

## THE HIGH COURT

2004 COS 374

**IN THE MATTER OF CHERBY 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 PAUL COOKE

RESPONDENTS

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

1. These proceedings pursuant to s.150 of the Companies Act, 1990 were heard directly after proceedings of a similar nature against the first named respondent, John Cooke, relating to a company called Cookes Events Company Limited. While the factual background of this company is somewhat distinct I will, where necessary, refer to the applicable legal principles which were summarised in the case heard first in time, that is the proceedings relating to Cookes Events Company Limited (in Liquidation).

2. On 1st May, 2003 the company in the instant proceedings resolved at a general meeting that it be wound up. Mr. Tom Kavanagh, the applicant herein, was appointed liquidator. At that time, John Cooke and Paul Cooke were the directors of the company.

3. The only matter to be dealt with by this court relates to an application concerning the first named respondent herein, John Cooke.

**Background**

4. The first named respondent was a director of the company from his appointment on 11th May, 1992 until the date of its winding-up. The company itself was incorporated on 28th November, 1991. It operated Cookes Café, a restaurant at 14th South William Street, Dublin 2. The company traded successfully for a number of years. In 1997 a second restaurant known as "The Rhino Room" was operated on the first floor of the premises. From the year 2000 until April, 2002 (when a separate company Cookes Events Company Limited was incorporated) the company also operated concession restaurants at the National Museum of Ireland premises at Collins Barracks and Kildare Street and subsequently at the Irish Museum of Modern Art premises at the Royal Hospital, Kilmainham.

5. From 1998 onwards the company began to experience financial difficulties. The respondent attributes this to a number of factors. He contends the company's cost base increased significantly. He states the turnover did not increase in line to cover these costs. He also states that additional costs included increased insurance, increased staff costs due to the introduction of the National Minimum Wage, an increase in wage costs for experienced front of house and restaurant staff and a greater necessity to use recruitment agencies which led to increased fees.

6. Furthermore, the first named respondent contends that due to an underestimation of the amounts payable to the Revenue Commissioners there occurred a substantial shortfall built up in the 1997/8 tax year. This liability was paid in the first instance by direct debit and the sum paid was insufficient to meet the company's ongoing liabilities. As a result, a substantial shortfall of approximately IR£130,000 occurred in that year. This liability was "rolled into" following years.

7. The first named respondent states that the company took some steps to address the matter and entered into instalment arrangements with the Revenue Commissioners to pay off outstanding amounts which remained in place up to mid-2001. Mr. Cooke adds that throughout 2000 and 2001 regular meetings took place with the Revenue Commissioners and other major creditors of the company. He states that increases in staff costs, PAYE and PRSI made it difficult for the company to keep up with the arrears payments and also to pay taxes as they fell due.

8. In the course of affidavits sworn in these proceedings Mr. Cooke describes a number of steps taken to reduce revenue liabilities, including reduction in days of trading and staff levels, and an alteration in the market niche of the business to a less expensive "brasserie-style" establishment.

9. Attempts which were made to interest investors in this project in the year 2001 did not succeed. While the company decided to continue trading over the Christmas 2001 period, it ultimately ceased operations in March, 2002.

10. The applicant states that he put up the leasehold interest (held in his own name) on 14 South William Street for sale. He states that he intended to use the proceeds to discharge the company's liabilities and gave undertakings to pay certain creditors of the company, including the Revenue Commissioners, G.E. Capital Woodchester Finance, Grants of Ireland and the Bank of Ireland out of the proceeds of the sale of the leasehold interest. On the date in question the Revenue Commissioners were owed €259,155.86; G.E. Capital Woodchester Finance were owed €26,805.89; Grants of Ireland Ltd. were owed €21,726.62 and Bank of Ireland €12,000.00.

11. It was originally estimated that the leasehold interest in the premises might yield between €700,000 and €900,000. On a number of occasions Mr. Cooke contends, offers for sale came close to fruition but none was completed.

12. He states that in early 2003 in the light of lack of interest in purchasing the leasehold, he decided not to sell it and instead to re-visit the idea of re-opening Cooke's Café as a brasserie. He states that the Revenue Commissioners agreed to release him from his undertaking in circumstances where he did not proceed with any sale of the lease.

