

THE HIGH COURT**Record Number: 2004 No. 348 Cos****IN THE MATTER OF CAPITAL AUTO GROUP LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 ("the 1990 Act") AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001 ("the 2001 Act")****BETWEEN****BRENDAN FOSTER****APPLICANT****And****PAUL SWORDS AND GARY CHAMBERS****RESPONDENTS****Judgment of Mr Justice Michael Peart delivered on the 21st day of December 2005**

1. On the 30th October 2002 it was resolved that this company be wound up for the reason that it was unable by reason of its liabilities continue its business. The liquidator appointed to act resigned in due course, and this event led to the appointment of the present applicant as liquidator on the 17th October 2003. In due course he prepared his report under s. 56 (1) of the 2001 Act and furnished it to the Director of Corporate Enforcement on the 15th April 2004. Having considered same, the Director of Corporate Enforcement wrote to the liquidator on the 1st September 2004 to inform him that he was not relieved of the obligation to bring the present application under the provisions of s. 150 of the 1990 Act.

2. By order dated 20th June 2005 an order of restriction was by consent made against the second named respondent, and accordingly the application before me is against the first named respondent only.

3. The company was incorporated on the 16th November 2000, and was in the business of selling motor cars. The liquidator is of the view that by May 2002 the company was insolvent. The respondent's Statement of Affairs which is exhibited by the liquidator and which is prepared as of the date of winding up shows the only asset of the company to be a credit balance in the bank account amounting to the sum of €12,000, and liabilities to trade creditors amounting to the sum of €68,998, of which by far the largest is shown as the Revenue Commissioners, namely €66,250. However, the liquidator has also exhibited a Revenue Commissioners' statement of sums due to the Revenue which shows a lesser sum, but it appears that the company had not submitted any VAT returns for 2001 and part of 2002. Nothing much turns on that uncertainty as to the amount due to the Revenue, except of course for the fact that the liquidator has stated that due to the company's books and records were not kept up to date, he is not in a position to ascertain the precise liabilities in this regard. In his second affidavit, however, the liquidator expresses the view that a review by him of the limited books and records available to him suggests that the sum of €66,250 would be a reasonable estimate of liability to the Revenue.

4. He also brings to the attention of the court the fact that due to the absence of books and records for the period after May 2002 he has been unable to determine definitively the precise reasons for the insolvency, and neither can he give an exact opinion as to the date by which the company was unable to trade out of its financial difficulties.

5. Apart from the fact that inadequate books and records were kept by the company after May 2002, the liquidator states also that the cheque stubs for the period after May 2002 are also missing, and that he was therefore unable to analyse the cheque payments for the period from May 2002 until the date on which a liquidator was appointed.

6. The liquidator is of the view that there may have been stock to the value of €150,000 at the end of May 2002, but that because of the absence of books and records he cannot say definitely whether there was any transfer of stock in the five months between May 2002 and October 2002. He refers to the fact that the respondent's statement of affairs to which I have referred showed no stock in hand.

7. The liquidator then gives some information about two Circuit Court claims brought by persons who had purchased cars. He was of the view that awards totalling about €42,000 were made in these cases. However, that figure appears to have been much lower than that figure.

8. Another matter of concern to the liquidator and which he brings to the attention of the court is that he came across one transaction by which in September 2002, just before the appointment of the liquidator, the company entered into a hire purchase agreement with GE Capital Woodchester, for a vehicle which it subsequently sold to a customer. However, it appears that the company's cheque which it gave to that bank in settlement of that agreement after the onward sale of the vehicle was not honoured by the company's own bank. It appears also that the company arranged finance on the vehicle for the customer with a different financial institution. A letter from GE Capital Woodchester dated 2nd December 2002 states that it had been arranged with the company on the 30th September 2002 that it could settle the hire purchase agreement with the company at the sum of €31,000, and that the company gave a cheque in that sum on the 2nd October 2002 which was not honoured by the company's bank. The date of the liquidation was the 14th October 2002.

9. Both respondents filed affidavits in response to the liquidator's application. As I have already stated, the second named respondent has consented to an order being made against him under the section, but in so far as it is necessary for the purpose of dealing with the application against the first named respondent, I shall refer to the affidavits of Mr Chambers in addition to the affidavits of Mr Swords, given that in certain respects there is disagreement between the two respondents about certain matters.

