THE HIGH COURT

2008 249 COS

IN THE MATTER OF JAMES MURPHY & SONS SALES (DUNDALK) LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

JIM STAFFORD

APPLICANT

AND

FRANCIS MURPHY AND ANNE MURPHY

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 19th day of April, 2010

1. The applicant is the official liquidator of James Murphy & Sons Sales (Dundalk) Limited (In Liquidation) ("the Company"), having been so appointed by order of this Court of 28th July, 2008. This application is brought by him, pursuant to s. 150 of the Companies Act 1990, for a declaration of restriction of each of the respondents.

2. The respondents are husband and wife and were each directors of the Company within twelve months of the date of commencement of the winding up. It is not in dispute that the Company is insolvent and, accordingly, that s. 150 of the Act of 1990 applies to the Company and to the respondents.

3. The applicant and the respondents have each sworn several affidavits in this application. There are a number of factual matters in dispute. There was no cross-examination of the deponents.

Background to the winding up

4. The Company was incorporated in 1979. It appears to have been dormant until February 2005. It formed part of a group of companies whose shareholders included the first named respondent, his late father, and Mr. Maurice Murphy and Mr. Donal Murphy, all part of the extended Murphy family. In February, 2005, it appears to have been agreed, effectively, that each of the first named respondent, Mr. Maurice Murphy and Mr. Donal Murphy would go their separate ways, and each acquire at least one of the companies within the group and the business or part of the business carried on by that company. The applicant has exhibited copies of two of the agreements entered into on 14th February, 2005. It appears that the first named respondent acquired all the issued shares in James Murphy & Sons MFG (Dundalk) Limited ("MFG") and the Company. Prior to February 2005, MFG carried on a business of the supply of truck bodies and other equipment for the carriage of goods, including refrigerated goods, dry freight and specialist cargo. Pursuant to the agreements entered into in February 2005, the business of MFG was transferred to the Company. Further, it appears that covenants were entered into by the first named respondent and MFG, that the then liabilities of MFG would be discharged. There were various transfers of monies between the parties to the agreements, in part aimed at permitting liabilities to be discharged.

5. The premises out of which MFG carried on business was owned by an unlimited company within the group, James Murphy & Sons (Dundalk). Pursuant to the 2004 settlement agreement, that company was acquired by Mr. Maurice Murphy. Further, a "business letting" agreement appears to have been entered into between James Murphy & Sons (Dundalk) ("the Landlord") and the Company, under which the Company was to pay a rent of €2,777 per month for the first nine months, and thereafter, a sum of €8,333 per month. The settlement agreement provided for the retention of monies on deposit to meet the first twelve months rent. Whilst there was a further retention of €50,000 in respect of rent thereafter it appears, both from the affidavits sworn and the settlement agreement, that it was envisaged that the Company would move out of the premises of the Landlord within twelve months. There was even provision for a refund in the event that it vacated the premises in advance of the twelve-month period.

6. The Company failed to obtain alternative premises prior to February 2006. It also appears to have failed to pay rent to the Landlord, and in June 2007, the Landlord obtained judgment against the Company in the sum of €141,666, together with an order for possession of the premises and an order for costs.

7. The Company moved to alternative premises in November 2007. It failed to discharge any part of the judgment and on 24th April, 2008, the Landlord served a twenty-one day letter of demand on the Company. On 25th June, 2008, the Landlord petitioned the High Court for an order for the winding up of the Company. The order for winding up was made on 28th July, 2008.

Applicable law

8. Section 150(1) of the Act of 1990 provides:

> "The court shall, unless it is satisfied as to any of the matters specified in subsection (2), declare that a person to whom this Chapter applies shall not, for a period of five years, be 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 meets the requirements set out in subsection (3); and, in subsequent provisions of this Part, the expression 'a person to whom section 150 applies' shall be construed as a reference to a person in respect of whom such a declaration has been made."

9. Insofar as relevant, s. 150(2) provides:

"The matters referred to in subsection (1) are—

(a) that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this section".

As appears, s. 150(1) imposes a mandatory obligation on the Court to make a declaration of restriction in respect of persons to which it applies unless the Court is satisfied as to any of the matters specified in sub-section (2). The only relevant matters on the facts of this application are those referred to in sub-section (2)(a), and primarily, that the persons concerned have acted honestly and responsibly in relation to the conduct of the affairs of the Company.