13. In February, 2003 however, on reviewing the financial position of the company and on the recommendation of Jane Cathcart & Associates, Financial Advisers, he took further advice from Melin & Associates, Chartered Accountants. It became clear that re-opening the restaurant was not a viable option for the company and consequently, on the advice of Melin & Associates, he took steps to have the company wound up.

**Liquidator's Concerns**

14. In the course of his affidavit the liquidator identifies a number of areas of concern regarding the first named respondent's conduct as managing director of the company.

15. By way of preliminary the liquidator points out that on 2nd November, 2002, a fire occurred in the Liffey Trust Centre, Sheriff

Street, Dublin, 1, where the majority of the books and records of the company were held. These books and records were stated to be destroyed in this fire. He was presented with a number of records that included some creditor invoices and statements, some bank statements, and miscellaneous items of correspondence. However, he states the records are not sufficient for him to build a picture of the company and its overall state over the last three years since the last set of audited accounts. The absence of such material also affected his ability to substantiate a debt that was outstanding from Cookes Bakery Limited, as referred to in the statement of affairs prepared by the directors.

16. The largest asset disclosed in the statement of affairs was a debt due by Cookes Bakery Limited, the company of which the first named respondent is also a director. According to the statement of affairs there was an amount due from Cookes Bakery Limited of €13,865.00 and lease payments due for Cookes Bakery of €9,012.00, giving rise to a total of €147,662.00. According to the statement of affairs these sums are due and owing by Cookes Bakery Limited.

17. The first named respondent disputes the indebtedness and has also submitted a counterclaim on foot of Cookes Bakery Limited which, in the view of the liquidator has not been substantiated to any extent. The first named respondent has informed the liquidator that Cookes Bakery Limited was in severe financial difficulties and not in a position to pay the sums due and owing to the company.

#### **Non-filing of statutory accounts**

18. The last set of accounts lodged in the Companies Registration Office was for the year ended 31st May, 2000. Turnover for that year was recorded in the accounts at IR£1,049,550.00 (€1,332,654.00) with a retained profit for the year of IR£54,272.00 (€68,911.00). There were no audited accounts submitted to the Companies Registration Office subsequent to this date. No accounts after the year ended 31st May, 2000 were prepared. The first named respondent has stated to the liquidator that the reason for this was that a significant amount of money was due to auditors which the company was not in a position to discharge. Consequently the auditors were not prepared to prepare any further accounts until such time as the amounts due were discharged. Investigations also showed that no management accounts were prepared by the company since year ended 31st May, 2000. The liquidator considers that the directors were not in a position accurately to state the financial position of the company during the last three years of trading at a time when the company was encountering financial difficulties.

19. Discrepancy between statement of affairs and the actual realisable assets

20. At the creditors' meeting of 1st May, 2003 a statement of affairs prepared by the directors showed that the total deficit of the creditors was the sum of €474,362.00 which included expected realisable assets of €197,662.00. However, the only assets in fact realised in the liquidation were fixtures and fittings of €6,897.00. Therefore it is suggested that a more realistic deficit is €665,127.00.

#### **Revenue liability**

21. There is, according to a statement from the Revenue Commissioners a sum due to them of €280,180.07. A significant amount of the revenue liability is in respect of periods going back to May of 1999. Whilst the revenue liability was allowed to accumulate over a number of years as disclosed in a Revenue Commissioner's print-out, the evidence shows that other creditors were paid during those periods, including the landlord of the premises.

22. It is also to be noted that the lease was not in the name of the company but in the name of the first named respondent. However, it is described as an asset in the statement of affairs. No sum has been realised by the liquidator in respect of this asset. In response to these concerns the first respondent states that the company employed an in-house book-keeper who managed the weekly payroll, processed supplier payments, carried out bank reconciliations and produced monthly management accounts. He states that the directors had access to monthly management reports including analysis of revenues costs and expenses, management profit and loss statements, weekly analyses of sales and payroll costs, weekly and monthly analyses of VAT and monthly analysis of purchases. The first respondent states that Ms. Lulu Pringle was involved in this role from 1999 to 2002. In addition he says that the company employed firms of accountants to carry out annual audits and also to provide general financial advice on a consultancy basis. The respondent contends that there was in place a management team consisting of a manager of Cookes Café, an office administrator and manager of the Rhino Room. He refers to copies of minutes of management meetings. He says he discussed the company's finances and cash flow with Lulu Pringle on a weekly basis. He states that at all times he tried to ensure that proper procedures were followed by management and staff, and that he met with the company's accountants, Donegan and Associates, approximately every five to six weeks and discussed the company's financial situation.