Books and records

10. Mr Swords states in his first replying affidavit that responsibility for the maintenance of books and records was that of his co-director, Mr Chambers, the second named respondent and that he believed and understood that these books and records were kept by Mr Chambers. He states also that he believes that upon the appointment of the liquidator all such books and records were handed over to the liquidator appointed at that time. In this regard, it is necessary to refer to the affidavit sworn by Mr Chambers on the 26th November 2004 because he states in that affidavit that Mr Swords was appointed company secretary when the company was incorporated and that it was resolved that he (Mr Swords) would be responsible for the keeping of books of accounts and record, although he does go on to say that he wrote up the lodgments and that he did this impeccably until such time as he left the

company, which was about May 2002. From that affidavit it appears that Mr Chambers at least is of the view that the two had fallen out, and that he found it impossible to continue in business with Mr Swords, and that he had no further involvement with the company after May 2002. In this regard, Mr Swords puts the parting of the ways between them as being in August 2002.

11. Mr Swords in a subsequent affidavit has disagreed that the sole responsibility for keeping the company's books and accounts was his, and states that both he and Mr Chambers wrote up lodgements, but again reiterates that it was Mr Chambers' responsibility to maintain the Company's books and records of the Company. He also avers that in the period May 2002 to September 2002 Mr Chambers wrote some 76 cheques on the company's bank account and that therefore it is clear that he was still involved in the business at that time contrary to what he himself has sworn to in his affidavits. These cheques are exhibited. He also says that the records of the company show that Mr Chambers also continued to receive a weekly wage from the company until October 2002 and that this is further illustration that what Mr Chambers says about when he left the company (i.e. May 2002) is incorrect.

12. In relation to this controversy, Mr Chambers has sworn another affidavit on the 15th June 2005 in which he states, inter alia, that due to difficulties which he and Mr Swords were having it was decided that the company's activities would be split into two locations, the Blanchardstown premises, and a premises in Parkgate Street, both being under what is called by Mr Chambers "the one umbrella". He also states that at that time it was decided that the stock in the hands of the company would be sold between these two premises, and that the company would be wound down, the creditors paid off and so on. Mr Chambers went on to state that while this was occurring after May 2002 he would meet Mr Swords once a week to make the lodgments, and that he had proceeded to make daily and weekly records of his part of the business and that he presumed that Mr Swords was doing the same. There is much in the averments made by Mr Chambers with which Mr Swords disagrees and he swore a further affidavit in that regard on the 11th July 2005. There is no need to set out the contents of same in any detail. I accept that there is disagreement between them in relation to certain matters, and neither deponent has been called for cross-examination.

13. It appears to be the case that each of the respondents could write cheques on the company's account without the other's signature.

Cheque stubs

14. Mr Swords states in his first replying affidavit that the cheque book stubs were given to the liquidator appointed in October 2002 and that in any event the present liquidator can get the cheques themselves from the bank if he wishes to see them.

GE Capital Woodchester

15. In this regard, Mr Swords states in his affidavit sworn on the 5th March 2005 that he had purchased a BMW car from a customer when that customer traded it in against a VW Passat, the latter being the vehicle on which there was the hire purchase agreement to which reference has been made. With regard to the dishonoured cheque he states the following:

"prior to writing the cheque to GE Capital Woodchester, I lodged a cheque for approximately €34,000 to the company's bank account. When the cheque to which Mr Foster refers to (sic) in paragraph 7(d) was not honoured I was quite frankly shocked as I was quite certain that prior to writing the same that the Company was in funds. Subsequently it emerged that the Second named respondent had been writing cheques drawn on the Company account to the value of €70,000 or thereabouts, without any recourse to your deponent. This impacted on the liquidity of the Company. The fact of the matter as that Mr Chambers was availing of the Company's funds to set up his own business, Park Gate Autos Limited. I had no involvement in that entity and I had no knowledge of the cheques identified above until after the cheque forwarded to GE Capital Woodchester was dishonoured."

16. In response to this averment the liquidator has sworn that the reason why the cheque written on the 30th September 2002 was dishonoured was that the bank was aware that a creditors' meeting had been convened for the 14th October 2002. He also states that this cheque was written by Mr Swords in the knowledge that such a meeting had been called, since the advertisement convening such a meeting had appeared in the newspapers on the 1st October 2002.

17. In response to this statement, Mr Swords in a later affidavit states the following:

"...I had lodged the proceeds of the sale of the vehicle in question to the said account prior to my writing the cheque to GE Capital Woodchester. I could not have known nor did I know that the account had been frozen by AIB by reason of the calling of a Creditors' Meeting of the Company. This was not held until 13 October 2002. I was not aware that a financial institution could freeze an account on the sole basis of the convening of a Creditors' Meeting and that until proper resolutions are passed a company is not in liquidation. I still harbour reservations about such action on the part of the bank."

