Neutral Citation Number: [2009] IEHC 397

THE HIGH COURT

2008 521 COS

IN THE MATTER OF MDN ROCHFORD CONSTRUCTION LTD (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/

KENNETH FENNELL

APPLICANT

AND

MICHAEL ROCHFORD AND DAVID ROCHFORD

RESPONDENTS

JUDGMENT of Mr. Justice MacMenamin delivered the 18th day of August, 2009

1. Section 150 of the Companies Act 1990 provides:-

> "150.—(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, …"

2. By resolution of the members of the subject company ("Construction"), passed at a general meeting held on 4th January, 2008, it was resolved that by reason of its liabilities it could not continue its business, and was insolvent within the meaning of the Companies Acts 1963 – 2006; that it be liquidated and that the applicant herein be appointed liquidator.

MDN Rochford Construction Limited
3. "Construction" was incorporated on 24th March, 2005. It began trading immediately thereafter from an industrial unit in Blanchardstown. It was involved in building projects primarily for Dublin City Council. It secured a number of contracts to develop extensions to council housing.

4. The respondents were registered in the Companies Registration Office as the directors of the company at the date of the commencement of the winding up. Their father, Noel Rochford resigned as a director on 26th September, 2007. The respondents were joint managing directors since its incorporation. It is not contested they were directly responsible for Constructions day to day running.

5. The liquidator has provided two reports to the Director of Corporate Enforcement (the Director) pursuant to s. 56 of the Company Law Enforcement Act 2001. Having completed his investigations he sought relief from the Director of the obligation to bring this application in respect of the applicants' father, Mr. Noel Rochford only. He was not relieved of such responsibility in relation to the respondents.

The statement of affairs
6. An estimated statement of affairs was prepared by the respondents and presented to the members and creditors of the company on 4th January, 2008. As was apparent therefrom, the respondents estimated that there would be an overall deficiency of €351,343, representing an excess of liabilities over assets. That deficiency included an estimated amount outstanding to the Revenue Commissioners of €98,398, incurred over slightly less than three years.

7. The statement of affairs as of 4th January, 2008 set out the following estimated figures:-

Assets	Book Value €	Estimated to Realise €
Leased fixed assets	34,864.00	-
Plant and Equipment	-	1,000.00
Debtors and work in progress	72,694.00	72,694.00

Redundancy reclaim	3,300.00	3,300.00
TOTAL ASSETS	110,858.00	76,994.00
Liabilities		
Estimated value of preferential creditors		61,235.00
Estimated value of unsecured creditors		367,102.00
TOTAL LIABILITIES		428,337.00
TOTAL SHORTFALL		(351,343.00)

8. The liquidator says that the reasons for the company's insolvency were trading losses and poor cash flow. He says that it was and should have been evident that the company was making trading losses of approximately €26,281 per month in the twelve months preceding his appointment. A number of reasons are given for this, including small margins on jobs undertaken.

9. The directors arranged for a new auditor to be put in place in mid 2007. In late November of that year the new auditor presented the respondents with management accounts for the period ended 30th September, 2007. The respondents say they only then realised the full extent of the company's financial situation.

10. It appears that the relationship between the company and Dublin City Council deteriorated throughout 2007. This is said to have had an adverse effect on cash flow as the company found it difficult to secure prompt payment.

The apparent financial position for years 2005/2006
11. For reasons that will appear hereafter, the true financial position of the company was not properly represented in the annual accounts. The profit position paid no regard to VAT, PAYE and PRSI liabilities which had not been discharged for these years. The company traded for approximately eight months in 2005. During that year it made an apparent profit of €2,359.00 from a turnover of €197,892.00. The apparent net asset position of the company as of 31st December 2005 was stated to be €2,459.00. Total costs for the year amounted to €195,533.00. Of this total the liquidator states that 48.6% related to the costs of sale.

12. For the following year ended 31st December, 2006, it was stated that the company made an apparent profit of €5,523.00 from a turnover of €836,748.00. The net asset position of the company as of 31st December, 2006 was €7,292.00. During that period the main costs incurred by the company were:

Costs	€
Cost of sales	370,664.00
Wages and PRSI	223,082.00
Management Charge	122,719.00
TOTAL	716,465.00

13. The liquidator states that the total costs for that year amounted to €831,225.00. Of this a total of 44.5% related to costs of sales. He comments that although the company's turnover for that year increased by approximately 422%, its profit only increased by 224%. He states that this appeared to be due to a management charge which the company incurred in that year for €122,719.00. As he did not have complete records for 2006 he was compelled to assume that this was made up of payments made to the directors throughout the year which were not processed as salaries. This was not denied. The low profit even in the context of the vastly increased turnover, speaks for itself.

