[2019] IEHC 261

THE HIGH COURT

[2017 No. 420 COS]

IN THE MATTER OF HAIRSPRAY WHOLESALERS LIMITED

(IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

JIM LUBY

APPLICANT

AND

WARREN LOGAN

AND

DOLORES MACKENZIE

RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 30th day of April, 2019

Introduction

1. This is an application by the liquidator of a company for an order pursuant to s. 819(1) of the Companies Act, 2014 that the respondents, as persons to whom Part 14, Chapter 3, of the Companies Act, 2014 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 of a company, or be concerned in or take part in the formation or promotion of any company, unless that company meets the requirements set out in section 819(3) of the Companies Act, 2014.

Background

2. Hairspray Wholesalers Limited ("*the Company*") was incorporated under the Companies Acts on 29th September, 2010 to carry on the business of distributing hairdressing supplies and other beauty treatments. The Company carried on business from premises at 22 Fashion City, Ballymount, Dublin 12. The directors of the Company from the time of its incorporation were the respondents, Mr. Warren Logan and Ms. Dolores MacKenzie, his mother. Mr. Logan is an executive director. Ms. MacKenzie is a non-executive director.

3. On 1st May, 2013 the Company resolved that it be wound up as a members' voluntary winding up and Mr. Gary Lennon was appointed liquidator.

4. On 30th April, 2013 the respondents, as directors, swore the required declaration of solvency, declaring that after full enquiry, they had formed the opinion that the Company would be able to pay its debts in full, within twelve months. The declaration of solvency showed an estimated surplus of €54,283. The principal asset of the company was stock in trade, estimated to realise €425,000. The unsecured creditors were shown as €44,337 and "*other liabilities*" at €431,655.

5. The liability to unsecured creditors was to the Revenue, and was made up of €13,062 for VAT and €31,275 for PAYE/PRSI. The "*other liabilities*" of €431,655 were made up of €384,122, said to be owing to Mr. Logan; €24,658, said to be owing to Ms. MacKenzie; and €22,875, said to be owing to Ms. Biba Logan.

6. The independent report attached to the declaration of the solvency was signed by Robinson Stewart & Co., a firm of chartered accountants and registered auditors with an address in London.

7. In April, 2014 Mr. Lennon formed the opinion that the Company would not be able to pay its debts in full and convened a creditors' meeting for 6th May, 2014.

8. Mr. Lennon reported to the creditors' meeting that shortly after his appointment, he had been provided with a VAT computation which was €5,870.15 higher than that provided for in the declaration of solvency, and a computation for PAYE/PRSI which was €3,750.53 less than was shown in the declaration of solvency. He reported that the cash at bank was €11,621.88 less than was shown on the statement of affairs. He reported that some of the debtors had been transferred to a company called Ballymount Hairspray Hair and Beauty Products Limited.

9. Mr. Lennon reported that the Company, from the time of its incorporation, had never prepared accounts or made returns; that the Company's VAT liability had been significantly under-declared; and that the value of the stock had been greatly overstated. Mr. Lennon had calculated that the Company had a VAT liability of €251,164 and that he had filed amended returns. Besides the liabilities for VAT and PAYE/PRSI, Mr. Lennon estimated that the Company had a corporation tax liability of €48,639. Mr. Lennon found no evidence to support the claims of the directors, or of Ms. Biba Logan.

10. Mr. Lennon reported considerable difficulty in locating and identifying the stock. Eventually, in February, 2014, the stock, or some stock, was located in four containers at the rear of a house in Dundrum. This stock was sold to a company called Hairspray Hair and Beauty Supplies Limited on 21st February, 2014 for €30,000 plus VAT.

11. Mr. Lennon reported to the creditors' meetings that his effort to resolve the realisation of stock with Mr. Logan had been met with a solicitor's letter demanding his resignation and, later, a threat of an application for an injunction restraining the convening of a creditors' meeting. On 26th March, 2014 Mr. Logan and Ms. MacKenzie applied to the High Court to have Mr. Lennon removed as liquidator.

12. By the time of the creditors' meeting, Mr. Lennon had collected €116,765 and paid out €105,561, of which €76,195 plus VAT was in respect of his own fees.

13. At the creditors' meeting on 6th May, 2014 Mr. Lennon was replaced as liquidator by Mr. James Luby.

14. Mr. Luby made his first report to the Director of Corporate Enforcement on 5th November, 2014 and, following a number of extensions of time, submitted his final report on 22nd August, 2016.

The issues identified by the applicant

15. On this application Mr. Luby expresses a number of concerns.

16. Firstly, he says that no annual returns or financial statements were filed with the Companies Registration Office from the time the Company was incorporated.

17. Secondly, Mr. Luby says that the Company did not keep proper books and records.

18. Thirdly, he notes that the Company's VAT liability which was shown in the statement of affairs at €13,062, had been recalculated by Mr. Lennon at €251,164. The directors did not agree with Mr. Lennon's calculation and commissioned a recalculation from a firm called Guardian Management Accounting ("*Guardian*"). Guardian recalculated the Company's VAT liability at €296,235, which was €45,071 higher than Mr. Lennon's figure.

19. Fourthly, Mr. Luby said that the Company's records were so deficient that he was not able to reconcile the stock. Specifically, he was unable to determine whether the stock existed, or had been sold, or had been transferred to other "*group*" companies.

20. After his appointment, Mr. Luby was shown stock in a storage unit in Ballymount which was said to have cost €71,615. He arranged to have this valued and marketed by a firm of auctioneers. The best offer Mr. Luby could get for the stock was from the respondents, who paid €6,542 plus VAT for it.

