Neutral Citation Number: [2005] IEHC 448

THE HIGH COURT

[2004 No. 437 COS]

IN THE MATTER OF FINCHLEY CONSTRUCTION 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

PATRICK F. ROACHE AS LIQUIDATOR OF FINCHLEY CONSTRUCTION LIMITED (IN VOLUNTARY LIQUIDATION)

APPLICANT

AND

FERGAL CULLOO, JACQUELINE MORAN, MICHAEL BARRY, JOHN MORAN

RESPONDENTS

Judgment of Mr. Justice MacMenamin delivered on the 28th day of July, 2005.

1. On the 11th February, 2003 it was resolved that the above company Finchley Construction Limited (in voluntary liquidation) (hereinafter the "company") be wound up and that Patrick F. Roache be appointed as liquidator.

2. Each of the defendants are executive directors of the company which is engaged in building and construction works in County Limerick.

3. The company was incorporated on the 25th October, 1997. Mr. John Moran the fourth named respondent was the Managing Director of the company. He was born in 1942. Mr. Michael Barry the third named respondent was the commercial manager responsible for valuations, estimates, tenders and sub contractor payments. Mr. Fergal Culloo the first named respondent was the Contracts Manager responsible with Mr. Moran for on-site activities. Ms. Moran the second named respondent (who is daughter of Mr. John Moran) was the Office Manager.

4. At the time of its liquidation the debts of the company substantially exceeded its assets. The liquidator had estimated the liabilities of the company as comprising the following

(a) preferential creditors €465,000.00

(b) floating charge holders €237,000.00

(c) unsecured creditors €3,689,515.00 Total €4,391,515.00

5. In the view of the liquidator no more than €1,100,000 will be realised and this figure may be considerably less. This will leave a deficit of some €3,200,000 and will result in no funds being available to a large number of unsecured creditors of the company.

The Management of the Company

6. It is the view of the liquidator that the company was badly managed. Problems arose in the operations and construction works of the company in respect of delays and poor quality work and certain contracts. This resulted in substantial contract charges and over runs. In turn this led to cash flow problems.

7. The accounts of the company in respect of the year ended 31st December, 2001, were signed off on the 26th September, 2002. These indicated that the company was a going concern. The liquidator contends that, having carried out examination of the books and records of the company that at this point it should have been clear to the directors that the company was in considerable financial difficulty. To some extent this is reflected in the accounts for that year wherein the auditors of the company state that they had received representations that additional funds would be made available by the directors of the company and that suitable bank support would also be available. The source and extent of this bank support has not been fully identified. The liquidator states that there was a lack of depth and expertise in the management of the company. This view is strongly disputed by the directors all of whom appear to have had a considerable degree of background in the building business. It is contended next that the director should not have authorised the commencement of works and the incurring of expenditure on projects until such projects had been brought to a more advanced stage of planning. It is further submitted the company's premature commencement of contracts contributed to a dispute over a substantial amount due from a client and the contention that the company was operated with poor cost controls and that the management demonstrated poor financial expertise. While the liquidator suggests that the company did not make extensive use of computer technology this contention is again in dispute and the directors state that each of them made use of personal computers. It is contended also that excessive prices were paid for lands.

8. One issue not in dispute is the company had not been discharging its revenue liabilities. Amounts owing include €357,638 for P35 amounts to 31st December, 2002; €19,452 for VAT to 11th February, 2003, and €123,509 in RCT. Nor is it disputed that the company owes employee wages and redundancy and holiday pay of some €90,000.

9. The liquidator acknowledges that Mr. John Moran and Mr. Michael Barry have been of assistance to him by providing information and swearing affidavits in connection with two High Court cases which he took on behalf of the company to recover moneys due and owing. Mr. Fergal Culloo also offered assistance to him with those cases but was not in a position to do so because of lack of personal knowledge of the transactions in question.

The Annacotty Transaction

10. A major consideration grounding the application before this court involves a transaction relating to the purchase and re-development of a site at Annacotty in Co. Limerick. It is undisputed that in or about the month of July, 2000, lands at Annacotty were purchased by Mr. Michael Barry and Mr. John Moran. The liquidator contends that Mr. Moran and Mr. Barry purchased these lands in partnership in their personal capacities and not as directors of the company. The purchase price of the lands was IR £1.1 million.

