Neutral Citation Number [2006] IEHC 179

# THE HIGH COURT

**[2004 No. 73 COS]**

**IN THE MATTER OF DCS LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT, 1990 AND IN THE MATTIER OF SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001**

**BETWEEN**

**MICHAEL FITZPATRICK AS LIQUIDATOR OF THE COMPANY IN THE WITHIN PROCEEDINGS**

**APPLICANT**

**and**

**CONOR HENLEY AND MARIE HENLEY**

**RESPONDENTS**

**JUDGMENT of Mr. Justice John MacMenamin delivered on the 4th day of April, 2006**

**1.** In these proceedings the applicant seeks a declaration that the respondents being person to whom chapter 1, part 7 of the Companies Act, 1990, applies, shall not for a period of five years be appointed or act in any way whether directly or indirectly, as a director or a secretary or be concerned or take part in a promotion or formation of any company unless that company meets the requirements set out in
sub-s 3 of s. 150 of the Companies Act, 1990, (as amended).

**2.** The applicant is the liquidator of the above entitled company ('the company') having been so appointed on the 16th day of February, 2001. On the same day it was resolved pursuant to s. 251 of the Companies Act, 1963, that the company be wound up.

**3.** The respondents herein were directors of the company at the date of the appointment of the applicant as liquidator. It carried on business of the management and operation of a convenience store in Leopardstown Valley Shopping Centre, Co. Dublin. This operation ceased in June, 2000.

**Trading history. The first named respondent's case**

**4.** It is now necessary to trace the history of the company as advanced by the first named respondent. It operated a business which traded as a general convenience store known as "the Valley Stores" since the year 1994. The first named respondent introduced approximately £50,000 into the company to finance it and to purchase stock in order to commence trading. By the year 1999 turnover had increased steadily and the business obtained a Lotto agency. The company traded under the "Day to Day" independent franchise and, it is claimed, generated a weekly turnover of approximately £25,000.

**5.** In the summer of 1999 a competitor, Londis Supermarkets, opened and began operating in close proximity to the company's premises. The applicant says an immediate decrease in the company's turnover was detected and reflected in its profits. Consequently the first named respondent sought alternatives to replace the loss of turnover. The company commissioned the first virtual supermarket website in this company which traded as "Store 2 Door". It was intended that this website would service the market in close proximity to the shop premises in Leopardstown. Shortly after the site went online on a test basis, it became apparent that there was a large demand for shopping in this way and the company approached a number of venture capital companies to discuss funding.

**6.** By the latter part of 1999 the company was in discussion with venture capitalists called Ocean Communications ('Ocean') concerning the provision of supermarket shopping services online to service the Dublin region. The company in suit entered into heads of agreement and a confidentiality agreement with Ocean and by spring 2000 the investors had assured the company that funds would be provided to finance the project.

**7.** The company in suit was advised by a corporate finance team and by chartered accountants. Advice was given to set up a separate corporate entity to run the project and to hold the intellectual property rights to the venture. "Store 2 Door" was incorporated for that purpose. The company resolved to transfer its business from the Leopardstown premises to Store 2 Door Limited and to purchase a new premises in Dublin West to run the internet supermarket business.

**8.** However, in June 2000 the venture capital company was taken over. Thereafter the company was advised that the capital injection that it had anticipated was to be put 'on hold'. Six months were spent revising business plans and approaching other interested parties. By January 2002 it was apparent that no external investors were willing to commit funds. By that time competitors had established a website in the online business. The directors met and decided that in the absence of external investors the company was not then in a position to proceed with the project and there was no alternative but to wind up its affairs.

**9.** On 16th February, 2001, the first named respondent prepared an estimated statement of affairs. He states that he himself and two other members of his family were listed therein as unsecured creditors. The first named respondent asserts in affidavit that he had invested in excess of €100,000 in the company and at that stage there was no chance of recovering any of that sum.

**Background**

**10.** Since the appointment of the applicant as liquidator he ascertained that the company was entitled to the lessee's interest in the property at unit 5 Leopardstown Valley Shopping Centre, Leopardstown and that the company was entitled to a 35 year lease between Panworld Holdings Limited of the first part, and Leopardstown
Valley Neighbourhood Shopping Centre Management Company Limited of the second part. This lease was dated 20th June, 1994, and ran from the 1st day of April that year.

