Neutral Citation Number [2006] 289

THE HIGH COURT

[2005 No. 112 COS]

IN THE MATTER OF XNET INFORMATION SYSTEMS LIMITED (INVOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 152 OF THE COMPANIES ACT 1990

BETWEEN

AIDAN HIGGINS

APPLICANT

AND
JAMES STAFFORD

RESPONDENT

AND
THE DIRECTOR OF CORPORATE ENFORCEMENT

NOTICE PARTY

Judgment of O'Neill J. delivered the 10th day of October, 2006.

1. In these proceedings the applicant seeks an order pursuant to s. 152 of the Companies Act, 1990, granting the applicant relief from the Declaration of Restriction pursuant to s. 150 of the Companies Act 1990, made by order of this Court of the 24th of May, 2004 (Finlay Geoghegan J.).

2. On the 5th December, 2005, the Director of Corporate Enforcement was joined as a notice party to the proceedings.

3. The background to this matter is as follows:

> The company recited in the title hereof was incorporated in 1995, its two shareholders being the applicant and one Kevin Moore. Until 2000 they were also its directors. The company engaged in the business of computer data storage and carried on this business out of a Victorian house at Haigh Terrace in Dun Laoghaire. The business of the company thrived and by the year 2001 it employed 26 people and had generated a turnover in excess of €4 million. By that time, it had for two years been in the top ten fastest growing companies in its trading sector in Ireland and had won the Deloitte and Touche Award for its achievements in the years ended March, 2000 and March, 2001. It was also numbered amongst the top 100 European Technology Companies and had received a variety of other awards. In the Spring of 2001, the affairs of the company appeared to be in a very good condition. Apart from the foregoing, it had at that time cash reserves in excess of €600,000.00, enough to cover three months operating costs.
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> The company did have one very pressing difficulty and that was that the premises, it occupied at Haigh Terrace in Dun Laoghaire was inadequate to accommodate the business. An additional difficulty, at that time, was that a Portakabin that had been brought on site to provide additional accommodation was refused planning permission.
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> To remedy this problem, a decision was taken to move to more suitable premises.
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> Such a premises was located at Glencormac, Kilmacanogue, Co. Wicklow and there was consensus amongst the directors; who at this stage had grown to four, with the addition of Mr. Howard Roberts and Mr. Nicholas Koumarianos; that these premises would be bought by the applicant and Mr. Moore who would then lease the premises to the company at an appropriate rent, i.e. the going rate per square foot for that kind of premises. This methodology was perceived as the way to get the company into the new premises, but with the minimum disbursement of cash so as not to interfere with its cash flow situation.

4. No doubt this might have been the way events would have unfolded were it not for the events that led to the resolution to wind up the company on 19th July, 2002, and in particular the events that persuaded this court (Finlay Geoghegan J.) to declare pursuant to s. 150(1) of the Companies Act 1990, that the applicant be not for a period of five years from the date of the order i.e. 24th May, 2004, appointed or act in any way whether directly or indirectly as a director or secretary or be concerned or take part in the promotion or formation of any company unless it met the requirements set out in s. 150(3) of the Act. The following passage from the judgment of Finlay Geoghegan J. delivered on 6th May, 2004 best tells the tale:-

> *"In summary, the following occurred. Between December 2000 and May 2001 the possibility of the Company moving to new premises was under consideration by the board. The board agreed that an independent advisor, Peter Cagney be appointed. He was retained and did give advice until May of 2001. He ultimately only appears to have given informal advice to the individual directors rather than any formal advice to the board of directors. His advice appears to have been that the price to be paid for the property was high by market standards but that the proposed rent to be paid by the Company for the property was fair.*
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> *I am satisfied that the first and second named respondents made the third and fourth named respondents aware that they proposed personally purchasing the property and that it would then be leased by them to the Company. This purchase was completed by the first and second named respondents in May 2001. A lease was entered into with the Company, which does not appear to have been approved by the board of directors though the Affidavits of the third and fourth named respondents make clear that they were aware from a conversation between Mr. Cagney and the third named respondent of the proposed initial rent.*
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> *The Company moved to the new premises in June 2001.*
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> *I have concluded, on the Affidavits, that the third and fourth named respondents did not become aware of the financing arrangements for the purchase of the premises and for the fit out of the premises until a board meeting of the 18th July 2001. In particular, I have concluded that they were not aware of any loan obtained by the Company in connection with the purchase nor any loan made by the Company to the first and second named respondents.*
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> *I have further concluded that the first and second named respondents, in organising the finance for the purchase of the premises at Kilmacanogue in their two names, made the following arrangements without consultation with the third and fourth named respondents, their fellow directors and without approval of the board of directors:*

(i) They obtained a loan to the Company from ICC in the sum of €285,691. This was expressed to be a business development loan.

