THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 280

Peart J.
Hogan J.
Baker J.

2015, 102

IN THE MATTER OF APPLEYARD MOTORS LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 297A OF THE COMPANIES ACT 1963 (AS AMENDED)

BETWEEN /

TOOMEY LEASING GROUP LIMITED

APPLICANT /

RESPONDENT

- AND –

GRAHAM SEDGWICK, COLIN FARRELL, PAUL GREENE, CHRISTOPHER PRATT

RESPONDENTS /

APPELLANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 13th day of October 2016

1. This is an appeal from a decision of the High Court (Binchy J.) delivered on 21st January 2015 whereby he held that the first and second respondents were personally liable to the applicant pursuant to s. 297A of the Companies Act ("the 1963 Act") in the sum of €48,250: see *Toomey Leasing Ltd. v. Sedgwick* [2015] IEHC 28. It is accepted that the applicant, Toomey Leasing Ltd., is a creditor of Appleyard Motors Ltd. ("the company" or "Appleyard") and that the first and second respondents were directors of that company up to the point when it ceased trading and went into liquidation in June 2012. The essential question which arises on this appeal is whether the directors should be deemed to have been knowingly a party to the carrying on of any business of the company in a reckless manner for the purposes of s. 297A(2)(a) of the 1963 Act.

2. As it happens, the third and fourth respondents were released from the proceedings at an earlier stage. The second respondent, Mr. Farrell, has entered into a personal insolvency arrangement and he is not therefore a party to this appeal. The appeal is, accordingly, reduced to the issue of whether the first respondent, Mr. Sedgwick, should be made liable for the debt of the company to Toomey Leasing pursuant to s. 297A(2)(a) of the 1963 Act. While neither the originating notice of motion of 31st October 2012 nor, for that matter, the actual order made by the High Court on 3rd February 2015, identify in terms s. 297A(2)(a) as the basis upon which personal liability is sought to be imposed, it is nevertheless clear that this was in fact the basis of the High Court order. The manner in which this provision should be interpreted was, in any event, the focus of the appeal to this Court.

3. For the sake of completeness, I should observe that as the events in question pre-date the coming into force of the Companies Act 2014 on 1st June 2015, it is agreed that the provisions of s. 297A of the 1963 Act continue to apply. In any event, s. 610 of the 2014 Act reproduces more or less verbatim the provisions of s. 297A of the 1963 Act.

The background to this appeal

4. Prior to its liquidation, the company operated a Ford car dealership from its premises in Blackrock, Co. Dublin, together with a spare parts and servicing operation. While it had traded successfully for almost 30 years prior to its liquidation in 2012, the post-2008 economic crash had hit the company hard. Indeed, it would be fair to say that ever since the onset of the economic crash that Appleyard had in fact been struggling for survival. By 2012 it was in arrears with its obligations to the Revenue Commissioners and it was experiencing severe financial difficulties. It was, in effect, depending for survival on the support of its principal banker, Ulster Bank.

5. The events giving rise to the present application may be said to have commenced on 17th May 2012 when, a Mr. Chris Proudman, the Account Manager with the applicant company ("Toomey Leasing"), sent an email to Mr. Allen Rodgers of Appleyard expressing an interest in purchasing three white Ford Fiesta five door cars from the company. Toomey Leasing is a UK car leasing company based in Derby.

6. As Toomey Leasing had never dealt with Appleyard previously it carried out a credit search in advance of its dealings. This search did not indicate anything of concern regarding the affairs or financial standing of Appleyard. Mr. Rodgers responded by email of 22nd May 2012 confirming that Appleyard was in a position to supply the vehicles at a price of €15,995.00 each. Subsequently, by email of 6th June 2012, Appleyard notified Toomey Leasing that it would have to charge an additional €260 in relation to one vehicle owing to the fact that it had to be supplied with bluetooth technology, thereby bringing the total payable to €48,250.