14. It is necessary then to look at a number of specific features which contributed to the decision to wind up the company.

Extent of the company deficit
15. The stated net asset position of the company as of 31st December, 2006 was €7,292. By 4th January, 2008 the net deficiency of the company was €351,343. This represents a fall in the net asset position of the company of €358,635.00 in the twelve month period prior to the liquidation of the company. By any standards this would appear to be a spectacular reverse by contrast to the apparent performance of the company in previous years; that is if the accounts reflected reality. With regard to this radical change of fortune, the liquidator states that by analysis of the figures in the twelve months prior to its liquidation the company was making an average trading loss per month of €26,281.00. During that same period of twelve months this loss of €26,281.00 per month was sustained on foot of an average monthly turnover totalling €52,886.94. Putting the matter at its simplest, every time the company turned over two euros it lost one euro.

Dealings with Dublin City Council
16. After his appointment, the liquidator was informed by the respondent that the company's largest debtor was Dublin City Council. He held a number of meetings with Council officials. On the finalisation of the various accounts, the officials informed the liquidator that payment could not be authorised to this company, as in fact they had been dealing with a related company, Rochford Bathroom and Tiling Ltd. ("Bathroom")

17. The liquidator asked the respondents to clarify the situation. He was informed by the first named respondent that the payments had always been made to "Bathroom" as it, (by way of distinction from the subject company) held a valid C2 certificate, that is a certificate of authorisation issued by the Revenue Commissioners demonstrating tax compliance. This procedure was at variance from that laid down in relation to C2 certificates pursuant to s. 531 of the Taxes Consolidation Act 1997. In itself however this was not a criminal offence. Even as of the time of this hearing the respondents appeared to be under a misapprehension as to whether Construction held a valid C2. Ultimately it was properly conceded the subject company did not.

Failure to file Revenue returns and to discharge Revenue liabilities
18. The total Revenue liability as at the date of the liquidator's appointment amounted to €98,398.00. An age analysis of the Revenue debt demonstrates that, unfortunately the apparent financial position of the company, even as of 2005 and 2006 was not as it appeared.

2005 VAT returns and payments
19. From the commencement of trading on 1st July, 2005 until 31st December of that year the company made three VAT returns, each of €1,250.00 which were filed with the Revenue Commissioners. However no payments were made on foot of these returns.

2006 VAT returns and payments
20. For the calendar year 1st January 2006 to 31st December, 2006 the company made VAT returns in a total of €17,976.00. But no payments were made on foot of those returns. No VAT returns or payments were made from November, 2006 until the company went into liquidation.

2007 VAT returns and payments
21. From 1st January, 2007 until 31st October, 2007, therefore the company did not make any VAT returns at all. The VAT liability of the company is therefore estimated in a total of €23,680.00 for that period.

22. Thus, for the entire period of its trading the company had incurred VAT liabilities of €45,406.00.

23. Unfortunately however, these figures do not paint the full picture. One turns then to the company's PAYE/PRSI record. From 1st January, 2006 until 31st December of that year, the company filed PAYE/PRSI returns reflecting a liability of €68,868.08. But only a total of €40,970.00 was paid during that period, leaving a balance outstanding of €27,898.08. From 1st January, 2007 until 31st December, 2007, the company's PAYE/PRSI liability was €33,612.00, from which the Revenue authorities collected only €9,576.00, leaving a balance of €24,036.00. Thus, under this heading, the company owed the Revenue a total of €51,934.08 over its entire operating period.

24. During the same period of operation the company also incurred a CT (Corporation Tax) liability of €1,049.00. In summary therefore, on an age analysis of Revenue debt, the company owed a total of €98,389.08 for VAT, PAYE/PRSI and Corporation Tax liabilities. None of this was reflected in the company's trading figures.

25. Of the VAT figure, €23,680.00 is based on estimates from the Revenue Commissioners. The Revenue Commissioners were obliged to raise these estimates as the company did not submit VAT returns from 1st November, 2006 onwards. The liquidator has been unable to complete these returns with any degree of accuracy due to the lack of information within the books and records of the company in his possession.

26. The liquidator comments that the liabilities owing to the Revenue Commissioners related to liabilities raised on returns since late 2006 when the company was experiencing significant cash flow difficulties. He comments that the respondent directors were, or should have been, fully aware of the relevant Revenue returns not being submitted and of the build up in Revenue liabilities and also that they could not have reasonably believed that the company would be in a position to discharge its debts as they fell due.

