THE HIGH COURT

[2009 No. 499 COS]

IN THE MATTER OF DERBAR DEVELOPMENTS LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990

(AS AMENDED) AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

THOMAS MCGUINNESS

APPLICANT

AND

BARRY DOBBIN AND DEREK LAVELLE

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 20th day of April, 2012

1. The applicant ("the liquidator") is the official liquidator of Derbar Developments Ltd. (in liquidation) ("the Company"), having been appointed by order of the High Court on 15th December, 2009.

2. The respondents were each directors of the Company within the 12 months prior to the commencement of the winding up. The Company is certified by the official liquidator as unable to pay its debts within the meaning of s. 214 of the Companies Act 1963.

3. The liquidator furnished a report to the Director of Corporate Enforcement pursuant to s. 56(1) of the Company Law Enforcement Act 2001, on 31st May, 2010. By letter dated 7th October, 2010, he was notified that he was not relieved of his obligation to make an application pursuant to s. 150 of the Companies Act 1990, seeking a declaration of restriction of each of the respondents. This motion issued on 28th October, 2010.

4. The Company was incorporated on 22nd January, 2001 (initially under the name of Cadomack Ltd.) and commenced trading in June 2002 when it purchased lands at Westport, County Mayo. It was a property development company. It acquired further lands in Westport and at Nenagh, County Tipperary. In 2006, the lands of the Company in Nenagh were sold for €6,600,000 with a resultant gain of €4,182,651 for the Company. Subsequent to this, the Company became a holding company for three subsidiary companies which it acquired with the proceeds of sale, namely: Westport Coursing Club Ltd., Lionbridge Developments Ltd., and Timber Frame Homes Ltd. The Company also acquired with the proceeds of sale 100% of the issued share capital of Derbar Developments (Westport) Ltd. from the respondents.

5. At the time of these acquisitions, Westport Coursing Club Ltd. and Lionbridge Developments Ltd. owned properties and Derbar Developments (Westport) Ltd. also owned sites with houses in the course of construction and nearing completion.

6. The liquidator identifies the cause of insolvency of the Company as the crash in the property market and consequent collapse in the value of the lands owned by the subsidiaries. Related to this was a resultant unwillingness by the banks to extend further facilities to the Company or its subsidiaries and their inability to carry out further development work, and in any event, as the liquidator points out, an absence of any purchasers for the property. The proximate cause of the winding up of the Company was the failure of the Company to pay the outstanding balance of the Capital Gains Tax liability on the sale of the Nenagh lands which was at the centre of this application.

7. The liquidator, in his report to the Director of Corporate Enforcement, assesses and reports on the performance of the respondents as directors of the Company under twelve headings and makes no real complaint about their performance or discharge of their responsibilities, save in relation to one transaction in relation to the Company's dealing with the Revenue Commissioners. The liquidator takes the view that the failure by the directors to set aside sufficient monies in the summer of 2006 to meet the Capital Gains Tax liability arising on the sale of the Nenagh lands their failure to ensure payment on the due date was irresponsible and such that the Court should now make a declaration of restriction pursuant to s.150 of the Companies Act 1990.

8. The facts relating to the Capital Gains Tax liability and its discharge are not in dispute and in summary were as follows. The sale of the Nenagh lands gave rise to a Capital Gains Tax liability of €836,530. This was due for payment on 31st October, 2006. The Company used all the proceeds of sale for the purchase of subsidiaries and did not make the tax payment on the due date. On 13th March, 2008, it paid €390,831. On 10th June, 2008, it made a further payment of €60,000. The funds to meet these payments were borrowed by the Company from Allied Irish Banks. The borrowings were guaranteed by the respondents personally.

The Law

9. Section 150, insofar as relevant, provides:

> "(1) 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.

(2) 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 ..."

10. As appears from the above, the essential question for the Court is whether it can be satisfied that the respondents each 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 either should be subject to the restrictions imposed by the section.

11. On the facts herein, no issue had been raised as to the honesty of either of the respondents by the liquidator. An issue has been raised as to whether they acted responsibly. Further, the liquidator has not raised any other fact which would make it just or equitable that the respondents be subject to the restrictions imposed by section 150. He has, in his report to the ODCE, expressly stated that they cooperated with him in relation to the liquidation.

12. The issue on the facts herein is whether the Court can be satisfied that the directors acted responsibly in relation to the conduct of the affairs of the Company, notwithstanding their failure to procure the discharge of the full Capital Gains Tax liability due by the Company in October 2006.