7. Following a further exchange of emails and confirmation of bank details, on 13th June 2012 Toomey Leasing transferred the sum of €48,250 in respect of the three vehicles. As it happens, Appleyard had sourced the vehicles through another Ford dealership, namely, Ashley Motors. In compliance with an arrangement that Appleyard had with its principal bankers, Ulster Bank, since 2010, it sought permission from the Bank to make payment of the amount due to Ashley Motors' purchasing subsidiary, Kitale Ltd., in respect of the vehicles.

8. This permission was not, however, immediately forthcoming and it transpired on the following day that the Bank had withdrawn its support. The net effect of this was that Appleyard could not take delivery of the vehicles and it ceased trading on the following day. On 26th June, 2012, the Appleyard entered into creditors' voluntary liquidation.

9. Appleyard learnt of its fate on 14th June 2012 when Ulster Bank refused to make a payment on behalf of the company by way of standing order in the sum of €1,000 to Gowan Motors as part of a repayment arrangement of a debt which it owed. In the High Court, the second named respondent, Mr Farrell, gave evidence that the directors knew that the stopping of that payment indicated the withdrawal of support by the Bank for the company and, for that reason, the respondents immediately took steps to cease trading and to put the company into liquidation. Appleyard's financial controller, Mr. Friel, recognised the consequences which this would have for Toomey Leasing (*i.e.*, it would not now receive the vehicles for which it paid) and requested the bank to allow these payments to be reversed. The Bank, however, declined to do so.

10. At the heart of this appeal lies Toomey Leasing's assertion that at least by 12th June 2012 (when the last request for payment was sent by Appleyard) and, failing that, by 13th June 2012 (when the monies were transferred), the respondents knew or ought reasonably to have known of the risk to it. It was accordingly contended that the first and second respondents were, while officers of the company, knowingly a party to the carrying on of the business of the company in a reckless manner. The High Court found that the first and second respondents were personally liable pursuant to s. 297A(2)(a) of the 1963 Act. As I have indicated it is not now necessary to consider the position of the second respondent.

The evidence before the High Court in relation to the ultimate collapse of Appleyard

11. Appleyard was incorporated in 1985 and until 2009 carried on the business of motor repairs. In the wake, however, of the collapse of the motor industry nationwide from 2008 onwards, Appleyard secured a Ford franchise. The company traded from a premises owned by its parent company, BFR, which remained valued in the company's books at €12.5m, but the true value of which was assessed by Ulster Bank at €2m. Arising from its purchase of the premises BFR was indebted to Ulster Bank in the sum of more than €9m. The company had an overdraft limit with Ulster Bank of €700,000, but according to Mr. Farrell the actual amount overdrawn typically "hovered around €800-€850,000, with it extending to €890,000 on occasion." Again according to Mr. Farrell, Appleyard at no time received any specific complaint from the Ulster Bank about the fact that it was trading in excess of its overdraft facility.

12. Mr. Farrell described the relationship of Appleyard with Ulster Bank as intimate and, in order to ensure transparency as regards the trading position of the company, from 2010 onwards it had been furnishing the Ulster bank with weekly statements of the anticipated receipts and payments of the company for each prospective week. The respondents had given personal guarantees to Ulster Bank in the sum of €1,500,000 each in relation to the liabilities of the companies within the group to Ulster Bank.

13. Appleyard also had banking facilities with AIB Bank. The respondents had also given guarantees in relation to the liabilities of the company to AIB Bank in the amounts of €50,000 and €130,000 each. The company also had the benefit of a new car stocking facility operated through Lombard Ireland ("Lombard"). Appleyard had a separate used car stocking facility provided by Bank of Scotland Ireland. The new car stocking facility was effectively a credit facility to the company up to the amount of €1m, which enabled the company to purchase its stock in trade and was, therefore, essential for the financial well being and day to day trade of the Company. Lombard Ireland formed part of the same group of companies as Ulster Bank.