(ii) The Company made a loan to the first and second named respondent of €285,691. This appears to have been to provide the balance of the purchase monies payable by the first and second named respondents.

(iii) The Company made a loan of €177,763 to the first and second named respondents. This appears to have been for the purpose of the deposit on the premises in Kilmacanogue.

(iv) The Company made a loan of €119,355 to the first and second named respondents. This was for the stamp duty payable on the purchase of the premises.

(v) The first and second named respondents purported to sell to the Company and the Company purported to agree to purchase the fixture and fittings in the building for a sum of €152,368.

It appears that when the third and fourth named respondents became aware of the above financial transactions at the board meeting of the 18th July and objected to same, the first and second named respondents indicated that the loans were of a temporary nature only and that it was intended to re-mortgage the premises within a period of six months and to repay to the Company the loans made to the directors. This appears to have been confirmed in a memorandum from the second named defendant to the third named defendant dated 21st August 2001.

In August 2001 when, as is accepted by all the respondents, the Company was in very difficult financial circumstances it appears that the first and second named respondents, without seeking the approval of the board of directors of the Company, procured the increase of the rent payable to them by the Company from IR£125,000 per annum to IR£145,000. This was done following a special resolution of the Company on the 7th August 2001 and a fresh lease entered into between the Company and the first and second named respondents at this rent. This lease does not appear to have been approved by the board of directors or to have been brought prior to its execution to the attention of the third and fourth named respondents.

There is a substantial dispute on the Affidavits as to whether the loans referred to above, which were made by the Company to the first and second named respondents, did or did not contribute to the demise of the Company. The applicant takes the view that they did contribute to the demise. The third and fourth named respondents take a similar view. The first and second named respondents take the opposite view and believe that it was the increased costs associated with the move to the premises in Kilmacanogue rather than the loans made to them which contributed to the demise of the Company.

By reason of the conclusions which I have set out below, it does not appear necessary for me to reach a conclusion on this issue.

The first and second named respondents were unable to obtain refinancing of the premises. They were unable in the Autumn of 2001 to repay the loans to the Company. Cost cutting exercises took place in the Autumn of 2001. The employment of the second named respondent with the Company was terminated in December 2001 in circumstances which are a matter of dispute between him and the Company and the first, third and fourth named respondents. It also gave rise to litigation and an interlocutory application which was determined by this court (O'Sullivan J.). All parties were in agreement that the facts pertaining to that issue were not relevant to the matters which I have to consider on this application.

In January 2002 definitive advice was received that the loans made to the first and second named respondents were illegal. The loans were called, in February 2002 but by then each of the first and second named respondents were unable to repay the loans.

The third named respondent resigned as a director on the 17th April 2002 and it was resolved that the Company be wound up on the 19th July 2002."

5. Earlier in her judgment Finlay Geoghegan J. had stated the following:

"It is stated, by the first named respondent that in the financial year beginning April 2001 the Company appeared to be in a healthy financial situation. It is submitted on his behalf and on behalf of the second named respondent that this is the context in which the facts surrounding the move by the Company to the premises in Kilmacanogue must be viewed. This does not appear to be disputed by the liquidator. The significant downturn in the technology sector appears to have occurred in the late Spring and Summer of 2001. The Company had a disastrous period between June and September 2001."

6. In her conclusion the learned judge said the following:

"I accept that at the time the financial arrangements were entered into that the directors may well have taken the view, based on reasonable evidence, that the Company had a good prospect of success. I also accept that they may have considered the loan arrangements to have been of a temporary nature. Notwithstanding, I have concluded that I cannot accept that directors of a company, even who do not take specific legal advice, could be regarded as acting responsibly in entering into significant financial transactions which were, in essence, financial transactions between the Company and themselves without either bringing those matters to the attention of the their fellow directors or obtaining formal board approval.