Failure to keep proper books and records

27. The liquidator states that he has reviewed such books and records as were available but has been unable to identify a number of smaller transactions in 2006 due to the lack of relevant records. He notes that the company's audited accounts did not contain any qualification, so he assumes that the records were at one stage properly maintained despite the lack of records being made available to him.

28. He has however been able to retrieve a nominal ledger from the company's accountant for the year ended 31st December 2007, but has been unable to access any information regarding tax returns for payments for 2006. On collection of the books and records he found it to be lacking a cash payments receipts book and cheque books. He requested these books from the respondents, which he described as "basic" and was informed that all available books and records had been retrieved by his staff. He comments therefore that in his opinion the books and records were not adequately maintained for the period beginning 1st January, 2006 to 31st January of that year.

Preparation and filing of statutory returns and audited accounts
29. From the date of its incorporation the company filed two annual returns. However the latest annual return was due on 24th September, 2007. Therefore the company was, *prima facie* in breach of s. 125 of the Company's Act 1963. Furthermore the company had not filed audited financial statements for the year ended 31st December, 2006 with the Companies Registration Office.

Preparation of management accounts
30. The liquidator found no evidence that the company prepared regular management accounts or operated any method of accounting that would allow management to review the current financial position of the company. He considers that such failure was particularly irresponsible in circumstances where the company was incurring average losses of €26,281.00 per month on foot of a turnover of €52,886.00 during the twelve month period prior to the liquidation of the company. It is asserted that the scale of these losses displays, at best, a complete absence of financial acumen and constitutes irresponsible managerial behaviour.

Failure to register with the Construction Workers Pension Scheme
31. Although no employees have formally made the liquidator aware of any issues they may have had, the company was not registered with the Construction Workers Pension Scheme and therefore was not making statutory pension deductions from its employee's wages.

Material differences
32. On foot of the director's estimated statement of affairs the company's debtors were estimated to realise €72,694.00. The

liquidator points out however that Dublin City Council insisted that they had at all stages worked with Rochford Bathroom and Tiling Ltd. (the C2 compliant company) and insisted that all payments be made to that account.

33. "Bathroom" was placed in liquidation on the same date as the subject company. The applicant was appointed liquidator of both companies. He states that although this materially affects the debtors figures stated in the director's estimated statement of affairs it also reduces the amount "Bathroom" might be owed by the subject company as an unsecured creditor in the sum of €72,694.00.

The directors' financial contributions
34. There are however a number of extenuating circumstances to which reference should now be made. The respondents are listed in the director's estimated statement of affairs as creditors of the company in the amount of €71,910.00. This amount is made up of a number of loans made by them to the company, including the sum of €33,000.00, which was lodged to the company's bank account in September 2007. It is not disputed that the director's have also personally guaranteed €30,000.00 of a total sum of €53,213.91 due to AIB, being the amount by which the company's bank account was overdrawn at the date of his appointment.

The director's honesty
35. It is not suggested in this case that the director's have acted dishonestly. As can be seen they extended significant loans and guarantees to the company. The issue before the court is whether the directors acted irresponsibly. The court would wish to make clear it disregards any concept such as "want of financial probity." The net issue is whether the directors acted responsibly or not.

The replying affidavit of Michael Rochford
36. A replying affidavit was filed by Michael Rochford, one of the two respondents. There are a number of points which are relevant to the Court's ultimate conclusion. First, Mr. Rochford asserts that "the company was working primarily for Dublin City Council…." As indicated earlier, the company that was actually entering into contractual arrangements with Dublin City Council was not this, but the associated company. A similar contention is made in a number of paragraphs of the replying affidavit which would suggest that the two companies were treated interchangeably by the respondents.

37. Mr. Rochford further asserts that the financial problems which the company encountered in late 2007 were "in reality solely and exclusively attributable to trading losses in the calendar year 2007". It is important to note that, as is clear from the liquidators report at the end of 2006, the company had made a profit of €5,523.00. In 2007 the company saw a very significant increase in work load and the company was extremely busy with new contracts. In or about the middle of June 2007 the respondents decided to change the company's accountants: "as we believed that we needed greater financial advice, guidance and assistance than we had been getting at the time". Mr. Rochford goes on to state:

> "Prior to this time the company's accountants had been G.T. Donnelly & Associates ("GTDonnelly"). Your deponent and the second respondent would meet with G.T. Donnelly once a month to pay all appropriate taxes and to review the company's accounts. The changeover from G.T. Donnelly to OCC Chartered Accountants proved very time consuming due in part to delay by G.T. Donnelly in furnishing necessary books and paperwork. In this regard and in overall terms the company was seriously impeded by a failure on the part of G.T. Donnelly to provide a satisfactory level of professional service to the company."

