

## THE HIGH COURT

[2004 No.365 COS]

**IN THE MATTER OF COOKE'S EVENTS COMPANY LIMITED (IN LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001**

BETWEEN

TOM KAVANAGH

APPLICANT

AND  
JOHN COOKE AND DEBBIE BYRNE

RESPONDENTS

**Judgment of Mr. Justice John MacMenamin delivered the 29th day of June, 2005**

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

2. The applicant is the liquidator of the above entitled company, having been so appointed on 1st May, 2003. On the same date the company resolved at a general meeting of the members of the company that the company be wound up.

**The Business & history of the Company**

3. The company in question carried on the business of a restaurant. It traded as "Grass Roots Café" from the Museum of Modern Art, Dublin Castle, Dublin 2; the National Museum of Ireland, Kildare Street, Dublin 2 and Collins Barracks, Dublin 7. The company was incorporated in April, 2002 to facilitate an outdoor catering business and to tender for the concession contract to run the cafes aforesaid.

4. In order to place this application in context it is necessary however to examine the background of this company in the context of another company, Cherby Limited (in liquidation) also the subject matter of a similar application relating to the two respondents which was heard on the same day by this court.

5. Cherby Limited was incorporated on 28th November, 1991 and operated the well known restaurant known as "Cooke's Café" at 14 South William Street, Dublin 2. It is agreed that this business traded successfully for a number of years. From 1997 a second restaurant known as "The Rhino Room" was operated by the company on the first floor of the premises. From the year 2000 until April, 2002 (when a separate company, Cooke's Events Company Limited was incorporated), Cherby Limited also operated concession restaurants at the National Museum of Ireland premises at Collins Barracks in Kildare Street and subsequently at the Irish Museum of Modern Art premises at the Royal Hospital Kilmainham as predecessor to Cooke's Events Company Ltd.

6. While the business problems of Cherby Limited do not form part of this application it is sufficient to say that from 1998 onwards it is common case that Cherby Limited was encountering financial difficulties. In 2002 the decision was taken to incorporate this new and separate company to deal with what for brevity will be called the "museum businesses" as described earlier. The catering for the concession at the three sites, at Collins Barracks, Kildare Street and Royal Hospital Kilmainham was carried out at a kitchen located at the Liffey Trust Centre, Sheriff Street, Dublin 1.

7. At the time that Cherby Limited had entered into the concession contract for the Collins Barracks and Kildare Street premises the National Museum of Ireland had, as Mr. Cooke avers, committed itself to undertaking various improvements and renovations to both premises. He states that in the case of the Kildare Street premises these works were not carried out until 2002. In the case of Collins Barracks, the footfall and customer numbers envisaged by the museum did not materialise. In recognition of this Mr. Cooke states that three months free rent was given at that site.

8. The first named respondent states that during the period after incorporation a number of other external factors adversely affected the company's performance. These included an increase in insurance costs, an increase in the national minimum wage and additional costs incurred due to the fact that it was not possible to carry out catering on-site at the Collins Barracks and Kildare Street premises. Consequently Mr. Cooke states it was necessary to locate and fit out a new kitchen facility at the Liffey Trust Enterprise Centre at a cost of approximately €40,000.

9. The first named respondent John Cooke also states that the company experienced ongoing difficulty and delay in obtaining sums outstanding from the National Museum of Ireland. This had serious cash-flow implications for the company.

10. In the light of these difficulties the first named respondent states that a review was undertaken as to whether the company should continue to operate the cafes in Collins Barracks and Kildare Street. The view was taken that, because the company had fixed overheads in relation to the kitchen facility at the Liffey Trust Centre, and also in relation to employing a general manager and head chef, it would not have been viable to operate only one café at the Museum of Modern Art. Consequently the company prepared proposals to tender for running in-house canteens or other business premises including An Bord Bia, if the company decided to close the two cafes at the of the National Museum of Ireland premises.