**11.** In May, 1997 the first named respondent entered into an agreement with the said Panworld Holdings Limited and Leopardstown Valley Neighbourhood Shopping Centre Management Company, whereby the first named respondent was demised the leasehold interest in Folio 91940L of the Register of Leaseholders in the County of Dublin which said folio comprised the property in question. Thereafter the first named respondent became the landlord to the company. On foot of this agreement the first named respondent paid the sum of €317,434.51 (IR£250,000) to Panworld Holdings Limited and Leopardstown Valley Neighbourhood Shopping Centre Management Company Limited.
**12.** On 11th May, 2000, by deed of transfer the company assigned its leasehold interest in the said premises to the first named respondent for a stated consideration of €158,717.25 (IR£125,000) which consideration was based upon a valuation stated to be dated May 1998 for the said amount which was furnished to the first named respondent by Desmond J. Boyle Property Consultants Limited trading as Boyle and Associates Valuers. This sum represented 50% of that paid by the respondent to the vendors of the lease taken in 1994. In the month of June 2000 the first named respondent disposed of his interest to a Mr. John Clohessy for the sum €1,320,520.60 (IR£1,040,000). On receiving these monies the first named respondent and the company discharged debts due to a number of creditors of the company. In the light of the fact that the superior leasehold interest in the premises increased from €317,434.51 (£250,000) in May 1997 (when the first named respondent acquired his interest) to €1,320,527.60 (£1,040,000.00) in June, 2000, when he disposed of his interest, a contention, as made by Mr. Henley that there had been no commensurate increase in the value of the leasehold cannot be justified and is unsustainable.

**Valuation of the lease**

**13.** In the course of his investigations the liquidator had, as one of his duties, to investigate this transaction. In correspondence with Desmond Boyle of Boyle and Associates it came to light that his involvement in the property dated from May 1998 when he was requested to value the property as a going concern after the first named respondent had purchased the head leasehold interest for nine hundred and ninety nine years. At that stage Mr. Boyle valued the property at £500,000 based on the information that the turnover was approximately £1,000,000 inclusive of VAT. Mr. Boyle stated that he was subsequently asked to confirm a valuation of the leasehold interest as at 1997, made by Aidan Brophy, who was represented to Mr. Boyle as the first named respondent's accountant. This valuation was in the sum of £125,000. However, it is stated it was based on an assumption that the lease was that from 1994 as he says he was not privy to the arrangements made between the first named respondent and his company.
**14.** In the course of a letter dated 13th August, 2001, Mr. Boyle stated that he was subsequently asked to change the date of the valuation to the year 2000. He says that he assumed that the details were the same, as he had not been given any information to the contrary. He added:

> "If the property was sold for £1,040,000 in August 2000, the turnover must have been significantly different from the figures I had been working on.
> The value of the bricks and mortar I would estimate at £500,000 which leaves a figure of just over £500,000 as being the value of the business. This would require a turnover of somewhere approaching £3,500,000 per annum.
> From this you will see that £125,000 does not represent the value of the leasehold interest that you say Conor's Company held at the time of the sale.
> Can you confirm that the above turnover represents the turnover as at August, 2000, whereupon I would provide an appropriate valuation."

**15.** In further correspondence on 27th August, 2001, Mr. Boyle stated his valuation of the freehold as at June 2000. He said that the first named respondent held under a ninety nine year lease and that the valuation of this leasehold interest was £200,000 as of the date of the sale assuming that was exclusive of turnover.
**16.** As a consequence of this information the applicant concluded that a deficiency in the company at the time of its liquidation of approximately €134,086.86 was in large part due to these transactions. The applicant as liquidator of the company initiated proceedings against the first named respondent and Boyle and Associates respectively. The first named respondent asserts that he acted appropriately in his dealings with the company. Nonetheless he concluded a settlement of these proceedings resulting in the payment of €40,000 inclusive of costs and the second defendant €60,000. The first named respondent had previously asserted a belief that the leasehold interest had a nil value. In his third affidavit sworn herein on 10th December, 2004 he stated that because his view of the value of the leasehold was contradicted by Boyle and Associates he had paid the sum of £125,000 despite his ???? . That respondent was content to assign the value on the surrender of the leasehold interest which was the main asset of the company.
**17.** The liquidator also concluded that the first named respondent had paid certain creditors in preference to the creditors of the company generally from the sum of €158,717 (£125,000) paid for the leasehold interest on 11th May, 2000.