21. Mr. Luby asked the respondents for a reconciliation of the stock as recorded in the declaration of solvency. The answer was that €230,491.55 had been purchased from Mr. Lennon; €74,367.33 (*sic*.) from Mr. Luby; and €120,141.12 transferred in April, 2013 to Henry Street Hairspray Limited ("*Henry Street*"). Henry Street had not paid for this stock but, according to the respondents, Henry Street was owed €102,489 by the Company. Neither of these amounts had been recorded in the declaration of solvency. In response to a request for supporting evidence for the claim of Henry Street, Mr. Luby was provided first with a letter from a firm called Easy Does It Accounting, which stated that according to their records €102,489 was due to Henry Street by the Company, and later a printout of a nominal ledger for Henry Street showing the same: but no invoices or delivery dockets or other evidence to support the alleged liabilities.

22. The Company's books and records were so deficient that Mr. Luby was unable to reconcile the stock but, on the respondents' account to him, stock with a nominal value of €230,491 had been sold for €30,000; stock which had been estimated to realise €71,615 had been sold for €6,542; and stock with a nominal value of €120,141 had been transferred to Henry Street before the declaration of solvency was sworn. The Company's stock which in the declaration of solvency had been estimated to realise €425,000, had realised just €36,542.

23. Mr. Luby's fifth concern was in relation to the directors' loans, said to be due to the respondents.

24. The declaration of solvency recorded a total sum for "*other liabilities*" of €431,655. When Mr. Luby challenged this, the respondents submitted revised claims in the total amount of €58,759. In support of that claim, the respondents produced a schedule of movement in the directors' loan accounts for the period 2010 to 2013, but these figures did not reconcile to those in the Company's management accounts and were unvouched and unsupported.

25. For completeness, Mr. Luby brought to the attention of the court that he had challenged Mr. Lennon's claim for remuneration. The respondents had asserted to Mr. Luby that the Company was solvent at the date of the liquidation and attributed the insolvency to Mr. Lennon's failure to realise the stock and the level of Mr. Lennon's fees. But as Mr. Luby pointed out, the estimated VAT liability of between €251,164 and €296,235 greatly exceeds the sum of the estimated surplus of €54,283, plus the full amount of Mr. Lennon's fees.

26. Mr. Luby reported to the court that the respondents had cooperated with him but that such information as was provided by them was of no assistance in remedying the deficit in the Company's records or resolving the issues which he had identified.

The respondents' case

27. The respondents contend that they at all times behaved honestly and responsibly. Mr. Logan filed a long and detailed affidavit on his own behalf and on behalf of Ms. MacKenzie.

28. The Company, said Mr. Logan, was incorporated on 29th September, 2010 and carried on business together with another company, which he described as the original company, Beauty Holdings Limited ("*Beauty*"), which had been incorporated on 4th July, 2006.

29. In the Summer of 2009 Beauty engaged the services of Mr. Gerard Doyle of Doyle Accountancy Services. Mr. Doyle is said to have been initially very attentive to Beauty's, and later the Company's, business but over time the service declined. Mr. Logan avers that as time went on, there were meetings with Mr. Doyle to discuss the deterioration in the level of service. Mr. Logan uses the word "we" by which he conveys to me that Ms. MacKenzie was party to the meetings and aware of the deterioration in the service being provided. Mr. Logan deposes that the relationship with Mr. Doyle was terminated at the end of 2011.

30. It is not clear precisely when Mr. Doyle's service began to decline or when the directors arranged the meetings to complain about the deterioration. What is clear, however, is that at the end of 2011 Mr. Logan and Ms. MacKenzie were aware that the Company's accounts, books and records were incomplete. Mr. Logan says that by then "*very little*" had been filed with the Companies Registration Office. The objective fact is that nothing whatsoever was filed with the Companies Registration Office from the time the Company was incorporated on 29th September, 2010 until the declaration of solvency, the resolution to wind up, and the notice of appointment of Mr. Lennon as liquidator were filed on 3rd May, 2013.

31. Mr. Logan obtained a letter from Mr. Doyle dated 9th April, 2015 which he furnished to Mr. Luby, and which Mr. Luby exhibited, in which Mr. Doyle admitted to shortcomings in his service in maintaining the Company's books and records and in completing some of the tax returns for both companies.

32. "*Looking back on it*", says Mr. Logan, "*it didn't make any sense to me as a director and there does not appear to be any logical or financial reason for inaccurate tax returns being filed or for any underpayment or non-payment of sums due to the Revenue Commissioners.*"

33. Mr. Logan goes on to depose that the companies were funded by loans from the directors, had very healthy cash flows, and had no bank borrowings.

34. In late 2011 Mr. Logan was introduced to Ms. Julie Maher, a qualified accountant, who was carrying on a business called Bawnogue Bookkeeping and in January, 2012 that firm was engaged to provide a full accountancy service to the Company and to Beauty. Mr. Logan deposes that he learned from a report prepared by Guardian Management Accounting in July, 2014 that the work carried out by Bawnogue was inaccurate and incomplete. Bawnogue was replaced in April, 2014 by a firm called Easy Does It. The principal of Easy Does It is said to have described the accounts and records of the Company maintained by Bawnogue as the poorest he had ever encountered in ten years in business.

35. "*The appalling services provided by Bawnogue*", says Mr. Logan, "*were not limited to their failure to maintain the books and records of the companies but extended to the advice we received from them as regards the restructuring of the companies.*"

36. Ms. Maher is said to have advised the respondents to restructure the companies "*…and that Bawnogue's time and resources would be better spent working on the new companies instead of the historical issues that Ms. Maher said that she had been working on for months in reconstructing Mr. Doyle's work.*" Ms. Maher is said to have advised that the Company was solvent and that the directors would be the only creditors, apart from the Revenue, and that a liquidation would enable the directors to get their loans paid back.