11. In order to further deal with this issue it is necessary to examine how this transaction was financed. The purchase was effected on foot of a loan which was obtained from National Irish Bank in the sum of €900,000. This loan was taken out by Mr. Moran and Mr. Barry in their own names. The balance of the purchase price, €200,000 was financed by the company which also funded legal costs, stamp duty and the deposit for the lands acquired by the directors. The memorandum of agreement made on 10th July, 2000, is revealing. It states that Michael Barry and John Moran were purchasers. The memorandum does not disclose that the purchase was carried out by these two persons in their capacity as directors of the company or in trust for the company. Beneath their names in the memorandum of agreement there is a heading provided in the event the purchaser is a limited company: "Having its Registered

Office at". This entry is left blank. Furthermore the vendors of the property in question are described as Ryno Developments a limited company though not so described in the memorandum and Mr. Patrick Noonan and Mr. Joseph Ryan. At the signature section of the memorandum there is an asterisk contained on the form after Mr. Noonan's name below is stated the following "(Sec Ryno Devs)". No such description is contained under the names of Mr. Moran or Mr. Barry.

12. Thus, for the time of the purchase, the evidence points to the conclusion that Michael Barry and John Moran were engaging on this transaction on their own account. No motion whatever is made of the company in suit at a time when there were a number of factors which must and should have been present to their minds or at least raises the issue as to the identity of the purchaser on the face of the memorandum of agreement itself.

13. In a memorandum furnished to the liquidator on 21st February, 2003, the company's auditors Patrick McNamara and Associates furnished information as to the nature of the Annacotty transaction. As it is of considerable importance it will be quoted *in extenso*.

> "The Annacotty site was acquired for development purposes. Finchley Construction Limited was going to do the development. *However the land was bought and registered in the names of John Moran and Michael Barry*". (emphasis added).
>
> "The company paid for some of the costs (e.g. legal, stamp duty and £400,000). The bank lent £900,000 to Finchley Construction Limited, John Moran and Michael Barry to complete the purchase of the site and which was to be repaid by way of site fines".
>
> "When the houses were being sold two contracts were used. The construction contracts were by Finchley Construction Limited. The site contracts were a mix of Finchley Construction Limited and Moran/Barry. The cash flow sequence that occurred was that money from the sale of sites and construction was being collected by solicitors and then paid out by way of a cheque to Finchley Construction Limited. Some of the money went towards the discharge of the term loan and more went into the current account. Strict site fine discharge did not occur".
>
> "When we attempted to reconcile the VAT arising on these contracts we discovered Finchley Construction had not been accounting for VAT on the sale contracts for either sites or construction".
>
> "The site had cost £1.1 million exclusive of VAT, which the partnership of Moran and Barry claimed. The VAT inclusive amount put down for the sale of the sites was £720,000. The values being put down for sites was inconsistent and was in part due to arbitrary apportionment of the contract prices".
>
> "In finalising the accounts for 2001 we took a "total" view of the Annacotty development. We treated the whole transaction as Finchley Construction Limited. "To balance the VAT, we identified the original cost of the site including VAT legal and stamp duty. We treated the purchase of the land as an "in out" in the names of Moran and Barry. In other words they bought the site for £1.1 million plus costs and in effect transferred it to the company at No Profit/No Loss". "The VAT, which was originally claimed by the partnership, was "taken" by the company. To balance things up the following needed to happen:-
>
> > 1. The partnership had recovered the VAT on the purchase. As the partnership had in effect sold on the site to the company it now needed to account for the VAT on the sale to the Revenue. We did an exercise which showed that the company owed the partnership £137,500 being the VAT refund it (the company had got the benefit of (sic)).
> >
> > 2. The partnership in order to collect the VAT from the company issued an invoice to the company upon which the company was to make a claim, an amount of €139,764 under expense (sic) creditors (Finchley Construction Limited) was apportionment of this VAT owed to the partnership at 31st December, 2001. The enclosed copy of the partnership accounts up to cessation 30th September, 2002.
> >
> > 3. Having recovered the VAT from the company the partnership was to file a final return in effect returning to the Revenue Commissioners the VAT claimed at the time of the land purchase.
>
> To assist Finchley Construction Limited John Moran told us he had arranged to personally borrow €150,000 to help sort out the VAT debt. We attach a letter sent to Moran and Barry. The company would get a VAT credit".
>
> "Michael Barry advised us during the preparation for the liquidation meeting that;-
>
> > 1. The VAT invoice had issued
> >
> > 2. It was claimed by Finchley Construction Limited.
> >
> > 3. A partnership VAT return was filed.
> >
> > 4. No payment was made. He apparently met with the Collector General's Office and had them transfer a refund due to Finchley Construction Limited (presumably on foot of the invoice) against the partnership liability. We do not know how he succeeded in arranging this set off. We have obviously not seen any evidence of the set off or associated correspondence."