13. The caselaw relating to s. 150 was reviewed in some detail by Fennelly J. in delivering the judgment in *Mitek Holdings Ltd. and the Companies Act* [2010] IESC 31, with which Hardiman J. and Finnegan J. concurred. In doing so, he cites with approval passages from the well-known judgments of Murphy J., in the High Court in *Business Communications v. Baxter and Parsons* (Unreported, High Court, 21st July, 1995) and Shanley J. in *La Moselle Clothing Ltd. v. Soualhi* [1998] 2 ILRM, 345. In the latter, Shanley J. interpreted s. 150 in the following way:

"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."

Fennelly J., at para. 74, summarises the proper approach of the Court to an application under s. 150 in the following terms:

"It is always appropriate to keep in the forefront of one's mind the terms of the applicable statutory provision. The question to be considered, in a case such as the present, where no question of honesty arises, is whether the director against whom an application for a restriction order is made *'has acted responsibly in relation to the conduct of the affairs of the company*'. The context is, of necessity, a company which is unable to pay its debts. The court should, in the words of Shanley J. [in *La Moselle*] *'look at the entire tenure of the director and not simply at the few months in the run up to the liquidation*'."

14. The above conclusion must be considered in the context of two earlier passages cited by Fennelly J. with approval. The first is from the judgment of McGuinness in *Re Squash Ireland Ltd*. [2001] 3 I.R. 31 at p. 40, where she 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 cases of all companies which have become insolvent it is likely that some criticisms of the directors may be made; but to categorise conduct as irresponsible I feel that one must go further."

And, secondly, the caution expressed by Murphy J. in *Baxter* that:

"Of course, one must be careful not to be wise after the event. There must be no single 'witch hunt' because the business failed as businesses will."

15. Fennelly J. also cited with approval from Clarke J. in the High Court in the matter of *Swanpool Ltd. McLaughlin v. Lannen* [2006] 2 ILRM 217, and in particular, his emphasis on the need for the Court, in each application under s. 150, to take account of the context in which the relevant acts or omissions of the directors need to be considered. In *Swanpool Ltd.*, at issue was a repayment of funds to BES Investors at a time when the directors knew the company was insolvent or facing insolvency. In that decision, Clarke J., at p. 8, having considered certain of the earlier decisions already referred to, stated:

"It does, however, seem to me that the differences in approach identified in those authorities are more apparent than real. The approach of the court in any case under s.150 will necessarily differ depending on the type of acts or omissions which are under scrutiny. In broad terms there would seem to me to be three types of situation which the court is typically required to consider in such applications. They are:

1. Issues involving compliance by the company with its formal obligations under the Companies Acts including keeping books and records, making returns, holding meetings and the like;

2. The commercial management of the company most particularly at the period when the company was insolvent or heading in that direction; and

3. Compliance by the directors with the obligations identified in Frederick Inns to ensure that once the company was facing insolvency its assets were dealt with in a manner designed to ensure the proper distribution of those assets in accordance with insolvency law."

Fennelly J expressed the view that the above is "a particularly useful classification of the principal settings for consideration of the responsibility of directors in a modern business". I respectfully agree.

Conclusion

16. On the facts herein, the primary issue raised by the liquidator is the failure by the respondents, as directors, in the summer of 2006, to set aside and retain sufficient of the proceeds of sale to enable the Company discharge the Capital Gains Tax Liability to the Revenue Commissioners in October 2006. This was in excess of 3 years prior to the order for winding up. Undoubtedly, the prudent course of action for the directors in the summer of 2006 was to set aside sufficient of the proceeds of sale. However, in my judgment, that is not the relevant test.

17. On the facts herein, the respondents, in their affidavits, and having regard to the liquidator's affidavit and his exhibited report to the ODCE, have established that, as directors, they ensured substantial compliance with all the Companies Acts' obligations. The evidence is that proper books of account were maintained and returns made to the Companies Office, albeit on occasion late. Further, in relation to the financial affairs of the Company, the liquidator expressed the view that the directors ensured that the Company maintained sufficient financial records to keep them informed about the Company's financial affairs; that proper systems were in place to obtain financial information and that the directors were active in monitoring the Company's financial affairs. Finally, he stated in his report that the directors recognised the Company's deteriorating financial situation and that, having regard to the property market collapse, there was little the directors could do to address the Company's financial difficulties caused by reason of the collapse of the property market. He also states that there is no allegation of any selective discharge of the Company's debts, any involvement in a phoenix-trading syndrome or any placing of the personal interests of the directors ahead of that of the Company. That assessment is an appropriate matter for the Court to take into account in considering whether it can be satisfied that the directors acted responsibly in the conduct of the affairs of the Company, having regard to their overall tenure as directors of the Company, notwithstanding their failure to retain sufficient monies in the summer of 2006 to enable discharge of the Capital Gains Tax liability.