38. The deponent repeatedly claims that many of the specific failures alleged by the liquidator were in reality failures that arose because of fault on the part of the company's former accountants. It is said that, insofar as the respondents were aware of cash flow problems being experienced by the company, they believed the situation could be reversed, and that far from being a situation where they were merely turning a blind eye to the situation, they genuinely believed the company could work through the difficulties that it was experiencing in 2007. Mr. Rochford lays particular emphasis on difficulties which they say they had, being "fobbed off" by Dublin City Council and inefficiencies and ultimate failure which they encountered in pressurising Dublin City Council to make payments. As indicated earlier these debts were due to the associated company.

39. It was accepted finally that the C2 certificate of Rochford Bathroom and Tiling Ltd. was used by the subject company for the purposes of securing work from Dublin City Council. But Mr. Rochford states:

> "All taxes were paid on behalf of the company as if the company did indeed have a C2, that is, that at no stage did I or the second respondent work off RCTDC's" (relevant contract tax deduction certificates) (formerly C45's) "given by Rochford Bathroom & Tiling Ltd…." (explanation added).

He states that he was not advised by the company's accountants that there was anything irregular about operating in this way.

Consideration of the respondents replying affidavit
40. The replying affidavit contains three striking averments. Mr. Rochford says that it was:

> " …significant the respondents did not have knowledge of the losses being incurred by the company for an extended period, and in any event insofar as these losses were solely incurred in one trading year, 2007."

The respondents anticipated that this trend would be reversed, and the situation could be rectified and "turned round".

41. Second is the undisputed fact, that the respondents invested a combined total of €96,000.00 into the company, apparently on the advice of their previous accountants as well as having personally guaranteed a substantial portion of the AIB loan.

42. Third, Mr. Rochford seeks to rebut the contention made by the liquidator to the effect that the respondents should have involved themselves more in understanding how the company was financed and operated. He contends that the company found itself in an impossible position since applying too much pressure to Dublin City Council for payment risked alienating that source of work upon which the company was reliant. This was to be seen in light of the fact that the company at the time of liquidation had "projects with a value of approximately €250,000.00 which consisted of two private jobs and one job for Dublin City Council". Mr. Rochford comments: "notwithstanding the existence of these projects the advice was nonetheless to place the company into liquidation". The decision to place the company in liquidation in hindsight was a course of action which he now regrets. It is in these circumstances that Mr. Rochford suggests that there was "a lack of reality" in the liquidator's assertions.

Issues which arise from the evidence
43. A number of issues therefore arise from the evidence generally and undisputed averments of the respondent. These are:

> (a) whether it was irresponsible for the directors of the company to be unaware of its financial position for a twelve

month period, said to be attributable to difficulties with an accountant;

(b) whether the issue of irresponsibility arises, particularly when one takes into account that the average monthly turnover of €52,886.94 gave rise to a monthly loss of €26,281.00 over the same period;

(c) whether it is tenable to suggest that in the circumstances the respondents met with their previous accountants once a month to "pay all appropriate taxes and to review the company's accounts";

(d) whether, in particular, it can be said that the deficit of the company whether due to tax liabilities or otherwise, arose only in 2007;

(e) whether inferences may properly be drawn from the fact that the respondent contended, up to the hearing, that the subject company actually did have a valid C2 certificate. It was properly conceded by counsel for the respondents that this was incorrect and that the company never had such a certificate;

(f) whether the above quoted averments support or undermine the proposition that the directors acted "responsibly";

(g) whether these averments reveal the directors held the requisite degree of knowledge and insight in the administration of the affairs of the company.

The general legal principles applicable to this application
44. A number of applicable legal principles are by this stage well settled. It is true that ordinary commercial misjudgement is in itself not sufficient to justify disqualification. (*Re Lo-Line Motors Ltd*. [1988] B.C.L.C. 698, Browne-Wilkinson V.C. at p. 703.) Second in an extreme case, gross negligence or total incompetence may give rise to disqualification (*ibid*). The court notes that in *Lo-Line* it is suggested that the conduct complained of must display "a lack of commercial probity". In this case there is no such evidence in that there is no allegation of dishonesty. In such a position a court may not find that there was a want of financial probity. (See *Director of Corporate Enforcement and Patrick Byrne*, Unreported, Supreme Court, Fennelly J., 23rd July, 2009). By way of distinction however, the fact that a respondent acted honestly and responsibly does not in itself exonerate the director (*LaMoselle Clothing Ltd. v. Soualhi* [1998] 2 I.L.R.M. 345 at 352.)