14. In February 2011 there were discussions between Appleyard and FCE Bank (Ford Credit Europe) ("FCE") with a view to FCE replacing Lombard in the provision of stocking facilities to the company. While FCE was willing to consider an application from the company for such facilities, it first required detailed proposals from the company in relation to the treatment of the group's debt, other creditors of the company and security to be provided by Ulster Bank to FCE in relation to any facilities that might be offered by FCE. Pending such proposals, FCE was not willing to provide a stocking facility to the company.

15. From March 2011 Appleyard began to fall into arrears with its VAT liabilities. It received a final demand for arrears of VAT in the sum of €108,961.09 dated 10th June 2011, in relation to which it entered into an instalment arrangement with the Revenue Commissioners (for a reduced sum of €94,810.00) in July 2011. Appleyard nonetheless continued to fall into arrears of ongoing VAT liabilities (notwithstanding adhering to the instalment arrangement) and received further final demands from the Revenue Commissioners in October 2011 (€62,682 in respect of August/September 2011 VAT), in January 2012 (€13,014 in respect of November/December 2011 VAT), and March 2012 (€186,423 in respect of January/February 2012).

16. In or around August 2011 Lombard made a decision to exit the Irish market and accordingly, requested repayment of its new car stocking facility of €1m from Appleyard. Relations between the company and Lombard were good and Lombard was prepared to allow the company the opportunity to repay the amount due on the facility from sales of new cars over a period of time. While Lombard was, in fact, repaid the bulk of monies owing to it between December 2011 and 15th June 2012, when Appleyard ceased trading, the withdrawal of this facility presented it with a very significant problem which it had to address as a matter of urgency if it was to continue in business. At a minimum it needed some other party to provide a replacement new car stocking facility. Additionally, the withdrawal of the facility exacerbated the VAT problems of the company because this facility enabled the company to purchase vehicles thereby creating VAT inputs which could be used to offset liabilities created by VAT outputs resulting from the sale of vehicles, *i.e.*, the liability to VAT was likely to increase owing to the fact that the company was now entering a period during which it would be selling far more vehicles than it was purchasing.

17. Discussions with FCE resumed with a view to replacing Lombard and on 7th September, 2011, JPA Brenson Lawlor Limited, financial advisers to the company, presented a proposal to FCE in relation to the provision of a stocking facility. These proposals were rejected by FCE in late October 2011.

18. Following upon that rejection, the respondents engaged in negotiations, on behalf of the company, to secure the supply of vehicles via Ashley Motors Limited, another Ford dealer. This source of supply was secured when Ulster Bank agreed to support the arrangement by providing a guarantee on behalf of the Company in the sum of €300,000 to Kitale Ltd., Ashley Motors Car Purchasing subsidiary. This enabled the company to continue to stock and supply new Ford vehicles for the duration of the facility which commenced on 6th January 2012, and was to last until 30th April 2012. On 26th April 2012, Ulster Bank confirmed its willingness to extend this facility for the remainder of 2012 or, in the words of Mr. Michael Fenlon of Ulster Bank, "until such time as issues on car stocking are clarified / resolved".

19. This facility might have enabled the company to pay Kitale/Ashley Motors for the vehicles and deliver them to the applicant, knowing that if the Bank did not permit a further increase in the Company's overdraft, it would still be obliged to honour the payment because of its guarantee. Of course, this would have meant that Ulster Bank was at the loss of the funds, but the Bank would have been aware of such a risk when giving the guarantee. This would have seemed the obvious way of dealing with Toomey Leasing's purchase request and, like Binchy J. in the High Court, I find it somewhat puzzling that this approach was not followed.

20. While consumer car market recovered somewhat in 2011, trading conditions remained difficult. The evidence nonetheless was that Appleyard was particularly strong in its servicing and parts section and that that business at all times remained profitable. It had secured the contracts for the servicing of Garda, CAB and HSE vehicles.

