Neutral Citation Number: [2005] IEHC 152

THE HIGH COURT

[2004 No. 136 COS]

IN THE MATTER OF SPH LIMITED (IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990
AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

KEN FENNELL AND RICHARD MAGUIRE AS JOINT LIQUIDATORS
OF SPH LIMITED (IN VOLUNTARY LIQUIDATION)

APPLICANTS

AND
SEAN SHANAHAN, MARIE SHANAHAN,
DECLAN FITZPATRICK AND PADRAIC CULLEN

RESPONDENTS

Judgment of Ms. Justice Finlay Geoghegan delivered on the 25th day of May 2005.

1. This judgment relates to the application under s.150 of the Companies Act, 1990 brought by the applicants who are the joint liquidators of SPH Limited (in voluntary liquidation) (the Company) against the first and second named respondents only.

2. It is undisputed that the first and second named respondents were each directors of the Company within twelve months of the date of commencement of the winding up and that the Company is insolvent. Accordingly s.150 of the Act of 1990 applies to the Company and to the first and second named respondents.

3. The Company carried on business as a construction company. It was incorporated in 1991 but is stated to have effectively commenced business as a construction company in 1996/97. It ceased trading on the 16th April, 2003, and on the 1st May, 2003, it was resolved pursuant to s. 251 that it be wound up and that the applicants be appointed joint liquidators.

4. The first and second named respondents are husband and wife. The first named respondent appears to have been the prime mover in the Company and in day to day control. The second named respondent was a non-executive director.

5. The Company appears to have traded successfully for a number of years obtaining many sizable building contracts.

6. The directors, in the statement of affairs estimated the ultimate deficiency (excluding costs of liquidation) to be in the region of €1,727,223.00. The first named applicant expresses the view that the build up of trading losses since April, 2001 was the main reason for the liquidation of the Company. He refers to dramatic increases in the cost of sales and also to the possibility that the Company may have been overambitious in its pricing of contracts. He expresses a view that the Company may have lacked the necessary management controls to trade successfully or profitably resulting in constant cash flow issues.

7. The first named respondent in his replying affidavits acknowledges that the Company operated under significant financial pressure in the last six months of trading. The ultimate catalyst for the winding up is stated to have been the withdrawal by the Revenue Commissioners of the C2 certificate of the Company on the 8th or 9th April and a subsequent demand dated the 11th April received on the 14th or 15th April for payment of a sum of €277,569.64 within seven days.

Applicable law.

8. Section 150 of the Act of 1990 imposes a mandatory obligation on the High 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-s. (2)". The relevant matters to this application are "that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company . . .".

9. An application such as this brought by a liquidator under s.150 (4) pursuant to his obligation under s.56 of the Act of 2001 is not a normal *inter partes* adversarial application. The onus of establishing that he/she acted honestly and responsibly rests on the director. The practice direction of the President of the High Court in relation to voluntary windings up requires a liquidator to put before the court those matters which he considers the court should take into account in determining whether the director has acted honestly and responsibly. Whilst in practical terms a director may primarily seek to address the matters raised by the liquidator, the director is not relieved of the general onus established by section 150 of the Act of 1990.

10. The matters to which the court should have regard in determining the responsibility of a director for the purposes of s.150 (2)(a) as set out by Shanley J. *in La Moselle Clothing Limited v. Soualhi* [1998] 2 I.L.R.M. 345 and as approved by the Supreme Court in *Re Squash (Ireland) Limited* [2001] 3 I.R. 35 are:

> "(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.

11. In a judgment given in the matter of *Tralee Beef and Lamb Limited (In Liquidation)*, (Unreported, High Court, Finlay Geoghegan J., 20th July, 2004), I concluded that the court should under para. (a) above also have regard to the duties imposed on a director at common law. Further, in that case I agreed 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:

> "Each 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."

12. I also agreed with three general propositions derived by Jonathan Parker J. in the same judgment from earlier authorities in relation to duties of directors in the following terms:-

> (i) "Directors had, 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 were 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 did 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, depended on the facts of each particular case, including the director's role in the management of the company."

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

14. Finally, in accordance with the decision of the Supreme Court in *Re Squash Ireland Limited* [2001] 3 I.R. 35 the Court should look at the entire tenure of the respondents as directors and not simply the twelve months in the run up to the liquidation.

Conclusions

15. No issue arises on the facts as to the honesty of the first and second named respondents. The issue which I have to decide is whether they have discharged the onus of satisfying the Court that they acted responsibly in relation to the conduct of the affairs of the Company in accordance with the above principles.