14. Further information as to the attitude of the Directors to the Annacotty issue is to be obtained from the minutes of the creditors meeting

> "A creditor enquired the Directors involvement in Annacotty Developments indicating that it was known that a number of the Directors had ownership of a number of these houses. MB (the reference here is to Michael Barry) indicated that two of the houses were bought by himself and a fellow director and mortgages were obtained in respect of the purchase of same … following an enquiry regarding directors remuneration it is indicated that directors remuneration for the year was €146k. MB explained that this was the four directors. A creditor enquired as to whether the auditors of the company were present in order to explain how they decided that the company was a going concern in September 2002, when the

audited financial statements in respect of the year ended 31 December, 2001 were signed off. Brendan McCarthy of Patrick McNamara & Associates who were auditors to Finchley Construction Limited, indicated that they had received representations that additional funds would be made available by the directors of the company and that suitable bank support would also be available".

15. On 12th January, 2004, Michael Barry the third named respondent swore an affidavit in these proceedings. He was not at the time legally advised. In the course of his affidavit he swore the following

> "In relation to the Annacotty Housing Development I say the following:
>
> > all proceeds from sales were made to Finchley Construction Limited including initial deposits from pre-sales and that the Development was a Finchley Construction Limited development from the outset.
> >
> > No deposits or any funds of any nature were ever made to myself or fellow director John Moran".

16. On 10th February, 2005, John Moran, again without the benefit of legal advice swore an affidavit to precisely the same effect and containing the same precise averments.

17. On 25th February, 2005, Michael Barry swore a supplemental affidavit in this matter. Regarding the Annacotty transaction he swore on this occasion

> "I say that in relation to the "Annacotty Transaction", the lands were at all times purchased by John Moran and I, in trust for the company. I say that we approach the bank and funds were advanced to us to purchase the site in a personal capacity, owing partly to the strong relationship between the bank and John Moran and due to the relatively short period of time the company had been trading. The 25th February, 2005 John Moran swore a supplemental affidavit on this occasion with the benefit of legal advice containing precisely the same phraseology regarding the Annacotty Transaction as that in Mr. Barry's supplemental affidavit.
>
> In the light of the information which has been subsequently obtained it is clear that the two averments contained the first affidavits sworn by Mr. Barry and Mr. Moran were incorrect. It is untrue to say that all proceeds from sales were made to Finchley Construction Limited including initial deposits from pre-sales. It is also untrue to say that the development was a Finchley Construction Limited development from the outset. It is equally untrue to say that no deposits or any funds of any nature were ever made to myself or fellow director John Moran".

18. Not only are these averments inconsistent with the facts as found and as described in the memorandum from the company's accountants Patrick McNamara & Company, they are also inconsistent with the document appertaining to the purchase of the Annacotty lands. No explanation has been tendered for these revealing inconsistencies nor for the conflict between the original affidavits sworn by two of the respondents and the evidence regarding the nature of the Annacotty transaction which has emerged from other sources as outlined above. No deed of transfer subsequently formerly transferred the legal ownership of the lands at Annacotty from Michael Barry and John Moran as individuals to the company consequent upon the decision taken by the auditors on the instruction of the directors to treat the entire of the Annacotty development as being in the ownership of the company. The lands in question were registered in the land registry under their names. In note No. 17 which appeared in the financial statements for the year ended 31st December, 2000, and year ended 31st December, 2001, there is reference under the heading of "related transactions" to "construction work for Annacotty developments, the promoters of which are John Moran and Michael Barry who are directors of Finchley Construction Limited". This records the Annacotty development as a related party transaction as opposed to a development being carried out in the beneficial ownership of the company. It is also a contradiction to the position adopted in the Annacotty memorandum.

