

## THE HIGH COURT

[Record No. 2001 293 COS]

## IN THE MATTER OF 360NETWORKS (IRELAND) LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT, 1963 – 1999

AND

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

BETWEEN

RORY O'FERRALL

APPLICANT

AND

PATRICK COUGHLAN AND STEPHEN LAKE

RESPONDENTS

**Judgment of Ms. Justice Finlay Geoghegan delivered on the 21st day of December 2004.**

1. This is an application under s. 150 of the Companies Act, 1990, brought by the applicant who is the official liquidator of 360networks (Ireland) Limited ("the Company") having been so appointed by order of the High Court of the 30th July, 2001, pursuant to petition presented by John Sisk & Son Limited of the 18th July, 2001.

2. The respondents were each directors of the Company within twelve months of the date of commencement of the winding up. They each state that they were appointed on the 1st August, 2000. It is undisputed that the Company is and was at the date of commencement of the winding up insolvent and accordingly that s.150 of the Act of 1990 applies to both the Company and the respondents.

3. The liquidator has made his report to the Director of Corporate Enforcement under s.56 of the Company Law Enforcement Act, 2001, and has not been relieved of his obligation to bring this application.

**Background facts**

4. The Company is a wholly owned subsidiary within a worldwide group headed by 360networks inc., a Canadian company. It is a member of the same group of companies as 360atlantic (Ireland) Limited (in receivership and in liquidation) in respect of which I have just delivered judgment in an application under s.150 against the four persons who were directors of that company within twelve months of the date of commencement of winding up, including the first named respondent herein.

5. The facts pertaining to the worldwide organisation of 360networks group and the cause of insolvency of the Company and 360atlantic (Ireland) Limited are similar. This judgment should be read in conjunction with that given in 360atlantic (Ireland) Limited. It is only intended in this judgment to refer to factual points of specific relevance to the Company and the respondents.

6. The Company was incorporated pursuant to the policy to establish separate corporate entities in different jurisdictions.

7. It is not clear when the Company commenced business. It appears to have been about the middle of 2000. The Company was engaged in the buildout of a data centre and co-location facility at the Clonsaugh site. There were perceived advantages in locating it beside the cable landing station at the Clonsaugh facility owned by 360atlantic (Ireland) Ltd. That site on which the Company built appears to have been owned by 360atlantic (Ireland) Limited. The Company is stated to have received funding from "the 360networks group" of approximately \$20 million which was used in the building and fitout of the premises at Clonsaugh. There is a significant lack of clarity as to the persons by whom such funds were advanced and the basis of such advances.

8. It appears that the co-location facility was approximately 90% completed by May 2001. In March 2001 it is stated that a decision was taken to offer the facility for sale or lease. It is unclear what, if any property interest the Company had in the premises upon which it had spent approximately \$20 million at that time. It appears from minutes of 360atlantic (Ireland) Limited of 12th June, 2001, that it was proposed to grant a lease of the relevant site at that time to the Company. The operation of the Company formed part of the European network operations of the 360 group. As such it was financially managed from the UK headquarters in Maidenhead in England.

9. The first named respondent Mr. Coughlan was based in Ireland and was the General Manager of 360networks group's Irish operations and in charge of its Europe-wide business development. The second named respondent, Mr. Lake was Vice-President of European network operations. He was based in England from the middle of 2000. He states that as the most senior executive of the group in Europe he was appointed to the board of all the newly created subsidiaries in the European jurisdictions following the group decision to create operating subsidiaries in each jurisdiction. He did not become a director of 360atlantic (Ireland) Limited because he states "this company was in existence prior to my joining and had an existing board".

**Applicable law**

10. The relevant legal principles are those set out in the judgment in 360atlantic (Ireland) Limited and it is not proposed to repeat them here.

**Issues**

11. The issue raised by the facts set out in the affidavits is whether the respondents can satisfy the court that they acted responsibly in relation to the conduct of the affairs of the Company whilst a director of same. No issue arises on the facts as to their honesty.

12. The primary issue is whether the respondents acted responsibly in the sense of discharging the minimum duty owed by them as directors of the Company to inform themselves about its affairs, and in particular its property and financial affairs, and to join with each other in controlling and supervising the affairs. Counsel for the liquidator submitted that there was an abdication by the respondents of their responsibility to supervise the management of the financial affairs of the Company.

**Conclusions**

13. I have concluded that neither Mr. Coughlan nor Mr. Lake has satisfied the court that they did act responsibly in relation to the conduct of the affairs of the Company. The affidavits sworn by them, when considered with the affidavit of the liquidator, do not disclose that they took any real steps to inform themselves about the affairs of the Company as a distinct corporate entity nor that they took any steps to manage and control the affairs of the Company, in particular the financial and property affairs as a distinct

corporate entity. The respondents' affidavits disclose considerable confusion about the identity of the holding companies, the principal activities of the Company and its financial affairs. I have concluded that the operation purported to be carried out by the Company at Clonshaugh was financially managed from Maidenhead and insofar as documents have been produced by the respondents from that source they do not identify financial information relevant to the Company. The liquidator has produced draft accounts furnished by the auditors which were stated to be at "an early draft stage". They do not indicate that separate financial information in relation to the Company was readily ascertainable, and for example do not refer to the guarantee and secured debenture of 29th September, 2000, which was also given by the Company.

14. Further, at a time of significant expenditure, apparently through the Company on the site at Clonshaugh, it is unclear that the Company had any interest in the site and hence put at risk its ability to benefit from the building on the site.

15. In reaching this conclusion I have taken into account in his favour steps taken by Mr. Coughlan in Summer 2001 to have a receiver appointed. Whilst the liquidator disputes the appropriateness of appointing a receiver it appears to have been following legal advice and is indicative of Mr. Coughlan taking steps to manage the Company.

16. The respondents each agreed to become directors of the Company which is an Irish limited company. In so agreeing they became obliged to discharge the minimum duties required at common law and under statute as directors of the Company as distinct from any other entity within the 360networks group as set out in the judgment delivered in 360atlantic (Ireland) Limited. It is only in respect of the discharge of those duties that this Court has concluded they have failed to satisfy that they acted responsibly. The Court is not considering any other responsibilities of the respondents within the 360networks group in respect of which they may not be subject to any criticism.

17. Accordingly I am bound to make the declarations of restriction as sought.