Every director must be deemed to know and appreciate the distinction between the Company as a separate legal person and themselves as individuals. Further, it appears to me that directors must be deemed to be aware of obligations which they have not only to the Company and its shareholders but also to creditors and others dealing with the Company. Further, directors must be assumed to know, at least in a general way, of their obligations under the Companies Act. Section 194 of the Companies Act, 1963 provides:

'(1) It shall be the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company'

This obligation to disclose and, thereby, bring to one's fellow directors a potential conflict of interest may properly be regarded as principles of good governance and sound commercial probity and proper standards in commercial dealings. The board of directors of a company is responsible for managing the affairs of the company. It appears to me that, independently of any specific legislative requirement, a person who is a director of a company must be aware or ought to be aware and understand that if he or she proposes to enter into a contract with the company that that the full board of directors should be made aware of the fact that he or she, a fellow director is interested in the contract and asked to approve the contract.

On the facts of this case the first and second named respondents did not simply fail to declare to the fellow directors an interest in a contract which they proposed entering into with the Company in breach of s. 194 of the Act of 1963. Rather, they took it upon themselves to decide on behalf of the Company both that the contracts should be entered into and to actually execute and complete the contracts between the Company and themselves without seeking approval from their fellow directors. They appear to have done this both in relation to the various financial transactions outlined above (including the loan from ICC to be lent on to themselves) and the increase in rent in August 2001.

The loans also appear to have been in breach of s. 31 of the Companies Act 1990. I accept that the first and second named respondents were not aware at the time of such potential breach. It is unnecessary in the light of the conclusions I have reached to consider whether it was irresponsible not to take legal advice on the loans.

In relation to the matters which I am required to consider in accordance with the decision of the Supreme Court in Squash Ireland Limited, I have formed the view that the first and second named respondents, by entering into these transactions without consulting with their fellow directors and obtaining the full approval of the board of directors for the transactions, have both failed to comply with their obligations under the Companies Acts and have also displayed a lack of commercial probity and want of proper standards in doing this.

In reaching this conclusion I wish to make clear that I am not attributing any bad motive or dishonesty to the first and second named respondents. It is clear from their Affidavits that they were at the time the sole shareholders of the Company. Further, the purchase of the premises by them rather than by the Company appears to have been motivated by a desire to minimise the expense connected with the purchase to be incurred in the Company. Notwithstanding this, they do appear to have shown a considerable disregard for the distinction between the legal person the Company and themselves and a disregard for their obligations as two directors out of four directors of the Company.

Regretfully, it appears to me that this disregard for their obligations as directors of the Company surrounding these transactions is sufficiently serious that, notwithstanding the very considerable achievements of the Company at an earlier period and what appears to have been an otherwise responsible attitude in relation to their position as directors of the Company, I have concluded that I cannot be satisfied that they have at all times acted responsibly in relation to the conduct of the affairs of this Company. Accordingly, under the terms of s.150 of the Act of 1990 I am bound to make the Declaration of Restriction in respect of each of the first and second named respondents."

7. The applicant (who was the first named applicant in the earlier proceedings) now seeks relief from the restriction imposed by the Finlay Geoghegan J. pursuant to s. 152 of the Companies Act 1990.

8. This section provides as follows:

(1) A person to whom section 150 applies may, within not more than one year after a declaration has been made in respect of him under that section, apply to the court for relief, either in whole or in part, from the restrictions referred to in that section or from any order made in relation to him under section 151 and the court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit.

(2) Where it is intended to make an application for relief under subsection (1) the applicant shall give not less than 14 days' notice of his intention to the liquidator (if any) of the company the insolvency of which caused him to be subject to this Chapter.

(3) On receipt of a notice under subsection (2), the liquidator shall forthwith notify such creditors and contributories of the company as have been notified to him or become known to him, that he has received such notice.

(4) On the hearing of an application under this section the liquidator or any creditor or contributory of the company, the insolvency of which caused the applicant to be subject to this Chapter may appear and give evidence.