19. It will also be seen that it was a condition precedent of the grant of facilities by National Irish Bank for the purpose of assisting with the purchase and development of the lands at Annacotty that the said facilities would be secured by, inter alia, a guarantee by Mrs. M. Moran the wife of John Moran, to be supported by a first legal mortgage over 5.5 acres of her property at Spancel Hill, Ennis, Co. Clare. It is difficult to draw any conclusion other than the fact that this is only consistent with the contention of the liquidator that the lands in question were not bought in trust for the company but by the directors for their own benefit and that this was a project embarked upon by Mr. Barry and Mr. Moran to benefit themselves in their personal capacities. It is to be noted that there was no guarantee from the company in this regard. The loans taken out by Michael Barry and John Moran in their own names from National Irish Bank were paid off in full from the proceeds of the site contracts and the building contracts from the Annacotty development to the benefit of those two directors and their guarantors. I do not accept in this regard the contention made that the respondents' characterisation of the purchase and development of the Annacotty lands is confirmed by the Annacotty memorandum. Indeed the contrary is true.

20. While it is asserted that National Irish Bank had an existing strong business relationship with both Mr. Moran and Mr. Barry and was willing to lend on their reputations and credit no independent evidence has been adduced in this regard.

21. Finally it is incorrect to state that as has been submitted on behalf of the respondents that "having reviewed and analysed the purchase and development of the Annacotty lands, the company's auditors CwC, have concluded, in the Annacotty memorandum that it is appropriate to take "total view" of the entire transaction as a transaction carried out by or on behalf of the company". This was a view taken by the auditors taken by the auditors of the company Patrick McNamara & Associates which was furnished by that company to PricewaterhouseCoopers and received by them on 21st February, 2003. The company was placed in voluntary liquidation on 11th day of February, 2003, and Mr. Patrick F. Roche Liquidator of PricewaterhouseCoopers was appointed liquidator. It was in that capacity that Mr. Roche received the so called "Annacotty memorandum".

22. While the court is urged to take a "benign view" of the Annacotty transaction regrettably this is not possible. The reasons for this are;

> (a) the internal conflicts described above between the various affidavits sworn by Mr. Moran and Mr. Barry, the conflict between the contents of the first affidavits and the memorandum of agreement for purchase of the Annacotty lands, the absence of any indication of the interest of Finchley Construction Limited at the time of purchase and the contents of the Annacotty memorandum as described above provided by the company's auditors Patrick McNamara & Company.

23. Thus far the court has considered three issues. These are the overall financial position of the company, the treatment of the Annacotty transaction and the transfer of the loss sustained on foot of the Annacotty transaction from the partnership of Mr. Barry

and Mr. Moran to the company. The liquidator states that the loss involved in what he describes as the "transfer" of the Annacotty development is of the order of £551,881.44. As a result of this transfer the loss is now borne by the company although it should have been borne by the developers John Moran and Michael Barry in their personal capacities. The calculation of loss sustained is as follows

Cost of lands IR£1.1 million

Stamp duty and legal fees IR£73,637.00

Contribution to County Council IR£18,600.00

Total Acquisition of lands (not including VAT) IR£1,192,237.00

Less proceeds from the site contracts (not including VAT) IR£640,355.56

Total loss attributable to the developers IR£551,881.44

Was there a breach of s. 29 of the Companies Act, 1990?

24. At the hearing of these proceedings three transactions were identified as being potentially subject to the regulatory provisions of s. 29 of the Company's Act 1990 these were;

(a) the Annacotty transaction,

(b) the sale of a house in the Annacotty Development to Michael and Aine Barry and,

(c) the sale of a house in the Annacotty Development to Fergal Culloo.

