Neutral Citation Number: [2009] IEHC 538

THE HIGH COURT

2007 459 COS

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IN THE MATTER OF PSK CONSTRUCTION LIMITED

(IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2006

AND IN THE MATTER OF AN APPLICATION BY TOM KAVANAGH

UNDER SECTIONS 297A AND 298 OF THE COMPANIES ACT 1963

AND SECTIONS 150, 160, 202 AND 204 OF THE COMPANIES ACT 1990

TOM KAVANAGH

(AS LIQUIDATOR OF PSK CONSTRUCTION LIMITED

(IN VOLUNTARY LIQUIDATION))

APPLICANT

AND

PETER KILLEEN AND LORRAINE HIGGINS

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 7th day of December, 2009

1. The applicant is the liquidator of PSK Construction Limited (in voluntary liquidation) ("the Company"), having been so appointed by resolution of 16th March, 2006.

2. The first named respondent ("Mr. Killeen") was the Managing Director of the Company. The second named respondent ("Ms. Higgins") was an employee of the Company and a director. Both respondents were directors within twelve months of the date of commencement of the winding up. The respondents are also partners for several years, and have one young daughter who has special needs.

3. The applicant seeks orders against the respondents pursuant to ss. 297A, 298(2) and 204 of Companies Act 1963, and s. 160, or in the alternative, s. 150 of the Companies Act, 1990. He also seeks an order in respect of certain personal expenses paid for by Mr. Killeen with the Company's credit card.

4. Most of the facts upon which the application is based are not in dispute. There is a factual dispute in relation to the purchase of tarmacadam, to which I will refer below. Similarly, there is significant agreement about the applicable law. The parties differ as to how the Court should apply the law to the facts.

The facts

5. Mr. Killeen is from County Mayo. He left school at age sixteen, and went to work on construction sites in the United Kingdom. He married young. His wife and children remained living in County Mayo. He travelled on a weekly basis to England to work. In the 1990s, in England, he had his own small construction business and states that he had no difficulty in obtaining payment, when due, from English employers. His marriage came to an end in the late 1990s.

6. He appears to have returned to Ireland in the late 1990s, and worked as a foreman for a Northern Ireland company on the construction of a hospital in County Kildare. Thereafter, in 2001, he commenced his own business and incorporated the Company for that purpose. He also had a second company, PLK Plant and Equipment Limited. Mr. Killeen states that he was a hands-on Managing Director. He states he had no experience of employing professionals such as quantity surveyors or other professionals.

7. The Company's first job was as a subcontractor to John Sisk Construction on the Dundrum Town Centre project. The Company continued to obtain contracts on that project for approximately two and a half years. Whilst engaged on that project, it also was engaged by Pierse Construction as subcontractors on a project in Swords and one on Sir John Rogerson's Quay. This latter contract was one of the contracts which caused the insolvency of the Company. On that contract, the Company ultimately incurred a loss of approximately €500,000.

8. In 2003/2004, the Company worked as a subcontractor for John Paul Construction on the building of the hospital at Beacon Court and Mr. Killeen states that they encountered no particular difficulties with that contract. However, in 2004, it was also engaged as a subcontractor on the south side of the Beacon Court project which was a joint venture between John Paul Construction and Hegarty. This latter contract is the second contract which caused the insolvency of the Company. It appears from the outset that the Company encountered difficulties on this project, both in relation to delays in payment, and in relation to the quantum of the payments. Mr. Killeen states that the Company was being paid less than the cost to the Company of carrying out the contract.

9. The audited accounts for the year ended 31st August, 2004, demonstrate that the Company traded successfully in its early years. By that year, it had a turnover of approximately €9 million, profits before taxation of approximately €300,000, and a balance sheet surplus of €420,010.

10. Draft financial statements for the period ended 31st October, 2005, were prepared by the auditors and signed by the respondents. The applicant draws attention to the very significant deterioration in the Company's finances between 31st August,

2004, and 31st October, 2005. Turnover increased to €16.4 million, but there was a loss for the period of approximately €2.1 million and a balance sheet deficit of €1,739, 346. The deficit, as at the date of commencement of the winding up, in accordance with the statement of affairs, was €3,186,737.

11. The applicant and respondents are in agreement that the losses on the contracts on Sir John Rogerson's Quay and Beacon South Quarter were the primary cause of this very sharp deterioration in the finances of the Company.