21. On 18th January, 2012, the Company's financial advisers, JPA Brenson Lawlor Ltd., sent to the respondents a group wide summary of the results for each company in the group, together with draft financial statements and draft abridged financial statements for each company for the year ended 31st October 2011. While it was noted that the "company is profitable at an operating level", serious concerns were raised about its ability to continue as a going concern. These concerns related to the significant amount owing by BFR to Ulster Bank and concluded with a warning that if the BFR loans were to fall into default, the bank might take control of the properties secured via a receivership and in turn this could trigger a knock on process leading to the closure of the company. They also advised that the absence of a new car stocking facility was a significant concern but that owing to the arrangement entered into with Ashley Motors, the company was able to continue trading. The auditors also advised that the book value of the premises from which the company operated should be written down to €2,000,000. Had this been done it would have had the effect of showing a deficit on the group wide balance sheet of €7,733,000 instead of a surplus of €2,767,000 in the accounts of the group.

22. In February 2012, the company received a warning from AIB that it had exceeding its overdraft facility with that bank. In March and again in May 2012 AIB returned a number of cheques to the company unpaid; one in the sum of €951.67, another in the sum of €11,500.00, and a third in the sum of €510.00. It also declined to pay a direct debit in the sum of €74.98. Two further cheques were returned by that bank in June 2012.

23. Another factor unhelpful to Appleyard's financial wellbeing was that during March, 2012, Henry Ford & Son reduced its car parts credit facility from €150,000 to €100,000. While this was part of a nationwide reduction in facilities by Ford, it represented another financial blow to the company.

24. While there are no indications that Ulster Bank ever gave any warnings to the company or the respondents of the impending withdrawal of its facilities, on 14th June 2012 Mr. Michael Fenlon of Ulster Bank sent an email to the respondents in the following terms:-

> "I refer to the above account and the s/o payment this morning of €1,000 to Gowans. Please be advised that owing to: -
>
> ☐ The precarious financial condition of the company;
>
> ☐ The sizable excess on the current accounts;
>
> ☐ The fact that we have yet to know:-
>
> (i) if FCE are willing to provide stocking, and
>
> (ii) if a third party investment will be forthcoming
>
> the Bank is not prepared to facilitate this payment until such time as these matters are resolved. We cannot permit further bank monies to flow to such external parties given the circumstances. This s/o will therefore be returned this morning."

25. As we shall see presently, this was the single more important event in this narrative as immediately thereafter the directors resolved to cease trading and to place the company into liquidation.

26. According to the directors' estimated statement of affairs as of 26th June 2012, estimated liabilities to preferential creditors of Appleyard were €535,923 and liabilities to unsecured creditors came to a total of €749,590.69. The second named respondent was the single largest unsecured creditor in the company, it appearing from the estimated statement of affairs that he was owed €196,117 at that date.

Conduct of the respondents

27. During the period from 2011 - 2012 the company experienced a number of significant challenges. The first of these was that it received the final demand for VAT in the sum of €108,961.09 from the Revenue Commissioners, as referred to in paragraph 13 above. The company responded promptly to the demand and entered into an arrangement with the Revenue Commissioners for payment of the amount due by instalments and subsequently adhered to that arrangement by making monthly payments to the Revenue Commissioners in an agreed amount per month over the following of six months.

28. When, in August 2011, Lombard demanded repayment of its new car stocking facility, the respondents entered into an arrangement with Lombard whereby the amount due to it could be repaid in an orderly manner from the sale of its stock of new cars. The respondents appraised Ulster Bank of the situation and it agreed to continue providing support to the company on certain conditions. These conditions included Appleyard securing the support of FCE in providing a new stocking facility, agreement upon the restructuring of the debt owing by BFE and the introduction of new capital to the company by way of a third party investor.

29. The respondents engaged the services of a Mr. Denis O'Riordan, a banking consultant who had previously worked with Ulster Bank. In September 2011 it also engaged the auditors of the Company, Messrs. JPA Brenson Lawlor Ltd., with a view to having a business plan prepared for the company. Negotiations again re-opened with FCE on behalf of the company with a view to the provision of a stocking facility. A recommendation for acceptance of the proposal was made by an internal credit analyst within FCE, but ultimately the proposal was rejected in October, 2011.