37. Mr. Logan says that he was "*reluctant and not inclined to follow*" Ms. Maher's advice. When, it is said, Ms. Maher's advice was confirmed by Mr. Lennon, Mr. Logan was "*somewhat taken aback by the advice*": but he eventually went along with it.

38. At the beginning of 2013, though undecided about the proposed liquidation, Mr. Logan caused a new holding company, Sweetmount Retail Holdings Limited to be incorporated and shortly after that two further companies, Tallaght Hairspray Limited and Wicklow Street Hairspray Limited. While Mr. Logan and Ms. MacKenzie were "*still resisting the advice to place the companies in liquidation*" they were reassured by Bawnogue that the Revenue liabilities prior to liquidation were approximately €300,000. With cash at bank well exceeding €300,000, neither Mr. Logan nor Ms. MacKenzie had any concerns about the companies' ability to pay all Revenue liabilities and Ms. MacKenzie's director's loan.

39. To understand the respondents' case, it is necessary to observe at this point that Beauty went into liquidation at the same time as the Company, and that the business previously carried on by those companies was thereafter carried on by Sweetmount Retail Holdings Limited, Tallaght Hairspray Limited, Wicklow Street Hairspray Limited, Henry Street Hairspray Limited, Dundrum Hairspray Limited and Ballymount Hairspray Hair and Beauty Products Limited.

40. Beauty went into members' voluntary liquidation on 31st May, 2013. Mr. Lennon was appointed liquidator. All of the employees of Beauty were transferred to the other companies owned and controlled by the directors.

41. The declaration of solvency of Beauty was sworn on 30th May, 2013 by Mr. Logan and Ms. Biba Logan, and it was supported by a report of Robinson Stewart & Company. The statement of affairs for Beauty showed estimated realisable assets of €610,855, made up of €393,355 in cash, €205,000 in stock, and other property of €12,500. The liabilities of Beauty were shown as €143,781 owed to unsecured creditors and €535,743 for "*other liabilities*". The statement of affairs for Beauty showed an estimated surplus of €31,331.

42. Mr. Lennon acted as liquidator of Beauty from 31st May, 2013 until 6th May, 2014, when he was replaced by Mr. Luby. Mr. Lennon reported to the creditors' meeting of Beauty that there were serious shortcomings in the books and records of Beauty. He had calculated the VAT liability of Beauty at €511,352, as against €73,450 in the statement of affairs, and had calculated that Beauty had a corporation tax liability of €286,772, so that the total Revenue liabilities were €798,124. Mr. Lennon reported that he had been provided with no evidence in support of the figure of €535,743 in the statement of affairs for "*other liabilities*" but that he had, on 2nd May, 2014, been provided with a schedule of transactions showing that the directors and Ms. MacKenzie were collectively owed €312,084, of which he was satisfied to admit €120,203.12.

43. Mr. Lennon reported to the creditors' meeting that Beauty's stock had been distributed, without payment, to other companies under the control of the directors and that he had recovered nothing in respect of it. He had collected €393,084 and disbursed €224,448, of which €158,069 plus VAT was in respect of his own fees.

44. In their answer to this application the respondents aggregate the assets and liabilities of the Company and Beauty and repeatedly protest that they relied on professional advice, but the figures simply do not add up. The Revenue liabilities shown on the statement of affairs for the Company were €44,337 and the Revenue liabilities shown on the statement of affairs for Beauty were €143,781. If, as Mr. Logan deposes, he and Ms. MacKenzie were assured that the Revenue liabilities for both companies were approximately €300,000, it follows that they must have known that the figures in the declarations of solvency were wrong.

45. In a text message to Ms. Maher on 12th February, 2013, on which he relies, Mr. Logan said:-

> *"I am leaning towards audit both companies then setting up two new companies (Dundrum Limited and Wicklow) then switching leases to new companies. Pay our dues and sit tight … and then gently wind down the companies over time."*

46. From this it is clear that prior to the resolution to wind up, Mr. Logan was alive to the fact that the companies had not been audited and that there was uncertainty as to the extent of their liabilities.

47. Mr. Logan offers a long and detailed account of growing concern and dissatisfaction with Mr. Lennon in the year following the resolution to wind up. He makes much of the association between Ms. Maher and Mr. Lennon and protests that because Mr. Lennon was a director and shareholder of Bawnogue, he should have known of the deficiencies in Bawnogue's work. Mr. Logan makes the case that Mr. Lennon "… *was familiar with the companies' books and records before his appointment as liquidator and we had explained to him the reasons for the historical deficiencies".*

48. Mr. Logan, in his affidavit, attacks the independence, competence and honesty of Mr. Lennon. Ms. O'Connell urges that great weight should be attached to the fact that Mr. Lennon allowed to go unanswered an affidavit sworn by Mr. Logan on an application made on 27th March, 2014 to have Mr. Lennon removed as liquidator. I disagree. The issue on this application is whether the

respondents can demonstrate that they acted honestly and responsibly, and not on whether Mr. Lennon acted honestly and responsibly. The directors of a company are entitled to take and to rely on professional advice, but they are not entitled to abdicate responsibility for the affairs of the company to a professional advisor.

The legal principles

49. The applicable legal principles are well settled. The starting point is to recall that section 819(2) of the Companies Act, 2014 provides that: -

> *"(2) The court shall make a declaration under subsection (1) unless it is satisfied that—*
>
> *(a) the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,*
>
> *(b) he or she has, when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and*
>
> *(c) there is no other reason why it would be just and equitable that he or she should be subject to the restrictions imposed by an order under subsection (1)."*

50. The court must make the declaration unless it is satisfied that the three conditions are met, and the onus is on the respondent director to satisfy the court that the conditions have been met.