11. On the 1st November, 2002 a serious fire occurred at La Boulangerie Des Gourmets Bakery at the Liffey Trust site. This fire destroyed the entire site including the company's catering kitchens, much of its books and records, catering equipment, foodstuffs, uniform, linen, furniture, crockery and glassware used for off-site events as well as promotional material and literature. It is stated that the fire adversely affected the company's business performance. While the three cafes remained open, they were only able to serve a very limited offering over the following ten day period of drinks, pastries and bought-in sandwiches and cakes. This, it is stated, by the first named respondent resulted in an estimated loss of sales of €10,000 over the ten day period, along with a loss of goodwill amongst regular customers. The first named respondent states that even after the company recovered from the fire its sales were approximately €10,000 a week compared to the €16,000 per week achieved prior to the fire.

12. The company moved its kitchen facility to premises formerly occupied by Cherby Limited at 14 South William, i.e. the Cooke's Café site, which premises had by mid-November 2003 been closed for seven months. It took almost two weeks and cost approximately €17,000 to set these premises back in a position to meet health and hygiene, requirements, reconnect utilities and put insurance in place.

13. The first named respondent states that while the company in suit carried insurance, the settlement from the fire did not materialise until April 2003 and did not cover the company's total loss of business immediately following the fire or its ongoing loss of business. Furthermore while such insurance covered the company's equipment it only extended to the book value thereof which was less than its replacement value.

14. In the circumstances, and following the advice of Jane Cathcart and Associates (a company brought in to assist in the preparation of day to day accounts) and Melin and Associates (also financial advisors to the company) the company's management team came to the conclusion in April 2003 that the business was, in essence, insolvent.

15. The first named respondent states that "this was due variously to unfulfilled commitments from the museums with regard to fit out and facilities which adversely affected sales, difficulty in obtaining timely payment of sums outstanding from the National Museum of Ireland which affected cash flow, higher unanticipated costs, and the impact of the November 2002 fire."

16. The first named respondent contends that prior to the fire on 1st November, 2002 the company had kept proper books and records. Initially he says Ms. Lulu Pringle who had been Accounts Administrator for Cherby Limited was responsible for maintaining the books and records of the company. He says that she furnished monthly management reports, analysis of revenues costs and expenses, management profit and loss statements, weekly analysis of sales and payroll costs, weekly and monthly analysis of VAT, and monthly analysis of purchases. The first named respondent also states that management accounts were supplied by the company to the museums quarterly, as per the terms of the concession contracts.

17. In August, 2002 Ms. Pringle became Acting Manager of Cooke's Bakery Limited another company in which the first named respondent was the major shareholder. She was appointed permanent manager to that company in September 2002. Thereafter, in October 2002, Mr. Cooke states that the company's book-keeping, including the preparation of payroll, management accounts, VAT, PAYE and PRSI returns was outsourced to Jane Cathcart and Associates who carried out this task from October 2002 until February 2003.

18. It will be recollected that the fire in question occurred on 1st November, 2002. Mr. Cooke states that this fire occurred shortly before up to date financial documentation and accounts in relation to the company could be furnished to Jane Cathcart. Ms. Cathcart, who carries out this service for a number of other restaurants in the Dublin area, was appointed to carry out this function in September, 2002. Notwithstanding this, the first named respondent states that Ms. Cathcart endeavoured to obtain proper accounting information, prepared sales analyses and bank reconciliations, and provided the directors with monthly profit and loss statements for the months from September, 2002 until February, 2003. She also prepared a profit and loss statement from the period September, 2002 until January, 2003.

19. In response to points raised by the liquidator, the first named respondent states that the directors, including the first named respondent, had extensive financial information available in order that informed decisions were made in relation to the company. This, it is contended, is evident from a substantial amount of documentation exhibited with the affidavits. However, Mr. Cooke states that the vast bulk of the company's records maintained up to November, 2002 were destroyed by the fire.

20. It is further stated that in addition to maintaining proper books and records the company had a management team which met on a monthly basis, made up of the following individuals: John Cooke – Executive Chef and Director, Debbie Byrne – non-executive Director, Rachel Clancy – General Manager, Damien Sheridan – Head Chef and Lulu Pringle – in-house Accounts Administrator until August, 2002.