**The turnover figures and averments on affidavit: issues of credibility**

**18.** The first named respondent asserts that the company was solvent in 1999. This is contested by the applicant. He states that the accounts for the two year period ended the 30th of June of that year showed a loss of some £9,951.00 for that period. The accounts also indicated that the directors proposed to hold a s. 40(1) Companies (Amendment) Act, 1983 extraordinary general meeting in order to discuss the financial situation of the company. The accounts also indicated that the average weekly turnover of the company for the two year period up to the end of 1999 was some £19,723 excluding VAT, as opposed to £25,000 per annum as asserted. The applicant contests the assertion made by the first named respondent that

the opening of a competitor in close proximity to his shop caused an immediate downturn in the company's turnover. The turnover figure for company showed that for the year ended 30th June, 2000, the turnover was £1,027,835 making an average weekly turnover of £19,766. This was similar to the weekly average turnover for the two year period up to the end of June 1999. Thus the contention made by the first named respondent regarding the effect of competition from Londis is not made out.

**19.** Furthermore serious doubt is cast on the first named respondent's assertion that he had, along with his family, invested some £100,000 in the company and lost this money. The statement of affairs, referred to earlier, merely shows that the Henley family were unsecured creditors to the company in the amount of some £12,700. Further the company's accounts for the two year period up to June 1999 showed that at that time advances made by the first named respondent amounted to some £21,000.

**Payments to creditors**

**20.** A comparison of the creditors as of 31st May, 2000, (the approximate time cessation of trading) and the creditor's balance of 16th February, 2001, (date of liquidation) demonstrates that certain payments were made to creditors. To take some examples:

| Creditor Details | Balances owing at 31/05/200 per letter dated 21/08/2001 to liquidator £ | Balances paid from proceeds on disposal of companies lease interest to Conor Henley for consideration of £125,000 | Balances owing as of 16/02/2001 per directors' statement of affairs as creditors' meeting £ |
|---|---|---|---|
| Musgrave's Cash and Carry | £45,000 | £45,000 | £0 |
| Rates and management company fees | £7,000 | £7,000 | £0 |
| Easons | £2,000 | £2,000 | £0 |
| National Lottery | £3,000 | £3,000 | £0 |
| Premier Diaries | £22,500 | £22,500 | £0 |
| AIB Bank | £20,000 | £20,000 | £0 |
| Green Isle | £3,500 | £3,500 | £0 |

**21.** By way of comparison, a sum of £60,952 remained outstanding to the Revenue Commissioners. In a list of twenty two other creditors, the balance owing as of 16th February, 2001 to each is identical to the balance owing as of 31st May, 2000. Furthermore, the total sum stated to be owed to the Henley family was £12,7000.

**22.** The AIB Bank overdraft was discharged from the proceeds, which overdraft had been personally guaranteed by the first named respondent. Why were the creditors shown in the table above were paid off in full whilst other creditors were not paid off at all?

**23.** The first named respondent states that while the accounts indicate a technical deficit of £9,951 as of 30th June, 1999, the accounts record the value of the leasehold interest held by the company as being nil. He states that there was no legal requirement to include a statement regarding the nil cost of the leasehold interest in financial statements and that prior to a disposal of its leasehold interest the company had received a valuation of the leasehold interest in the sum of £125,000. That must be seen in the light of the financial statements of the company were he says prepared on a prudent and conservative basis. The technical deficit of £9,951 would have been eliminated and a revaluation of the leasehold interest been included in the financial statements for any value in excess of that sum; and the absence of a revaluation of the company's leasehold interest from nil to any value in excess of £9,951 in the financial statements was a mitigating factor in determining whether the company was, or was not solvent. He asserts that the accounts of 1999 were not qualified by the auditors on the basis that the company was insolvent and would be unable to continue trading.

**24.** The first named respondent does not in fact dispute the figures tended by the liquidator in relation to the turnover of the company at the time of its liquidation. He asserts that a sum of "at least £100,000" lost by himself and his family was introduced to the company by way of initial capital and subsequent top up loan facilities from himself and his family which he asserts were repaid in the course of trading and taken into account when calculating his salary and tax returns. However regard to the total sum stated to be owed to the Henley Family of £12,7000 as of 16th February, 2001 it thus cannot be said that the sum of £100,000 was outstanding to family members at the time when the company went into liquidation.