10. The terms of s. 150 are such that whilst the application is brought by the liquidator, pursuant to s. 150(4A) and his obligations following a decision of the Director of Corporate Enforcement under s. 56 of the Company Law Enforcement Act 2001, it is not a normal *inter partes* adversarial application, nor is the onus of proof of all matters on the liquidator, as applicant. The onus is on the liquidator to establish that s. 150 applies both to the Company and the respondents. He has discharged that onus on the facts of this application. Thereafter, the onus shifts to the respondents in relation to the issues of honesty and responsibility in relation to the conduct of the affairs of the Company. Insofar as the second part of s. 150, sub-section(2) is concerned, the onus is regarded as resting on the liquidator to establish that there is some other reason for which it would be just and equitable that the respondent be subject to the restrictions imposed by the section. A liquidator may often refer to the behaviour of a director in the course of the winding up and submit that it is such that he should be subject to a declaration of restriction.

11. On the facts of this application, the liquidator did raise one matter relating to each of the respondents which must be considered under this heading. In relation to the first named respondent, the liquidator contends that in August 2008 the first named respondent agreed to pay him the sum of €5,000 within two weeks in consideration of taking over the lease of a leased motor vehicle. There is a dispute as to whether this was an absolute agreement or whether it was subject to the respondent obtaining the necessary finance. The respondent contends that he has been unable to obtain the necessary finance. It appears unnecessary to resolve this as it is not a matter which, in any event, I consider would justify, of itself, the making of a declaration of restriction.

12. In relation to the second named respondent, the liquidator contends that she has not cooperated with him in the winding up and has refused to make an appointment to meet him. The second named respondent states that she never received a letter from the liquidator. The address used by the liquidator did not contain the name of the house. I am not satisfied, on the affidavits that as a matter of probability that the second named respondent received the alleged letter or has failed to cooperate with the liquidator. I propose, therefore, ignoring both of these matters on this application.

13. On the facts of this application, the Court must determine whether the respondents have each acted honestly and responsibly as directors in relation to the conduct of the affairs of the Company. In accordance with the practice direction of the President of the High Court (HC28, Applications under s. 150(1) of Companies Act 1990), the liquidator has set out in his grounding affidavit the matters which appear of concern to him under this heading and which he brings to the attention of the Court. That practice direction does not, of course, relieve the respondents of the general onus of establishing, to the satisfaction of the Court, that they acted both honestly and responsibly as directors in the conduct of the affairs of the Company.

14. On the facts of this application, I am satisfied that the matters raised by the liquidator do not raise issues in relation to the honesty of the respondents in the conduct of the affairs of the Company. They do raise issues as to the responsibility of the respondents. The Court,must consider these in accordance with the decision of the Supreme Court in *Re Squash (Ireland) Limited* [2001] 3 I.R. 35, in which it approved of the matters set out by Shanley J. in *La Moselle Clothing Limited v. Soualhi* [1998] 2 I.L.R.M. 345, as requiring consideration by the Court. In *Squash Ireland*, McGuinness J. at pp. 39-41 stated:

"The question before the court is whether they acted responsibly and this, as was correctly stated by counsel on behalf of the respondent, must be judged by an objective standard. In the case of all companies which have become insolvent it is likely that some criticisms of the directors may be made. Commercial errors may have occurred; misjudgments may well have been made; but to categorise conduct as irresponsible I feel that one must go further than this.

In a number of judgments in the High Court both Murphy J. and the late Shanley J., have drawn attention to matters which are to be considered in deciding whether directors have acted responsibly. Features are mentioned such as having proper books of account, and whether the directors have sought proper professional advice, and whether they have abided by it. The situation is very well set out by the late Shanley J. in a passage which was opened to the court by counsel for the appellants in the case of *La Moselle Clothing Ltd. v. Soualhi* [1998] 2 I.L.R.M. 345. At p. 352 of that judgment, the learned Shanley J. said:-

'In the case of In *re Lo-Line Motors Ltd*. [1988] B.C.L.C 698, Browne-Wilkinson V.C. said at p. 703:

"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 record as directors of insolvent companies have shown them to be a danger to creditors and others … Ordinary commercial misjudgment 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."