21. At these meetings it is stated the company's accounts were considered and its financial position was reviewed. In addition to the General Manager, each site had a supervisor and assistant supervisor who the first named respondent states oversaw the staffing and day to day running of the cafés.

22. Prior to the appointment of Jane Cathcart & Associates the company for a number of months had, encountered difficulty in obtaining a VAT/PAYE number from the Revenue Commissioners, despite application having been made. Consequently, the court was informed the salaries and wages for the company in suit were processed through Cherby Limited.

23. In November, 2002, shortly after the engagement of Ms. Cathcart, the VAT/PAYE number issued. Mr. Cooke states that given that when the VAT/PAYE number was issued it was already week 43 of the tax year, the decision was taken to continue processing the salaries and wages through Cherby Limited to the end of 2002.

24. From January, 2003 until the company was put into liquidation, salaries and wages were processed through Cooke's Events Limited. Reference was made to sample copies of the payroll schedules prepared by Jane Cathcart & Associates. Mr. Cooke accepts that the said schedules for 2003 erroneously referred to Cherby Limited. However, he states the PAYE number is that of Cooke's Events Limited. He states that "this was due to a system error".

25. Mr. Cooke further states that, based on an arrangement which Cherby had operated with the Revenue Commissioners, it was intended that VAT and PAYE/PRSI returns would be made on an annual basis. P.35 forms were prepared by Jane Cathcart & Associates in respect of Cherby Limited and Cooke's Events Limited for the periods ended 31st December, 2002. However, in Mr. Cooke's words, "Events overlooked the matter and these were never submitted". However, he emphasises, both VAT and PAYE/PRSI were accounted for at all times.

26. One of the debts due to the company is owed by Cooke's Bakery Limited, a company of which the first named respondent is a shareholder and Managing Director. According to the directors' estimated state of affairs prepared by them at the time of liquidation, Cooke's Bakery Limited owed the company €52,313.00 with the entire amount expected to realise. While the liquidator negotiated with the first named respondent regarding this issue, it soon became clear that the amount stated in the Statement of Affairs would be disputed by the first named respondent in his capacity as director of Cooke's Bakery Ltd.

27. The first named respondent therefore suggested that there was a full counterclaim. This has not been substantiated to the satisfaction of the liquidator. Indeed the first named respondent has indicated to the liquidator that Cooke's Bakery Limited was, as of September, 2004, in severe financial difficulty and it was not expected to be in a position to make any settlement to the liquidator. No more up to date information as to Cooke's Bakery Limited has been provided to the court. It is accepted by the first named respondent that this debt was inappropriately dealt with in the Statement of Affairs prepared for the directors meeting. The net effect of this, it would appear, is that either no money is due and owing by Cooke's Bakery Limited to the company in suit or, if there is, there is little or no likelihood of its being recovered or being available to the liquidator.

### **The position of the second named respondent**

28. It is now necessary to deal with the position of the second named respondent, Ms. Debbie Byrne. She is the wife of the first named respondent. By affidavit sworn in these proceedings she describes her business experience, having worked for four multi-national companies over a period of fifteen years. She was promoted to the position of General Manager of the Irish subsidiary of L'Oreal, a large international cosmetics company. The Irish subsidiary encompasses six business units and has a turnover of €50 million with approximately 60 staff. Her responsibilities as General Manager included profit and loss responsibility for the business, setting business strategy, formulating the annual operating plan and three-year plan, and managing all supply chain, commercial, marketing and financial aspects of the business. As General Manager of the Irish subsidiary of L'Oreal she was a member of the U.K. board of L'Oreal from January, 2000 to July, 2004. She has been nominated and accepted as a member of the Institute of Directors in Ireland and has been accepted on to their "boardroom" panel.

29. It is important to point out that Ms. Byrne was appointed as a non-executive director only. There was no question of her taking an active role in the day to day management of the business and this was clearly understood, she states, by the first named respondent. Furthermore, Ms. Byrne states that she had no experience of the restaurant business and would have been unable to provide little practical assistance in its daily running.