**25.** With regard to the allegation of fraudulent preference, the first named respondent states that the reason why some creditors were paid in full from the proceeds of the leasehold interest and other creditors were still outstanding at the date of liquidation was that the remaining undischarged creditors were allegedly aware of the plans of the company at the time and intended to be involved as suppliers to "Store 2 Door". As far as he can recall none of these companies was agitating from payment and only one of the companies listed attended the creditor's meeting. He states that the revenue commissioners

were due a technical refund from the "Store 2 Door" liquidation and it was intended that this would be set off against the liabilities of DCS Limited and the balance settled in full when "Store 2 Door" commenced trading. The sums due to creditors were a small percentage of the funding that was anticipated would be received from the printer capitalist which it was expected would be in the region of £5,000,000.

**Findings Re the Affidavit Evidence**

**26.** I am unable to accept a number of the first named respondent's assertions.. First, his statements as to the deficit in the company contradicts what he stated in his letter of 7th August, 2003, wherein he stated:

> "My belief based on actual experience, is therefore that there was no 'real' tangible value of the leasehold interest in the property at any time during my association with the properties." Subsequent information demonstrates the incorrect nature of this assertion.

Second, it is not strictly correct for the first named respondent to say that the accounts of the two year period ended 30th June were not qualified in any way. The accounts indicated an intention to hold a s. 40(1) Companies Amendment Act 1983 extraordinary general meeting. Third, the assertion there was a downturn in the turnover of the business is not supported by the evidence. The figures do not show any significant downturn between the two year period ended 30th June, 1999, and 30th June, 2000.

**27.** Fourth, at the time of the liquidation the Henley family was in fact only owed some £10,137 only. The first named respondent contended on affidavit that he was supported by a number of the undischarged creditors in the scheme he was adopting. He has been unable to identify any individual creditor in this regard. He sought to influence the valuer with the effect of reducing the assets which would be available for discharging debts to creditors. The narrative of events set out in affidavit regarding the level of investment by family members had (to put the matter euphemistically) to be "reappraised" in the absence of any evidence that the first named respondent was owed substantial sums still remaining in the company at the time of liquidation by reason of a history of previous cash injections. In fact such sums had been very largely withdrawn and the outstanding sums were approximately one tenth of those which an objective reader might have inferred from the first affidavit sworn by the first named respondent. The first named respondent then swore "I say that to date your deponent and the above family members remain unpaid. Your deponent and my family have to date invested in excess of €100,000 in the company and at this stage your deponent believes that there is no longer any chance of recovering any of the sum."

**28.** When it was pointed out by the applicant that the statement of affairs exhibited by the first named respondent merely showed the Henley family being unsecured creditors to the company in the amount of £12,700 the first named respondent then swore in his second affidavit:

> "The family and I introduced at least IR £100,000 to the company by way of initial capital and subsequent top up loan facilities with the Irish Nationwide Building Society. The draw down from this financial situation were made in your deponents name and introduced to the company by way of directors loans. I have requested copy statements from the building society and will forward this for inspection immediately they are available. The repayment of these funds occurred in the course of trading and was taken into account when calculating my salary and tax returns in order to legitimately optimise the overall tax situation of both the company and your deponent."

The contrast between the two sworn statements is self evident. The promised statements from the building society were not exhibited in the course of this application. There has been a lack of candour by the first named respondent in the affidavit evidence adduced herein.

**29.** Fifth, no evidence was adduced by the respondent in relation to his assertion that the undischarged creditors were not agitating of their monies on the basis that they were going to be involved suppliers of 'Store 2 Door'." The contrary is so. There was no evidence in respect of the averment that the Revenue Commissioners were due a technical refund which was going to be set off against the liabilities of DCS Limited. Such a contention is contested by the Revenue. With regard to the other creditors, the second largest creditor of the company, BCP, indicated on 21st May, 2001, that they had not received a proxy form in respect of the creditor's meeting. They were unaware of the meeting. A letter dated 28th September, 2001, from Green Isle Foods Limited shows that they were agitating for payment by the company. On sheer common sense grounds it is evident, and in fact not seriously disputed by the first named respondent that those creditors whose debts were actually discharged were those of greatest importance to the first named respondent in his future trading activities as says he envisaged them and particularly would be of importance in the trading future of "Store 2 Door Limited".