25. Section 29 of the Companies Act 1990 states;

"(1) Subject to subsection (6) (7) and (8) a company shall not enter into an arrangement

(a) whereby a director of the company or its holding company or a person connected with such a director acquires or is to acquire one or more non cash assets of the requisite value from the company; or

(b) whereby the company acquires or is to acquire one or more non cash assets of the requisite value from such director or a person so connected; unless the arrangement is first approved by a resolution of the company in general meeting and if the director or connected person is the director of its holding company or a person connected with such a director, by a resolution and general meeting of the holding company

(2) For the purposes of this section a non cash asset is of the requisite value if at the time the arrangement in question is entered into its value is not less than £1,000 that subject to that, exceeds £50,000 or 10% of the amount of the company's relevant assets, and for those purposes the amount of a company's relevant assets is-

(a) except in a case falling within paragraph(b) the value of its net assets determined by reference to the accounts prepared and laid in accordance with the requirements of s. 148 of the Principal Act in respect of the last preceding financial year in respect of which accounts were so laid.

(b) where no accounts have been prepared and laid under that section before that time the amount of its call up share capital."

26. Under subs. (4) of s. 29 it is provided;

(4) "Without prejudice to any liability imposed otherwise than by this subsection with subject to subs. (5), where an arrangement is entered into with a company by a director of the company or its holding company or a person connected with him in contravention of this section, that director and the person so connected and any other director of the company who authorised the arrangement or any transaction entered into in pursuance of such an arrangement shall (whether or not it has been avoided in pursuance of subs. (3) be liable;

(a) to account to the company for any gain which he had made directly or indirectly by the arrangement or transaction; and

(b) (jointly and severally with any other person liable under this section) to indemnify the company for any loss or damage resulting from the arrangement or transaction".

27. Under subs. (9)(b) it is provided;

"any reference to the acquisition of a non cash asset includes a reference to the creation of extinction of an estate or interest in, or a right over, any property and also a reference to the discharge of any persons liability other than a liability for a liquidated sum".

28. It is clear then that s. 29 applies both to any transfer of the ownership of the lands at Annacotty to the company and the sale of houses by the company to Michael and Aine Barry and Fergal Colloo. It is accepted that in both these cases there was a failure to have either of these transactions approved by the company in general meeting and thereby there was a failure of compliance with s. 29 of the Companies Act aforesaid.

29. With regard to the impugned transactions however it will be noted that the section is designed to provide protection to the members of the company rather than its creditors. It does this by requiring the members of the company to approve by means of an ordinary resolution, substantial property transactions in excess of €63,486 entered into between companies and their directors. The

section provides a safeguard against directors abusing their position in corporate transactions involving themselves in their personal capacity. Failure of compliance with s. 29 is not a criminal offence although an unapproved transaction may be voidable at the instance of the company.

30. In the instant case the following matters are of relevance. First as regards the company in suit the directors and shareholders are the same. Thus were the impugned transactions were authorised by the directors, any failure to comply with the technical requirement of s. 29 does not ipso facto constitute irresponsibility within the meaning of s. 150. Here the transactions were approved by the directors who were one and the same persons of the shareholders. In approving the transactions, the directors were under a fiduciary duty to act in the best interest of the company. Acting in their capacity as directors (it is submitted) the respondents concluded that the transactions were in the commercial interests of the company. The respondents further submit that it must be assumed that had the same persons held a shareholders' meeting they would necessarily have ratified the transaction. There is little alternative to find but there has been *prima* facie breach of s. 29 of the Companies Act 1990. The directors accept that they should have been aware of and ensure compliance with the section. However even after the transactions it would have been open to the shareholders to ratify the transactions under s. 29(3)(c). I accept that s. 29(3)(c) demonstrates that the true purpose of the section is a safeguard as members' interests as opposed to creditors as members may retrospectively validate an otherwise voidable transaction.

31. It is submitted on behalf of the respondents that in considering whether any failure to comply with s. 29 was "irresponsible" within the meaning of s. 150(2) the court should have regard to the provisions of s. 29(8) which provides that arrangements whereby a director acquires assets from a company in his capacity as a shareholder are not subject to the regulatory requirements of s. 29(1). Section 29(8) has no application where a company acquires a non cash asset from a director. Thus it is submitted that even if the precise capacity in which the directors acquired the houses is unclear, the court should have regard to the position of the directors as members.