30. Ms. Byrne points out that between April and September, 2002 the company had an internal book-keeper, Ms. Lulu Pringle, who provided her with monthly management accounts. Ms. Byrne was not a director of Cherby Limited, nor was she involved in its daily business affairs. She states that accounts were furnished to her by Jane Cathcart & Associates which in turn showed money being lodged to bank accounts, specifically a business account and a VAT account. In those circumstances she assumed, and had no reason to think otherwise, that all appropriate returns were being made to the Revenue Commissioners in respect of VAT.

31. The applicant liquidator fairly points out that he had understood that Ms. Byrne was the General Manager of the company. While preparing his report pursuant to s.56 of the Company Law Enforcement Act, 2001, he endeavoured to contact her. However, it was not until Ms. Byrne was served with the proceedings that he became aware that she played a non-executive role in the company. He immediately wrote to the Office of the Director of Corporate Enforcement and so informed them. However, despite this additional information having been furnished this did not cause the Director to alter the decision that the liquidator should be not relieved of bringing proceedings against Ms. Byrne.

32. It is of course true that pursuant to s.150 of the Companies Act, 1990, the onus lies upon a non executive director to demonstrate to the court that he/she acted honestly and responsibly in respect of the affairs of the company. However, having regard to the affidavit evidence and the submissions made I was satisfied that no prima facie case had been, or could be made out against Ms. Byrne on the basis of the information available to the court. Consequently I directed that she be dismissed out of the proceedings. Applying the test set out by Finlay Geoghegan J. in *Kavanagh v. Delaney* 20th July, 2004 (Unreported), there was no evidence that Mrs. Byrne had failed to inform herself about the affairs of the company or guide or monitor its affairs.

33. Were it to be held that a prima facie case had existed against the second named respondent, I am satisfied that on the basis of the evidence that she would have been in a position to demonstrate that, for herself, she had acted honestly and responsibly with regard to the affairs of the company in accordance with the five tests outlined by Shanley J. in the case of *Re La Moselle Clothing* [1998] 2 I.L.R.M. 345 at p.350. Furthermore, in the event that I am wrong in any of the above, I would take the view that any evidence in relation to Ms. Byrne would come within the category of a commercial error or misjudgement as identified by the Supreme Court (*McGuinness J.*) in *Re Squash Ireland* [2001] 3 I.R. and not as a result of any irresponsible activity on her part. On the basis of the evidence her sole error, if error it was, was in allowing herself to become a director of this company at the time of its incorporation.

### **The allegations of the liquidator**

34. The picture painted thus far on the basis of Mr. Cooke's testimony would appear to be that of a company which had been dogged somewhat by misfortune, albeit one which was essentially profitable on a day by day basis. It is accepted that remarkably, the company was trading profitably on a month by month basis up to a point close to the decision to wind up. The profit and loss accounts for December, 2002 to the end of January, 2003 disclose a net income of €20,628.67. The profit and loss account to the end of February, 2003 discloses a net income of €29,312.18.

35. How then was the company insolvent? It is to this issue, and the linked point as to when the respondent should have been aware thereof that one must now turn.

36. In essence the liquidator puts the following matters before the court as being issues for consideration as to whether the first named respondent acted honestly and responsibly with regard to the affairs of the company.

### **Trading history**

37. The company was incorporated on 8th April, 2002. In total it traded for thirteen months. During that period the deficit incurred was €420,000.00.

### **The debt from Cooke's Bakery Limited**

38. According to the directors' estimated Statement of Affairs, Cooke's Bakery Limited owed the company €52,313.00 with the entire amount expected to realise. The first named respondent, was Managing Director of Cooke's Bakery Limited. He was in a position of conflict of interest in his capacity as a board member of both companies and especially with regard to his duties as a director of the company in suit as regards the realisation and/or recovery of the debt owed. Moreover, if it is accepted that the chances of recovering the Cooke's Bakery debt are small to the point of unreality, the consequence thereof is that the total indebtedness incurred by the company of a thirteen-month period is €420,810.00 to which must be added the Cooke's Bakery debt of €52,313.00.