**30.** The first named respondent's contentions in relation to the leasehold interest having been audited included in the audited financial statements in respect of the two years ended 30th June, 1999, at nil value, must be seen in a context where the only mention of leasehold at all is in Note 4 at page 9 of these financial statements where there is reference to leasehold improvements accumulatively in the sum of €83,723 at cost as of 30th June, 1999. There is no mention in the notes regarding the leasehold interest being valued at nil or otherwise.

**31.** As to the solvency of the company on 16th August, 2001, the first named respondent provided the liquidator with a detailed listing of the company's creditors as of 31st May, 2000, which amounted to the sum of £208,602 (€264,870). In the space of twelve months from 30th June, 1999 to May 2000 the company's financial position had therefore apparently deteriorated by the sum of £199,011 (€252,692). Taking into account the fact that the financial statements in respect of the year ended 30th June, 1999, were not signed off until 17th September of that year (six months prior to the company ceasing

to trade in June 2000 with unsecured creditors of £208,602 [€264,870]) it is difficult to accept that the company's deteriorating financial position was not apparent to the directors' auditors at 17th December, 1999 when the company's financial state was in respect of the two years ended 30th June, 1999, were finalised.

**32.** As to the circumstances of valuation of the leasehold interest the following additional points are material. Having furnished a valuation of £125,000 Mr. Boyle, the valuer, reconsidered this valuation and confirmed the valuation of the leasehold interest held by the company as of May 2000 in the sum of £200,000. Thereafter the liquidator wrote to Mr. Hanley informing him of this. He again wrote to Mr. Hanley in the following month requesting the deficiency of funds to the company arising from under-valuation of the leasehold interest be made good and enclosing a letter from the Revenue Commissioners confirming that the Revenue were in fact pressing for collection of the additional funds due to the company on foot of the revised valuation from Mr. Boyle and an independent valuation provided at the liquidator's request and at his own expense. The first named respondent did not reply to these letters and the applicant thereafter was constrained to commence legal proceedings in order to recover these funds as this was the company's only asset and that a confirmation that leasehold interest was undervalued at an amount of £125,000 would be the only hope of the liquidator being able to satisfy the company's creditors. Ultimately the independent valuer provided a valuation of the leasehold interest as of June 2000 in the sum of IR £244,000.

**33.** Reverting to the four largest creditors of the company identified in the statement of affairs dated the 16th February, 2001, it is further relevant to note that, far from mentioning any agreement on the part of the Revenue Commissioners to support any new proposed operation by the directors of the company, the evidence is that the Revenue were actually pressing for collection of the additional sums due to the company on foot of the revised valuation. In relation to BCP Limited it is impossible to see how that company could have agreed to any alleged support, taking into account the evidence whereby the company confirmed it did not receive a notice of the liquidation of the company. With regard to a third creditor, Johnson Brothers Limited who were owed £6,450.00, at no time has the liquidator been told that that company had any agreement or even discussion in relation to supporting any new venture by the directors. Finally with regard to Green Isle Foods Limited despite contacts with that company no evidence has been provided to the liquidator of any scheme of arrangement or support as alleged by the first named defendant.

**Failure of Co-operation**

**34.** These issues must be seen in the context of what can only be described as a failure of cooperation on the part of the first named respondent. The evidence indicates that there has been an ongoing refusal and failure to assist the liquidator by providing all the company's books and records despite numerous requests. The liquidator attended a meeting at the office of Brophy and Gillespie Auditors, on Friday 27th July, 2001 the purpose of which was to convince the first named respondent to deal with his request for information and to give him the necessary assistance to conduct the liquidation in an orderly manner. Numerous allegations and counter allegations are contained in affidavits sworn by the applicant and Mr. Aidan Brophy Chartered Accountant a partner in the firm which acted as auditor and agent for the company in liquidation. It is suggested that Mr. Brophy took an adversarial attitude to the liquidator. Some, but not all of the company's records and books of records were provided to the liquidator but he says only after repeated requests. Mr. Brophy has deposed that the computer files in his company were "purged" a number of years after such records as they contained regarding the company had been made available to the liquidator. While it is true to say that spreadsheets and other documentation were forwarded to the liquidator in 2001 it is equally clear that the applicant liquidator had to proceed in this matter in the absence of other records which may have been purged from Mr. Brophy's firms computer records at a time not identified in affidavit. Whatever may have been Mr. Brophy's professional obligations, it would have been a counsel of prudence for him to consult with Mr. Fitzpatrick prior to removing these records in relation to a company where, at the minimum, he was aware that the circumstances of the liquidation were controversial. This was not done.