32. While I accept there is force in this transaction it seems to me that the matter should be looked at in another way and perhaps more simply. While prima facie there appears to have been a breach of s. 29 of the Companies Act 1990 no evidence has been adduced that there is either any dishonest irresponsible element to these transactions. While on their face irregular it would appear that the transactions were intended by the directors to benefit the company by the purchase of houses on the Annacotty estate. While the transactions therefore are on their face irregular and indeed a breach of s. 29 of the Act of 1990 I am satisfied that the court must see the transactions in question within the context identified by Shanley J. in *La Moselle Clothing Limited v. Soualhi* [1993] 2 ILRM 345 that is to say the *extent* to which the director has or has not complied with any obligations imposed upon him by the Companies Acts.

33. There are also two additional factors to which I am satisfied the court must have regard in assessing the respective liability of the directors. These are first that Mr. Fergal Colloo the first named respondent invested some €48,000 of his own money in the company in December 2002. It is to Mr. Moran's credit that he is proposing the injection of €150,000 into the company to assist with cash flow when a sudden and critical illness prevented him from carrying out this injection of funds.

34. Finally it is uncontroverted that Jacqueline Moran, Michael Barry and John Moran obtained a personal loan from Bank of Scotland (Ireland) in 2002 in the sum of €250,000 in order to discharge the company's insurance premium for the year. When the company went into liquidation the sum of €100,000 remained outstanding on foot of the said personal loan by Jacqueline Moran and the same was discharged to Bank of Scotland (Ireland) by Jacqueline Moran remortgaging her property at Willmount, Groady Hill, Dublin Road, Limerick.

35. Both John Moran and Michael Barry signed personal guarantees on behalf of the company with National Irish Bank on 4th January, 2001, for the purposes of the bank affording credit facilities to the company. As a result of the insolvency of the company they are currently indebted to National Irish Bank in the sum of €269,565.34 joint and severally.

Consideration of the Issues in the light of established case law

36. The issue in this case is whether the conduct of the respondents was such that they did not act honestly and/or responsibly having regard to criteria established in the following authorities *La Moselle Clothing* [1998] 2 I.L.R.M. 345; *Re Squash Ireland Limited* [2001] 3 I.R. 35; *Re Colm O'Neill Engineering Services Ltd* (Unreported, The High Court, Finlay Geoghegan J. 13th February, 2004) and *Re Tralee Beef and Lamb Limited* (Unreported, The High Court, Finlay Geoghegan J. 20th July, 2004).

37. Under s. 150 of the Companies Act 1990

> "(1) The court shall unless it is satisfied as to any of the matters specified in subsection (2) declared that a person to whom this chapter applies shall not for a period of five years be appointed or act in anyway 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".

38. Under subs. (2) of the same section it is provided;

> "The matters referred to in subs. (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".

39. In *La Mosell* Shanley J. set out the test for acting responsibly. He considered that "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 Act, 1963 to 1990;
>
> (b) the extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility;
>
> (c) the extent of the directors responsibility for the insolvency of the company;
>
> (d) the extent of the directors responsibility for the net deficiency in the assets of the company disclosed at the date of

the winding up or thereafter; and

(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."

40. These tests were explicitly approved in *Re Squash Ireland Limited* [2001] 3 I.R. 35 by the Supreme Court per Guinness J. Responsibility which must be established by directors goes on beyond simple compliance with the Companies Acts' obligations or regulatory obligations. See Finlay Geoghegan J. in *Colm O'Neill Engineering Limited*. I also accept the dictum of the same judge in the case of *Tralee Beef and Lamb Limited (In Liquidation)* (Unreported, 20th July, 2004) that among the factors to which the court must have regard are the duties imposed on a director at common law. Additionally I accept the dictum, referred to in that judgment, of Jonathon Parker J. in the case of *Re Barings plc and Others (No 5); Secretary of State for Trade and Industry v. Baker and Others* (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".

41. With regard to Michael Barry and John Moran it is clear that there have been breaches of s. 29 of the Companies Act. I do not consider that there is sufficient evidence upon which the court might be satisfied that the sale of company assets took place at an undervalue. However for the reasons which have been outlined above there is substantial evidence that the Annacotty transaction and its treatment thereafter was improper. This transaction was, I am satisfied in breach of the fiduciary obligations owed by the directors to the company as they are outlined in the case of *Tralee Beef and Lamb Limited (In Liquidation).*

42. I am satisfied also that with regard to the two aforementioned Directors there is evidence of a degree of incompetence such as might amount to irresponsibility.