(5) Any liquidator who contravenes subsection (3) shall be guilty of an offence and liable to a fine."

9. For the applicant, it was submitted that s. 152 gives the court the broadest of discretions to relieve against the restriction where it was just and equitable to do so. In this regard reliance was placed upon the judgment of Laffoy J. In *Re Ferngara Associates Limited: F & R Robinson v. Forrest* [1999] 1 I.R. 426 and also the judgment of Finlay Geoghegan J. in *Carolan and Cosgrave v. Fennell* [2005] IEHC 340. In particular it was submitted where it was just and equitable to so do, the court had an unfettered discretion to relieve against the entirety of the restriction order.

10. It was submitted that the factors which the court should have regard to in assessing whether there were just and equitable grounds for relief were, the importance of the applicant's constitutional right to earn a livelihood; the absence of any finding of dishonesty regarding the applicant's conduct as a director; the applicant's conduct since the commencement of the winding up; hardship; s. 150's role in protecting the public and investors; and the effect, if any, on the deterrent value of the s. 150 restriction.

11. In regard to the applicants constitutional right to earn his livelihood it was submitted that the courts must vindicate that right and whilst it is not an absolute right any statutory provision which curtailed the right should be closely examined by the courts to ensure that the restriction or curtailment was not, having regard to the legitimate objective of the statutory restriction, either arbitrary or excessive. In this regard reliance was placed on cases of *Murphy v. Stewart* [1973] I.R. 97; *Attorney General v. Paperlink Limited* [1984] I.L.R.M. 373 and *Cox v. Ireland* [1992] 2 I.R. 503.

12. The applicant submitted that the rigidity of the s. 150 restriction was to be contrasted with the very broad discretion given under s. 152 and that whereas all conduct which attracted the s. 150 restriction was treated the same, from the worst dishonesty to the mildest irresponsibility, the exercise of the broad discretion given under s. 152 necessitated a consideration of the gravity of the actual conduct which attracted the restrictions so that a distinction would be drawn between very serious dishonesty, and, as in this case, irresponsibility, in considering whether relief should be given against the restriction.

13. It was submitted that the applicant's conduct since the winding up, in that notwithstanding his own impecuniosity, he entered into an agreement with the liquidator to repay certain sums i.e €25,000 in two payments of €10,500 on 6th December, 2004, and €14,500 paid on 12th January, 2006, and that the discharge by the applicant of these sums should be a weighty factor in persuading the court to lift the restriction. In this regard attention was drawn to the fact that because of these payments the liquidator i.e. the respondent was not opposing the relief sought on this application.

14. It was submitted that the applicant had endured hardship as a result of the restriction, in that being an entrepreneur he has been unable to engage in commercial activity and has been forced to rely upon his wife's earnings for the support of his family. In addition the collapse of the company resulted in personal losses to the applicant in the region of €150,000.

15. In regard to the deterrent value of the s.150 restriction, it was submitted that where there was no dishonesty or bad motive found, that the element of deterrence involved in these restrictions in order to protect the public i.e. the creditors and others who would have dealings with the director in question, is much less engaged. The applicant in this case was found to have acted honestly and since the winding up has determinedly paid monies due to the liquidator under the terms of his settlement agreement with the liquidator. In addition the applicant has had to endure the stigma which necessarily attaches to a Restriction Declaration in the commercial world and beyond, a factor which was referred to by Murphy J. in B*usiness Communications Limited v. Baxter* (Unreported, High Court 21st July, 1995). Having regard to the length of time, now in excess of two years, that the restriction has applied it was submitted that having regard to the nature of the applicant's conduct, the deterrent value of a s. 150 restriction in this case would not be undermined if the restriction were lifted at this point in time.

16. It was submitted by the applicant that little assistance or guidance is to be had from other jurisdictions and in particular Australia or the United Kingdom where the relevant statutory schemes deal with the disqualification of directors rather than restriction as in this jurisdiction. Also provision for relief from disqualification tends to be statutorily restricted, in contrast to the very broad discretion to grant relief under s. 152. Hence it was submitted that it is not necessary nor should it be required that in order to obtain relief that an applicant should have to furnish details of his proposed future business plans. It is submitted whilst the court had a discretion to impose terms and conditions, it was not intended that s. 152 would involve or necessitate the court taking on a supervisory role in relation to the future business activity of an applicant, post granting of relief.