**The Law**

**35.** In *Re Frederic Inns Limited* [1994] ILRM 387 the Supreme Court had to considered the question of the duties of directors in a situation where a company was being wound up and where any creditor could have had it wound up on the ground of insolvency. Blayney J. in giving the judgment of the court, found that in such circumstances the directors owed a duty to the creditors to preserve the assets so as to enable them to be applied *pro tanto* in discharge of the liabilities of the company. There can be little doubt therefore that amongst the important duties of directors is one to ensure that when it becomes clear that a company is insolvent, the assets are preserved and dealt with in accordance with the requirements of the Companies Acts.

**36.** In *LaMoselle Clothing Limited v. Soulahi* [1998] 2 ILRM 345 Shanley J. defined the particular matter to which the court should have regard under s. 150 in the following terms:-

> "(a) the extent to which the director has or has not complied with any obligation imposed on him by the Companies Act 1963 – 1990.
> (b) the extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.
> (c) the extent of the directors responsibility for the insolvency of the company.
> (d) the extent of the directors responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.
> (e) the extent to which the director in his conduct of the affairs of the company has displayed a lack of commercial probity or want of proper standards".

**37.** This passage was approved by the Supreme Court in *Re Squash (Ireland) Limited* [2001] 3 I.R. 35. However in that case McGuinness went on to say (at p. 41) the following:-

> "The court should look at the entire tenure of the director not simply at the few months in the run up to the liquidation. It appears from the history of the company that the appellants have always acted responsibly and honestly and have put the interests of the company in the forefront of their minds even insofar as losing their own money in an effort to assist in the continuation of the company".

**38.** The judgment of Browne Wilkinson VC in *Re Lo-line Motors Limited* [1998] CH 477 is also apposite:

> "What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the cases to which I have been referred is probably the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past record as directors of insolvent companies has shown them to be a danger to creditors and others … ordinary commercial mis-judgment is in itself not sufficient to justify disqualification. In the normal case the conduct complained of must display a lack of commercial probity although I have no doubt that in extreme cases of gross negligence or total incompetence disqualification could be appropriate.

**39.** In *Re Gasco Limited* (Unreported, High Court, McCracken J. 5th February, 2001) that judge drew attention to the fact that s. 149(2) of the Companies Act applies the restriction provision to any person who is a director of the relevant company at the date of, *or within 12 months prior to the commencement of its winding up*. In that context McCracken J. observed:

> "I think it is quite significant that no restrictions can attach to somebody who has ceased to be a director of the company more than 12 months before the winding up. This seems to me to indicate that the primary aim of s. 150 is to deal with directors who have behaved irresponsibly or dishonestly during the last 12 months of the life of the company and that the actions of a director who is subject to s. 150 are to be looked at *primarily in the light of his actions during that period.* (emphasis added) This indeed has a considerable practical logic, as it is presumably intended to focus attention on the behaviour of the directors in the period leading up to the winding up and to try to ensure that they deal responsibly with creditors when a company is in difficulties. In my view therefore there should be particular scrutiny of the actions of directors during the final months before winding up".

**40.** It is noteworthy that in excusing a failure to write up the books and records of a company for a relatively short period towards the end of the life of that company Murphy J. in *Re Costello Doors Limited* (High Court, Unreported, 21st July, 1995) took into account the fact that appropriate books and records had indeed been kept and written up until a period some three to four months prior to the liquidation.