16. The first and second named respondents are faced with the difficulty that there is a large deficit. Even on the Directors' estimate in the statement of affairs the deficit is in the order of €1.7m. Of this there are stated to be debts due to trade creditors in the order of €1.3m. The first named applicant has fairly acknowledged that proper books and records of the Company were kept save that audited accounts for the year ended 30th April, 2002, had not been prepared. The annual returns for that year had not been filed in the Company's office. He further acknowledges that the respondents have cooperated with him as liquidator of the Company.

17. A serious issue raised by the applicants is whether the respondents acted responsibly in relation to the control and supervision of the financial affairs of the Company having regard in particular to the amount of the liability to the Revenue and the manner and period over which this had been allowed to accumulate. Whilst the affidavits suggest some dispute as to the precise quantum of the liability to the Revenue, the applicants have produced a revenue printout as exhibit "KF 10" which was not disputed by the first and second named respondents in the subsequent affidavits. It shows an aggregate liability of approximately €345,000. The first named respondent has drawn the Courts attention to the fact that that printout discloses that the Company paid a sum of approximately €1.25m in taxes to the Revenue in the period in which it traded.

18. The printout, however, also discloses that in respect of Relevant Contracts Tax (the tax deducted by a principal contractor from payments made to certain sub-contractors.) (RCT) the Company accrued the following liabilities according to returns made by it to the Revenue Commissioners.

06/04/00 to 05/04/01	€15,379.78
06/04/01 to 31/12/01	€69,028.68
01/01/02 to 31/12/02	€142,543.86

19. It further discloses in respect of RCT, that for the above periods the only amount paid was €15,379.79. It is noted that in the period 6th April, 2001, to 5th August, 2001, no liabilities appear to have arisen. Hence effectively this period commences on 6th August, 2001.

20. On these facts, I have concluded that the first and second named respondents either knowingly permitted significant sums due to the Revenue in respect of RCT to accrue from August, 2001 without providing for the payment thereof or alternatively if they were unaware of the liabilities accruing that they failed to have in place appropriate systems to inform themselves of the financial position of the Company to allow them properly control and manage the affairs of the Company.

21. Added to this, the same Revenue printout discloses an outstanding liability in respect of PAYE/PRSI for the year 1st January, 2002, to 31st December, 2002, in accordance with the P35 return of €119,646.64. Whilst this amount may only have become due to the Revenue following the submission of the P35 for year ended 31 December, 2001, it appears from the printout that monthly declarations with a standard payment of €25,394.76 were made from the 6th July, 2001. Again, I have reached the conclusion that the first and second named respondents either knew or ought to have known, if proper financial management had been in place, that the standard payments being made to the Revenue with the monthly declarations were significantly less than the Company's liability in respect of PAYE/PRSI. The Revenue printout indicates that for the previous nine month period 6th April, 2001, to 31st December, 2001, the Company in the first three months made differing payments (all in excess of €25,394.76) with the monthly declarations and then having commenced the standard amount paid a balancing figure of €69,993.72. This, presumably was paid in early 2002 and at that stage, at the very latest the first and second named respondents knew or ought to have known that the amount of monthly payments were pitched at a level which was accruing significant balancing liabilities in respect of PAYE/PRSI.

22. Upon the above facts I have concluded that either by late 2001 or early 2002 the first and second named respondents knew or ought to have known (if proper financial management had been in place) of the accrual of significant liabilities, on a monthly basis in respect of deductions made for both RCT and PAYE/PRSI to the Revenue Commissioner. They do not appear to have taken any steps during 2002 to provide for the payment of such liabilities. In the same period the taxes deducted by the Company and due to the Revenue were used for trading purposes but nevertheless trade creditors were owed approximately €1.3m by April, 2003. Whilst the first named respondent has referred to difficulties which arose on certain contracts in September, 2002, such matters do not explain in full the continuing financial decline of the Company. Further it was early 2003 before any significant steps were taken to attempt to address the Revenue liabilities. The affidavits of the first named respondent refer to cost cutting steps in early 2003 and a meeting with the Revenue in March 2003.

23. I have noted that the Company employed an accountant. However in accordance with the principles set out above even if the day to day management of the finances were delegated to him it cannot relieve the first and second named respondents of their obligations to inform themselves about the financial affairs of the Company and with their fellow directors to supervise and control the delegated functions.

24. I have concluded that the above facts, in particular, in relation to financial control and management in the period commencing at latest early 2002 and notwithstanding other positive aspects of their conduct as directors during the trading life of the Company, preclude the Court from being satisfied that the first and second named respondents acted responsibly as directors of the Company. Having reached such conclusion it is unnecessary for me to form a concluded view on the matters raised by the applicants in relation to the payments into the Company's bank account in the last week of trading.

25. The Court not being satisfied that either of the first and second named respondents acted responsibly in relation to the conduct of the affairs of the Company whilst a director thereof, the Court is bound to make the declarations of restriction as sought under section 150 of the Act of 1990.