As averred previously, the reason why the Company's funds had been depleted was due to the activities on the part of the second named respondent, Mr Chambers, diverting such funds to his own business Park Gate Autos Limited..."

18. By way of conclusion as far as the affidavits of Mr Swords are concerned, there is considerable dispute taken with many averments made by Mr Chambers as to the dispute between them and the circumstances in which their business relationship ceased. I do not believe that it is necessary to set out the detail of the allegations and counter-allegations in that regard for the purpose of this present application. Those matters are between the two men concerned, and do not have any significant relevance to the issues of whether Mr Swords acted honestly and responsibly in relation to the conduct of the affairs of the company and whether there are any other reasons why it was be just and equitable for the Court to make the order sought.

The drawing of the cheque to GE Capital Woodchester

19. I am not satisfied that the respondent has sufficiently discharged the onus of satisfying the Court that he acted honestly with regard to this cheque which was dishonoured. I retain concerns under this heading that when arranging the onward finance for the buyer. The liquidator's affidavit states in this regard that the Company arranged finance on the vehicle for the customer through another institution. That is not contradicted by Mr Swords, and a necessary inference is that the new financing could have been arranged with GE Capital Woodchester and that this would have enabled that bank to clear the existing financing on the vehicle while at the same time facilitating the new purchaser. That did not happen, and I am not satisfied that this action has been sufficiently explained. That act alone in my view comes within any ordinary meaning of dishonesty, even if there is no direct evidence that Mr Swords benefited personally from the way in which the matter was handled.

The books and records

20. It is not sufficient for Mr Swords to say that these were the responsibility of his co-director and that he presumed that all was being attended to. Each director as part of acting responsibly has a duty to inform himself without any doubt, as to whether books

and records are being kept. Sometimes this is achieved by the employment of suitable staff. Other times it is achieved by each director himself or herself making sure that all matters of that kind are looked after and being attended to as required. I am not left with anything like an assurance that Mr Swords concerned himself adequately with matters of this kind, particularly after May 2002. In that way he has not acted responsibly. Especially in the atmosphere which was within the relationship between himself and Mr Chambers from May 2002 onwards, the obligation upon him to ensure that the affairs of the company were run responsibly increased. The fact that he was aware that cheques could be written on the signature of only one director, rather than on the signature of both, meant at the least that some mechanism would be in place to ensure that he appraised himself of necessary information, so that he himself would not write a cheque without knowing what cheques were already written by his co-director. Nothing seems to have been done in that regard, and in my view that was not responsible behaviour, and was behaviour likely to lead to the very situation which arose in relation to the cheque written by him to GE Capital Woodchester and which his bank dishonoured by the company's bank. It is extraordinary, if it be true, that his co-director could write seventy six cheques on the company's bank account without his knowledge. In my view this fact alone is evidence that the affairs of the company were not conducted in a responsible manner.

21. The need to keep proper books and records fulfils more than one purpose. Another purpose is so that upon a winding-up the liquidator is able to perform his functions under the Companies Acts. In the present case the liquidator has sworn that the absence of proper books and records has impeded him in this regard. It is of no real importance in the present case that the liquidator has identified a period after May 2002 as being one in which he is hampered as far as books and records are concerned. I agree that the Court in looking at the responsibility of a director's behaviour should have regard to the behaviour of the director over the entire life of the company, but in the present case I am satisfied that not much assistance can be got from that exercise so as to satisfy the Court that overall the conduct of Mr Swords was responsible.

22. It is also not sufficient for this respondent to simply blame Mr Chambers. They each have a shared responsibility, and where there is a deterioration in the relationship especially, there is an onus on each director to ensure that the affairs are nevertheless conducted in an honest and responsible way.

The cheque stubs

23. The respondent has stated that it is his understanding that the cheque stubs from May 2002 onwards were given to the first liquidator appointed. But there has been no effort by him to follow that up. All he has suggested is that if the present liquidator wants to see them he can get the cheques from the bank. That to my way of thinking does not demonstrate an attitude consistent with responsible behaviour, and may well have resulted in the court making an order on the basis of not being satisfied that there is not any other reason why an order should not be made. It would in my view come easily within the concept of non-cooperation with the liquidator. However, I need not reach any final conclusion in that regard in this case.

24. Since I have not been satisfied that Mr Swords has in all respects acted honestly and responsibly in the conduct of the affairs of the company, I am obliged to make the order sought and so order.