12. Central to this application is a decision, admitted by Mr. Killeen to have been taken by him in March 2005, that the Company should both under-declare and under-pay its monthly liability to the Revenue Commissioners in respect of its PAYE/PRSI liability and in respect of its Relevant Contracts Tax ("RCT"). The applicant has put before the Court all the relevant details in respect of the monthly returns made by the Company for the eight-month period from February to September 2005, in respect of PAYE/PRSI, and the nine-month period from January to September 2005, in respect of RCT. These show that in each of those months, the Company both under-declared and under-paid its liabilities in respect of PAYE/PRSI and RCT. The total under-declaration and under-payment in respect of the eight months from February to September 2005, in respect of PAYE/PRSI, was €1,075,851. The total under-declaration in respect of RCT for the months January to September 2005, was €583,172. The under-declaration and under-payment in respect of RCT for January 2005, was only €181.73. The significant under-declaration and under-payments commence in respect of the month February 2005, which return would have been made in March 2005.

13. The Company made no monthly returns for PAYE/PRSI or RCT for October, November and December 2005, until January 2006. Those returns then over-stated the amounts due to the Revenue Commissioners in respect of each of those months, to correct the under-declared returns submitted between February and September 2005. Those returns were accompanied by the relevant annual returns, the P35, in respect of PAYE/PRSI, and RCT 35 in respect of RCT which included approximately correct annual amounts.

14. There is some dispute as to when Mr. Killeen made contact with the Revenue Commissioners in relation to the under-declarations and outstanding amounts due. He contends that the Revenue Commissioners were aware of the under-declarations prior to the end of 2005. The applicant has obtained affidavits from Mr. Boland and Mr. Hogan of the Revenue Commissioners, both of whom dealt with the Company's affairs, and I am satisfied, as a matter of probability, that the Revenue Commissioners did not become aware of the under-declarations and proper liability of the Company until January 2006.

15. The Company, through its auditor, sought an instalment plan from the Revenue Commissioners in January 2006. This was refused. There was a subsequent dispute with the Revenue Commissioners which gave rise to injunction proceedings which is not relevant to this application.

16. It does not appear to be in dispute that the total amount under-declared to the Revenue Commissioners during the year 2005, for both PAYE/PRSI and RCT, is in the order of €1,659, 023, and that the total liability to the Revenue Commissioners at the date of commencement of the winding up (as *per* the statement of affairs) was €2,361,314.

17. The Court has had the benefit of two affidavits from Mr. Killeen, the transcript of an interview by the applicant with Mr. Killeen in July 2006, and replies to interrogatories by Mr. Killeen and Ms. Higgins. It has also has an affidavit from Ms. Higgins.

18. Mr. Killeen seeks to identify the cause of the Company's losses on the Sir John Rogerson's Quay project and the Beacon South Quarter project as being partly caused, at least, by incompetent advice and performance by its then quantity surveyor. The Court is not able to form any view on the facts before it whether this contention is correct, and if it is, it does not appear relevant to the issues which the Court has to decide on this application as it is not disputed that Mr. Killeen was aware, at the relevant time, of the difficulties and losses relating to the contracts.

19. The Company, in 2004/2005, appears to have had approximately two hundred employees. It had a turnover of approximately €16 million for a fourteen-month period. It did not employ a financial controller or accountant. It appears from the interview with Mr Killeen, in July 2006, that basic accounting functions were performed by the employees in the office who do not appear to have had any particular qualifications. Mr. Killeen dealt with contracts. No management accounts were ever prepared. Information was sent by the employees to the auditors who prepared accounts for the purpose of the audit. Ms. Molloy, one of the employees, prepared the Revenue Commissioners returns. Ms Higgins was responsible for pricing materials and stock, office administration and related paperwork. She was also a bank signatory.

20. Mr. Killeen has accepted that he knew, in the winter of 2005, that the Company was in financial difficulty. In his interview in July 2006 he indicated that he knew the Company "was in trouble" probably about February/March 2005. When asked if he sought professional advice at that stage he indicated that his auditor "suggested I give it up but I kept going. I didn't get any specific advice. I was very headstrong and I know that".

21. In his first affidavit, Mr. Killeen explains that he took a decision, in March 2005, that, "as money came in every fortnight, we would pay wages and pay for the hire of necessary equipment and we would then declare and pay the balance to the Revenue". Mr. Killeen accepts, with the benefit of hindsight, that his decision was "a very foolish and ill-considered decision". However, he states that at the time, "I simply felt that I was delaying payment until such time as the company left the loss-making job".