23. As in the case of Cookes Events Limited, the respondent states that the absence of substantial quantities of records is attributable to the fire which took place on 1st November, 2002, at the Liffey Trust Centre, Sheriff Street, Dublin 1. Although it was possible to reconstruct much of the company's records from subsequent invoices obtained from suppliers, the respondent accepts that the books and records provided to the liquidators were in some ways insufficient although he contends that this was due to the fire.

#### **The debt due from Cookes Bakery Limited**

24. Regarding the debt due from Cookes Bakery Limited the respondent accepts that the position as set out in the statement of affairs was incorrect and that the liquidator has correctly set out the true position. He says this was due to the error in preparation of the statement of affairs prepared by a self-employed accountant named Cian O'Meadhra, who assisted the company in its preparation in April, 2003. The first respondent contends that this document was prepared in a degree of haste for the creditors meeting. He further states that he believes that arising from a meeting with the liquidator on 29th October, 2003, that it is accepted that the maximum sum owed to the company by Cookes Bakery Limited was approximately €46,000.00.

25. In affidavits sworn in the within proceedings Ms. Lulu Pringle, the former accounts administrator of Cherby, states that this underestimate occurred as a result of what are stated to be incorrectly entered transactions, simple data entry errors, and an incorrect beginning balance on an accounts software package system. These errors, she states, led to an overestimate of the balance due by Cookes Bakery Limited to Cherby Limited in the statement of affairs of approximately €73,000.00. Additionally Ms. Pringle considers there are a number of additional deductions which should be made to this data including €6,120.00 relating to time spent by her while being paid by Cookes Bakery Limited on matters relating to Cherby Limited's dealing with the National Museum of Ireland; and €16,376.00 driver's wages for the transportation of food to and from museum functions. Ms. Pringle contends that while the driver was employed by Cookes Bakery Limited, he spent approximately half his working day on Cherby Limited's work. Additionally she claims €5,600.00 petty cash payments are due for fuel for this driver. In a further affidavit Ms. Pringle also refers to the aged debtors ledger of Cookes Bakery Limited provided to the liquidator at a meeting on 29th October, 2004, in order to ascertain the company's position vis-à-vis Cookes Bakery Limited. She states that these reports clearly show the site to which various sales related and also included a separate statement for the old balance outstanding from the company. She states she offered the liquidator copy invoices for all transactions outstanding but that the liquidator accepted that these statements were sufficient.

26. The liquidator states that the invoices do not go any further to distinguishing between the debts due from the company and those due from Cookes Events Limited.

#### **The leasehold interest**

27. Mr.Cooke suggests that the reason for the misattribution of the ownership in the leasehold in the statement of affairs was due to simple error and haste in the preparation of this statement.

28. The liquidator points out that Mr.Cooke would have been well aware that the leasehold of the company's premises was in his own name. In addition, as a director of Cookes Bakery Limited, he states he should have been aware of any counterclaim made by that company. The liquidator therefore, states that he does not find it acceptable that Mr.Cooke allowed a statement of affairs containing these errors to be put to the creditors of the company. He points out that during the year 1997/98 the company made the appropriate bi-monthly returns to the Revenue Commissioners and accordingly the amounts owed were properly calculated and available to the respondent. From the financial information available to the directors it should quickly have become obvious that the liabilities to the Revenue Commissioners were not being met thereafter and steps should have been taken to prevent the mounting of substantial arrears. While accepting that the company entered into an instalment arrangement with the Revenue Commissioners, the company failed to meet the terms of this arrangement fully and liabilities to the Revenue Commissioners continued to accrue. As of the date of liquidation the Revenue Commissioners were owed approximately €175,200.00. There will be no funds available for a dividend.