### **Revenue liability**

39. During the period of trading the company made no returns whatever to the Revenue Commissioners. Accordingly, from a Revenue Commissioners' print out of 6th May, 2003, there was no PAYE or PRSI due. However, the liquidator has processed employee claims for company employees with the Department of Enterprise. This process has been outsourced to Jane Cathcart & Associates. Based on their records of 1st January, 2003 to 1st May, 2003 the liquidator submitted a P.35 form to the Revenue Commissioners showing a total of €35,203.00 in PAYE and PRSI deductions which were not paid over to the Revenue Commissioners. Given that the company processed its payroll and VAT through Cherby Limited, the VAT number of Cherby Limited should have recorded all liabilities owed by both Cherby Limited and the company in suit. According to the Revenue Commissioners' print out, neither company submitted returns nor discharged any monies for the entire period the company was trading. Annual VAT returns and PAYE/PRSI returns were due on 19th February, 2003. These were not filed. No satisfactory explanation has been furnished to the court for this situation.

### **The accuracy of record keeping**

40. The Liquidator points out that the majority of the company's financial information is stated to have been destroyed by the fire on 1st November, 2002. This may subsequently have caused difficulties in accurate financial reporting. Nonetheless, the information provided to the respondents by Ms. Cathcart was that the company was trading at a profit between as long ago as September, 2002 and February, 2003. This, as he points out, is in stark contrast to the final position reflected in the directors' Estimated Statement of Affairs which recorded a deficit of €420,810.00 in the twelve-month period prior to the liquidation. As the applicant points out, with very considerable understatement, "It would appear that the accounts presented to the respondents were not a true reflection of the overall financial position of the company". He adds that the accounts provided by Ms. Cathcart date from September, 2002 until February, 2003. However, the company did not go into liquidation until 1st May of the latter year.

### **Control of debtors**

41. There appear to have been difficulties encountered by Cherby Limited in relation to commitments given by the National Museum of Ireland at their various premises from the outset. However, the company was incorporated on 8th April, 2002, almost two years after Cherby Limited entered into the concession contract with the National Museum of Ireland. The first respondent would have been well aware of the difficulties with the museum concession contracts at the time of incorporating the contract and, that steps should have been taken at the outset to ensure that there was adequate capital to deal with the situation. In the interests of this company Mr. Cooke should have acknowledged that control of debtors is a fact of business life and he should have been alert to the necessity of implementing and enforcing a strict credit control system to avoid the type of situations that occurred with the National Museum of Ireland. It would appear that it took the first named respondent some eighteen months to regulate the National Museum of Ireland accounts although this was one of the largest clients of the company.

### **Administration of the company's affairs**

42. In addition to the foregoing, the liquidator points out that, even accepting the absence of documentation caused by the fire, there is no documentation in regard to board meetings, even after the fire on 1st November, 2002. This is of particular importance in the light of the matters referred to above and particularly the evidence, as it was subsequently disclosed, regarding the company's very substantial indebtedness.

43. In the circumstances serious questions arise regarding the reliability of the information furnished and set out in the accounts.

44. It is further pointed out on behalf of the liquidator by Mr. Neil Steen B.L., that the difficulties facing this company should have been evident even prior to incorporation in the light of the fact that they took over this business from Cherby Limited. The issues and the problems which the company would face were already starkly evident. Even the minutes of the meetings which took place with the National Museum and the Museum of Modern Art demonstrate that the problems in credit control were not the only ones facing the company. Substantial issues were arising on a constant basis regarding the provision of the service by Cooke's Events Limited. The reasons furnished for the inadequacies in the accounts, even having regard to the fire of 1st November, 2002, were inadequate. Take one example; it was unnecessary that there should be available opening balances in order to furnish profit and loss accounts.