The conduct referred to by Brown Wilkinson V.C. is similar to the conduct identified by Murphy J., namely, that a director broadly complying with his obligations under the provisions of the Companies Acts and acting with a degree of commercial probity during his tenure as a director of the company will not be restricted on the grounds that he has acted irresponsibly.

Thus it seems to me that in determining the 'responsibility' of a director for the purposes of s. 150 (2)(a) the court should have regard to:

(a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts 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 director's responsibility for the insolvency of the company.

(d) The extent of the director's 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'.

I find this passage of considerable assistance in the instant case and applying the standards set out by Shanley J. to the facts I would say firstly that in speaking of his tenure as a director of the company I would agree with Shanley J. that the court should look at the entire tenure of the director and not simply at the few months in the run up to the liquidation."

15. In many decisions relating to s. 150 of the Act of 1990, the Court has emphasized that it must be careful not to be wise after the event. Regretfully, it is inevitable that certain businesses will fail and companies will become insolvent. In particular, where the Court is considering whether or not directors have acted with commercial probity in continuing to trade at a time where it is alleged they either knew or ought to have known that the company is insolvent, it is particularly important that the Court does not consider the facts with the benefit of hindsight. The Court must objectively look at what was done or not done by the directors with only the facts then available to them or such facts as ought to have been available to them.

16. Another issue which arises on the facts of this application is the inter-relationship between the failure of the Company to make tax returns and/or pay taxes over the period and the issue as to whether directors have acted responsibly in the conduct of the affairs of the Company for the purposes of section 150. The applicant drew attention to a decision which I gave in the matter of *Digital Channel Partners Limited* (In Voluntary Liquidation) [2004] 2 I.L.R.M. 35 where, at p. 40, I stated:

"There are, I think, two ways of looking at the failures to make tax returns. The failures to make tax returns are clearly in breach of the relevant Taxes Acts. Similarly, the failure to make the payments are in breach of the Taxes Acts. The mere fact that a company is in breach for, as in this case, a relatively limited period will not of itself, it seems to me, indicate that the directors of the company have acted either dishonestly or irresponsibly in such a way as to preclude my concluding that overall they acted responsibly and honestly in relation to the conduct of the affairs of this company. Unfortunately and inevitably where companies are under significant financial pressure, this may occur.

It appears to me that in relation to tax liabilities there must be something more than a limited failure over a period to indicate that the directors have acted irresponsibly. This has been put in a number of different ways and certainly insofar as there may be evidence that there either has been selective distribution or selective payment of liabilities of a company or indeed a total disregard of obligations to the Revenue, or even a decision to effectively seek to use taxation liabilities for the purpose of financing a company, that of itself will normally be indicative of the fact that directors have been acting at least irresponsibly."

17. The above, I note, was an ex tempore judgment given by me. Nevertheless, I remain broadly of the view expressed. It appears to me a Court should consider in relation to the facts of each case whether the failure to make the tax returns or pay the taxes displays a lack of commercial probity or want of proper standards, as identified by Shanley J. at para. (e) in *La Moselle*.

18. In relation to the second named respondent, it is necessary to repeat what I have said in several judgments (see, for example, in the matter of *SPH Limited* (In Voluntary Liquidation) [2005] IEHC 152) that, in addition to considering whether a director had or had not complied with any obligation imposed by the Companies Acts, as identified by Shanley J. at para. (a) in *La Moselle*, the Court must also have regard to the duties imposed on a director at common law. Further, as already stated, I agree with the general formulation of the duty of an individual director as stated by Jonathan Parker J. in *Re Barings plc. and Ors. (No. 5); Secretary of State for Trade and Industry v. Baker and Ors*. [1999] 1 BCLC 433, in the following terms at p. 486:

"[E]ach individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them."

19. I also agree with the three general propositions derived by Jonathan Parker J. at p. 489 of the same judgment from earlier authorities in relation to duties of directors in the following terms:

"(i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.

(ii) Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions.

(iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company."

This summary was approved of by the Court of Appeal in *Re Barings plc. and Ors. (No. 5); Secretary of State for Trade and Industry v. Baker and Ors*. [2000] 1 BCLC 523 at page 536.