29. Moreover, the applicant points out that although the company ceased to trade in March, 2002, it was not put into liquidation until 1st May, 2003. During this time the respondent allowed the wages and salaries of the related company, Cookes Events Company Limited, to be processed through the company. The stated reason for this system was that Cookes Events Company Limited had difficulties in obtaining a VAT/PAYE number from the Revenue Commissioners.

30. From the incorporation of Cookes Events Company Limited in April, 2002, no returns were made by the company to the Revenue Commissioners. This resulted in the company's liabilities to the Revenue Commissioners continuing to accrue.

31. It would appear that on the basis of undertakings provided by the respondent, the Revenue Commissioners did not take any steps to enforce payment of the arrears owing to them. As stated earlier, the premises were not sold and no payments were made on foot of these undertakings.

32. The leasehold of the prime retail premises at 14 South William Street remains in the name of Mr. John Cooke. The premises remained closed for a considerable period although it is stated on affidavit that Mr. Cooke is now currently involved in a new partnership operating a delicatessen and restaurant from the same premises.

33. While the directors had access to monthly management accounts, such information was, in the view of the liquidator, incomplete. It would not be sufficient for the directors to have a full understanding of the overall financial situation of the company.

34. For example the accounts exhibited for June to December, 2001 do not take into account the outstanding amounts due to the Revenue Commissioners. According to the profit and loss accounts, the company was making a net profit of €50,855.00 for the period. The applicant was not in a position to substantiate this information as he is not in possession of any primary books of account. However, he points out that according to the directors' estimated statement of affairs the company was wound up with a deficit of €474,362.00.

35. With regard to the general administration of the company the applicant points out that there was no reference in the various minutes of management meetings to the overall financial situation of the company. Such minutes as have been provided are up until 23rd October, 2001 only. However, the company did not go into liquidation until 1st May, 2003. The applicant has not been provided with any board minutes relating to the period 1st November, 2002 to May, 2003, which show the type of financial advice taken by the directors in relation to the affairs of the company which was insolvent as of March, 2002.

36. With regard to the Cookes Bakery Limited debt, the applicant does not accept that the maximum amount owing to the company in suit was €46,000.00. The documents provided to him at the meeting aforesaid were not sufficient to prove the existence of a counterclaim. This was because the aged debtors' ledger of Cookes Bakery Limited made no distinction at all between debts allegedly due from the company and debts allegedly due from Cookes Events Company Limited. Additionally, he noted, the majority of the transactions relating to the counterclaim occurred during the period 2002 to 2003, a time when the company had allegedly ceased to trade. The liquidator points out that the respondent was under an obligation to satisfy himself as to the accuracy of information provided at the creditors meeting. He points out that despite several discussions with Mr. Cooke regarding the settlement of the debtor balance outstanding, no monies have yet been received.

37. Finally, the liquidator points out that leaving aside the books and records of the company being destroyed in the fire, there are large sums of money owing to the Revenue Commissioners with liabilities dating back as far as 1997. While there is a deficit of €474,362.00 noted in the statement of affairs, this deficit will increase to €672,024.00 due to bad debts and the error regarding the ownership of the leasehold.

38. On behalf of the respondent it is submitted by Mr. Fitzpatrick B.L. that no case as to irresponsibility has been made up to the year 2000. He contends that the entirety of the applicant's case relates to the period thereafter. He states that the applicant liquidator himself has been hindered in furnishing substantial quantities of information to the court by reason of insufficient information. This is attributable to the fire on 1st/2nd November, 2002. It is submitted that the revenue liabilities accrued at a point prior to 1st November, 2002 and that in order to deal with them Mr. Cooke retained professional advisers, Messrs. Melin & Associates, to which reference has previously been made.

39. It was further submitted that this matter must be seen in the context of the overall running of the company from the date of its inception, that is a period of thirteen years approximately. The evidence before the court is not sufficient to demonstrate systematic conduct on the part of the respondent sufficient to demonstrate an absence of responsibility. Moreover, there is no evidence that the respondent's conduct had a bearing on the insolvency.