45. Moreover, there was evidence that Mr. Cooke was in a position of conflict of interest whereby he was failing in his statutory and common law fiduciary duties to this company regarding the manner in which the Cooke's Bakery Limited debt was listed as an asset, and/or the question as to whether there was a genuine issue regarding the recoverability of the debt or the existence of a counterclaim. Also as, Mr. Steen points out, the management minutes appear to pay little regard to the financial position in which the company found itself.

46. Mr. Andrew Fitzpatrick B.L. appeared on behalf of Mr. Cooke. He points out there were a number of issues facing the company. These have been outlined earlier. There was the issue of increased costs. The museum had to carry out renovation work in Kildare Street and elsewhere. A number of steps were taken by Mr. Cooke, to remedy the position. It was submitted are not indicative of want of responsibility although there may be evidence of commercial errors of judgment. But, Mr. Fitzpatrick submits, such errors are not evidence of a want of honesty or responsibility. The company must be seen as a going concern, and the conduct of the affairs of the company should not be seen from the point of view of hindsight only. The court must have regard to the increase in delivery costs, staff costs, insurance and national minimum wage as well as the various problems outlined with the museum sites. Moreover, one must have regard to the fact that the National Museum is a State entity and should, by reason of compliance with prompt payments legislation, have discharged its debts within 28 days. The evidence, it is urged, indicates a number of steps taken to ensure that the accounts were properly maintained, including the appointment of Ms. Pringle and thereafter the retention of Jane Cathcart & Associates. Mr. Fitzpatrick also draws attention to the fact that the company was demonstrably trading at a profit on a month by month basis. Insofar as there was an error in relation to the treatment of the Cooke's Bakery Limited debt, this could not be seen as a want of honesty or responsibility. He points to the affidavit of Ms. Lulu Pringle on this point. Ms. Pringle states that the debt stated to be due from Cooke's Bakery Limited resulted from the fact that a number of inter-company transactions were not taken into account at the time of the preparation of the Statement of Affairs. She states that reductions should have been made to account for sums properly due to the bakery company for products purchased on a daily basis in respect of the Irish Museum of Modern Art, a debtor balance of approximately €25,000.00, the Kildare Street site debtor balance of approximately €13,000.000, and Collins Barracks debtor balance approximately €3,000.00. In addition to that, she states that there are other inter-company transactions of approximately €3,000.00. As a result, approximately €2,000.00 is in fact due to the bakery by the company.

### **Consideration of the issues**

47. Dealing with the last issue first, it is difficult to avoid the conclusion that the treatment of the Cooke's Bakery Limited debt, whatever the veracity of the claim, is clearly indicative of three things.

48. First, the overall unreliability of the accounts; second, the conflict in Mr. Cooke's role; and third, the appearance that Mr. Cooke ran each of these companies for his own benefit and without due regard to his duties as a director, to the company itself and to other creditors. They are a paradigm for the administration of the company.

49. Similar considerations apply to the accrued debts found to be due to the Revenue Commissioners for PAYE, PRSI and VAT. Doubtless there is a degree of validity in the points made for and on behalf of Mr. Cooke. It may be accepted that each of the factors identified above may have had a bearing on the company's trading position.

50. But it is not possible to reconcile these contentions with two other factors. The first of these is a statement that the company was trading profitably on a month by month basis up to February, 2003. The second is the undeniable fact that this company, which had traded for a mere twelve to thirteen months, had a total deficit as stated in the directors' Estimated Statement of Affairs, as €420,810.00.

51. Even accepting that books and records up to November, 2002 were destroyed, it would appear that during the entire trading

period the company had no management or audited accounts prepared. Although there was no statutory requirement for the company to prepare such accounts, the failure to do so showed poor management as the directors could not be clear as to the financial position of the company during the period of trading. As a result it is not now possible to indicate a turnover for the company.

52. Putting the matter in the most stark terms, having regard to the extent of the indebtedness after thirteen months trading, either the first named respondent actually knew of the position or he ought to have known about it. And even accepting the validity of such steps as he took to ensure that there were profit and loss accounts produced from September, 2002 until February, 2003, no satisfactory explanation has been furnished to the court as to how and in what circumstances such substantial indebtedness accrued. Having regard to the time-span involved in this case, it is extremely difficult to imagine that such indebtedness could arise by virtue of inadvertence, ignorance or even by the adoption of a policy of commercial tunnel vision.