18. The respondents, in their affidavits, have explained both their use of the entire proceeds of sale for reinvestment and their plan for the discharge of the Capital Gains Tax liability in 2006. They state that it was always their intention that the Company discharge its Capital Gains Tax liability on the due date. They draw attention to the Company's record of compliance with tax liabilities. The Court accepts such intention of the directors.

19. They explain that with the encouragement of the Company's then bankers that the directors decided, in the summer of 2006, to immediately reinvest the entire proceeds of sale for the benefit of the Company by the acquisition of the subsidiaries already referred to. Two of those subsidiaries owned lands, one of which was already zoned for development but which required planning, and the other of which required rezoning. The intention was to realise those properties following the obtaining of planning and, where necessary, rezoning, but without carrying out full development. They indicate this would have been completed in the short to medium term, as viewed in the summer of 2006. That plan was interrupted by the collapse of the property market, which, they say, was not envisaged in the summer of 2006.

20. They further explain in their supplemental affidavits in similar terms that the short-term plan for the payment of the Capital Gains Tax, in October 2006, was to be from the proceeds of three houses already completed and actively for sale on the market "at that time" which I take to be the summer of 2006. The advertised sale price for each house was stated to be €560,000 and the site purchase and development cost to be in the region of €750,000. The net profit available to the Company if those sales had been achieved was estimated at €750,000. The directors have also averred that they had the verbal agreement of the regional manager of AIB, the Company's banker, with whom they had a personal relationship, that the bank would make available funding to meet the balance of the Capital Gains Tax liability. They have referred to the practice at the time, in the context of the rising property market, of developers relying upon oral agreements for funding with bankers. Whilst the liquidator refers to the absence of any written agreement, he does not dispute this practice and the Court is prepared to accept the respondents' averments.

21. It is important to emphasise that the Court is required to objectively consider the actions of the respondents in the context and at the time when they occurred. It was 2006. On the evidence, it was prior to any knowledge of the downturn in the property market. There is no suggestion that the Company was insolvent or heading towards insolvency in 2006. On the facts, it is very different to the situation considered by Clarke J. in *Re Swanpool Ltd.*, where the payments took place when the company was either insolvent or heading towards insolvency. This was a company which had recently made a profit on the disposal of lands in excess of €4 million. The respondents undoubtedly believed that they could turn to profit the further acquisitions made through the subsidiaries with the proceeds of sale. They believed they had, in the short term, arrangements in place, including if necessary bank funding which would enable the discharge by the Company of the Capital Gains Tax liability. The respondents have satisfied the Court that as a matter of probability it was the collapse of the property market which prevented the carrying out of this plan.

22. The liquidator has drawn attention to the fact that the Company did have €300,000 on deposit with AIB in 2006 but did not use this to discharge the Capital Gains Tax liability. The respondents have explained that this was required to be kept on deposit as a condition of its facilities with AIB. When it became available for use, they did use it to discharge other ongoing liabilities of the Company. However, on the facts, it is not alleged that there was any selective payment of creditors. Further, they draw attention to an important fact in their favour that they did arrange a further facility from AIB in 2008, at a time subsequent to the downturn in the property market, by *inter alia*, providing their own personal guarantee for the borrowing and and did thereby arrange that the Company discharge at least part of the Capital Gains Tax liability aggregating €450,831. That borrowing, personally guaranteed and those payments support the declared intention by the respondents that the Company discharge its Capital Gains Tax liability, and demonstrate a responsible approach by the directors to the conduct of the affairs of the Company subsequent to the downturn in the property market and at a time when they may have known the Company was facing insolvency.

23. On all of the foregoing facts and for the reasons stated, it appears to me that the Court can be satisfied for the purposes of s. 150, of the Act of 1990 that the respondents acted responsibly in relation to the conduct of the affairs of the Company, taking into account their conduct during their entire period as directors notwithstanding their failure to ensure that the Company discharge in full its Capital Gains Tax liability. As previously stated, no issue arose as to the honesty of the respondents and there is no other reason of which the Court is aware for which it would be just and equitable to make a declaration of restriction.

24. Accordingly, the Court refuses the application for declarations of restriction of the respondents.