40. With regard to the discrepancies in the statement of affairs, the treatment of the leasehold, and the overstatement of the debt from Cookes Bakery Limited, were both attributable to haste. Any effort to mislead the creditors or the liquidator in the statement of affairs is denied. Moreover, it is submitted that the good faith of the respondent is demonstrated by the fact that he gave personal undertakings to the Revenue and other creditors to discharge the liabilities of the company from the proceeds realised from the sale of the leasehold. While not denying that the salaries, PAYE and PRSI of Cookes Events Company Limited were put through Cherby Limited, this was done in order to maintain staff employment levels lest by non-payment of employees the effective operation of the

company would be undermined.

### **Consideration of issues**

41. The legal principles applicable to this case have already been outlined in the judgment furnished by this court on the same day in s.150 proceedings against the respondent, John Cooke, in the case entitled *In the Matter of Cookes Events Company Limited (in Liquidation)*, Record No.2004 COS 365.

42. Not the least remarkable aspect of this application is the extent to which matters have been uncontroverted by the respondent. The extent to which large revenue liabilities were allowed to accrue is not denied. Neither is the failure to take any effective countermeasures to deal with the position. No documentary evidence has been adduced as to the existence of board meetings between November, 2002 and May, 2003. No statutory accounts were produced after the year ended May, 2000. No annual returns were made.

43. Remarkably the company was allowed to incur liabilities in the name of another company, Cookes Events Company Limited. These liabilities included VAT, PAYE and PRSI. Effectively, Cherby Limited, the company in suit, although an empty shell was used as a mechanism in order to allow the new company, Cookes Events Company Limited, to trade. And no satisfactory explanation has been given as to the discrepancies which occur in the statement of affairs.

44. The court does not accept the explanation given that the misdescription of the leasehold as being an asset of the company was attributable to haste. Nor can one accept the explanation given as to the discrepancies in the treatment of the indebtedness of Cookes Bakery Limited. The additional details furnished in the affidavit of Ms. Pringle of alleged indebtedness by Cherby Limited to Cookes Bakery Limited clearly demonstrate the extent to which the first named respondent operated through a number of companies, almost interchangeably, in order to achieve his objectives.

45. No explanation or evidence has been given to the court as to the circumstances in which Mr. Cooke was released from his undertakings.

46. It is a remarkable fact that another company with which the first named respondent is continued to be associated, is trading in the same premises, even as of the date of swearing of the affidavits.

47. It also has gone uncontroverted that a substantial number of the transactions to which reference was made earlier took place in the period 2002 to 2003, at a time when the company in suit had already ceased to trade and was insolvent. The expedients which were adopted in order to permit Cookes Events Company Limited to trade demonstrate scant regard for the interests of the creditors of Cherby Limited.

48. The respondent contends that he put in place appropriate financial management procedures. I do not accept that this is so. As Managing Director he 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 may have been entitled to delegate particular functions to others and to trust their competence and integrity, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of delegated functions.

49. It is clear also that there was a failure to comply with the obligations imposed on this company by the Companies Acts.

### **Decision**

50. It may be that the respondent's conduct could be regarded as having been so incompetent as to amount to irresponsibility. There is no doubt that the respondent in his conduct was responsible for the insolvency of the company and also for the deficiency of the assets disclosed at the date of winding up and thereafter. It is clear that the respondent displayed a want of proper standards. Additionally, by reference to the confusion between the affairs of Cookes Bakery Limited and the company in suit, it is clear that the respondent failed in his common law fiduciary to the company also.

51. I am satisfied that either the respondent knew as to the position of Cherby Limited or, alternatively, he ought to have known as to the matters which have been set out above. In either circumstance failure to act thereon and indeed his other actions whereby he used this insolvent company as a springboard to launch Cookes Events Company Limited, demonstrate that the respondent herein satisfies each of the tests outlined by Shanley J. in *La Moselle Clothing Ltd. v. Souhali* [1998] 2 I.L.R.M.345 and the additional test laid down by Finlay Geoghegan J. in *Kavanagh v. Delaney* (re Tralee Beef and Lamb Ltd.) High Court, 20th July, 2004, Unreported, which are outlined in the *Cookes Events Limited* judgment.

52. Having regard to the foregoing, the court must conclude that the respondent failed to act responsibly in relation to the conduct of the affairs of the company. Nor is there any other reason why it would not be just and equitable that he should be subject to the restrictions imposed by the section.

53. In the circumstances therefore, I will grant the declaration sought on the notice of motion.