51. Section 819(2)(a) and (c) of the Act of 2014 are similar to section 150(2)(a) of the Companies Act, 1990. Section 150(2)(a) of the Act of 1990 was considered by Shanley J. in *Re La Moselle Clothing Limited and Rosegem Limited* [1998] 2 ILRM 35. In *La Moselle* Shanley J. identified five factors to be taken into account in assessing the "*responsibility*" of a director for the purposes of a restriction application, which are:-.

> (a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts.
>
> (b) The extent to which his 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.
>
> (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.

52. At p. 352 of the report of *La Moselle*, Shanley J. went on to explain:

> *"These criteria necessarily overlap: for example a failure to keep proper books of account may directly contribute to the company becoming insolvent and may be caused by the incompetence of a director. …*
>
> *Apart, from satisfying the court that he as a director acted honestly and responsibly, the director must also satisfy the court that there are no other reasons why it would be just and equitable to restrict him from acting as a director of a company. It is to be noted that acting honestly and responsibly relates to the 'the conduct of the affairs of the company' and arguably such bears no relation to any period after the commencement of a winding up or receivership of the particular company where the person may not be involved any further in the conduct of the affairs of the company. That the director must satisfy the court that there is no other reason why it would be just and equitable to restrict the director, allows the court to take into account, in my view, any relevant conduct of the director after the commencement of the winding up or the receivership (for example, any failure to co-operate with the liquidator or receiver) in deciding whether or not to make an order under s. 150(1) of the Companies Act, 1990."*

53. The test propounded by Shanley J. in *La Moselle* was approved and applied by the Supreme Court in *Re Squash (Ireland) Limited* [2001] 3 I.R. 35. Any ambiguity as to the relevance of the period after the commencement of the winding up was removed by s. 819(2)(a) of the Act of 2014. Any necessity to have recourse to the just and equitable condition to bring into account the director's cooperation with the liquidator was obviated by s. 819(2)(b) of the Act of 2014.

54. In *Colm O'Neill Engineering Services Ltd*. [2004] IEHC 83 Finlay-Geoghegan J. said:

> *"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 courts' perspective, not to view the matter with the inevitable benefit of hindsight which arises in the course of the liquidation. This latter obligation is sometimes difficult to observe in practice as the actions or inactions of the directors which it is being suggested may indicate a lack of responsibility are inevitably being 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. It appears to me that the actions of the directors must be looked at on the basis of the companies being a going concern and insofar as it is possible, for the [court] to conduct that artificial exercise to consider the alleged actions or inactions in the context of the company as a going concern and prior to the commencement of a winding up."*

55. In *Vehicle Imports Limited* (Unreported, High Court, Murphy J., 23rd November, 2000) the managing director of the company had entrusted the maintenance of the books and records of the company and the statutory filings to another director, who was a chartered accountant. Murphy J. restricted the managing director notwithstanding his reliance on the chartered accountant director. Murphy J. adopted the summary statement of principle set out in the headnote of the decision of the English High Court in *Re Barings plc.: Secretary of State for Trade and Industry v. Baker and Others* [1999] 1 BCLC 433 where it was said, at pages 435 and 436:

> *"(a) Each individual director owes duties to the company to inform himself about its affairs and to join with his co-*

directors in supervising and controlling them.

(b) Subject to the articles of association of the company, the board of directors might delegate specific tasks and functions. Some degree of delegation was almost always essential if the company's business was to be carried out efficiently: to that extent, there was a clear public interest in delegation by those charged with responsibility for the management of a business.

(c) The duty of an individual director, however, does not mean that he might not delegate. Having delegated a particular function, it does not mean that he was no longer under any duty in relation to the discharge of that function, notwithstanding that the person to whom the function had been delegated appeared both trustworthy and capable of discharging the function.

(d) Where delegation had taken place the board (and the individual directors) remained responsible for the delegated function or functions and retained a residual duty of supervision and control. The precise extent of that residual duty will depend on the facts of each particular case, as will the question of whether it has been breached.

(e) A person who accepted the office of director of a particular company undertook the responsibility of ensuring that he understood the nature of the duty a director was called upon to perform. That duty would vary according to the size and business of that particular company and the experience or skills which the director held himself or herself out to have in support of appointment to the office. The duty included that of acting collectively to manage the company.

(f) Where there was an issue as to the extent of a director's duties and responsibilities in any particular case, the level of reward which he was entitled to receive or which he might reasonably have expected to receive from the company might be a relevant fact in resolving that issue. It was not that the unfitness depended on how much he was paid. The point was that the higher the level of reward, the greater the responsibilities which might be reasonably be expected (prima facie at least) to go with it.

(g) The following general propositions could be stated with respect to the director's duties: -

(i) Directors had, both collectively and individually a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.

(ii) Whilst the directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in a management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegated functions.

(iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it had been discharged, depended on the facts of each particular case, including the director's role in the management of the company."

56. Section 202 of the Companies Act, 1990 required that the Company should cause to be kept proper books of account that correctly recorded and explained the transactions of the Company; that would at any time enable the financial position of the Company to be determined with reasonable accuracy; that would enable the directors to ensure that the financial statements of the Company complied with the requirements of the Companies Acts; and that would enable the accounts of the Company to be readily and properly audited.

57. *Re Careca Investments Limited* [2005] IEHC 62 was a case in which the company had failed to maintain any significant books or records. On an application for a s. 150 order, one of the directors sought to make the case that he had acted responsibly, in that his exclusion from the affairs of the company had prevented him from having any capacity to ensure that proper books of account were kept. As to the director's responsibility for the keeping of books and records, Clarke J. said:-

"There is no significant evidence to suggest that, at any time up to and around the period when that property was sold, [the director] was sufficiently excluded from the conduct of the affairs of the company so as to absolve him from his obligations to ensure that proper books and records were kept. It should be pointed out that it is not, of course, his obligation to keep those records himself. It is his obligation as a director to satisfy himself, to a reasonable extent, that they are [being] kept. I am not satisfied that he took any reasonable steps to ensure that sufficient books and records were being kept so as be able to identify the financial state of the company from time to time. The fact that no audited accounts were produced at any stage and the fact that no significant attempt seems to have been made to produce audited accounts until the early part of 1995 clearly supports the view that none of the directors took any adequate steps to ensure that proper books and records were kept. In the circumstances I am satisfied that [the director] acted irresponsibly in failing to ensure that proper books and records of the company were kept at a minimum up to a period in the middle part of 1995 when disputes between him and the other [named] director and principal of the company and the company solicitor [named] became serious."