Conclusions

20. The liquidator raises two matters which are to some extent interrelated and undoubtedly raise issues as to both directors' responsibility in the conduct of the affairs of the Company. First, the liquidator contends that when the Landlord obtained judgment in June 2007 in the sum of €141,666, together with an order for possession of the premises plus an order for costs, that the respondents ought to have been aware that the Company was insolvent and unable to meet its debts as they fell due and ought to have taken steps to wind up the Company. The second and interrelated factual issue is the alleged failure by the Company either to make any VAT returns or to pay any VAT between February 2005 and June 2008. Whilst the liquidator raises issue about the probity of the approach of the directors to tax returns and payment of taxes, he also contends that by reason of the VAT liability of which they either were aware or ought to have been aware in June 2007, that this further increased the knowledge which they either had or ought to have had in relation to the Company's then inability to pay its debts as they fell due. The liquidator draws attention to the

fact that the directors, in their statement of affairs, included a liability of €371,561 due to the Revenue in respect of VAT. Further, that the draft management accounts exhibited by the liquidator for the year ended 31st December, 2007, includes a current VAT liability of €327,056.25.

21. There is a factual dispute by the first named respondent in relation to VAT payments made in 2005 and 2006. In a replying affidavit, he states that he has now discovered that VAT payments made in 2005 and 2006 in the sums of €94,358.35 and €97,997.38 were incorrectly credited by the Revenue to MFG when MFG had ceased trading at that time and had made no payments since February 2005. He states he believes that this sum should be credited to the Company by the Revenue which would give a revised VAT liability of €179,205.27 in June 2008. The liquidator does not accept this explanation. He refers to the fact (which is not disputed) that the first named respondent personally gave a covenant in the settlement agreement of 14th February, 2005, that all liabilities of MFG would be paid. Further, he refers to an ROS statement in relation to MFG's VAT liability which shows a liability of €1.04 as at 9th September, 2009, after crediting the disputed payments. The liquidator continues to assert that the Company did not prepare VAT returns. Whilst the first named respondent, in a further affidavit, refers to an administrative error which he states caused VAT returns to be prepared in the name of MFG rather than the Company, he does not exhibit any such VAT returns or relate them to the business of the Company. Nevertheless, it appears from the Company's records that the directors were able to identify aggregate VAT liabilities of the Company as at 31st December, 2007, and at the date of the statement of affairs, both in excess of €300,000.

22. Whilst the facts remain unclear, I have concluded as a matter of probability that the Company did not make VAT returns for any period after February 2005; further, that it did not make any payments on account of VAT for a period which commenced at latest in early 2007. I also have concluded, as a matter of probability, that the directors had available to them records which permitted them to know during 2007 that there were significant sums due to the Revenue in respect of VAT.

23. It is undisputed that the Company ceased making PAYE/PRSI returns in January 2008, and ceased making any payments on account of PAYE and PRSI at the same time. However, the respondents did not ignore all the tax liabilities of the Company. The first named respondent arranged with Bord Iascaigh Mhara, a debtor of the Company, to pay a sum of €99,946.06 directly to the Revenue, which was credited by them on 10th January, 2008, against the PAYE/PRSI liabilities of the Company for the year ended 31st December, 2007. Further, it appears that an instalment arrangement may have been entered into with the Revenue in August 2007 in relation to the tax liabilities of MFG. The first named respondent exhibits an instalment plan from the Revenue but there is a lack of clarity in the affidavits as to what then happened. However, there is a reference to payments of Corporation Tax of €2,190.00 and €108,304.37, which may have related to the Corporation Taxes of MFG but were paid by the Company. Both the payment of the taxes and the instalment proposal are referred to together at para. 13 of the replying affidavit of the first named respondent.

24. The first named respondent, in his affidavits, accepts that in June 2007, he was aware that the Company had cashflow problems but considered that the Company could put itself into a position to discharge debts for three reasons:

> (i) He believed he could obtain alternative premises for the Company, which he did, in November 2007.
>
> (ii) He believed that the Company would recover sufficient sums from its debtors to be able to discharge the sums due to Mr. Maurice Murphy (the owner of the Landlord).
>
> (iii) He was optimistic that he could come to a further arrangement with Mr. Maurice Murphy to discharge the judgment sum in instalments.

