Neutral Citation [2013] IEHC 113

THE HIGH COURT

[2010 No. 51 COS]

IN THE MATTER OF BUSINESS INTERIORS AND DESIGN (BID) LIMITED (IN LIQUIDATION) AND IN THE MATTER OF S. 150 OF THE COMPANIES ACT 1990 AND IN THE MATTER OF S. 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

AIDAN HEFFERNAN

APPLICANT

AND

TIMOTHY MURPHY, MICHAEL MURPHY AND COLIN MURPHY

RESPONDENTS

JUDGMENT of Mr. Justice Herbert delivered the 22nd day of February 2013

1. The company named in the title hereof was incorporated in the State on the 29th July, 2002. Its stated principal objects and indeed its sole business, was the design and fitting out of interiors of office, commercial and other properties in the public and private sectors and the supply of office furniture. The affidavit evidence established that 70% of the issued share capital of the company was held by the first respondent, who was also managing director of the company. The remaining 30% of the issued share capital was divided equally between his sons, the other respondents named in the title hereof. The company was a small limited liability private company of which the respondents were the sole members and directors. Each of the respondents also worked in the company. Before the present difficulties arose, the company employed on average between 20 and 10 other workers. The company carried on its business from premises held under lease at Unit 11, Metro Business Park, Ballycurreen, Co. Cork. There was no dispute at the hearing of this application that the greater part by far, about 75%, of the company's business came from fitting-out subcontracts in business and office developments in the Munster area generally and in the Cork City and County area in particular. The collapse of the property and development market nationally, starting in about mid 2008, had a devastating effect on the construction industry here, which inevitably carried over to businesses such as that carried on by the company in the form of cancelled orders, bad debts and restricted credit.

2. On the 2nd April, 2009, an extraordinary general meeting of the company was held, at which all three respondents are minuted as having been present. This meeting had to be held as the then net assets of the company were noted to be less than half the amount of its called-up share capital. The minutes of this meeting exhibited at para. 24 of the replying affidavit of the first respondent, sworn on the 14th August, 2012, records as follows:-

> "This extraordinary meeting has been convened at short notice to comply with the requirements of section 40(1) of the Companies (Amendment) Act 1983. Notice of this meeting has been waived as all the directors and shareholders are present.
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> The directors have become aware as of the 1st April, 2009, that the net assets of the company are less than half of the amount of called up capital in the company.
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> The purpose of the meeting is to consider what measures should be taken to deal with this situation.
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> The Chairman, Timothy Murphy, advised the meeting that he had applied for a personal financial facility of €200,000 and that he intended to invest the proceeds of this facility in the company to address the shortfall. He stated that he expected a positive result from this application within seven days, in addition, he advised the meeting that he was also seeking an external investor to invest additional funds to resolve the shortfall.
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> In the circumstances, all the directors agreed that it was in the best interests of the comapny and the creditors to continue to trade, but that they would keep the matter under review and would hold a further meeting within seven days."

3. Thereafter the company continued to trade until wound-up on the petition of the Revenue Commissioners, by order of this Court made on the 22nd March, 2010. By the terms of that order, the applicant was appointed official liquidator. In compliance with the provisions of s. 56(1) of the Company Law Enforcement Act 2001, the applicant furnished reports to the Director of Corporate Enforcement on the 22nd September, 2010, 22nd February, 2011, and the 9th December, 2011. By a Certificate dated the 10th November, 2011, the applicant certified that the company was then and had been since the commencement of the winding up unable to pay its debts within the meaning of s. 214 Companies Act 1963 (as amended). By a letter dated the 9th March, 2012, the Director of Corporate Enforcement declined to relieve the applicant of the obligation imposed on him by the provisions of s. 56(2) of the Act of 2001, to apply to this Court for a restriction in respect of each of the respondents pursuant to the provisions of s. 150 of the Companies Act 1990.

4. In the notice of motion dated the 8th May, 2012, the applicant claims these restrictions on the following grounds set out at para. 6 of his grounding affidavit sworn on the 4th May, 2012:-

> "(i) Delay winding up the Company;
>
> (ii) Revenue debt;
>
> (iii) the treatment of creditors;

(iv) the Company's banking arrangements; and

(v) co-operation difficulties."