58. In *Re Digital Channel Partners Limited (in voluntary liquidation); Kavanagh v. Cummins and Others* [2004] 2 ILRM 35, Finlay-Geoghegan J. considered the responsibility of directors for the failure on the part of a company to make tax returns. At p. 40 of the report she said:-

"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 the 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 pressure this may occur.

It appears to me that in relation to tax liabilities there must be something more than a limited failure over a period to indicate that the directors have acted irresponsibly. This has been put in a number of different ways and certainly insofar as there may be evidence that there either has been a selective distribution or selective payment of liabilities of a company or indeed a total disregard of obligations to the Revenue or even a decision to effectively seek to use

taxation liabilities for the purpose of financing a company, that of itself will normally be indicative of the fact that the directors have been acting at least irresponsibly."

59. In *Director of Corporate Enforcement v. Walsh* [2016] IECA 2 (often referred to as *Walfab*) the Court of Appeal restated the law in relation to the disqualification of directors. Starting at para. 67, Kelly J. considered the position of passive directors. At paras. 70 to 72 he said: -

> *"70. It would be contrary to the whole notion of proper corporate regulation that passive directors would be exonerated from liability or relieved from disqualification or restriction on the basis of the passive nature of their role. There are a number of cases where that is made clear.*
>
> *71. In Re. Costello Doors (High Court, 21st July, 1995) Murphy J. did not accept that a director could be excused from acting responsibly merely because he or she accepted the office to facilitate the proprietor without being prepared to involve him or herself in any aspect of the management of the company. Similarly in Re. Vehicle Imports [1985] ILRM 75, the wife of an executive director who alleged that she was just a named director with no involvement in the company was unsuccessful in persuading the judge that director's duties did not apply to her. He held that there was no doubt that director's duties apply equally to non-executive as to executive directors, but on the facts of the case he found it was inappropriate to make a restriction order against her because she had adopted a responsible position in opposing the company's increased borrowings. These decisions were given in the context of s. 150 restrictions, but I am of opinion that no different test would be appropriate in the context of a s. 160 application. All directors whether passive or otherwise are required to undertake all reasonable steps to file annual returns.*
>
> *72. There is no warrant to limit the disqualification or restriction of passive directors pursuant to s. 160(2)(b) to one where there is a 'real moral blame' on their part shown."*

Analysis

60. Mr. Luby in his succinct and measured affidavit sworn in support of this application identified five areas of concern. Each area of concern is as to whether the respondents behaved responsibly: there is no suggestion of dishonesty. It is acknowledged that the respondents co-operated with the liquidator, in the sense that they engaged with him: but such information as they were able to provide was not particularly helpful in understanding the business of the Company. Mr. Luby did not, nor did Mr. Arthur Cunningham who presented the case on his behalf, embark on a witch hunt but rather laid out the facts as they had been found, and the basis for the concerns. There is considerable overlap between them.

61. The first concern is that the Company filed no annual returns or financial statements from the time it was incorporated. This is the fact. The responsibility for filing accounts and returns is that of the directors. A failure on the part of a professional advisor to provide a service he has agreed to provide may be a mitigating factor but it does not absolve the directors of their responsibility. It is clear from Mr. Logan's evidence that part of the thinking behind the decision to wind up was to try to avoid addressing the known deficiencies in Mr. Doyle's work. Mr. Logan and Ms. MacKenzie, on their own account, had serious reservations about doing so: and they were right.

62. Ms. Jennifer O'Connell urges that the respondents and the Company were very unlucky to have engaged two incompetent firms of accountants sequentially, and points to the fact that after the liquidation the respondents engaged Guardian to do extensive and detailed work. In support of her argument that the respondents acted responsibly but were badly let down by their professional advisers, Ms. O'Connell refers to the decision of Barrett J. in *Re Gerando Ltd*. [2014] IEHC 187 and of Cregan J. in *Re Pierse Contracting* [2015] IEHC 74.

63. It seems to me that these cases are clearly distinguishable. In *Gerando* the question identified by Barrett J. was to what extent the directors of a small company might be held liable for breaches of important but highly technical breaches of company law, in circumstances in which they had sought appropriate expert advice and entrusted due completion of the transaction to them. In *Pierse Contracting* the court was concerned with issues as to the correct accounting treatment of inter-company loans by the auditors of a company and the entitlement of the directors to rely on the advice of a reputable professional valuer as to the value of a number of property developments. This is not a case in which the directors sought and relied on advice. Neither is it a case which engages issues of technical company law. The respondents were aware, at least in general terms, of the requirement to file accounts and returns. If they initially trusted first Mr. Doyle and later Bawnogue to make the returns, it is clear that they knew the returns were not being made. The respondents were entitled to delegate the work of preparing and filing the returns but, having done so, had a continuing obligation to ensure that that was done. This is not a case in which there was a delay in making the returns. They were simply never made.

64. The failure to make the returns is inextricably bound up with the failure to keep proper books and records. Before accounts can be filed, they first have to be made up. Accounts cannot be made up in the absence of proper books and records.

