THE HIGH COURT

[2012 No. 483 COS]

IN THE MATTER OF COLLEGE FREIGHT LIMITED TRADING AS

TARGET EXPRESS (IN LIQUIDATION)

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

1990 (AS AMENDED)

AND IN THE MATTER OF SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001

BETWEEN

MICHAEL MCATEER AND STEPHEN TENNANT

APPLICANTS

AND

SEAMUS MCBRIEN, ANN MCBRIEN AND MICHELLE CUNNINGHAM

RESPONDENTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 11th day of March,2016

Introduction
1. These applications are brought on behalf of the joint liquidators of College Freight Ltd. (in Liquidation) ("the company") for declarations that the respondents shall not act as directors or secretaries or be concerned in the promotion or formation of any company unless that company meets the requirements of s.150(3) of the Companies Act 1990 (the equivalent section in the Companies Act 2014 being s.819(3)).

2. The applicants ("the liquidators") were appointed as provisional liquidators of the company on the 29th August, 2012, and were subsequently appointed joint liquidators. The respondents were required by this Court to declare a statement of affairs by order of the 12th October, 2012.

Undisputed facts
3. The first named respondent ("Mr. McBrien") is the husband of the second named respondent and father of the third named respondent. The respondents were directors of the company on the date of the liquidation.

4. The company, since the commencement of the winding up, was unable to pay its debts. The Director of Corporate Enforcement did not relieve the liquidators from their obligation to seek the declarations sought after the liquidators had expressed concerns about the conduct of the affairs of the company.

5. The PAYE and PRSI liabilities of the company were the subject of incorrect filings made on behalf of the company for the year ending in 2011.

6. Mr. McBrien negotiated with the Revenue Commissioners an arrangement which led to an agreement for the company's liability amounting to €796,642.08 to be paid over a period of nine months commencing on the 31st May, 2012.

7. On the 23rd August, 2012, the Revenue Commissioners issued an attachment order to the company's bank ("the attachment order") for the sum of €151,000 which resulted in the company having insufficient funds to pay staff wages on the 24th August, 2012. The company ceased to trade on the 27th August, 2012.

The law
8. The Court is obliged to make the declarations sought unless it is satisfied that the respondents acted honestly and responsibly in the conduct of the affairs of the company. In other words the respondents bear the burden of proving that they have acted responsibly and honestly.

Hearing of this application
9. The Court reserved its judgment in this application because the hearing of the application commenced on the 23rd November, 2015, and was then adjourned on a few occasions subsequently to allow for the liquidators and Mr. McBrien to overcome legitimate concerns expressed about the hearsay nature of some averments relied upon by the solicitor for Mr. McBrien and on behalf of the applicants in regard to the circumstances giving rise to photographs of the company's vehicles in respect of which there were questions raised at the hearing in November, 2015.

10. The final affidavits were opened and submissions were completed on the 29th

February, 2016.

Background
11. The company, which was incorporated in August, 1997, operated under the trading name Target Express with the related company College Freight Services (NI) Ltd. The parent company of both of those companies was registered in the U.K. This group of companies provided freight services. The company suffered from 2009 with the economic downturn, increasing costs and lower charges which it could recover for its services from its customers.

Invoice discounting facilities
12. In May, 2012, Mr. McBrien approached a Harry Parkinson (then of Close Invoice Finance Ltd ("Close") who he had known for about 25 years. Mr. Parkinson swore an affidavit in December, 2015 which was filed at the request of Mr. McBrien in order to overcome the hearsay averment of Mr. McBrien that Close "conducted what can only be described as a comprehensive and meticulous due diligence" of the debtors' book of the company.

Bank of Scotland
13. At the end of 2011 Bank of Scotland Plc ("BOS") gave notice that it was withdrawing its invoice discounting arrangements for the company.

Close
14. Close was the only company which offered to maintain such a facility for the company. Close ultimately purchased the debtors' book from BOS for a sum which is unknown to the Court. Close obtained a charge over the book debts of the company. Charge on a home

15. Close also obtained a charge over the family home of Mr. and Mrs. McBrien in Northern Ireland which was later sold giving rise to a payment by Mr. and Mrs. McBrien of €250,000 in compromise of Close's proceedings to realise that security which had been given.

Mr. Parkinson
16. The affidavit of Mr. Parkinson merely confirmed Mr. McBrien's statement in regard to the due diligence exercised for the benefit of Close. It omitted to enlighten the Court as to the extent of the facility then maintained for the company in exchange for the book debts of the company.

17. The affidavits of Mr. Parkinson and Mr. McBrien left the Court to wonder about the reasoning of the respondent directors, if any, concerning the benefit of the arrangement with Close for the creditors of the company.

18. Many of the averments of Mr. McBrien in his affidavits amounted to bluster as opposed to an effort to satisfy the Court about the responsible nature of the respondents' reasoning relating to the issues which are discussed in this judgment. Effectively the Court was left wondering how the company estimated book debts of €5,873,000.00 on the date of appointment of the joint liquidators while Close then found that €2,596,000.00 was uncollectible. The bold averment of Mr. Parkinson that "Close sustained no loss as a result of its commercial association with" the company underscored the sense of the questions posed by the liquidator.