30. This rejection was not final, however, and left it open to the company to come back with a fresh proposal addressing the concerns of FCE which included the provision of an Ulster Bank guarantee and the introduction of new investment capital. In order to deal with the immediate needs of the company, however, in January 2012 the company secured the arrangement to which I have already referred with Ashley Motors and Kitale Ltd., with the support of an Ulster Bank guarantee in the sum of €300,000.

31. It will be is obvious that the respondents were not ignoring the difficulties of the company and throughout the second half of 2011 and the first half of 2012, took steps to ensure the continuity and support of Ulster Bank, to replace the Lombard stocking facility with one provided by FCE and to secure an investor for the Company. Additionally, it should be noted that Mr. Farrell, who would otherwise have been due to be paid a salary of €10,000 per month, received only €10,000 in the five months leading up to the liquidation of the company.

32. The respondents did not take any further financial advice other than that referred to above and, in particular, did not take advice from an insolvency practitioner until they knew the company had to be wound up. Mr. Farrell agreed in evidence that by accepting the applicant's money before the vehicles were registered in the name of the applicant, the company was taking risks with the

applicant's money. It would appear that the possibility of opening a separate escrow account to hold the client's funds prior to effecting delivery of the vehicles never occurred to the directors of Appleyard at the time.

The judgment of the High Court

33. In the High Court Binchy J. found that the first and second respondents were personally liable for the debt to Toomey Leasing pursuant to s. 297A(2)(a) for the following reasons:

> "The applicant was not an ordinary creditor of the company, in the sense of being a trade creditor. The applicant was a customer of the company, which became a creditor because it paid in advance for vehicles which it did not receive, rather than making payment against delivery. Against the troubled background in which the company was trading, it had a duty to take special protective measures for customers such as the applicant.
>
> One such measure that the company could have taken would have been to ensure that it did not receive funds from the applicant until the company itself had taken delivery of the vehicles. The company was in a position to do this because it knew that upon making payment for the vehicles to Kitale/Ashley Motors, Ulster Bank would have to honour payment for the vehicles by reason of its guarantee. This would have been done with very limited risk to the company because it would then only effect delivery to the applicant upon receipt of cleared funds. This was surely the principal purpose of the Ulster Bank guarantee, i.e, to enable the company to purchase stock and indeed this was identified by the company's auditors in their report of 18th January 2012 to the directors as being the key facility that enabled the company to continue trading. Furthermore, it seems to me that there was no reason why the company needed to seek the permission of the bank to make payment for the vehicles even after the bank refused to honour the payment to Gowan Motors on 13th June 2012, because the bank would in any case have been bound to honour the payment to Kitale/Ashley Motors by reason of its guarantee. If for whatever reason, not explained to the Court, it was not open to the company to acquire the vehicles from Kitale/Ashley Motors, through reliance on the Ulster Bank guarantee, whether before of after 13th June 2012, the directors were under a duty to take professional advice or alternative measures to protect creditors such as the applicant or if no such measures could be identified, to wind up the company.
>
> As stated above, the extension by Ulster Bank of the guarantee facility for the acquisition of cars from Ashley Motors on 26th April 2012 afforded the Directors some breathing space, however they remained under an obligation to keep the overall position of the company under review and to keep the creditors' interests to the fore. In practical terms this meant that in the ensuing weeks and certainly no later 31st May 2012, the company needed either to secure the measures necessary for its survival, or to obtain further professional advice to establish if the continued trading by the company could be justified. While I believe that the directors acted honestly and responsibly up to 26th April 2012, I consider that their failure to take further professional advice regarding the future of the company no later than 31st May 2012, and/or to take appropriate measures to protect creditors or alternatively to take steps to wind up the company as of that date, was not responsible conduct in light of all of the information that they had in relation to the company, including the previous advice they had received from their consultant, JPA Brenson Lawlor Ltd as far back as January 2012. The directors were at this point failing to keep the interests of creditors to the fore, which was clearly required of them given the precarious state of the company and the group as a whole.
>
> In my opinion, any objective analysis of the affairs of the company as of 31st May 2012, and quite probably earlier, would have demonstrated that the company had no future and steps should have been taken no later than that date to wind up the company or, alternatively, steps should have been taken to protect creditors such as the applicant. While I do not believe that the evidence demonstrates that the respondents were knowingly parties to the carrying on of any business of the company in a reckless manner, I am of the view that the respondents may be so deemed pursuant to the provisions of s.297A (2) of the Companies Act, 1963 in that having regard to all of the information available to them, and, having regard to the general knowledge, skill and experience that may reasonably be expected of persons in the position of the respondents, they ought to have known that their actions or those of the company would cause loss to the creditors of the company or any of them, after 31st May 2012."