53. The fire which occurred on 1st November, 2002 may explain the absence of accounts but it does not explain what occurred. Nor does it explain the absence of any satisfactory explanation for these areas of concern.

### **Legal principles**

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

55. Section 150(2)(a) of the Companies Act, 1990 identifies the issues as to which the first named respondent must satisfy the court so as to avoid a restriction order being imposed: "(a) that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this section." No allegation has been made on the evidence that the respondent has not acted honestly. Thus the issue for decision is whether or not the respondent has acted "responsibly".

56. The appropriate standard to be used in determining whether directors have acted responsibly was considered by the Supreme Court in the case of *Re Squash (Ireland)* [2001] 3 I.R.35 in which McGuinness J. emphasised: "In the case of all companies which become insolvent it is likely that some criticisms of the directors may be made. Commercial errors may have occurred; misjudgements may well have been made; but to categorise conduct as irresponsible I feel that one must go further than this." In deciding whether a director is unfit McGuinness J. quoted a passage from the English case of *In Re Lo-Line Motors Limited* [1998] B.C.L.C.698, 703, a decision of Browne-Wilkinson Q.C., which was also quoted by Shanley J. in the case of *La Moselle Clothing Limited v. Soualhi* [1998] 2 I.L.R.M.345. "The approach adopted in all the cases to which I have referred is broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past record as directors of insolvent companies has shown them to be a danger to creditors and others ... Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate." Thus a director complying with his obligations under the provisions of the Companies Acts and acting with a degree of commercial probity during his tenure will not be restricted on the grounds that he has acted irresponsibly. In the case of *Re Colm O'Neill Engineering Services Limited* (ex tempore judgment, 13th February, 2004) Finlay Geoghegan J. stated: "What is also clear from the decisions to date is, firstly, that simply bad commercial judgment does not and will not be considered by the court to amount to a lack of responsibility by directors. Further, that the courts must be careful in considering applications under this section not to, as was described in one judgment, permit the conducting of witch-hunts against directors and, perhaps more importantly from the court's perspective, not to view the matter with the inevitable benefit of hindsight which arises in the course of the liquidation. This latter observation is sometimes difficult to observe and (a misprint for "in") practice as the actions or inactions of the directors which it is being suggested may indicate a lack of responsibility are inevitably considered by a liquidator with the benefit of hindsight and it is, perhaps, difficult for the court to avoid looking at it on occasion from that perspective." The primary source for the applicable principles to be considered in determining whether a director acted "honestly and responsibly" are to be found in the decision of the late Shanley J. in the case of *La Moselle Clothing Limited v. Soualhi* in which he set out the five well known criteria to which the court should have regard:

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

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

58. In the course of *re Costello Doors Limited* (Unreported, High Court, 21st July, 1995) Murphy J. stated that the maintenance of proper books and records in such a form as to enable directors to make reasonable commercial decisions, and the employment of appropriate experts went a long way towards proving that a director had acted reasonably. Similarly, in the case of *Business Communications v. Baxter* (21st July, 1995) Murphy J. opined: "Ordinarily 'responsibly' will entail compliance with the principal features of the Companies Acts and the maintenance of the records required by those Acts. The records may be basic in form and modest in appearance. But they must exist in such a form as to enable the directors to make a reasonable commercial decision and auditor (or liquidators) to understand and follow the transactions in which the company was engaged."

### **Application of principles of law**

59. Primarily the responsibility for ensuring that proper systems of accounting are put in place lies with an executive director, in this case the first named respondent. It has been stated that from April to September, 2002 the company had an internal book-keeper. Upon Ms. Pringle's taking up of a new position Jane Cathcart & Associates were appointed to manage the financial and regulatory aspects of the company's business, including the management of payroll management accounts and revenue liabilities. But the financial "black holes" described above are unexplained.