Questions arising about debts

19. The Court agrees with the submissions made on behalf of the liquidators that the enormity of the uncollectible balance of some €2.5 million in debts:-

1. raised the prospect of irresponsible behaviour on the part of the respondents; and

2. begged the question about how long the company was trading while insolvent, particularly when one considers the undisputed fact about the settlement of arrears with the Revenue for some €796,000 in 2012.

20. None of the respondents have given satisfactory answers to these questions. It should be said that the third named respondent placed many issues of concern in a context which at first sight appeared understandable from her perspective as the director with primary responsibility for human resources. However she left her father to explain the fundamental problems of the Revenue debt together with the disparity between the alleged book debts and those which were collected.

Statement of affairs
21. Mr. McBrien rightly admits his failure to comply with various directions of this Court to prepare a statement of affairs and seeks to excuse his conduct by reference to the depression which he suffered following the collapse of his business.

22. The liquidators point to the late engagement of Mr. Gerard Murray (chartered accountant) in March, 2003 by Mr. McBrien (some six months following the order directing the respondents to swear a statement of affairs) and the poor standard of the statement of affairs which indicated that the company will return a surplus of nearly €224,000 while the liquidators estimated that the overall deficit will be in excess of €5.5 million.

23. While the Court is mindful of the trauma and undisputed depression suffered by Mr. McBrien, it is necessary to determine whether the respondents have addressed adequately the concerns of the liquidators which are shared by the Court. Mr. McBrien in his affidavits and submissions made on his behalf appeared at times to be more belligerent than cooperative. It is certainly the right of directors to dispute facts which are put before the Court by liquidators, but directors who are the subject of this type of application have a duty to satisfy the Court about the responsible nature of their conduct.

24. A statement of affairs was eventually sworn. The Court shares the view of the liquidators also in that it did not reflect accurately the standing of the company.

25. Suffice to say at this stage that it is indeed well established that the actions of directors following the appointment of liquidators is a factor which the Court may take into account when deciding whether it is just and equitable to make the declarations sought.

Revenue liability
26. The incorrect PAYE and PRSI returns for the company in 2011 were not explained by the respondents. The Court is not aware of any understandable excuse for the mistake which resulted in a liability of €151,000 for 2011. Moreover, the Court is left with no coherent reason for the non-payment of the sum due under the instalment agreement in July, 2012.

27. In view of the court's finding in regard to the July 2012 default, there is no need for the Court to comment extensively on the failure of the company to pay the August, 2012 liability which Mr. McBrien relies upon to criticise the Revenue for being impatient and lacking commercial sense. The Court is left again by the respondents to query when they would have petitioned for the winding up of the company were it not for the effect of the Revenue's attachment order in August, 2012.

28. The Court recognises that the non-payment of tax may not of itself be irresponsible, but the duty remains on directors to satisfy the Court that they acted responsibly. None of the respondents have satisfied this Court that they actually went through a reasoning process which weighed up the benefits and risks of the incorrect returns to the Revenue for 2011, the effect of the instalment

agreement on the company's ability to discharge its liabilities and the consequences of non payment under the instalment agreement.

Books, records and assets
29. Counsel for the second named respondent correctly submitted that much of the evidence relating to the whereabouts of vehicles sought by the liquidators was inadmissible. Nevertheless it is true to state that the liquidators were obliged to go to great lengths to identify vehicles and their whereabouts which were leased, owned or used by the company. Some suspicions of the liquidators may not have been proven but the mingling of vehicle use by the company and its associates was not easily identifiable for those investigating matters on behalf of the liquidators. In short, the Court recognises that the task of the liquidators in seeking to safeguard assets of the company following their appointment was not helped by the absence of records and actual vehicles. The respondents have failed to satisfy the Court that they had in place reasonable measures to identify and secure the vehicles of the company.

Individual respondents
30. Although the respondents did not have to investigate each and every debt, the whereabouts of vehicles or communications with the Revenue on behalf of the company, they all had an independent duty to question the viability and solvency of the company over the years after 2009. Moreover they ought to have put safeguards in place for compliance with Revenue requirements and to protect assets for the benefit of the company's creditors. They also had a duty to assist the liquidators.

31. The second named respondent was a non-executive director who did not demur from her responsibilities as a director of a limited liability company in resisting these applications.

32. The Court has not been satisfied by the respondents that they acted responsibly in the conduct of the affairs of the company. No acceptable reason has been offered as to why the restrictions which are the subject of the declarations sought, should not apply.

33. Finally if the Court is wrong in respect of any particular finding - for example in relation to its conclusion about the duty to consider measures which ought to have been taken- each of the other concerns outlined in this judgment taken individually or collectively have not been addressed by the respondents in a way which satisfies this Court that the respondents acted responsibly before the appointment of the liquidators. The evidence of conduct or lack of action after the appointment is only a small factor for consideration by the Court. Nothing in the post liquidation conduct makes it just and equitable for the Court to refrain from making the declarations sought.