34. As I have already noted, the first named respondent alone has appealed to this Court against that finding. Before considering the question of personal liability of Mr. Sedgwick, it is necessary first to set out the text of s. 297A of the 1963 Act.

Section 297A of the 1963 Act

35. Section 297A of the 1963 Act provides:

> "(1) If in the course of winding up of a company or in the course of proceedings under the Companies (Amendment) Act 1990, it appears that:-
>
> (a) any person was, while an officer of the company, knowingly a party to the carrying on of any business of the company in a reckless manner, or
>
> (b) [not applicable in this case]
>
> the court, on the application of the receiver, examiner, liquidator or any creditor or contributory of the company may, if it thinks it proper to do so, declare that such person shall be personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct.
>
> (2) Without prejudice to the generality of subs. (1)(a), an officer of the company shall be deemed to have been knowingly a party to the carrying on of any business of the company in a reckless manner if:-
>
> (a) he was a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position, he ought to have known that his actions or those of the company would cause loss to the creditors of the company or any of them.
>
> (b) he was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts (taking into account the contingent and prospective liabilities).

(3) Notwithstanding anything contained in subs (1), the court may grant a declaration on the grounds set out in paragraph (a) of that subsection only if:-

(a) paragraph (a), (b) or (c) of section 214 applies to the company concerned, and

(b) an applicant for such a declaration, being a creditor or a contributory of the company, or any person on whose behalf such application is made, suffered loss or damage as a consequence of any behaviour mentioned in subs. (1).

…

(6) Where it appears to the court that any person in respect of whom a declaration has been sought under subs. (1)(a) has acted honestly and responsibly in relation to the conduct of the affairs of the company or any matter or matters on the grounds of which such declaration is sought to be made, the court may, having regard to all of the circumstances of the case, relieve him either wholly or in part from personal liability on such terms as it may think fit."

36. It is not disputed that Appleyard was at the material time a company to which s. 214 of the 1963 Act applied.

37. The first thing to note is that s. 297A(2)(a) of the 1963 Act is not concerned with reckless trading *as such*. I say this because it is easy to overlook the fact that s. 297A(2)(a) is a provision which *deems* certain conduct to amount reckless trading for the purposes of ascribing personal liability, even if such conduct would not in fact otherwise amount to reckless trading. This deeming provision thus extends the normal meaning of the word "knowingly" so that certain conduct is deemed for this purpose to amount to reckless trading. The Oireachtas could just as easily have severed s. 297A(2) from s. 297A(1) and provided separately for personal liability in cases coming within the former as well as the latter category.

38. I stress this point because the very artificiality of the deeming provision tends to create the erroneous impression that cases coming within s. 297A(2)(a) are specific categories of reckless trading so identified by the Oireachtas. It would be more accurate to say that the sub-section is concerned with a specified category of corporate conduct which is deemed to amount to reckless trading for the purpose of ascribing personal liability on the part of the corporate officers, even if such conduct would not otherwise come within the terms of s. 297A(1). This is underscored by the use of the phrase "without prejudice to the generality of sub-section 1(a)" in the opening words of s. 297A(2): the very use of that term highlights the fact that the Oireachtas considered that the categories of conduct identified in s. 297A(2) should not be invoked in order to assist in any determination of the general parameters of the concept of reckless trading in s. 297A(1) itself.