43. As they were the prime moving spirits of the company when the accounts for the year ended 31st December, 2001, were signed off on 26th September, 2002, on a going concern basis it should have been clear to them that the company was in considerable financial difficulty as this was four months before the company ceased trading. The liquidator has calculated from his examination of the books and records of the company that the company made a loss of at least €900,000 in the 12 month period from January, 2002, to January, 2003, being the date on which the company ceased trade. As the final deficit is approximately €3,200,000 then assuming there was no substantial reduction in assets over that period the company must have entered the year with the running deficit of €2,300,000. It is unavoidable to conclude that continuing in such circumstances amounted to an inability on the part of the above two named directors to "see the writing on the wall" i.e. they were unable to see from a perusal of the company's management accounts that the company was trading while insolvent. I am satisfied that this was from a degree of incompetence sufficient to justify a restriction under s. 150.

44. A number of factors have been identified by the liquidator as constituting mis-management these include;

1. An alleged lack of depth and expertise in the management of the company

2. That the director should not have authorised the commencement of work and the concurring of expenditure and projects until such projects had been brought to a more advanced stage of planning.

3. The premature commencement of contracts contributing to a dispute over substantial amounts due from clients.

4. Alleged poor cost controls and poor financial expertise.

5. An alleged lack of utilisation of computer technology giving rise to inefficiency.

45. Suffice it to say I do not consider that there is evidence of any of these factors such as would justify ground for restriction under s. 150 on the basis of decided authority. However I am satisfied that the court is also entitled to have regard to the facts that the company had not been discharging its revenue liabilities and that amounts owing included €357,638 for P35 amounts from 31st December, 2002; €19,452 for VAT to the 11th February, 2003, and €123,509 in RCT. Additionally the company owed employee wages and redundancy and holiday pay of some €90,000.

46. In addition to these factors the court is entitled to have regard to the facts that the Annacotty transaction exacerbated the losses accrued by the company and the failure on the part of the above named two Directors to disclose the sale of the company assets to connected parties in notes to the financial statements for the year ended 31st December, 2001.

47. With regard to Annacotty the court cannot ignore the fact that by treating that side as the property of the company although purchased by them individually Mr. Moran and Mr. Barry transferred a loss described in the affidavits from their partnership to the company thereby increasing the net deficiency by some a very substantial sum.

48. In the circumstances therefore the court has no alternative but to make a declaration in relation to the above named respondents under s. 150 as sought in the notice of motion.

49. With regard to the first two named respondents however somewhat different considerations apply. It cannot be gainsaid that prima facie they too were guilty of breaches of s. 29 of the Companies Act but to their credit they each individually either invested personal funds (€48,000 in the case of Mr. Colloo) or alternatively made personal guarantees in the case of Ms. Moran on account of the company's insurance. I believe these matters are issues to which the court may have regard in determining whether or not the first and second named respondents acted honestly and responsibly.

50. With regard to the alleged breaches of s. 29 of the Companies Act 1990 I do not believe that it has been established that they benefited thereby. In any case I consider that the Court is entitled to have regard to their particular position both as shareholders and directors and to the overall shareholding structure of the company. I do not consider that it has been established that the interests of creditors have been affected.

51. Of particular importance is the fact that neither the first nor second named respondents were parties to the Annacotty transaction. I also take into account the facts that Ms. Moran was a daughter of the third named respondent and was office manager and that the first named respondent was Contracts Manager responsible for on site activities with Mr. Moran. While I fully accept the statement of Jonathon Parker J. in the Barings case that each individual director owes duties to the company to inform himself about

his affairs, I am nonetheless of the view that there a number of balancing factors which have been outlined above which are sufficient to discharge the onus which devolves upon them under s. 150. In particular the court may have regard to the fact that there is no evidence that either the first or second named respondents abdicated their roles as Directors and to a degree the prime motivators in the company were the third and fourth named respondents.

52. While it is undoubtedly unfortunate that the fourth named respondent suffered serious ill health in the autumn and winter of 2002 this cannot, regrettably, detract from the degree of responsibility which he shares with the third named respondent for the ultimate insolvency. In summary therefore the Court will make the declaration sought with regard to the third and fourth named respondents. The court will decline to make such a declaration in relation to the first and second respondents.