22. Mr. Killeen lays great emphasis on the difficulties encountered with the contract on the Beacon South Quarter. It appears from his affidavit that he was aware, in the winter of 2004/2005, that he was being underpaid by approximately €40,000 *per* fortnight. He also now accepts, with the benefit of hindsight, that in early 2005 he should have ceased working on the job. However, it was not until November 2005, that he succeeded in negotiating with the main contractor that the Company go on "day work". This had the effect that, for the remaining months, the main contractor would cover the gross wages of the Company and pay a percentage towards the equipment on site. Mr. Killeen states that it meant that the contract was no longer costing the Company money, but it would also not make a profit.

23. Ms. Higgins has sworn a short affidavit in which she acknowledges that she was aware of the Company's cash-flow problems in 2005. She was also aware of the under-declaration and under-payment to the Revenue Commissioners. However, she states that she accepted Mr. Killeen's explanation that this was a temporary measure and that the Revenue arrears would be paid in full when the cash-flow problem was straightened out. Ms. Higgins had signing authority in respect of the Company's bank accounts, but states that she exercised this on the direction of Mr. Killeen. She states that all decisions in respect of who should be paid and what amounts were made by Mr. Killeen.

Section 297A of the Companies Act, 1963

24. The applicant's claim against Mr. Killeen pursuant to s. 297A of the Companies Act, 1963 is both for fraudulent and reckless

trading pursuant to sub-sections 1(b) and 1(a), respectively. The claim against Ms. Higgins is in respect of the reckless trading pursuant to sub-section 1(a), alone. Section 297A (1) provides:

> "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) any person was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose;
>
> 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."

Reckless trading

25. I propose first to consider the claim against both respondents that each was knowingly a party to carrying on any business of the Company in a reckless manner. It is common case that the principal authority on reckless trading is *Re Hefferon Kearns Limited (No. 2)* [1993] 3 I.R. 191. This was a case which concerned the interpretation of s. 33 of the Companies (Amendment) Act, 1990, which was framed in materially identical terms to s. 297A of the 1963 Act. In that case, Lynch J. (in the High Court) referred to the objective test of recklessness set out by the Supreme Court in *Donovan v. Landys Limited* [1963] I.R. 441. In the latter case, Kingsmill Moore J. cited with approval the following passage from the judgment of Megaw J. in the English High Court in *Shawinigan v. Vokins* [1961] 1 W.L.R. 1206, where he stated:

> "'In my view, 'reckless' means grossly careless. Recklessness is gross carelessness - the doing of something which in fact involves a risk whether the doer realises it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described in ordinary parlance as 'reckless'. The likelihood or otherwise that damage will follow is one element to be considered, not whether the doer of the act actually realised the likelihood. The extent of the damage which is likely to follow is another element, not the extent which the doer of the act, in his wisdom or folly, happens to foresee. If the risk is slight and the damage which will follow if things go wrong is small it may not be reckless, however unjustified the doing of that act may be. If the risk is great, and the probable damage great, recklessness may readily be a fair description however much the doer may regard the action as justified and reasonable. Each case has to be viewed on its own particular facts and not by reference to any formula. The only test, in my view, is an objective one. Would a reasonable man, knowing all the facts and circumstances which the doer of the ace knew or ought to have known, describe the act as 'reckless' in the ordinary meaning of that word in ordinary speech? As I have said, my understanding of the ordinary meaning of that word is a high degree of carelessness."

26. Lynch J. then stated at page 222:

> "The inclusion of the word 'knowingly' in s. 33, sub-s. 1(a) must have been intended by the Oireachtas to have some effect on the nature of the reckless conduct required to come within the sub-section. I think that its inclusion requires that the director is party to carrying on the business in a manner which the director knows very well involves an obvious and serious risk of loss or damage to others, and yet ignores that risk, because he does not really care whether such others suffer loss or damage or because his selfish desire to keep his own company alive overrides any concern which he ought to have for others."

27. Counsel for the respondents does not dispute the above as being the proper approach of this Court, but also draws attention to s. 297A, sub-section 2(a), which provides:

"Without prejudice to the generality of subsection (1) (a), an officer of a 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, . . ."

Counsel for the respondents, in particular, drew the Court's attention to the fact that it must have regard "to the general knowledge, skill and experience that may reasonably be expected of a person in his position" and referred separately to the positions of Mr. Killeen and Ms. Higgins.