5. At paras. 17 and 23 of his grounding affidavit the applicant states that it is his belief, as liquidator of the company, that the respondents should have ceased trading and taken steps to wind up the company much earlier than the 22nd March, 2010. At para. 21 of his replying affidavit sworn on the 14th August, 2012, the first respondent states that in his first report (22nd September, 2010) to the Director of Corporate Enforcement the applicant gave two dates on which he considered the company was unable to trade-out of its difficulties and should have ceased to trade: 4th April, 2009, following the extraordinary general meeting and, the 10th December, 2009, the date of the statutory 21 day Notice issued by the Revenue Commissioners. He then points to the fact that in his final report to the Director of Corporate Enforcement dated the 9th December, 2011, the applicant specified the 4th April, 2009, as the date when the company should have ceased to trade. At para. 11 of his supplemental affidavit sworn on the 9th November, 2012, the applicant states that it is his belief that the decision made by the respondents to continue to trade after the 1st April, 2009, suggested a want of prudence on their part amounting to irresponsibility. At the hearing of this application, counsel for the applicant, not surprisingly, confirmed that the applicant believed that the company should have ceased trading after the extraordinary general meeting on the 2nd April, 2009.

6. At paras. 4 to 7 inclusive of his supplemental affidavit sworn on the 22nd September, 2012, the applicant avers that "registration type offences" were committed by the respondents in that no annual returns were made for the company for the year ending the 31st December, 2008, and V.A.T. charged by the company and P.A.Y.E./P.R.S.I. sums deducted from employee wages was not paid to the Revenue Commissioners. On the affidavit evidence, I am satisfied that annual returns had been made by the company up the 31st December, 2007. Thereafter, an unaudited Balance Sheet and the Profit and Loss Account as at the 31st December, 2008, were available to the applicant.

7. At para. 10 of his replying affidavit sworn on the 14th August, 2012, the first respondent states that in 2009, the company owed money to its accountants and because of a disagreement with respect to fees the accounts for the year ending the 31st December, 2008, were not audited and filed. He claims that the company had gone into liquidation before annual accounts for 2009 were required to be filed. In *Re: Mitek Holdings Limited: Grace v. Kachkar* [2010] 3 I.R. 374, Supreme Court at 386 and following, Fennelly J. held that while a failure to comply with formal obligations of this nature is serious if it contributes to the insolvency or hides the true condition of the company from those dealing with it, a relatively short term failure to comply with formal obligations where historically there had been compliance over a longer period would be difficult to describe as irresponsible. In the above circumstances, I do not consider that the failure of the respondents to approve and make annual returns for the company for the year ending the 31st December, 2008, or the 31st December, 2009, amounts to a lack of responsibility on their part in the management of the affairs of the company.

8. I adopt what was held by Finlay Geoghegan J. in *Re: Digital Channel Partners (In Voluntary Liquidation)* [2004] 2 I.L.R.M. 35, that something more than non-compliance for a limited period of time with tax legislation is required to show that directors did not act responsibly in the management of the affairs of a company. At para. 34 of his replying affidavit sworn on the 14th August, 2012, the first respondent offers an explanation that the under payment of V.A.T. in the period January to June 2007, was due solely to a miscalculation not discovered until 2009. The first respondent states that all V.A.T. returns and payments for the year ending the 31st December, 2008, were made as they fell due and, this was not disputed by the applicant.

9. At paras. 35 and 36 of the same affidavit, the first respondent for himself and the other respondents expresses regret that P.A.Y.E./P.R.S.I. deducted from employees wages was not returned to the Revenue Commissioners at the end of 2008 and during 2009. He states that this was solely due to cash flow problems within the company at that time and was not done with any intent to defraud the Revenue Commissioners. At para. 36 of a further affidavit sworn by him on the 30th October, 2012, the first respondent states that in or about August, 2009, the book keeper of the company had to be made redundant and that thereafter he and his wife assumed responsibility for these returns to the Revenue Commissioners. The first respondent accepts, (as pointed out by the applicant at para. 28 of his supplemental affidavit sworn on the 9th November, 2012), that a, "nil" return was incorrectly made on these occasions. At para. 28 of this supplemental affidavit to which I have just referred, the applicant submits that the company was in a position of trust when deducting P.A.Y.E./P.R.S.I. from wages of employees for the benefit of the Revenue Commissioners. At para. 18 of his grounding affidavit sworn on the 4th May, 2012, the applicant states that the total amount due by the company to the Revenue Commissioners for V.A.T. and P.A.Y.E./P.R.S.I is €104,416. The figure stated in a Final Demand issued to the company by the Revenue Commissioners on the 5th August, 2009, is €103,782, comprised as follows: R.C.T. €3,163, P.A.Y.E./P.R.S.I from the 1st January, 2008, to the 31st March, 2009, €42,288, and, V.A.T. from the 1st January, 2007, to the 30th April, 2009, €58,331. The Revenue Commissioners are of course preferred creditors in respect of these sums.