17. In essence the applicant's case for relief is that he is an entrepreneur with an expertise in the computer industry; that he has developed ideas which have commercial potential but that he cannot exploit these without forming and being a director of a company. Furthermore that the raising of the €63,000 in order to gain the benefit of the exemption from restriction under s. 150(3) is beyond his capacity to raise money having regard to his circumstances, and that in exploiting the commercial benefit of his ideas if he continues under restriction he will be placed at a gross disadvantage vis-à-vis investors who may be interested in joining him in a commercial enterprise as they will be in a position to extract from him an unfair and disproportionate share of the enterprise because of his restricted status.

18. The respondent did not oppose this application.

19. The notice party submitted as follows:

> The English and Australian experience with regard to the related, to though obviously not identical question of relief of directors from disqualification is of considerable assistance and guidance. In these jurisdictions the cases establish certain requirements before relief is granted. The first of these is that the applicant demonstrates a need or legitimate interest in having the restriction lifted and as a general rule it would be rare for the disqualification to be lifted in the absence of some need of a company for the services of the applicant in a prohibited capacity.
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> It was submitted, that it has been recognised that every disqualification and by analogy, restriction, in this jurisdiction will involve hardship of some sort and it must be assumed that parliament in enacting these provisions was mindful of their economic effect and intended that the objective of protection of the public outweighed the punitive effect on the person to whom the restriction applied.
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> English and Australian courts have attached more weight to the interests of third parties such as the companies which an applicant proposes to be a director of, and their employees, creditors and shareholders.
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> It was submitted that any court dealing with an application for relief from restriction must be satisfied firstly that the public is adequately protected in respect of the concerns giving rise to the original disqualification or restriction, and secondly that the deterrent value of restriction in general is not thereby undermined.
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> Given the broad general discretion conferred upon the court, it was not appropriate to trammel the breadth of that discretion by insisting on the kind of two part test that was once stipulated in the United Kingdom and Australian courts.
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> As the Oireachtas has stipulated a mandatory restriction of five years for the purpose of protecting the public it was submitted the court should be slow to grant relief unless the interest of justice so requires and the purposes of s. 150 as to the protection of the public and the general deterrence with encouragement for appropriate standards would not thereby be undermined.
>
> The court should have regard to the need of the applicant for the relief or his interest in gaining such relief, but greater weight should be attached to third party interests. The capitalisation requirement stipulated in s. 150(3) i.e. €63,000 was in the vast majority of cases less than the amount of working capital required to start up a company and the capitalisation requirement of s. 150(3) requiring as it did an "equity cushion" was a valuable protection of creditors and the court should very carefully evaluate and be very satisfied as to the reasons put forward by an applicant as to why the requirement to put up this capital is unduly onerous for him.
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> It was submitted that the court should pay particular regard to the reasons for the applicant's restriction and consider whether the public interest can be adequately protected in the context of a partial or total relief from restriction.

As s. 152(1) authorises the court, if granting relief from restriction to do so "*on whatever terms and conditions it sees fit*", the court should carefully consider the imposition of appropriate conditions to protect the public interest, and it was submitted that relief if granted, ought generally to be limited and conditional unless the circumstances of the case clearly warranted otherwise.

20. Specifically it was submitted that, if the court was disposed to grant relief in this case it should do so upon the following conditions namely:

1. That the applicant should be permitted to be a director of one private company limited by shares, such company to be notified to the notice party;

2. The provisions of s. 150(3) apply to the company with the exception that the figure of €40,000 be required by way of share capital instead of €63,487;

3. That the provisions of s.153 apply to the applicant with the exception that any order of partial relief be registered with the CRO in accordance with s. 153(2);

4. That the provisions of s. 155 apply to the company;

5. That the company have a majority of directors independent of the applicant and his wife or any relative of either of them and that no business be conducted at any meeting of the board of which the applicant and his wife and/or any relative of either constitute a majority;

6. That the company cheques have two signatory's, at least one of which is of an independent director and that the applicant may not be an approved signatory on the company's bank account;

7. And finally that the notice party have liberty to apply to vary any conditions and/or revoke the relief in total should the circumstances warrant such application to be on notice to the applicant.