28. I cannot accept this submission in relation to consideration of the application of s. 297A (i)(a) to the respondents. Section 297A, sub-section (2) appears to be directed to additional circumstances in which an officer of the company may be "deemed (emphasis added) to have been knowingly a party to the carrying on of any business of the company in a reckless manner" as distinct from a situation where the Court is considering whether or not a person has been knowingly a party to the carrying on of any business of the company in a reckless manner for the purposes of section 297A (i)(a). I respectfully agree with the view expressed by Lynch J. in *Re Hefferon Kearns Limited (No. 2)* [1993] 3 I.R. 191 in respect of s. 33(2) of the Act of 1990 (which was in similar terms to s. 297A of the Act of 1963) where at p. 222, he stated:

> "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."

29. Accordingly, it appears to me, that I must first consider the applicant's submission that applying the test set out by Lynch J. in *Re Hefferon Kearns Limited (No. 2)*, the decision to keep the business going by under-declaring and under-paying to the Revenue Commissioners involved, to the knowledge of each respondent, an obvious and serious risk of loss or damage to creditors, and yet this risk was ignored by reason of a desire to keep the Company alive.

30. I am satisfied, in respect of Mr. Killeen, that the applicant has established, as a matter of probability, that Mr. Killeen must have

known, in March 2005, that if he continued to keep the Company trading by under-declaring and under-paying to the Revenue Commissioners, that such decision involved an obvious and serious risk of loss or damage to creditors of the Company. It is always dangerous for a Court to examine with the benefit of hindsight decisions taken by directors of a company at the relevant time. I have reached this conclusion taking into account what Mr. Killeen acknowledges he knew at the relevant time. He was aware that the contract in relation to Sir John Rogerson's Quay was loss-making. He was also aware of serious difficulties with the contract relating to the Beacon South Quarter and that the Company was being under-paid by approximately €40,000 *per* fortnight, in its estimation. He had also received some general advice from his auditors which he decided to ignore. He must also have been aware of the extent of the under-declarations for the month of February 2005 which, in respect of PAYE/PRSI, was €147,112. Only €20,000 was declared and paid on the P30 for that month. Also, in respect of RCT for the month of February 2005 only €20,000 was paid, and the under-declaration was €111,957.

31. Whilst I accept Mr. Killeen's averment that, at the relevant time, he intended the under-declarations and under-payments to be a temporary measure, until, as he states, cash-flow problems were sorted out, I am not satisfied that he then had any reasonable basis for a belief that this might only be a temporary measure. He must have been aware that the decision he made involved a serious risk of loss or damage to others and decided to ignore that risk because of his desire to keep the Company alive.

32. The position in relation to Ms. Higgins is different. She describes herself as a "non-executive" director. By this, she means that she was an employee of the Company and had no executive or management role, but acted under the direction of Mr. Killeen. I am not satisfied that the applicant has established, as a matter of probability, that Ms. Higgins had sufficient knowledge about the financial position of the Company in March 2005, such that I should conclude that she then knew that a decision to continue trading, notwithstanding the cash-flow problems of which she was aware, by under-declaring and under-paying to the Revenue Commissioners, constituted a serious risk of loss or damage to the Revenue Commissioners or other creditors. She states in her affidavit that she accepted Mr. Killeen's explanation that the under-declaring and under-payment to the Revenue Commissioners was "a temporary measure and that the Revenue arrears would be paid in full when the cash flow problem was straightened out". The last set of accounts which she would have signed prior to March 2005, were those of August 2004, which showed the Company to be in a positive financial situation.

33. It is therefore necessary for me to consider whether, having regard to s. 297A (2)(a), I should deem Ms. Higgins to have been knowingly a party to the carrying on of the business of the Company in a reckless manner. I am satisfied that she was a party to the carrying on of the business of the Company insofar as she was made aware of the decision taken by Mr. Killeen and did not object to same. I am obliged by the sub-section to have regard to "the general knowledge, skill and experience that may reasonably be expected of a person in [her] position", and then be satisfied that she "ought to have known" that her actions, or those of the Company, would cause loss to the creditors of the Company or any of them. Mr. Killeen was the Managing Director. The decision taken to under-declare and under-pay the Revenue Commissioners, and continue trading by doing so, was a decision which he alone took and for which he takes responsibility. I am not satisfied that the applicant has established, on the facts of this application, that, having regard to the general knowledge, skill and experience which might reasonably be expected of Ms. Higgins that she ought to have known that the decision of Mr Killeen to under-declare and under-pay would cause loss to the Revenue Commissioners or other creditors.. She was an employee of the Company with responsibility for the pricing of materials and stock, administration of the office and related paperwork, but with no accounting expertise or qualifications. She also accepted what Mr. Killeen told her "that this was a temporary measure and that the Revenue arrears would be paid in full when the cash flow problem was straightened out".