10. At para. 35 of his replying affidavit sworn on the 30th October, 2012, the first respondent exhibits Guidelines published by the Revenue Commissioners in November 2011, entitled "Dealing with Tax Payment Difficulties and Engaging with Revenue". In accordance with these guidelines the Revenue Commissioners after correspondence and communications with the company commencing on the 16th February, 2009, indicated to the company by email on the 31st July, 2009, that they would consider entering into a phased payment arrangement with the company with regard to the payment of this debt. On the 19th March, 2010, an instalment agreement was formally offered to the company by the Revenue Commissioners which required a down payment of €30,000 on signing the agreement and thereafter 18 monthly payments of €3,490.30. The company was unable to make this down payment of €30,000 and the Revenue Commissioners sought an order of this Court winding up the company which was made on the 22nd March, 2010. It seems to me that the correct inference to be drawn from this offer of a phased payment agreement to the company is that the Revenue Commissioners considered that the following passage in these Guidelines applied to the company:-

> "In the last number of years, some financially viable businesses and taxpayers have experienced particular difficulties in meeting their tax payment obligations. This has been due, for example,
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> > to particular cash flow problems arising from extended and ongoing late payment by their debtors, or from bad debt(s) that have been exceptionally incurred, or
> >
> > from a tightening of credit and overdraft facilities by financial institutions.
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> These types of difficulties can severely restrict the capacity of the business or taxpayer concerned to meet immediate financial obligations, including timely payment of tax debts as they fall due."

11. As has been pointed out by the Supreme Court and by this Court, the purpose of s. 150(1) of the Companies Act 1990, is not to

punish directors of a company for commercial misjudgement or error or to engage in a witchhunt because the particular business has failed. I must accept, on the uncontested sworn evidence of the applicant that the sum of €22,466 is due by the company to the Revenue Commissioners for P.A.Y.E./P.R.S.I since January 2008 and a sum of €81,950 for V.A.T. since March 2007. I am satisfied on the affidavit evidence that a portion of this non payment of V.A.T. arose out of an accounting error. I am satisfied on the affidavit evidence that the failure of the company to transfer to the Revenue Commissioners the P.A.Y.E./P.R.S.I deducted from the wages of employees, however much this is to be deplored, is not in itself, in the circumstances in which it occurred and having regard to the sum involved, sufficient evidence of irresponsibility on the part of the respondents in the management of the affairs of the company, to merit the imposition of restrictions pursuant to the provisions of s. 150(1) of the Companies Act 1990. However, the fact that the company was unable to pay these amounts to the Revenue Commissioners remains relevant to the consideration of whether the decision of the respondents to continue to trade after the extraordinary general meeting of the company on the 2nd April, 2009, was irresponsible.

12. In a letter dated the 29th August, 2011, from the applicant to the first respondent, exhibited in the affidavit of the applicant sworn on the 37th September, 2012, the applicant accepted that during a period of eleven months after the extraordinary general meeting on the 2nd April, 2009, in which the company continued to trade that the "creditors overall figure did not get any worse". However, he asserted that during this period individual creditors' balances did get worse. It is accepted by the first respondent at para. 25 of his replying affidavit sworn on the 30th October, 2012, that as at the 31st March, 2009, the current liabilities of the company, at €988,772 exceeded its total assets of €580,073, by €408,677. By comparison with the unaudited Balance Sheet as at the 31st December, 2008, trade creditors in the first three months of 2009 had increased by €282,710, (from €297,814 to €580,524) and, bank borrowings had increased by €97,171, (from €187,029 to €282,206). The applicant, at paras. 10 to 12 inclusive of his grounding affidavit sworn on the 4th May, 2012, states that he believes that the actual net loss to the company in the 90 day period ending on the 31st March, 2009, was approximately €654,000.

13. Audited accounts for the company for the year ending the 31st December, 2007, show that the company made a profit of €69,001 in that year and the unaudited accounts for the year ending the 31st December, 2008, show that the company made a profit of €105,941 in that year. However, comparing the latter with the Balance Sheet prepared for the three month period ending on the 31st March, 2009, the figures for Stock and Work in Progress have been written down by €129,300, (from €199,340 as at the 31st December, 2008, to €70,000 as at the 31st March, 2009) and, trade debtors have been written down by €169,023, (from €415,287, as at the 31st December, 2008, to €246,264 as at the 31st March, 2009). The respondents assert that this was due to cancellation of orders and to debtors becoming unable or unwilling to pay, because of the collapse of the property and development market.

14. At para. 14 of his grounding affidavit, the applicant expresses a concern that these unaudited accounts for the year ending the 31st December, 2008, might not accurately reflect the company's affairs as at that date. Apart from the fact that the accounts are not audited, the only reasons advanced by the applicant for this concern is that they appear to indicate that the company achieved its highest level of profit, - €105,914, - in that year even though it is incontestable that the difficulties in the property and development market had commenced in May 2008, and, the fact that the company went from a profit of €105,941 as at the 31st December, 2008, to a huge loss situation, (whether this be €408,699 or €654,000), by the 31st March, 2009. The affidavit evidence advanced by the respondents offers a *prima facie* explanation for this drastic reversal in the company's fortunes over such a short period in the first quarter of 2009. While the unaudited accounts for the year ending the 31st December, 2008, certainly do not have the same weight as they would if audited, I cannot find they do not present a true and fair view of the state of the company's affairs at that date on the basis of a suspicion however genuinely held by the applicant.