65. The second concern is that the Company did not keep proper books and records. Again, this is acknowledged. It may strictly speaking be hearsay, but on Mr. Logan's account, the Company's records were the worst that the principal of Easy Does It had encountered in ten years in practice. On Mr. Logan's evidence that the directors were reassured that the aggregate Revenue liabilities of the Company and Beauty were approximately €300,000, the figures in the statements of affairs were plainly wrong. On Mr. Lennon's calculation, the Company's VAT liability for the time during which it traded was €341,214. The total paid was €90,040, which was about 26% of what should have been paid. On Guardian's calculation, the Company's total VT liability was €386,275, which was about 77% more than was paid. Although the Company commenced trading in September, 2010 it first paid VAT for the period January/February, 2011. The payment then made was €613, while the liability was either €24,714 on Mr. Lennon's calculation or €29,097 on Guardian's.

66. It is now said that the underlying financial information was all there – as witness the fact that the VAT liability could later be calculated. I cannot accept that argument.

67. In principle, the keeping of basic records is not adequate compliance with the requirements of the Companies Acts. If authority were needed for that proposition, it is to be found in *Re Costello Doors Ltd*. (Unreported, High Court, Murphy J., 21st July, 1995). In that case Murphy J., not without some hesitation, was persuaded that a failure in the last three months of the life of a company to write up the records was not irresponsible. That case, too, is clearly distinguishable. In the first place, the omission to write up the books was limited to three months. In this case the failure persisted for upwards of two and a half years. In *Costello Doors* the

company had kept proper books from the time of its incorporation in April, 1986 until September or October, 1992. In this case proper books were never kept.

68. In any event, it is quite clear that such underlying financial information as was available was hopelessly inadequate. While there was a computer record of transactions, it seems to me that that was of very limited value without the paperwork to substantiate the transactions. It is not contested that the Company's records were so deficient that neither Mr. Lennon nor Mr. Luby could reconcile the stock, either generally or specifically in relation to the transfer of stock to Henry Street and the Company's alleged liability to Henry Street.

69. It is well established that the directors were not entitled to abdicate responsibility for the keeping of proper books and records to others. Mr. Logan and Ms. MacKenzie knew that Mr. Doyle was not doing the work he was supposed to be doing and allowed this to continue for some months. If, following the appointment of Bawnogue they were reassured for some time that work was being done on the outstanding books, records and returns, it was obvious that this was not so because as a matter of objective fact, the work was not done. The respondents acknowledge that by early 2013, at the latest, they knew that this was so.

70. Ms. O'Connell relies on a dictum of McCracken J. in *Re Gasco* (Unreported, High Court, 5th February, 2001) where it was said that during the last months of the life of the company in that case, it was very important, if only for the purpose of collecting in as many debts as possible, that the company should have kept proper records. It is said that in this case the Company had no debts, so that the absence of books and records did not have the consequence that debts could not be collected. In my view, the respondents' reliance on *Re Gasco* is misplaced. The keeping of books and records is no less important for the purpose of knowing and paying the liabilities of the company, as knowing and collecting its assets.

71. As to the intercompany liability of €102,488.52 claimed by Henry Street to be owed by the Company, Mr. Logan deposes that he is satisfied that this sum is due and owing but does not offer any explanation. Mr. Logan suggests that the refusal of Mr. Luby to admit this claim does not mean that the sum is not due but rather that Mr. Luby is not satisfied that the books and records of the company support such a claim. It seems to me that this misses the point entirely. The purpose of the requirement for proper books and records is to allow the directors, and if necessary a liquidator, to form a view as to the financial affairs of the company. The omission of this sum from the statement of affairs meant that the liabilities of the Company were understated by that amount. Mr. Logan fails to address the point (which arose from his attempt to explain to Mr. Luby the figure of €425,000 shown in the statement of affairs for stock) that shortly before the declaration of solvency was sworn, stock to the value of €120,141 had been transferred to Henry Street.

72. The third concern was the understatement in the statement of affairs of the Company's VAT liability. The respondents, by reference to the Guardian report, acknowledge that the outstanding VAT liability is more than twenty times the figure shown in the statement of affairs, and that the VAT paid by the Company is about one quarter of what should have been paid. They acknowledge that the VAT liability cannot now be paid but argue (as they suggested to Mr. Luby) that the insolvency of the Company is the responsibility of Mr. Lennon.

73. Ms. O'Connell urges that in considering the responsibility of the respondents, the court should take into account the assurances given to them by their accountancy professionals that the sums due for both the Company and Beauty for VAT were estimated at around €300,000. I do so: but it only makes matters worse for them. The necessity for an estimate arose from the fact, known to the respondents, that neither the Company nor Beauty had kept proper books and records for about two and a half years. Knowing that the liabilities were uncertain, the respondents completed statements of affairs showing precise figures; and those precise figures amounted in total to less than two thirds of what they had been advised the liability would be.

74. Ms. O'Connell refers to a *dictum* of MacMenamin J. in *M.D.N. Rochford Construction Ltd.* [2009] IEHC 397, which was cited by Herbert J. in *Re Fergus Haynes (Developments) Ltd.* [2013] IEHC 53 to the effect that directors, if acting responsibly in the supervision and control of the affairs of a company, must engage in a continuing assessment of its profitability. She submits that in circumstances in which the directors had bank statements showing deposits of about €460,000 and had been told by the accountants that the Revenue liabilities were in the order of €300,000, they "*had a handle on the finances"* and "*were not flying blind*".

75. This submission, in the first place, is based on a phrase taken out of context and in the second place, it is at variance with the evidence. The point of the *dicta* cited is that a director's obligation to engage in a continuing assessment of the company's profitability is to be met by ensuring that proper books and records are kept. There is no warrant for a suggestion that it might be met otherwise. In any event, the demonstrable objective fact is that the respondents were flying blind. The figure shown in the statement of affairs for Revenue liabilities was a fraction of what the respondents now acknowledge that it was, and the figure shown for directors' loans was a multiple of what the respondents now contend it was.