34. Accordingly, I would refuse the application against Ms. Higgins pursuant to section 297A.

35. The applicant also pursues the application pursuant to s. 297A (1) against Mr. Killeen for fraudulent trading pursuant to paragraph (b). Having regard to my finding in respect of reckless trading under s. 297A (1)(a), it may not be necessary to set out my findings, but as it might affect the extent of the declaration which might be made, and having regard to the application under s. 160, it appears that I should shortly set out my conclusion on that part of the claim.

36. Carroll J. in *Re Hunting Lodges Limited (In Liquidation)* [1985] I.L.R.M. 75 determined that the carrying out of one single transaction constituted "carrying on of the business" of a company, within the meaning of a similar phrase to that used in s. 297A of the Companies Act, 1963. On the facts of this application, the making of returns to the Revenue Commissioners forms part of the carrying on of the business of the Company. It is a necessary obligation of the Company as part of its business. It appears to be an inescapable conclusion that what was done on the instructions of Mr. Killeen between March and September 2005, *i.e*. the under-declaring of the amounts due to the Revenue Commissioners for PAYE/PRSI and RCT in respect of the months from February to August 2005, was done for a fraudulent purpose. The fraudulent purpose was to induce the Revenue Commissioners to believe that the amount due by the Company to the Revenue Commissioners in respect of the particular month in respect of PAYE/PRSI deducted from employees' wages and RCT was the lesser amount declared, rather than the true amount. The related purpose, presumably, was to avoid the Revenue Commissioners moving against the Company if it was told, by way of declaration of the true amount, that the Company was only in a position to make a part payment. Mr. Killeen was knowingly a party to the Company doing this insofar as he took the decision that the Company should do it.

37. As already stated, I accept that Mr. Killeen intended this to be a temporary measure, but find that he did not have any reasonable grounds for believing that the Company would be able to make the greater payments. To Mr. Killeen's credit, he did make, in respect of the year 2005, a full declaration on an annual basis of the liabilities of the Company for PAYE/PRSI and RCT in early January 2006. However, by that time, the Company was unable to pay the total amounts due. For the purposes of s. 297A (1)(b), the Court must consider the purpose of the relevant transaction in the carrying on of the business at the time it took place. In March 2005, the purpose of the Company under-declaring its tax liabilities for February was for the purpose of the Revenue Commissioners then believing that it had a lesser liability which it was fully discharging for the month of February 2005. That was, at the time, a fraudulent purpose. A similar position pertained for each of the returns subsequently made for the months until August 2005.

38. Accordingly, I have concluded that the applicant has made out the claim against Mr. Killeen pursuant to section 297A (1)(b).

39. Having regard to the findings under s. 297A (1)(a) and (b) against Mr. Killeen, the Court now must consider whether it should make a declaration that Mr. Killeen be personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the Company. Correctly, counsel for the respondents did not seek to assert that s. 297A, sub-section (3)(b) precluded the Court making a declaration in respect of its finding under section 297A (1)(a). He also correctly drew attention to the principle of proportionality referred to by O'Flaherty J. in delivering the judgment of the Supreme Court on the challenge to the constitutionality of s. 297A of the Companies Act, 1963 in *O'Keeffe v. Ferris* [1997] 3 I.R. 463. In that case, part of the challenge was based upon a proposition that s. 297A permitted the Court to include in a declaration a punitive element, insofar as a wrongdoer might have to repay more than he got out of his wrongdoing. In considering that proposition, O'Flaherty J. at p. 473, stated that, "[a]ny sanction imposed should be proportionate to the wrongdoing that has been made out".

40. It is common case that Mr. Killeen has not personally obtained any benefit from the wrongdoing, save possibly to the extent that he may have been paid wages during the period for which the Company continued trading. No submission was made in relation to any such wages. Any such sum would, in any event, be significantly less than the sums I am about to consider.