15. The affidavit evidence establishes that during the period in which the company continued to trade after the extraordinary general meeting on the 2nd April, 2009, four unsecured trade creditors were not treated equally with the general body of trade creditors. The entire amount of the debt owing to the following unsecured trade creditors was cleared in full:-

Blackwater Asset Management - €12,880.51.

Rhenus Logistics Limited - €13,050.63.

Crean Mosaics Limited - €8,866.29.

16. In addition, a sum of €32,000 was paid in reduction of the debt owed by the company to Associated Refrigeration Limited. The explanation offered by the respondents for the special treatment of Blackwater Asset Management is that no money in fact changed hands and the company wrote-off the debt due to it by Business Interiors and Design (BID) Limited in return for consultancy work done on its behalf by the first respondent himself. Rhenus Logistics Limited were shipping agents employed by the company and it is stated that this company was withholding products necessary to enable B.I.D. to complete a contract with An Teagasc. As a result of this debt being paid the respondents claim that the contract was completed and the Revenue Commissioners issued a Notice of Attachment to An Teagasc on foot of which they received the sum of €12,228.31 in part payment of the sums then due to them by the company. The first respondent avers that there was no actual payment made by the company to Crean Mosaics Limited. He stated that representatives of that company had succeeded, without the consent of the respondents in re-possessing the product supplied by it to B.I.D. which created this debt. The respondents claim that they paid the sum of €32,000 to Associated Refrigeration Limited under duress. This took the form of constant pressure exerted by representatives of that company even though this did not extend to threats of legal proceedings.

17. Undoubtedly, some, at least of this €66,000 paid in total to these four unsecured trade creditors would have been available to the general body of unsecured trade creditors had the company not continued to trade after the 2nd April, 2009. It was submitted by counsel for the respondents that having regard to the evidence as to why these sums were paid it would be impossible for the applicant to establish, the onus being on him, that these four payments were a fraudulent preference of these particular creditors. The applicant at para. 23 of his grounding affidavit and elsewhere asserts that the respondents should have decided to cease trading and taken steps to wind up the company at a much earlier date than the 22nd March, 2010, in which circumstances the alleged necessity to make these four payments would not have arisen..

18. At reply No. 13 in a Questionnaire submitted by the applicant to the respondents and completed by them, the first respondent stated that they considered that the company could continue to trade without making the position of the creditors worse. At reply No. 18 in the same Questionnaire he asserted that the trading after the 2nd of April, 2009, did not make the position of the Revenue Commissioners or any creditor worse. As hereinbefore appears, the applicant accepts that during this period of trading after the 2nd April, 2008, the creditors overall figure did not get any worse. There may well have been some changes in individual creditor's balances during this period as claimed by the applicant. At reply No. 19 in the Questionnaire the first respondent stated that, "After April 2009, small amounts were paid to creditors to keep the company going in the ordinary course of business". However, I am not satisfied that this period of trading after the 2nd April, 2009, caused extensive loss to creditors as alleged by the applicant at para.

23 of his grounding affidavit. It appears from the affidavit evidence that ten creditors have obtained judgments against the company, but it is not stated when, in what Court, or for how much these judgments were obtained, nor is there any suggestion that any of these creditors sought to enforce those judgments. I am satisfied that no case has been made out that the company should have ceased to trade at or before the 31st December, 2008. The unaudited accounts as at that date showed that the company was still trading profitably even if it had substantial current liabilities, (€562,378) and, even if it was experiencing some cash flow difficulties in January 2009, which induced the first respondent to seek to raise €200,000 additional capital.

19. The company's bank borrowings for the year ended the 31st December, 2008, were €187,029. These borrowings had increased to €282,206 by the 31st March, 2009. The applicant, at para. 24 of his grounding affidavit, accepts that as and from early April 2009, the only movements in this account were payments out on foot of the use by the respondents and, Alan Murphy, of an Ulster Bank Business Card (a form of credit card), and the addition of interest and other bank charges. It appears from the affidavit evidence that Ulster Bank Ireland Limited hold a security created in 2007 over the debtor's ledger of the company in respect of the operation of an invoice discounting facility, and also has a floating charge over all the assets of the company. It further emerges that the first respondent and the third respondent are co-sureties for these borrowings of the company up to €75,000, or €100,000 (the evidence is not clear as to which). It is not clear whether this figure is inclusive or exclusive of interest. On the 2nd April, 2009, the respondents on behalf of the company opened a new account at the Patrick's Bridge Cork branch of Bank of Ireland. The affidavit evidence establishes that from the 2nd April, 2009, to the 10th March, 2010, lodgements to this account amounted to €359,909.81 and payments out to €359,904.16.