39. It follows, therefore, that the general case-law on reckless trading coming within s. 297A(1) is of limited assistance in considering whether the case at hand is within the deeming provisions of s. 297A(2). The former category is concerned with what is in fact reckless trading, whereas the latter category is concerned with specified conduct which might not otherwise be regarded as reckless trading at all, but is deemed to be such by the statute for the purposes of imposing personal liability: see to this effect the comments of Lynch J. in *Re Hefferon Kearns Ltd. (No.2)* [1993] 3 I.R. 191 and those of Finlay Geoghegan J. in *Re PSK Construction Ltd.* [2009] IEHC 538. As Lynch J. said in *Hefferon Kearns* ([1993] 3 I.R. 191, 222) in respect of s. 33(2) of the Companies Act 1990 (which was in similar terms to s. 297A of the 1963 Act):

> "I now turn to s. 33, sub-section 2. Sub-section 2 does not affect or extend the meaning of sub-s. 1(a) but it extends the application of sub-s. 1(a) even though the director was not guilty of reckless trading within the meaning of sub-s. 1(a) itself, as interpreted by me above. Sub-section 2 deems a director to be guilty of reckless trading in the circumstances set out in paras. (a) and (b), and that presupposes that otherwise he would not be so guilty."

40. So far as the present appeal is concerned, the question, therefore, which this sub-section requires us to consider is a somewhat different one, namely, whether a director of a company such as Appleyard "ought to have known that his actions or those of the company *would* cause loss to" a creditor such as Toomey Leasing (emphasis supplied). The statutory test is, of course, an objective one and the court is further expressly required by the terms of s. 297A(2) "to have regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position."

41. Accordingly, it is not enough that, viewed objectively, an experienced director ought to have known that his actions or those of the company *might* cause loss to a creditor. Section 297A(2)(a) imposes an even more exacting requirement: viewed objectively, ought an experienced director to have known that the actions in question *would* cause loss. This suggests that the loss to the creditor must have been foreseeable to a high degree of certainty.

42. On any review of the evidence there is little doubt but that, viewed objectively, a director in the position of Mr. Sedgwick must have known that there was a real risk that creditors *might* not be paid. The company was, after all, in a perilous financial situation and every week involved a struggle to survive. That, however, is not quite the question which we are required to consider. The issue is rather whether, viewed objectively, a person in the position of Mr. Sedgwick ought to have known that his conduct (or that of Appleyard) *would* cause loss to this particular creditor.

Is there evidence that Mr. Sedgwick ought to have known that a demand for payment "would cause loss" to Twomey Leasing within the meaning of s. 297A(2)(a) of the 1963 Act?

43. What, then, is the evidence that from which it may be inferred that a responsible director ought to have known that his conduct (or that of the company) would have caused this particular loss in these circumstances? It is true that by this stage (*i.e.*, June 2012) the company's survival depended on the good will of Ulster Bank. I think it also plain that any director would have known – or, at least, feared - that the risk of the withdrawal of support by the Bank must have been a real one and, indeed, that the collapse of the company might have come at any time.

44. There is, however, little to indicate that Mr. Sedgwick ought to have known that the collapse would come precisely when it did on the 13th and 14th June 2012 or that the receipt of the moneys from Toomey Leasing by way of advance payment for these vehicles would lead to loss on the part of that creditor. In any event, the evidence in the High Court suggests that while Mr. Sedgwick was aware in general terms of the Toomey Leasing purchase, he was not personally involved in that transaction. It must be recalled that Appleyard were also dealing with a range of perhaps 20 to 30 customers on a daily basis - albeit mainly in relation to the servicing and spare parts business – right up to the end of the company's life.