41. The effect of the wrongdoing which has been found was that the Company continued to trade during a period when it ought to have been wound up. In that period it incurred liabilities to third parties. The applicant, in his affidavit, analysed carefully what he terms the "pure trading losses" of the Company between 31st August, 2004, and the date of commencement of winding up. This, he states, is the difference between the net asset position as *per* the 2004 audited accounts, which demonstrate a surplus of €420,010, and the net deficit at the date of winding up, as *per* the directors' statement of affairs of €3,186,737, less a reduction in asset values due to liquidation in the sum of €796,072. This calculation establishes pure trading losses in the sum of €2,810,675 for the period from 31st August, 2004, to 13th March, 2006. This, in turn, gives an average monthly trading loss in the sum of approximately €156,149, if it is spread evenly across the entire period. Such an application of the figures is probably to the benefit of Mr. Killeen insofar as it is probable that the trading losses increased towards the end of the life of the Company. These figures were not disputed by the respondents.

42. Counsel for the applicant suggested that in accordance with the principle that the sanction should be proportionate to the wrongdoing made out, that any liability imposed on Mr. Killeen should only relate to a period after 31st March, 2005, and should not include a reduction in asset value due to liquidation.

43. The applicant estimates such a figure to be €1,760,675. This figure is made up of the entire deficit at 13th March, 2006, less the reductions due to liquidation and of the approximate monthly trading loss from 31st August, 2004, to 31st March, 2005. Whilst the under-declaration to the Revenue Commissioners commenced in March 2005, it appears to me that even if the directors had then properly taken steps to wind up the Company, it might reasonably have been one further month before the Company was wound up. Accordingly, I propose reducing this figure by a further €156,149. I have concluded that a reasonable estimate of the increased deficit of the Company, by reason of the reckless and fraudulent trading found against Mr. Killeen, within the meaning of s. 297A, is €1,604,526.

44. The applicant is entitled to a declaration that Mr. Killeen is personally liable for the debts of the Company in a sum not exceeding €1,604,526.

45. I will hear counsel for the parties prior to making any further order pursuant to s. 297A, sub-section (7) in relation to the payment of this amount.

Section 298 and Tarmacadam
46. Having regard to my findings in relation to s. 297A, it is not necessary to consider the claim pursuant to section 298. The applicant made a further allegation in relation to an alleged purchase of stolen tarmacadam largely based upon what was said by Mr Killeen at interview in July 2006. This is now disputed by Mr Killeen in his affidavits. It is not possible to resolve this issue on only affidavit evidence and have ignored the allegation for the purpose of the decisions taken herein.

Sections 202 and 204
47. Section 202 (1) of the 1990 Act, as amended, provides that:

> "Every company shall cause to be kept proper books of account, whether in the form of documents or otherwise, that -
>
> (a) correctly record and explain the transaction of the company,
>
> (b) will at any time enable the financial position of the company to be determined with reasonable accuracy,
>
> (c) will enable the directors to ensure that any annual accounts of the company comply with the requirements of the Companies Acts and, where applicable, Article 4 of the IAS Regulations, and
>
> will enable the annual accounts of the company to be readily and properly audited."

48. Section 202 (3) provides that:

> "Without prejudice to the generality of sub-sections (1) and (2), that the books of account kept pursuant to that sub-section shall contain:
>
> (a) Entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place
>
> . . .
>
> (d) if the company's business involves the provision of services, a record of the services provided and of all the invoices relating thereto."

49. The applicant, in his grounding affidavit from paras. 43 to 48, identifies absences of the type of records referred to in sections 202 (1) and (3)(a) and (d) of the Companies Act, 1990. I am satisfied that the applicant has established that the Company did not keep proper books of account in contravention of s. 202 of the Companies Act, 1990.

50. The applicant claims, pursuant to s. 204 (1), a declaration that the respondents be personally liable for all or part of the debts and liabilities of the Company or, in the alternative, for a sum of €21,447, estimated by the applicant as the additional costs incurred in the liquidation in reconstituting the books of account.

51. The proper approach of the Court to s. 204 was considered by Shanley J. in *Re Mantruck Services Limited: Mehigan v. Duignan* [1997] 1 I.R. 340. In that case, Shanley J. determined that the Court should have regard to the extent to which the director's involvement in the s. 202 contravention resulted in financial loss to the company and if it did, whether such loss was reasonably foreseeable by the director as a result of the contravention. Save in exceptional circumstances, he stated, liability should not be imposed for contraventions not resulting in loss or for losses not reasonably foreseeable as a consequence of the contravention. He held, in that case, that the respondent should be personally liable for the liquidator's professional fees and outlays attributable to the time occupied by seeking to overcome deficiencies in the books and records of the company.