20. There is nothing in the affidavit evidence to suggest that Ulster Bank Ireland Limited actually refused banking facilities to the company on or at any time after the 31st December, 2008. Having regard to the affidavit evidence, I have no reason to doubt the statement made by counsel for the respondents during the hearing of this application, - though of course it is not evidence – that the reason why this new bank account was opened with Bank of Ireland was to prevent a situation arising where payments which might be made to Ulster Bank Ireland Limited after the 2nd April, 2009, might later be challenged as a fraudulent preference of that Bank or of the first respondent and/or the third respondent as guarantors of a portion at least of the company's indebtedness to that Bank. I therefore find that this decision of the respondents to open and to operate a new bank account after the extraordinary general meeting of the company on the 2nd April, 2009, does not demonstrate a lack of responsibility on the part of the respondents in the management of the affairs of the company.

21. At para. 28 of his affidavit sworn on the 14th August, 2012, the first respondent makes the following averment:-

> "I say that in 2009 I had applied to I.C.S. Building Society for a mortgage of €200,000 on the security of my family home with a view to providing an investment in the Company to resolve the Company's current shortfalls."

22. By a letter dated the 7th May, 2009, this application was approved. At para. 27 of this affidavit sworn on the 14th August, 2012, the first respondent states that Mr. Stephen McCarthy, Senior Manager, Business and Corporate Banking, Ulster Bank Ireland Limited furnished a reference in support of the application by the first respondent to I.C.S. Building Society. This letter is dated the 20th January, 2009, and states as follows:-

> "Business Interiors and Design Limited is a properly constituted private limited company, the management of which we consider would not undertake a commitment, which the company could not fulfil.
>
> The company is an established client of the bank and we have a satisfactory working relationship."

23. From the foregoing it is obvious that the company was experiencing cash flow problems in the first quarter of 2009. The affidavit evidence establishes that this situation continued to deteriorate to the point where on the 2nd April, 2009, current liabilities exceed total assets by €408,699. Counsel for the applicant submitted that in these circumstances it was not responsible management of the affairs of the company for the respondents to have decided that the company should continue to trade. He referred to para. 10 of the supplemental affidavit of the applicant sworn on the 9th November, 2012, where the applicant states that in order to make up the losses suffered over the first three months of 2009, (shown in the draft accounts for the period ending the 31st March, 2009, as €653,994), the company would have to trade profitably at the level of profitability enjoyed in the year ending the 31st December, 2008, (€105,941) for a period of six years. Against the background of the then serious problems in the property and development market in the State, counsel submitted that the decision of the respondents, to continue to trade amounted to irresponsible self delusion. Their decision, he submitted, was in particular a breach of the duty owed by the respondents in such circumstances to the general body of creditors to preserve the assets of the company or at least not to dissipate them.

24. In this latter respect, counsel for the applicant referred to the decision of the Supreme Court in *Re: Frederick Inns Limited* [1994] 1 I.L.R.M. 387, where at p. 396, Blayney J. held as follows:-

> ". . . as soon as a winding-up order has been made the company ceases to be the beneficial owner of its assets, with the result that the directors no longer have power to dispose of them. Where, as here, a company's situation was such that any creditor could have caused it to be wound up on the ground of insolvency, I consider that it can equally well be said that the company had ceased to be the beneficial owner of its assets with the result that the directors would have had no power to use the company's assets to discharge the liabilities of other companies. Once the company clearly had to be wound up and its assets applied *pro tanto* in discharge of its liabilities, the directors had a duty to the creditors to preserve the assets to enable this to be done, or at least not to dissipate them."

25. In my judgment there is a distinction to be drawn between the position where a creditor could cause a company to be wound up and the situation where it clearly had to be wound up. That distinction is important to the principal issue raised by the present application. Many companies trading successfully might be unable to pay their debts and could be wound up if some significant creditor were to insist on a right to immediate payment or serve a statutory 21 day letter, (s. 214(a) Companies Act 1963 as substituted by s. 213 Companies Act 1990). Such a situation could be precipitated by a cash flow or liquidity problem in the company, caused, for example, by an unforeseen market downturn or the loss of an important customer. This, however, does not necessarily mean that the company clearly has to be wound up. The directors of a company in such a difficult financial situation have to decide whether to cease to trade and to wind up the company or to permit it to be wound up or to take a risk and continue trading. Such a decision must be properly informed and based on a reasonable belief that the company will be able to pay its debts and return to profitable trading in the short term.