21. It was submitted that in the present case the applicant had not made out a case for any relief let alone conditional relief from the restriction. It was submitted that as the applicant failed to provide any particulars of the companies or business which he proposed to engage in, he failed to demonstrate any need or interest requiring the lifting of the restrictions totally or partially. The evidence adduced by the applicant is purely personal to him and does not show any need or interest on the part of any third party or parties as would be normal. Whilst the applicant has adduced evidence of straightened personal circumstances, he has not demonstrated by evidence that he cannot earn his living using his entrepreneurial skills otherwise and through a limited company of which he is a director. It was further submitted that he has not demonstrated, having regard to his averments on affidavit, that the enterprise which he is interested in would require working capital well in excess of the €63,487 why it is, that he cannot comply with the requirements of s. 150(3).

22. It was submitted that the reasons which led to the imposition of the restriction by Finlay Geoghegan J. though not involving any finding of dishonesty were nonetheless extremely serious in that it was demonstrated that there was a serious disregard of the applicant's obligations under the Companies Acts and an entirely inadequate appreciation of the duties and responsibilities of directors particularly in the very sensitive and important area of dealings in which a director is personally interested.

23. It was submitted that notwithstanding the applicant's plea of personal necessity, that in the light of his forgoing conduct the protection of the public could not be ensured if the applicant were relieved in any respect from his current restriction.

Decision

24. Approaching the issues that arise on this application one must have regard firstly to what is the fundamental purpose of the restriction declaration provided for in s. 150. In my view it can only have one legitimate purpose and that is to protect the public from the dishonesty and/or the responsibility of persons who in the discharge of their duties as directors of companies have acted dishonestly or irresponsibly.

25. A very unusual feature of s. 152(1) is that an applicant for relief must apply within "*not more than one year after a declaration has been made in respect of him*".

26. The necessary implication of such provision is that the Oireachteas envisaged that applications for relief would be made within a short time of the Declaration of Restriction being made. From this I infer that the duration or term of a restriction is not to be viewed in a manner similar to say a jail sentence, i.e. that the person restricted must be required to, as it were serve out or endure the full term of five years unless there are good grounds for remission.

27. In my view when one takes into account the relatively low capitalisation threshold provided for in s. 150(3) and the above mentioned time provision, it would seem that it was intended that the Oireachteas was intent on the relatively speedy rehabilitation of directors in respect of whom declarations of restriction were made. Hence in my view the very broad discretion given to the courts in s. 152(1) is to be understood in that context, but also bearing in mind the fundamental purpose of the s.150 restriction namely the protection of the public as mentioned above.

28. It must be borne in mind that given the low capitalisation threshold in s. 150(3), the public may be, in practical terms, relatively unprotected from restricted directors who happen to have access to modest levels of wealth. As a matter of basic fairness therefore and to ensure equality of treatment of persons in similar circumstances as required by Article 40.1 of the Constitution, this statutory provision cannot be applied in such a way as to work an invidious discrimination against impecunious persons.

29. How then in the light of all this does one apply these provisions so as to ensure the protection of the public?

30. The first matter in my view which the court must have regard to are the reasons which led to the restriction in the first place. A court asked to lift the restriction either wholly or partially under s. 152 must be satisfied that the risk to third parties, be they creditors, other directors or shareholders of another company, being damaged, by either the dishonesty or irresponsibility of the applicant in the future is of such a low order as to leave the court satisfied that the restriction can be, safely, either, wholly or partially lifted.

31. There will be applicants whose conduct be it either dishonesty or irresponsibility was of such an appalling nature, that no court

could be satisfied that it was safe to expose the public to these persons by removing the restriction at any time.

32. At the other end of the scale, there are circumstances such as those illustrated in the *Re Ferngara Limited F & R Robinson v. Forrest case* where it was apparent to the court that it was inappropriate to keep the restriction in place any longer.