76. In support of her argument that the respondents acted responsibly, Ms. O'Connell suggests that the Company's PAYE and PRSI liabilities, which, she says, are fiduciary taxes, were paid. Well, they were and they were not. According to the declaration of solvency there was an outstanding liability for PAYE/PRSI of €31,275. Mr. Lennon thought that it might be a bit less. It seems to me that, in principle, responsible directors will ensure that the company pays all of its PAYE/PRSI liabilities as they fall due. Mr. Cunningham argues that VAT, no less than PAYE and PRSI, is a fiduciary tax. Ms. O'Connell, quite rightly, agrees. To the extent, then, that payment of most of the PAYE and PRSI demonstrates responsibility, the non-payment of most of the VAT is evidence of irresponsibility. Moreover, inasmuch as a proportion of all of the Company's receipts represented VAT, there was a fiduciary or quasi-fiduciary obligation to ensure that a sufficient record was kept to ensure that the Company was aware of the extent of its liability, and paid it when due.

77. The fourth concern is in relation to the stock. The estimate in the statement of affairs was that the stock would realise €425,000. In fact, Mr. Lennon and Mr. Luby, between them, realised €36,542, plus VAT, for as much of it as they managed to recover and sell. Mr. Luby's expressed concern is that the records were so deficient that he could not reconcile whether the stock existed, or had been sold, or had been transferred to another group company. Mr. Logan does not address the absence of records but blames Mr. Lennon (and Bawnogue, and Robinson Stewart & Co.) for the difference between the estimated realisable value and the price achieved. It is said, variously, that the stock was overvalued in the statement of affairs, which was the fault of Mr. Lennon; that Mr. Lennon failed to realise the value of the stock; and that even by reference to the prices achieved for the stock, the cause of the insolvency is the liquidators' costs and fees, which, in turn, are attributed to bad advice to put the Company into liquidation.

78. The figure of €425,000 is said to have been a figure estimated by Bawnogue and Mr. Lennon by reference to a manual stock-take carried out on a date in 2013 which is not specified, save that it was prior to liquidation. As a result of Mr. Lennon's familiarity with the business, it is said, Mr. Logan and Ms. MacKenzie did not query the figure. The stock, it is said, is very much fashion driven and is perishable, with a shelf life of three to six months. Mr. Logan says that since the liquidation of the Company and of Beauty, he has

been advised that the value of the stock needs to be written down at regular intervals, and he blames Mr. Lennon for the fact that this was not done, and for the delay in selling it – or as much of it as was sold.

79. It makes perfect sense to me that the value of the stock needed to be re-evaluated from time to time and written down as appropriate. But in my firm view the realisable value of the stock was primarily a matter within the peculiar expertise of the directors. It was the directors who were responsible for purchases and it was they who could judge fashion trends. It was the directors who, primarily at least, would have been aware of the perishable nature of the stock. Mr. Lennon is said to have been intimately acquainted with the Company's warehouse, accounts and stock management systems and to have been paid €5,166 for work in relation to stock control. I see no connection between the fact that Mr. Lennon arranged a stock control system and the valuation issue. The stock control system (if the data was inputted) would have counted the stock in and out. It might, I suppose, have been able to track the sell-by dates of the stock but I doubt that it would have been able to keep track of fashion trends. Incidentally, Mr. Logan does not say how much of the total was out of date or out of fashion at the time of the resolution to wind up, or how the €120,141.12 (more than a quarter of it) came to be transferred to Henry Street between the time of the stock-take and the date of liquidation, or the date on which as much of it as was handed over to the liquidators, was handed over.

80. There was a long delay in realising the stock. I am not persuaded that this delay can be laid entirely at the feet of Mr. Lennon. In the ten months between the time of Mr. Lennon's appointment on 1st May, 2013 and the purchase of the stock by Ballymount on 21st February, 2014 it was under the control of the directors. It appears to me that the Company was in a relatively niche business and, as witness what eventually happened, the most likely purchaser was one or more of the several companies set up by the directors to take over the Company's, and Beauty's, business. It does appear to have taken Mr. Lennon an inordinate time to locate as much of the stock as he did locate. In his report to the creditors' meeting he did not make clear that he knew that what he had located was not the entirety of the stock. In my view, a responsible director would have immediately delivered up the stock to the liquidator: or at least immediately told the liquidator where it was. Mr. Logan does not say that he did that.

81. The fifth concern was in relation to the directors' loans. The figure in the declaration of solvency was €431,655. Mr. Logan says that he got this figure from Bawnogue and Mr. Lennon and cannot explain it. He says that Guardian and Easy Does It concluded that the sum owing to the directors was €58,759. Startlingly, Mr. Logan suggests that because Mr. Luby has not admitted this claim, the issue of the directors' loans cannot have contributed to the Company's insolvency.

82. In the written argument filed on behalf of the respondents, and in the course of the hearing before me, much was made of the fact that the only unpaid unconnected creditor of the Company is the Revenue Commissioners. That may very well be so but I do not consider it to be relevant that the Company's other creditors are connected with the Company, or that they do not mind, or are reconciled to the fact, that they will not be paid. The obligation of the directors to keep proper books and records is not diminished by the fact, or to the extent that, the creditors may be directors or outsiders.

83. It is submitted on behalf of the respondents that with cash balances available (between both companies) of €462,000 and an estimated combined VAT liability of €300,000 it was not unreasonable for the respondents to have been confident of their ability to discharge those sums. That is all very well but ignores the fact that the VAT liability as eventually calculated was twice what it had been estimated or guessed to be, as well as the other Revenue liabilities, not least (as Mr. Cunningham correctly points out) substantial interest and penalties.