26. In such a situation of very questionable solvency, the directors of a company in deciding to take a risk to continue trading must consider the position of the general creditors of the company. Whether in such circumstances a decision to keep trading was a responsible decision will not be judged with the benefit of hindsight, but objectively by reference to what a reasonable board of

directors would reasonably have done at the date the decision was made in the light of all the circumstances then prevailing. As was pointed out by MacMenamin J. in *Re: M.D.N. Rochford Limited: Fennell v. Rochford* [2009] I.E.H.C. 397, such a decision must be based not on hubris or wilful self-delusion, but on commercial acumen, verification and objectivity.

27. Though addressing the matter in terms of misfeasance, I consider that the decision of Vice-Chancellor Sir Richard Scott in *Facia Footwear Limited, Wisebird Limited (both in Administration) v. Hinchliffe and Harrison* [1998] 1 B.C.L.C. 218, well illustrates the sort of problems that can arise in these situations.

28. In that case a major trading Group was placed in a, "parlous financial state", when a company with which it had a stock-supply agreement served, on the 3rd May, 1996, a fourteen day notice to pay all sums outstanding on foot of that agreement. This was followed on the 24th May, 1996 by a statement of intent to present a creditors' administration petition on the 3rd June, 1996, unless all sums due were paid by the 31st May, 1996. The directors claimed that during April and May 1996, they believed that the Group had a reasonable chance of weathering its financial difficulties and therefore continued to trade. This belief was based on the fact that merger discussions had been taking place with a U.S.A. incorporated Group which, if successful would provide a substantial sum of working capital. In addition, discussions had been taking place with a U.S.A. Securities Broker with a view to raising funds in the U.S.A. The affidavit evidence before Scott V.C. was that both these arrangements were close to being finalised. However, the board decided at a meeting on the 30th May, 1996, that because of the creditor's decision the Group could not continue to trade without immediate refinancing and the re-financing proposals could not provide this. Administrators were appointed to the Group on the 31st May, 1996.

29. In the course of his judgment Scott V.C. held as follows:-

> "These authorities and the principles expressed in them entitle Mr. Crystal to submit that the duty owed by Mr. Hinchliffe and Mr. Harrison to Facia Footwear Limited in April and May 1996, was a duty that required them to take into account the interests of the creditors. The whole Facia Group and Facia Footwear Limited as an individual company were in a very dangerous financial position. The future of the Group probably depended on satisfactory refinancing arrangements becoming available.
>
> But if the discussions about re-financing arrangements had to be brought to fruition, the Group would have to continue trading in the meanwhile. Mr. Crystal has contended that the re-financing prospects were negligible if not hopeless and should have been seen to be so by Mr. Hinchliffe and Mr. Harrison. That is a submission that seems to me to be quite unacceptable at this stage of the proceedings. The benefit of hindsight was not available to the directors at the time. It is clear enough that in continuing trading throughout April and May they were taking a risk. But the boundary between an acceptable risk that an entrepreneur may properly take and an unacceptable risk the taking of which constitutes misfeasance is not always, perhaps not usually, clear cut. It is, in my opinion quite unrealistic for Mr. Crystal to argue, in the face of the explanations given by the directors in their respective affidavits, that the continuation of trading by the Facia Group companies up to the 30th May, shows such a dereliction of duty on the part of the directors as to expose them to liability for misfeasance. I accept that, given the parlous financial state of the Group, the directors had to have regard to the interests of the creditors. But the creditors of the Group and of Facia Footwear Limited in particular would clearly have been best served by a re-financing that could support a continuation of profitable trading. The cessation of trading followed by the disposal of the assets of the companies on a forced sale basis, would, it was always realised, lead to heavy losses for the creditors. The creditors only chance of being paid in full lay in a continuation of trading. A continuation of trading might mean a reduction in the dividend eventually payable to creditors, but it represented the creditors' only chance of full payment. It is, therefore, not in the least obvious, that in continuing to trade in April and May the directors were ignoring the interests of the creditors.
>
> The directors have deposed that at the critical time, April and May 1996, it was not obvious to them either that the re-financing efforts would fail to reach fruition in time or that Sears would pull the plug on them in the manner that eventually happened. They retained optimism to the end. There has been no attack on their *bona fides* in this regard. . . ."

30. It was held by the Supreme Court in *Re: Mitek Holdings Limited; Grace v. Kachkar (ante)* that it is not responsible for directors of a company to continue to trade when this is imprudent in the extreme.

