third named respondent.

5. Affidavit two in number including an affidavit of discovery sworn by Michael Shanley who advised the company and the first named respondent at the time of the acquisition by the first named of the shareholding of the third named respondent in the company.

6. Affidavit of James Murphy, solicitor who advised the second named respondent at the time of the sale of his share as afore-mentioned.

7. The Court considered all the evidence presented and concluded as follows:

Solvency

Facts proved to the satisfaction of the court
8. Audited account were produced to 31st January, 2002, which showed the company with a small surplus of assets over liabilities of €28k, a profit of €28k with a turnover of €506k over a two year period.

9. The second named respondent sold his interest in the company in July, 2002, resigned as a director and was replaced by the third named respondent.

10. The audited accounts for the nine month period ending on 31st August, 2002, showed a profit of €221k on a turnover of €2,848k. The companies trading had increased exponentially following the takeover and nervousness arising from this anticipated increased volume was one of the reasons the second named respondent sold his interest in the firm. In the twelve months to 1st January, 2003, turnover is shown in the draft accounts at that date at €3,864k with a loss of €65k and a balance sheet deficit of €37k.

11. The Court concluded that the company failed, *inter alia*, because of overtrading. Too narrow an equity base compounded this

problem. There were of course other matters that played their part. At the time of the liquidation there was a substantial deficit and it is the nature of the construction industry that a company in liquidation is 'fair game' for all manners of disputes, which render any estimated deficit at liquidation liable to be exceeded. On the assumption that the management accounts of the company to October, 2002 and January, 2003 were honestly prepared (a fact not at issue) the bulk of the trading loss occurred in the early months of 2003 up to the liquidation in April, 2003. The action of the first named respondent in introducing fresh capital at that stage appears to confirm his bona fides.

Conclusions on honest and responsibility of trading

12. Ignoring the issue of the sale of shares for the present, on the basis of the information available to this Court there can be no suggestion that the second named respondent acted with regard to the ultimate insolvency either dishonestly or irresponsibly. The scale of the overtrading was still not obvious or its impact clear when he resigned.

13. The matter is less clear with regard to the first and third named respondents. In January, 2003 the alarm bells were sounding and that was the time to take decisive action. The directors waited for a further three months. The Court has concluded that in all the circumstances the first and third named respondents acted responsibly and honestly in permitting the company to continue trading for a further three months. Their actions were not wise but the Court is mindful of the words of Murphy J. at p. 17, in *Business Communications Limited v. Baxter and Parsons* (Unreported, High Court, Murphy J., 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."*

14. The Court is satisfied that in this case the board of directors made, what proved to be, an incorrect decision in January, 2003 to continue trading but the Court is not satisfied that the wrong decision should be characterised as irresponsible or dishonest.

Issue of s. 60 Companies Act 1963

15. At the time, the second named respondent left the company a payment of €87,500 was agreed. In the affidavit of Mr. Hughes this is clearly stated to be in respect of the purchase of his 50% share in the company. The company took legal advice on the matter and the second named respondent was separately advised in the matter. Mr. James Murphy advised the second named respondent but the Court is satisfied that though he did know that his client was a director of the company he did not and indeed could not be termed an adviser of the company or its board. The advice he gave was to Mr. Hughes as vendor of the shares not as a director. The source of the funds was not the responsibility of Mr. Murphy or his client as vendor. Of course as a director the third named respondent had a duty but this duty was his jointly with the first named respondent and the incoming director the third named director. The legality of the board's action was not and never could be the concern of Mr. Murphy.

16. The payment to Mr. Hughes was made under the pretext that it was for a number of reasons including loss of office but at all times it was primarily a payment reflecting the then value of the shares being transferred. In the view of the Court the agreement as drafted was contrary to s. 60 Companies Act 1963 in that the company was assisting in the purchase of its own shares. It is possible that this could have been regularised by the calling of an EGM but this was not done. The directors were (for the purposes of this application) in breach of one of their duties under the Companies Act. This appeared to the Court to be a fatal blow to the submissions of the respondents that they should not be restricted.

17. The Court was astonished to be supplied with an affidavit by the solicitor to the company, Mr. Michael Shanley, indicating that while he raised the share purchase issue with the first named respondent his advice was that the proposed scheme was not contrary to s. 60 of Companies Act 1963. In looking at issues from time to time the best of legal advisers will overlook a problem. The Court would understand such a lapse. What is more difficult to accept is that a solicitor having applied his mind to the issue would conclude that the scheme was not contrary to s. 60. The Court, however, accepts that the advice as described was tendered and though the matter was couched in terms of some doubt the basic advice appears to have been that the scheme was legal. That advice was wrong but the first named and third named respondents are entitled to rely on it for the purposes of defeating this application though not necessarily in proceedings under other enactments which operate on the basis of strict liability.

18. Just as the court would have refused to investigate any advice tendered to the second named respondent as vendor and visited on him the actions of the board of directors of which he was still a member, if it led to his restriction operating, he is entitled to benefit from the positive consequences of the erroneous advice of the company's solicitor.

19. The third named respondent was entitled to depend on the advice given to the board of which she was an incoming member.

20. The applications are therefore refused.