84. Starting at the end and working backwards, the respondents submit that the combined VAT liabilities of the Company and Beauty, calculated by Guardian, comes to €550,000. At the date of liquidation, the companies had combined cash balances of €460,000 and (between the two companies) the sales of stock achieved €80,000. So, it is said, there was, or would have been, enough money available in May, 2013 to discharge the VAT liabilities in full. The cause of the deficit, it is said, is the costs and expenses of the liquidations. Leaving aside the fact that the arithmetic does not work, what the submission boils down to is that if proper books and records had been kept (as they should have been) the Company (and Beauty) would have known what its Revenue liabilities were and would have paid them.

85. The respondents make the case that since the only creditor other than the directors was the Revenue, which was always going to be paid first, they had nothing to gain by overstating the directors' loans. First acknowledging that there is no suggestion of dishonesty in this case, it is the fact that in a solvent winding up, the repayment of a loan is treated differently to the payment of a dividend. On their own case, the respondents' hope and expectation was that all, or substantially all, of the proceeds of realisation, after payment of the Revenue liabilities, would be paid to them in, or towards, satisfaction of a claim for which they now acknowledge there was no basis. If it was not dishonest to make such a claim against the Company, it was, in my firm view, irresponsible.

Conclusions

86. On the respondents' account of events, a significant part of the reasoning for the liquidation was the historical issues, for which first Mr. Doyle and later Bawnogue, are blamed. Those historical issues were that proper books and records had not been kept and that there was an issue as to the extent of the Company's liabilities. I do not understand how it was hoped that the liquidation would obviate the need to deal with the deficit in books, records and returns but, on the respondents' account of events, the choice was between making up the books and records and liquidation: and the respondents chose liquidation.

87. The keeping of books and records and compliance with statutory obligations are matters which the directors are entitled to delegate but for which they remain responsible.

88. To the knowledge of the respondents, the Company did not keep proper books and records, did not prepare annual accounts, and did not make any returns. To the knowledge of the respondents, the deficit in the books and records and returns which dated back to at least 2011 was not addressed before the Company went into liquidation on 1st May, 2013.

89. The fact that the Company paid for its stock in advance and had no bank borrowings is said to show a sober and conservative approach to finance. I do not disagree but I do say that to avail of credit, whether from suppliers or banks, upon terms that a Company can meet, is perfectly sober and conservative. The fact that the directors had only a vague (and in the event, quite wrong) idea of the extent of the Company's Revenue liabilities and none at all of the liability to directors, in my view, is evidence of irresponsibility.

90. Both respondents make the case that their formal education was limited. I do not see how that is relevant to the concerns identified by the liquidator, which engage the duties of directors at the very basic level. They are very experienced business people. Mr. Logan has deposed that he has dyslexia. I do not see how that is relevant either. The fundamental problem in this case is not the ability of the respondents to understand complex documents but the absence of relatively straightforward books and records.

91. I am not satisfied that the respondents carried out the full enquiry into the Company's affairs which would have allowed them to reasonably form the opinion that the Company would be able to pay its debts within twelve months.

92. In the absence of proper books and records or a forensic analysis of the Company's bank accounts of the kind much later undertaken by Guardian, the hope that the Company would be able to pay its debts in full could only have been based on guesswork.

93. Even on the basis of the figures given in the statement of affairs, any prospect of the Company being able to pay its debts was entirely dependent on the accuracy of the estimated realisable value of the stock.

94. By reference to the explanation much later given to Mr. Luby, the nominal value of the Company's stock at the date of liquidation was €120,141 less than the €425,000 shown in the statement of affairs. The transfer of stock to the value of €120,141 to Henry Street Hairspray Limited has not been adequately explained. The liability of the Company of €102,489 to Henry Street has not been adequately explained.

95. On the respondents' account, the estimate of realisable value failed to take into account the fact that much of the stock was out of date and out of fashion. The need to make a realistic assessment of realisable value is something which should have been discussed at the time of preparation of the statement of affairs, but I cannot see how the directors might reasonably have expected that out of date stock could be sold for what was paid for it.

96. The delay in the realisation of the stock has not been adequately explained.

97. The respondents admit that the statement of affairs showed the Company's Revenue liabilities at less than what they believed them to be.

98. The respondents admit that the Company's Revenue liabilities are nearly twice what they thought them to be at the date of liquidation.

99. The respondents admit that they had no idea where the figure of €431,655 shown in the statement of affairs for directors' loans came from.

100. I reject the argument that the absence of proper books and records did not contribute to the insolvency. On the respondents' case, the Company always met its Revenue liabilities and, if the extent of the VAT liability had been known, it would have been paid. That being so, the failure to pay the VAT can be traced directly to the failure to keep records and make tax returns.

101. As far as the making of VAT returns, and the payment of VAT, is concerned, this is not a case of a limited failure over a limited period. Without proper books and records, it was not possible to make correct returns. Without correct returns, it was not possible to make the correct payments. On their own case, the respondents were aware of the deficit in the books and records, and in the returns, and in the payments which had been made. Throughout the life of the Company, the VAT returns showed a fraction of the true liability.

102. While the respondents' case is put in terms that the inability of the Company to pay its Revenue liabilities is attributable to the costs of the liquidation, it is, in truth, that the liabilities, if known at the time, could and would have been paid at the time. In my view, it follows inexorably that the cause of the insolvency is the fact that the Revenue liabilities were not identified and discharged when they should have been.

103. While Mr. Logan was active in the day-to-day business of the Company and Ms. MacKenzie was a non-executive director, they have met the application together, and on the same basis. On the authorities and on the facts there is no basis to differentiate between them.

104. For the reasons given, I am not satisfied that the respondents acted responsibly in relation to the conduct if the affairs of the Company and I must make an order in the terms sought against both respondents.