25. The debtors of the Company included, at the time, Irish Pallets Limited from which the first named respondent said he was hopeful he would recover a sum of €493,690. In his affidavit he also estimates that the net profit from that contract would have been €85,000 for the Company. He refers to an additional generation of VAT of €85,680 by this contract . The Irish Pallets Limited contract was the subject of controversy in the affidavits and, according to the first named respondent, it was not ultimately cancelled until March 2008. Whilst it may not have been formally cancelled until March 2008, it appears from the emails and text messages exhibited that the first named respondent was made aware, at latest in December 2007, that Irish Pallets Ltd. might not be in a position to take the trucks which they had ordered. A 10% deposit had been paid which, it would appear, had been retained by the Company and not transmitted to its supplier.

26. The first named respondent relies, in addition, upon the fact that he negotiated a five-month rent-free period for the new premises, presumably commencing in November 2007. He also refers to agreements reached with SIPTU in relation to the move by employees to the new premises and a potential business plan to attract investors.

27. Taking into account all the matters referred to by the first named respondent, and even resolving certain of the conflicts of fact in his favour, it does not appear to me that considering his entire tenure as a director of this Company from the time it commenced trading *i.e.* 2005, he has established that he acted responsibly in the conduct of the affairs of the Company. I have reached this conclusion primarily for the following reason. I am prepared to accept that whilst the view which he formed of the affairs of the Company in the summer of 2007 may have been a very optimistic view, that it was not totally unreasonable and that there was no lack of commercial probity at that time in deciding to continue the Company in being and attempting to move to new premises. However, it appears to me that by the beginning of 2008, he either was aware or ought to have been aware that the Company was in a hopelessly insolvent position. By that time, the following appears to have occurred:

> (i) He had to arrange for the debt from Bord Iascaigh Mhara to be paid directly to the Revenue to discharge the 2007 PAYE/PRSI liabilities.
>
> (ii) There was still the judgment outstanding of €141,666 plus interest.
>
> (iii) The Company had paid no VAT, at least for the entire of 2007, and the draft management accounts for that year indicate a VAT liability of €327,056. The directors either knew or ought to have been aware of an accrued liability of this order.
>
> (iv) There was very considerable uncertainty about the performance of the Irish Pallets Ltd. contract, which, in any event, would have only produced a profit of €85,000.
>
> (v) The Company had become unable to make its PAYE/PRSI payments as they fell due.
>
> (vi) No other new significant source of business has been referred to as then envisaged.

27. Regrettably, it appears to me that the respondent directors failed, at latest, in early 2008, to face up to their responsibilities as directors of a then insolvent company. Even when the twenty-one day notice of demand was served by the Landlord in April 2008, they did not take steps themselves to place the Company in liquidation. I have concluded that the continuation of trading and failure of the respondents to take steps to cease trading and wind up the Company, at latest in early 2008 when they knew or ought to have known that the Company had no reasonable prospect of discharging its debts, is indicative of a lack of commercial probity and precludes me from being satisfied that the respondents acted responsibly as directors in the conduct of the affairs of the Company .

28. In addition, the second named respondent appears to have misunderstood the grounding affidavit of the liquidator. In her first replying affidavit, she expresses the view that the liquidator only referred to her at para. 29 of his grounding affidavit. This is correct insofar as he only refers to her by name in that paragraph. However, he refers to the board of directors collectively in relation to their responsibilities concerning the alleged delay in commencing the liquidation of the Company and failure to make tax returns. The second named respondent states at para. 4 of her first affidavit in response "I had no participation in the running of the Company at any stage". She then indicates that she consented to act as a director on 5th March, 2007, and exhibits the relevant form B10. In the consent, which she signed on 5th March, 2007, she states:

> "I acknowledge that as a director I have legal duties and obligations imposed by the Companies Acts, other enactments and at common law."

Those common law duties include the general duties which I have set out above and include informing oneself about the affairs of the company and joining with co-directors in supervising and controlling them. A person who agrees to act as a director takes on those minimum duties set out above. It is not possible to find that a person such as the second named respondent has acted responsibly in the conduct of the affairs of the company, as a director, by not participating in the running of the company.

29. By reason of the above views which I have formed, it is not necessary for me to deal with the payment made into the bank account on 28th July, 2008.

30. The conclusions reached above, make it mandatory for the Court pursuant to s. 150 of the Act of 1990 to make a declaration of restriction in respect of each of the respondents.