31. In the present case the Balance Sheet as at the 31st March, 2009 showed that the current liabilities of the company amounted to €988,772; (unsecured trade creditors were owed €580,524, Ulster Bank Ireland Limited was owed €282,200, the Revenue Commissioners were owed €79,677 and, €46, 365 was owed on foot of a Lease). As against this indebtedness the sum recorded as due to the company by trade debtors was €246,264, stock and work in progress was valued at €70,000 and there was cash in the bank in the sum of € 387. At para. 26 of the affidavit of the first respondent sworn on the 14th August, 2012, there is a passing reference without further detail to several vehicles having been sold following the extraordinary general meeting of the company on the 2nd April, 2009, "to ease cash flow difficulties", I am satisfied on the entire of affidavit evidence that the realisable value of the assets of the company was always small. Ulster Bank Ireland Limited had a floating charge over these assets and a specific charge over the Debtors Ledger of the company. The premises from which the company carried on its business was held under the terms of a Lease, (no particulars of which appear in the affidavit evidence). The manufacturing and other equipment of the company also appears to have been held on lease, (again no particulars are furnished in the affidavit evidence). Even assuming that the finished value of the work in progress would be €70,000 and also assuming that the entire of the debtors balance of €246,264 together with this sum of €70,000 would be recoverable, - a very questionable assumption on the 2nd April, 2009, having regard to the affidavit evidence, - the respondents would still have to consider how and, within what timeframe the remaining indebtedness of €602,121 could be discharged and, whether the company could continue to trade in the meanwhile without incurring further significant debts.

32. I am satisfied that the decision of the respondents on the 2nd April, 2009, to continue to trade was not taking an unacceptable risk and, was not so imprudent as to amount to wilful and irresponsible self delusion. The fact that their commercial decision taken on that occasion has, with the benefit of hindsight, been shown to have been over optimistic does not render it irresponsible.

33. I am satisfied on the affidavit evidence that on the 2nd April, 2009, the first respondent had good reason to believe that he would be successful in obtaining in the very near future a sum of €200,000 for reinvestment in the company. At para. 25 of his affidavit sworn on the 14th August, 2012, and, at para. 33 of his affidavit sworn on the 30th October, 2012, the first respondent states that at and after the 2nd April, 2009, the company had a number of ongoing contracts and was actively pursuing new work. A number of projects current on the 22nd October, 2009, are identified and a number of potential customers to whom the company had submitted quotations in the period of August to December 2009, are also identified. While this may fall well short of demonstrating that on the 2nd April, 2009, the company had a secure portfolio of future work, it does establish that the respondents at that time were not

irresponsible in considering that the company had a future and could continue to obtain constant work both in the public and private sectors. This is particularly so against what he states at para. 31 of his affidavit sworn on the 14th August, 2012, was the then prevailing official view that the problems being experienced in the commercial property market and in the national economy at that time would be resolved in the short term and business credit would again become available.

34. Though the affidavit evidence establishes that as of the 15th February, 2011, ten creditors had obtained judgment against the company and, that Ulster Bank Ireland Limited was taking steps to enforce the guarantee given by the first respondent and the third respondent, there is no evidence that any of the approximately 155 trade creditors listed in the Aged Creditors Analysis as of the 31st March, 2010, had commenced or threatened to commence any form of recovery proceedings against the company prior to the 2nd April, 2009. At para. 25 of his affidavit sworn on the 14th August, 2012, the first respondent avers that the decision to continue trading after the 2nd April, 2009, was made, "with the benefit of advice from the company's accountants and financial advisers, Parfrey Murphy". As no affidavit sworn by any of the partners of this firm of Accountants was furnished by the respondents, on whom the onus of demonstrating that they acted responsibly in the management of the affairs of the company falls, the only primary finding I can make from this evidence is that the respondents acted responsibly in obtaining that advice before deciding that the company should continue to trade. It may however be possible to go further and to infer from the fact that the letter dated the 28th May, 2009, was sent, not by the company but by Parfrey Murphy to the then existing trade creditors of the company, - I am satisfied that insofar as this letter did not reach some creditors, this was simply an error and was not intentional, - that these accountants and financial advisers were not of the view that it was an unacceptable risk and irresponsible for the company to continue to trade after the 2nd April, 2009.

35. This letter from Parfrey Murphy to the trade creditors dated the 28th May, 2009, states as follows:-

> "BUSINESS INTERIORS AND DESIGN (BID) LIMITED
>
> We confirm we act as accountants and financial advisers to the above company.
>
> Due to the current financial recession and difficult trading environment our client at present is not in a position to discharge its debts as they fall due. However, the directors are of the opinion that the company can return to profitability and discharge its liabilities in due course.
>
> The company substantially streamlined its operations in the past few months to reduce costs and Tim Murphy, Managing Director is seeking to remortgage his principal private residence.
>
> At present we have proposed to the directors that current creditors are repaid over a period not exceeding 24 months. A creditor's repayment structure cannot be finalised at present, but will be examined as soon as possible.
>
> While the current situation is unwelcome for all parties, the directors have requested me to assure you that they intend to stabilise matters and reduce liabilities. The Directors are appreciative of your understanding in this matter and Tim Murphy will contact you again as soon as he has information to share with you but will keep you informed on a regular basis on how the company is progressing."