45. Excluding financial probity therefore relevant factors to which the court will have regard in this case are the extent:

- of compliance with any obligation imposed under the Companies Acts 1963 – 1990;
- to which directors conduct should be regarded as so incompetent as to amount to irresponsibility;
- of the director's responsibility for the insolvency of the company;
- of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of winding up (*La Moselle*).

These tests were among those approved in Squash (Ireland) Ltd. [2001] 3 I.R. 35. They were applied by Finlay Geoghegan J. in *Colm O'Neill Engineering Services* (in voluntary liquidation) (High Court, Finlay Geoghegan J., 13th February 2004).

Directors powers to delegate not an abrogation of responsibility
46. In certain circumstances a director may delegate some tasks, but each director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them (*Vehicle Imports (in liquidation)* (Unreported, High Court, Murphy J., 23rd November 2000)). These points are now considered in more detail.

47. Applying principles from *Barings plc and others*, *Secretary of State for Trade and Industry v. Baker & Others* [1999] 1 B.C.L.C. 433. Murphy J. identified the following pointers regarding delegation in *Vehicle Imports*:-

A. the duty of each individual director to inform himself about the company's affairs;

B. the fact that some delegation is always essential if company business is to be carried out effectively;

C. that delegation is not to be equated with the absence of a continuing duty to supervise;

D. nor is such delegation to be equated with abrogating responsibility for delegated functions;

E. the extent of the duty may be assessed in accordance with the size and nature of the business;

F. the level of reward a director might be entitled to receive;

G. the general principle that directors have, collectively and individually, a continuing duty to acquire and maintain sufficient knowledge and understanding of a company's business.

The power to delegate is not to be seen as an abrogation of the powers and duties of a director; the extent of the duty is to be determined on the facts of each individual case. (See also *Cooke's Events Company Ltd*. [2006] 1I.L.R.M. 191 at 208, MacMenamin J.)

Revenue non-compliance
48. Finally, non-compliance with tax legislation is not in itself sufficient in order to determine whether a director acted irresponsibly (*Digital Capital Partners* (in voluntary liquidation) [2004] 2 I.L.R.M. 35, Finlay Geoghegan J.) In relation to such liabilities, there must be something more than mere limited failure to discharge liabilities over a period to indicate that the directors have acted irresponsibly.

Application of the principles to the instant case
49. The facts must now be looked at in the context of the principles just identified. The court must have regard to the onus of proof which arises in this case. The onus is upon the directors to demonstrate that they acted responsibly. Unfortunately I do not think the relevant facts, or even the director's response to the evidence as demonstrated in affidavit form shows such responsibility.

50. All business and financial enterprises commence on the basis of optimism. But the issue of profitability lies at the essence of a company, whether it be great or small. If a business is loss making from the outset, and then increasingly so, its future is placed in doubt. The question of solvency will inevitably arise. One test which must be applied as to directors' responsibility is the extent to which they were alert to this key issue, and ensured that there were available to them management accounts so as to ascertain

whether, on a month by month basis, a company was trading profitably. This is not to impose a counsel of perfection on directors. It is mere prudence in order to ensure that an enterprise is not engaging in over-trading, and that increased turnover is not misconceived as increased profitability. It is by no means unusual in applications of this type for directors to have confused one for the other. Monthly management accounts, and a clear assessment of where the company is going, are as essential to company directors as navigation instruments are to a pilot. Directors cannot excuse the fact that they were, for an extended period, "flying blind", by asserting that their duties had simply been delegated to "someone else". Accounts cannot be manicured by ignoring liabilities to the Revenue or elsewhere.

49. These considerations apply specifically here, when such documentary evidence as is available does not even begin to indicate that the directors were, in fact, engaging in a continuing assessment of their company's profitability, or that they were, in fact, meeting their then accountants to pay tax liabilities as they fell due. If they had been engaged in such a process they "failed to see the writing on the wall". If such meetings were in fact taking place for such a purpose, the consistent non payments to the Revenue would have been apparent to all present. There is no evidence the directors adverted to these issues at all. This was irresponsible. The irresponsibility is exacerbated when the issue of solvency was of fundamental importance from the beginning. The position was worsened by the fact that the directors were apparently blind to it. It goes significantly beyond "tipping point" when the directors (then and now) appear still to confuse the total turnover figures which might have been achieved from potential future contracts, as being in themselves entirely potential profit, sufficient to redress losses from previous years.