45. Over and above this, however, it is important to note that, as Binchy J. expressly found, Appleyard had never received any warning from either its auditors, financial controller or from the Bank itself that there was any imminent risk of losing support from

Ulster Bank. This, to my mind, is a crucial finding because for so long as that support was maintained, Appleyard could continue to trade. It was, however, only on June 14th 2012 that Ulster Bank withdrew support and then only following a query in respect of an unrelated transaction which led to the non-payment of a standing order.

46. At that point the decision was made by the directors to cease trading and to put the company into liquidation. Indeed, it is only fair to recall that Appleyard's financial controller, Mr. Friel, then sought to intercede with the Ulster Bank in order to have the Toomey Leasing payment unwound, but to no avail.

47. In the light of these facts I find myself obliged to differ with respect from the conclusions of the High Court. Although the difficult financial position of Appleyard cannot be gainsaid, the fact that a payment was received from Toomey Leasing immediately before the Bank withdrew support and the company ceased trading does not in itself mean that the exacting requirements of s. 297A(2)(a) of the 1963 Act have been satisfied. Even if – contrary to the evidence – we shall suppose that Mr. Sedgwick had personally been actively involved in the Toomey Leasing payment, I find it hard to see how on either 12th June 2012 (when a request for payment was made) or 13th June 2012 (when payment was received), he ought to have known that these actions *would* cause this creditor loss. He could not have known that this would occur for so long as Ulster Bank continued to support the company. But as he had no reason to believe that the decision of Ulster Bank to cease to support the company was imminent or had been even threatened, the standard imposed by s. 297A(2)(a) ("…would cause loss to the creditors of the company or any of them….") is simply not met in these circumstances.

48. Of course, once the Bank withdrew support on 14th June 2012 the situation changed entirely. Had, for example, the request for advance payment been made *after* that date, then there would be little doubt but that a director ought to have known that such conduct would cause loss to this creditor. This, however, is not what happened, for the company ceased trading immediately once the Bank withdrew its support.

49. There is no doubt – certainly viewed in retrospect – Appleyard took an enhanced risk with the funds of Toomey Leasing by accepting advance payment before the delivery of the vehicles could actually be effected. It would certainly have been wiser if, for example, the funds had been paid into some form of escrow account prior to the delivery of the vehicles. Yet none of this is in itself sufficient to ensure that the statutory test in s. 297A(2)(a) of the 1963 Act has been satisfied.

Conclusions

50. In summary, therefore, I would conclude as follows:

51. First. s. 297A(2)(a) of the 1963 Act simply creates a mechanism whereby particular corporate conduct (which might not otherwise amount to reckless trading) is deemed to amount to reckless trading for the purpose of ascribing personal liability to an officer of the company. It follows that the general case-law on reckless trading arising under s. 297A(1) of the 1963 Act has little relevance in the context of cases which are said to come within the specific category of s. 297A(2).

52. Second, in cases coming within s. 297A(2), the court must be satisfied that the officer of the company in question ought to have known that this conduct would cause the creditor loss. It is not enough to show that this *might* have occurred: the loss to the creditor must have been foreseeable to a high degree of certainty.

53. Third, so far as the present case is concerned, while it is clear that the financial situation of the company was perilous, what is critical is that it had no prior warning that its financial support was about to be cut off. This only became clear on 14th June 2012, the day after the advance payment had been received from Toomey Leasing. In these circumstances, Mr. Sedgwick, as director of the company, could not have known that the receipt of this advance payment would cause loss to Toomey Leasing.

54. I cannot close this judgment without expressing considerable sympathy for the plight of the applicant, Toomey Leasing. It is the entirely innocent victim of the collapse of Appleyard. This, however, cannot take from the fact that on the facts of this case the exacting requirements of s. 297A(2)(a) of the 1963 Act have not been satisfied in order to establish a personal liability on the part of Mr. Sedgwick as director of Appleyard.

55. It is for these reasons that I would allow the appeal of Mr. Sedgwick and I would refuse to make the declarations sought under s. 297A(2)(a) of the 1963 Act.