52. On the facts of this application, I am not satisfied that the applicant has established the necessary causal link between his inability to recover certain of the debts of the Company and the failure of the Company to maintain its books in accordance with the requirements of s. 202 of the Companies Act, 1990. The collection of debts due on construction contracts in the winding up of a construction company is notoriously difficult. I could not be satisfied, on the facts stated in the affidavit, that the inability of the applicant is caused by the absence of the books and records. It is not disputed, however, on behalf of the respondents, that the applicant incurred additional expenses in the liquidation of €21,447 in relation to the reconstitution of books, and I am satisfied that a claim pursuant to s. 204 in respect of this amount has been made out. Both respondents were directors of the Company. The directors are ultimately responsible for the proper keeping of books of account. I have concluded that both respondents must be considered to be in default in failing to ensure that the Company kept proper books of accounts in accordance with s. 202 and neither of the respondents have put facts before the Court which entitle them to avail of the potential defences in section 204(4).

53. The applicant is entitled pursuant to s. 204(1) to a declaration that the respondents are jointly and severally liable in the sum of €21,447 in respect of additional expenses incurred in the liquidation, which is a liability of the Company. As this sum is a quite separate and distinct sum to that already declared pursuant to s. 297A against Mr. Killeen, it must stand as a separate declaration.

Claim for personal debts
54. The applicant contends that Mr. Killeen used the Company's credit cards to defray personal expenses in the sum of €8,823.34. I am satisfied that this was so. However, the deficit of the Company, which was used for the purpose of determining the amount of the liability to be imposed on Mr. Killeen under s. 297A of the Companies Act, 1963, presumably includes this sum. I therefore do not propose making any separate order against Mr. Killeen under this heading.

Application for disqualification or restriction
55. The applicant seeks disqualification orders against both respondents pursuant to s. 160(2) of the Companies Act, 1990. Section 160(2)(c) and (d) appear the most relevant sub-sections. These provide:

> "Where the court is satisfied in any proceedings or as a result of an application under this section that -
>
> . . .
>
> (a) a declaration has been granted under section 297A of the Principal Act (inserted by section 138 of this Act) in respect of a person; or
>
> (b) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company; . . .
>
> the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit."

56. The appropriate test to be applied by the Court in considering whether to disqualify an individual under s. 160(2) (d) was considered by the Supreme Court in *Re C.B. Readymix Limited (In Liquidation): Cahill v. Grimes* [2002] 1 I.R. 372, where Murphy J. at p. 381 quoted with approval the following statement of Browne-Wilkinson V.C. in *Re Lo-Line Limited* [1988] Ch. 477:

> "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 broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others. Therefore, the power is not fundamentally penal. But, if the power to disqualify is exercised, disqualification does involve a substantial interference with the freedom of the individual. It follows that the rights of the individual must be fully protected. Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

57. In my view, the findings already made in respect of Mr. Kileeen pursuant to s. 297A of the Companies Act, 1963 indicate that the Court should, as a matter of discretion, make an order of disqualification against Mr. Killeen. In forming this view, I have taken into account the fact that he did, in early 2006, make the full declaration to the Revenue Commissioners. Nevertheless, it appears to me that the actions taken by him in the spring of 2005 are such that, in my view, he is unfit to be concerned in the management of a company. His subsequent recognition that what he did was wrong is a matter which, more properly, should be taken into account in determining the period of disqualification.

58. I have also formed the view that notwithstanding that I did not consider that the applicant had made out a case against Ms. Higgins pursuant to s. 297A, her complicity in the making of under-declarations to the Revenue Commissioners, not just once, but over a period of approximately five months, is such that she has rendered herself unfit to be concerned in the management of a company, and that, accordingly, I should also make a disqualification order against her. Her relative role again goes to the period for which the disqualification order should be made.

59. The proper approach to the period of disqualification appears now well settled and has been set out, *inter alia*, in my judgment in *Re Clawhammer Limited: Director of Corporate Enforcement v. McDonnell and others* [2005] 1 I.R. 503. Applying those principles to the facts of this application, I have concluded that, in Mr. Killeen's case, the order for disqualification should be for a period of seven years, and in the case of Ms. Higgins, for a period of five years.