50. While each case must be judged on its facts, there comes a point where optimism becomes hubris, and where belief that a company can trade out of its difficulties is simply wilful self-delusion. Commercial acumen is necessary. Hope must be matched by verification and objectivity. The absence of all of these necessary characteristics constitutes irresponsibility. They were unfortunately absent here.

51. The facts show that, in fact, the company was never profit making as the directors claim. They never took into account tax and VAT liabilities. Why, is unexplained. If they had, they would have known that they were progressively in a worsening loss making situation. If they had directed their minds to this fact, the alarm bells should have begun to ring as the turnover of the company increased. The respondents could, and should have asked themselves whether the turnover was giving rise to real profit in a low margin environment. Even now they do not seem to appreciate the difference between profit and turnover. The problem could have been identified by the directors properly informing themselves as to the financial state of the company. While, for a short period of time, one might excuse difficulties derived from changing accountants, there is yet a further point in this context which raises difficulty for the respondents.

52. The respondents' reasons for their change of accountants are unexplained. A "problem with an accountant" can have manifold causes. To be a justification for default there should be a full explanation of what, precisely, was the problem. Hypothetically, if such a problem was in fact non payment of accountant's fees, then it is no explanation at all. If alternatively there are faults which lay at the door of the accountants, this should be explained. Moreover, the nature of the delegation cannot preclude the directors knowing about the deficits in VAT and PAYE/PRSI returns, outlined earlier in this judgment. This was not a function that could be entirely delegated to accountants in a very small company employing six or eight workers. The ultimate responsibility for ensuring such revenue payments and compliance lay with the respondents, and no one else. The apparent lack of awareness of the C2 certificate is a further pointer to a culpable lack of knowledge of the company's affairs.

53. This is not to apply a hindsight test, but to look at the situation from the standpoint of any responsible director engaging in prudent conduct of the affairs of a company. Granted the directors acted honestly. They have incurred substantial personal losses. But this I am afraid, does not exonerate them from a finding that there was a failure to discharge their duties with a proper level of skill, care and diligence.

54. The situation here is entirely distinct from entirely external causative factors as identified by Peart J. in *Re Usit World plc* [2005] IEHC. In this case, I am afraid, the issue of "causation" of the collapse of this small company can only be laid squarely at the door of the directors themselves. By way of its contrast with *Usit,* the collapse did not derive from an external cause such as the tragedy of 9/11 and its effect on world travel. Even had all the debts of this company (howsoever categorised) been brought in, they would have been insufficient to bring the company back into solvency.

55. It is of course true that the failure of a company is not *ipso facto* evidence of lack of responsibility by the directors. Courts must exercise extreme care not to engage in a retrospective "blame game". The test must always be whether the directors acted prudently and responsibly, as seen in the context of the information which was, or should have been available to them at the time they made critical decisions, such as that to continue to trade when they were wilfully or negligently unaware of their company's true position. Unfortunately, applying all these standards I must find that the respondents have failed in their duty, and that orders should be made pursuant to section 150. I make this order subject to one proviso however, having regard to the fact that no case is made that the respondents acted dishonestly. The extent of the sanction should be proportionate to the extent of the wrongdoing.

56. Section 152 (1) of the Act of 1990 provides:

> "152.—(1) A person to whom *section 150* applies may, within not more than one year after a declaration has been made in respect of him under that section, apply to the court for relief, either in whole or in part, from the restrictions referred to in that section or from any order made in relation to him under *section 151*(inapplicable here) and the court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit."

57. An application under this section must of course be made on notice, and there being satisfactory evidence before a court that it would be just and equitable to make such an order having regard to the interests of the public and other creditors. One factor, to which a court might have regard, may be as to whether there has been other evidence of want of duty on the part of the respondents. A further factor might be whether the respondents have taken steps to educate themselves as to the financial realities of running a company and their duties as directors. In the light of the evidence as to the respondents honesty, and if there were sufficient proof of the respondents ability competently to conduct the affairs of a company under the Act, a court might be prepared to entertain such application brought under section 152. This indication however is not in any circumstance to be seen as a guarantee of the outcome of any such application, if made.