33. It has to be stressed that the overriding principle in all of these applications is that the applicant should not be granted relief either, in whole or in part unless the court is satisfied that the public will not be harmed either by the total removal of the restriction or by its partial removal in conjunction with appropriate conditions.

34. Next in my view, the court should have regard to the "*need*" or "*interest*" that an applicant has for having the restriction removed.

35. In this regard there cannot be any particular prescriptive test. This is for two reasons. Firstly, there is the very broad discretion given in s. 152(1) which ought not to be cut down by judicial interpretation. Secondly, one has to have regard to the fact that a restricted director with ample funds is not in any way subject to any such requirement, to demonstrate a need for or interest in the removal of the restriction. An applicant must demonstrate some "*need*" or "*interest*" which requires the removal of the restriction in whole or in part. It would not be sufficient for an applicant, to seek the remedy simply to restore his reputation, where he had no plan or intention to re-engage in trade through the medium of a limited company. Hence in my view whilst the court should have regard to the "*need*" and/or "*interest*" these, on their own, should not be decisive factors in the determination of the application.

36. In this context it is clear that an applicant must satisfy the court that the capitalisation threshold in s. 150(3) is having regard to his impecuniosity an insurmountable obstacle to him. Where a court is satisfied having considered the reasons for the restriction, that the risk to the public is still there, but is low or with conditions would be low, in my view the appropriate course to follow is to reduce the capitalisation threshold to a level which is attainable to the applicant in question.

37. The court must in my view also have regard to a number of other factors. These are the deterrent effect of the restriction order i.e. the deterring of directors from dishonest or irresponsible conduct and thereby the promotion of high standards of corporate governance. This of course, is integrally connected with the fundamental objective of this part of the Act, namely the protection of the public from dishonest and irresponsible directors.

38. The courts must also have regard to the conduct of the applicant since the winding up. This is an important factor where a director has been restricted for irresponsible conduct, in enabling the court to evaluate whether at the time the application is heard there remains a risk of the public being damaged by future irresponsible conduct on the part of that individual if his restriction is removed.

39. The court should also have regard to the hardship suffered by an applicant. Again in this context it must be borne in mind that the restricted director with ample means, who can readily avail of the exemption under s. 150(3) will not suffer hardship.

40. Nonetheless hardship is in very many cases the inevitable consequence of a declaration of a restriction and is a consequence which it must be assumed was contemplated by parliament. Whilst it is a factor to be taken into account and given due weight, it is not one which could outweigh the paramount consideration which is the protection of the public.

41. This brings me to a consideration in the light of the above of the facts as revealed in the evidence in this case.

42. The factors laid out in the judgment of Finlay Geoghegan J. which led to the Declaration of Restriction are in my view, serious matters. They are clearly not at the worst end of the scale of turpitude, but also, they are not at the other end either. In conjunction with these factors it has to be borne in mind as was noted by Finlay Geoghegan J. in her judgment that the applicant had behaved responsibly in relation to the affairs of this company throughout the greater part of its life. Indeed the evidence in both applications suggests that the applicant and his fellow shareholder and director Mr. Moore had been very successful in bringing the company from very modest beginnings to great success by April of 2001. In assessing the risk now to the public of removing the restriction wholly or in part, it would be wrong and unrealistic for those years of responsible conduct to be ignored.

43. Also into the balance must go the applicant's conduct since the winding up. The evidence establishes that since then, he has entered into an agreement with the respondent to repay monies due by him to the company and he has honoured that agreement in spite of his very straightened financial circumstances.

44. There is no doubt that the applicant has been given a very expensive lesson by his experience of the collapse of the company and the conclusions reached by Finlay Geoghegan J. concerning his irresponsibility as set out in her judgment and I would be satisfied that the applicant has absorbed guidance and instruction from these.

45. In the light of the foregoing in my opinion the risk to the public of a repeat of irresponsible behaviour by the applicant in the discharge of his duties as a director of a company is very low.

46. That brings me then to consider whether the deterrent effect of a s. 150 restriction in general would be undermined by the removal in whole or in part of the restriction on this applicant.