36. This letter did not precipitate a run on the company. The affidavit evidence establishes that as stated in the third paragraph of this letter, the respondents considered on the 22nd April, 2009, that they could and, did successfully, - even at great loss to the workforce and at no little cost to themselves, – take immediate and effective steps to streamline the operation of the company and reduce costs and overheads. The evidence also establishes that as and from the 2nd April, 2009, the company in effect operated on a cost neutral cash basis.

37. I am satisfied on the evidence that in light to the foregoing it was not irresponsible for the respondents on the 2nd April, 2009, to have considered that the position of the general body of creditors of the company would be best served by the company continuing to trade. If the company had ceased trading on the 2nd April, 2009, and was wound up thereafter the preferential creditors would probably have received some payment, but the unsecured trade creditors would most probably have received nothing. While it does appear that some motor vehicles the property of the company were sold by the respondents after the 2nd April, 2009, and the proceeds of sale used in reducing cash flow problems in the company, I am not satisfied on the affidavit evidence that the general body of creditors has been prejudiced by this decision of the respondents to continue to trade. I am not satisfied that in reaching the decision to continue to trade after the 2nd April, 2009, the respondents ignored the interests of the general body of creditors and thereby failed to act responsibly in the management of the affairs of the company.

38. By the end of June 2009, it was clear that the first respondent would be unable, because of his inability to obtain life insurance, to take up the offer of I.C.S. Building Society made on the 7th May, 2009, to advance the sum of €200,000. On the balance of probabilities it was never likely that after the financial results for the first three months trading in 2009 became available that anyone, other than the respondents themselves, would be likely to invest in the company. Unfortunately also, what is described by Parfrey Murphy in their letter of the 28th May, 2009, as the "current financial recession and difficult trading environment", did not, as anticipated end or even become less severe. Credit throughout the economy became ever more difficult to obtain, more of the company's trade creditors defaulted and work became more and more difficult to obtain. Despite redundancies, costs savings and wage cuts, I am satisfied that after June 2009, the company was hopelessly and irredeemable insolvent and continuing to trade only on a Micawber like basis. In his affidavit sworn on the 17th December, 2012, the first respondent accepts that at the end of 2009, only a book keeper and three employees remained with the company working one day a week each. For the year ending the 31st December, 2009, the three respondents, he states, were paid only €20,969 between them and received no payment whatever thereafter. I note that at para. 27 of his affidavit sworn on the 9th November, 2012, the applicant states that, "employee and directors claims for arrears of wages and minimum notice resulted in a cost of the State of €10,862. However, I am satisfied that over this period of trading from the 2nd April, 2009, to the 23rd March, 2010, the position of the general body of creditors of the company neither improved or disimproved materially. In effect the position of the company fossilised after June 2009.

39. Considered objectively and in context, I am satisfied, on the affidavit evidence that the commercial management of the company by the respondents, particularly after the 31st December, 2008, was neither incompetent nor lacking in commercial probity or standards. Despite the failure of the company to make annual returns in the year ending the 31st December, 2008, its non payment to the Revenue Commissioners of V.A.T. and P.A.Y.E./P.R.S.I., and the historical late lodgement of annual returns in the years ending the 31st December, 2003, 31st December, 2004 and 31st December 2006, I am satisfied that there was a sufficient compliance by the respondents with the regulatory requirements of the Companies Acts 1963-2009. I find that the respondents were only indirectly involved in the insolvency of the company to the extent that the low liquidity ratio indicated by the unaudited accounts for the year ending the 31st December, 2008, may have rendered the company particularly vulnerable to the sudden property market collapse and

associated credit freeze which commenced in the second half of 2008. The applicant however, did not seek to argue that the respondents had not acted responsibly in the management of the affairs of the company by permitting such a high ratio of current liabilities to current assets to build up in the company's finances. In my judgment the affidavit evidence does not raise even a *prima facie* case that the respondents dissipated or failed to preserve the assets of the company after the 2nd April, 2009, the date of the extraordinary general meeting.

40. On the affidavit evidence I can see no reason why it would be otherwise just and equitable that the respondents or any of them should be made subject to the restrictions provided for in s. 150(1) of the Companies Act 1990. At the hearing of this application the claim that alleged non cooperation on the part of the respondent with the liquidation process and delay in filing a Statement of Affairs, which alleged non cooperation was strenuously denied in the affidavit evidence, should move the court to make a restriction declaration was not advanced. I will therefore decline to make the Declarations sought in the Notice of Motion.