60. It is contended that proper books and records were maintained, that the dissatisfaction expressed by the liquidator with the books and records available to him after his appointment, is attributable to the fact that most of the books and records of the

company for the period up to November, 2002 were destroyed in the fire of 1st November. This in turn created knock-on difficulties for Ms. Cathcart in the preparation of management accounts.

61. With regard to the Revenue Commissioner's liability it is contended that suitably qualified persons were appointed with responsibility in relation to the tax affairs of the company. Ms. Pringle and Ms. Cathcart had the responsibility for making returns to and payment of any advance due in respect of that PAYE and PRSI to the Revenue Commissioners. The accounts furnished showed money being lodged to two bank accounts, specifically a business account and a VAT account.

62. Granted all these factors are so, no satisfactory explanation has been given to the court (a) as to how the very substantial indebtedness of the company arose, (b) the evident deficiencies in the accounts and (c) the failure to ensure that proper provision was made for revenue and VAT liabilities.

63. Moreover, to point to absent accounts in no way discharges the legal onus which devolves from the respondent to demonstrate that he has acted responsibly toward the company.

64. I am satisfied that the respondent was well aware of the difficulties with the museum concession contract at the time of the incorporation of the contract. Steps should have been taken at the outset to ensure that there was adequate capital to deal with the situation. The respondent should have been alert to the necessity of implementing and enforcing a strict credit control system in order to avoid the type of situation that occurred with the National Museum of Ireland. This position did not come to him out of the blue. It was a position which already subsisted dating from the activities of Cherby Limited. At the time of the company's incorporation Mr. Cooke was aware that the National Museum of Ireland appeared unlikely to fulfil its commitments as to fit out facilities. This is a factor which should be taken into account in the financial planning of the company.

65. The fact that the company was trading at a profit between September, 2002 and February, 2003 lies in stark contrast to the final position reflected in the directors' Estimated Statement of Affairs disclosing a minimum deficit of €420,810.00 in the ten month period prior to the liquidation. The only conclusion which can be drawn is that the accounts as presented were not a true reflection of the overall financial position of the company. This is not explained by the absence of records in the fire.

66. Moreover, the financial position of the company was such, that the extent of the indebtedness must or ought to have been clear to Mr. Cooke as from February, 2003.

67. Yet it was not until 1st May of that year that the company actually went into liquidation. Annual VAT returns and PRSI returns due on 19th February, 2003 were not filed. The position regarding the Cooke's Bakery debt, however unclear, is indicative of a clear conflict of interest and a failure on the part of Mr. Cooke to realise his duties towards this, specific company.

68. Regrettably the court can only conclude that having regard to the foregoing matters, the first named respondent's conduct was such as can only be regarded as being so incompetent as to amount to irresponsibility. Having regard to the factors identified above, it was for the first named respondent to recognise each of these issues and to act in the interest of the company and for the protection of its creditors. It is impossible to avoid the conclusion that the first named respondent was responsible to a very large degree for the net deficiency in the assets of the company disclosed at the date of winding up and thereby demonstrated a want of proper standards in the conduct of the company. Moreover, it is clear that in at least one instance (the Cooke's Bakery Limited debt) the director did not comply with the fiduciary duties imposed on him qua director of the company.

69. The first named respondent had a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable him properly to discharge his duty as a director. While he was entitled to delegate particular functions to those below him and to trust their competence and integrity, the exercise of that power of delegation does not absolve him from the duty to supervise the discharge of such delegated functions. Moreover, issues such as delegation which may have a significant bearing in the defence of the activities of directors in larger enterprises can hardly be seen in the same light in this small company where the managing director either knew, must have known, or ought to have known, any relevant matter regarding the conduct of the company's affairs and its overall solvency.

70. Having regard to the foregoing I regret I have no alternative but to grant the relief sought in the notice of motion, that is to direct declaration that John Cooke, being a person to whom Chapter I of Part VII of the Companies Act, 1990 applies shall not for a period of five years be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless that company meets the requirements set out in sub-s.(3) of s.150 of the Companies Act, 1990 (as Amended).