47. The applicant has been subject to the restriction now, since May 2004. Thus for that time he has been unable to engage in trade through the medium of a limited liability company. That in itself is in my opinion a very significant deterrent. Secondly he has had to live with the stigma associated with the declaration under s. 150 for the period in question since the making of the declaration. This stigma arises from knowledge of the declaration in the business community and in my view the removal of the restriction at that stage will not end the stigma effect of the original declaration. No doubt in time as the applicant is rehabilitated in commercial life the stigma effect will wane. As was noted by Murphy J. in the *Baxter* case, the stigma is a crucial if not the decisive aspect of the deterrent effect of a Declaration of Restriction.

48. As noted earlier regard should be had to factors such as "*need*" or "*interest*" of the applicant in the removal of the restriction and also to hardship suffered.

49. I accept that the applicant is a person with experience and expertise in the computer sector and that whilst it might be possible for him to obtain employment or to have his services engaged in a manner which is not affected by the restriction, he is entitled, if he has ideas which have commercial potential, to exploit these ideas using his own entrepreneurial skills. Needless to say in order to do that, in the ordinary course, the medium of a limited liability company would be used. I accept that in attempting to exploit

commercial benefit from his ideas the applicant would be significantly disadvantaged by the Declaration of Restriction for the plain and obvious reason that in dealing with other investors his corporate disadvantage would put him in a position whereby he would probably be compelled to concede to others a disproportionate and perhaps an unfair share in the ownership in the exploitation of his ideas. In my view such a consequence is wholly unnecessary for the purposes of the protection of the public, and indeed has no relation to it, and were it, to happen, would be an unjust and inequitable consequence of the restriction.

50. In general, the court should not elevate the "*need*" or "*interest*" factors to the level of an obstacle to the granting of relief, to an applicant who otherwise merited relief.

51. In this case in any event, I am satisfied on the evidence that the applicant has demonstrated a "*need*" for the relief, to enable him to engage his entrepreneurial skill and experience in developing his ideas through the medium of a limited liability company without being subject to the risk of unfair exploitation by other investors on account of his restricted status.

52. There is no doubt in my view, on the evidence, that the applicant has suffered great financial hardship both as a result of the collapse of the company and the Declaration of Restriction. That is a factor which weighs to a certain extent in the balance in favour of some removal of the restriction.

53. I have come to the conclusion that the factors which led to the Declaration of the Restriction though very serious in themselves, when taken in conjunction with his prior responsible behaviour in relation to the company and his conduct since the winding up leads to a conclusion that there is very little risk to the public of being exposed to any damage or injury if the applicant is permitted to act as a director of a company again. I am also of the view that the deterrent effect of a s. 150 restriction will not be significantly undermined by such removal. I take the view however that the factors that led to the Declaration of Restriction in themselves, were of a serious nature. That and the low level of risk which may exist to the public by removal and any possible undermining of the deterrent effect of a s. 150 declaration justify a partial removal rather than a total removal of the restriction.

54. As indicated earlier, in my view, the correct approach to be adopted is to have regard to the applicant's real impecuniosity and his inability, which on the evidence I accept, to acquire the capital necessary to comply with the capitalisation threshold in s. 150(3), by simply reducing the amount required to comply with s. 150(3) to a sum which the applicant even in his present straightened circumstances must in all probability be able to raise if he is at all serious about giving commercial effect to his plan. In my view that sum is €7,500.

55. In this way the applicant will be enabled to engage in trade in the computer sector as he plans to do, whilst at the same time all other aspects of the Declaration of Restriction will remain in place until their statutory expiration. In addition to the foregoing I would impose the following condition. The first is that the applicant notify the notice party of the name of any company of which he becomes a director or secretary or in which he takes up any position which is the subject matter of the declaration of restriction. I will also give liberty to the Notice Party, to apply to this Court on Notice to the applicant, to vary any of the conditions attached to the granting of relief and/or to revoke the relief in toto should the circumstances warrant it.

56. Also I will direct that particulars of the relief now granted, be furnished to the Registrar and entered by him on the register pursuant to s. 153(2).

57. I do not think it is appropriate to impose conditions as contended for by the notice party in relation to independent directors or the voting restrictions recommended, as these, in my view, would in the circumstances of the applicant be of such an embarrassing and burdensome nature as to probably defeat any prospect of launching a successful company.