**41.** As was pointed out by Clarke J. in *In The Matter of Swanpool Limited (In Voluntary Liquidation)*; Eugene McLoughlin Liquidator Applicant and Raymond Lannen and Deirdre Lannen Clarke J. (Unreported, 4th November, 2005) that judge pointed out that the approach of the court in any case under s. 150 will necessarily differ depending on the type of acts or omissions which are under scrutiny. He said:-

> "In broad terms it would seem to me to be three types of situation which the court is typically required to consider in such applications. They are:-

1. Issues involving compliance by the company with its formal obligations under the Companies Acts including keeping books and records, making returns, holding meets and the like;
2. The commercial management of the company most particularly at the period when the company was insolvent or heading in that direction; and
3. Compliance by the directors with the obligations identified in *Frederic Inns* to ensure that once the company was facing insolvency his assets were dealt with in a manner designed to ensure that proper distribution of those assets in accordance with insolvency law."

> He continued:
> "The considerations that will apply will necessarily be different depending on the sort of issues that the court is considering. In the first category it is of course particularly important to have regard to the entire history of the involvement of the directors concerned with the company. For the very reason identified by Murphy J. in Costello Doors it would be difficult to make a finding of irresponsibility where there is a relatively short term failure to comply with formal obligations in the light of a historical compliance with such obligations over a much longer period. On the other hand a failure to comply with formal obligations which might be said to have contributed either to the insolvency or to the knowledge of parties dealing with the company of the likelihood of that insolvency will necessarily be regarded more seriously."

That judge added

> " … it should be added that a key factor in any assessment must the seriousness of the failure to act responsibly concerned taken in conjunction with the number and frequency of any such failures. Clearly there are failures which, taken by themselves as a single instance can justify the making of an order under s. 150. Similarly there are failures which are relatively minor but which if they be numerous and protracted could give rise to an overall finding of a level of irresponsibility sufficient to warrant the making of an order under the section."

Clarke J. concluded:-

> " … one of the most important obligations of any director is to ensure that *when a company is facing an insolvency situation its assets are dealt with in accordance with law. For the reasons identified by McCracken J. in Gasco the actions taken at such time must be subject to particular scrutiny. While understanding the pressures which may have been on the directors it does have to be noted that all directors in insolvent circumstances are likely to be subjected to significant pressure. It is their job to resist such pressure and to ensure that the company's assets are properly dealt with. Any significant failure in that regard has to be taken as demonstrating a level of irresponsibility sufficient to warrant making an order under the section.*" (emphasis added)

**Application of Legal Principles**

**42.** In the instant case the following matters are clear:

1. Preference was given to a number of creditors in the period between cessation of trading and the decision to wind up the company.
2. The pattern of preference was in no way random. The creditors whose debts were discharged for those on whom the first named respondent thought he would be reliant in the future trading of a new company for credit.
3. The first named respondent has given less than candid explanations as to why certain creditors were favoured over others.
4. Certain creditors were apparently not informed of the creditors meeting.
5. The process of creditors preference took place against a background where there was, apparently, at the behest or on behalf of first named respondent, an under valuation of the leasehold interest such as would affect the interest of the creditors as a whole.
6. The effect of the actions of the first named respondent has been to reduce the assets of the company, thereby preventing them being applied *pro tanto* in discharge of the company's liabilities.
7. The actions in question took place in circumstances where it is clear that there was an absence of the cooperation that the liquidator was entitled to expect both from the first named respondent and his accountant.
8. The affidavits sworn by the first named respondent contained purported ? explanations for his actions which have been less than full and candid.
9. The findings outlined are ones to which the court is entitled to have regard both individually and collectively.

**43.** The failures identified are not a single instance. Many of the specific issues concern took place in circumstances of apparent insolvency when directors are subject to significant pressures and temptations. There is no evidence that the first named respondent resisted these pressures in the interests of all the creditors of the company so that the assets of the company were properly dealt with. In fact the contrary is the case.

**The Second Named Respondent**

**44.** It is clear that the second named respondent who is the mother of the first named respondent was a non executive director. No evidence has been adduced indicating that she was a direct participant or instigator in any of the actions which give rise to this application other than as a mere passive bystander. While the courts have been careful to point out that a non-executive director, no matter how small their involvement, cannot wash their hands of responsibility, no specific evidence of wrongdoing has been adduced in relation to the second named respondent and therefore I do not think that the applicant is entitled to the relief sought against her.

**Conclusion**

**45.** In the light of these findings, I propose making an order under s. 150 against the first named respondent. In the event of further application I would, draw attention to the manner in which the first named respondent, approached the issues which arose during the course of the liquidation and this proceeding.