

THE HIGH COURT**Record Number: 2005 No. 103 Cos.****IN THE MATTER OF DUBLIN SPORTS CAFÉ LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF THE SECTION 150 OF THE COMPANIES ACT, 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001****BETWEEN****KEN FENNELL****APPLICANT****AND****DAVID LONG AND GERRY WRIGHT****RESPONDENTS****Judgment of Mr Justice Michael Peart delivered on the 21st day of December 2005**

1. By Notice of Motion dated 18th March 2005 the applicant ("the liquidator") seeks a declaration that each of the respondents, being persons to whom Chapter 1 of Part VII of the Companies Act, 1990 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 formation of any company unless that company meets the requirements set out in sub-section (3) of Section 150 of the Companies Act, 1990 (as amended).
2. The liquidator has sworn two affidavits, the first being that upon which the motion itself is grounded and is sworn on the 18th March 2005. His second affidavit which is sworn in response to affidavits sworn by the respondents is sworn on the 25th July 2005.
3. The first named respondent, David Long has sworn two affidavits, being those sworn on the 16th June 2005 and on the 7th October 2005 respectively. The second named respondent, Gerry Wright has sworn one affidavit on the 24th June 2005.
4. Under the provisions of s. 150 of the Act, the Court *shall* make the order sought unless it is satisfied that the respondents 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/she should be subject to restriction. The provision is therefore mandatory until such time as the Court is so satisfied. The respondents in the present case have each sworn affidavits by which they submit that the Court should be satisfied that an order is not required to be made. In applications of this kind, the liquidator in his affidavit brings to the attention of the Court any matters which he feels are of relevance to the issues which the Court must decide.
5. The company operated a licensed premises in Parnell Street, Dublin. There appear to have been two distinct operations from these premises. Firstly there was pub, bar, disco and off licence business, and secondly there was a lap-dancing business. It appears that certainly from May 2002 onwards the company was unable to achieve a sufficient turnover in order to meet its overheads, and this led to substantial trading losses. The deficit as at the date of appointment of the liquidator was in the order of €2,400,866. It appears also that the second named respondent is himself an unsecured creditor in the sum of €1,645,580, and that in addition both respondents have an exposure to bank of Scotland in the sum of €425,410 on foot of personal guarantees which they signed. The respondents, and particularly the second named respondent are by far and away the largest creditors, and account for either 80% or 91% of the indebtedness depending on the outcome of some dispute about the ownership of the licence attaching to the premises.
6. The first named respondent was the managing director of the company and appears to have day to day charge of the running of the business. The second named respondent, who resides in British Columbia, Canada, was a non-executive director, and he provided the financing for the company at the outset.
7. The liquidator was appointed on the 17th October 2003 by an ordinary resolution of the members who resolved that by reason of its liabilities the company could no longer continue in business, and that it should be wound up voluntarily. He has not been relieved by the Director of Corporate Enforcement of the requirement to bring this application. In his grounding affidavit, he acknowledges that the first named respondent has assisted him in relation to various matters which he needed to investigate in relation to the affairs of the company, and states that in his opinion the collapse of the company was due to genuine business failure resulting from the location of the premises. He also states that the bulk of the losses were incurred in the first two years of trading, even though losses continued throughout the trading life of the company.
8. He nevertheless suggests that there are matters which would justify the Court in making the order sought against each respondent in the absence of adequate and satisfactory explanation by the respondents:

1. The company failed to maintain proper books and records. In particular, the liquidator states that while there was a part-time book-keeper employed, who kept detailed and up to date financial records for the bar and off-licence business, there were no records available to the liquidator at the time of his appointment. Some rather brief records from that side of the operation were subsequently handed over in circumstances which I will deal with by reference to the affidavit of the first named respondent. The liquidator in his grounding affidavit states that the first named respondent explained to him that these books and records had been removed by members of An Garda Síochána when they raided the premises in June 2003. It appears that the Gardai were interested in matters concerning the employment of foreign workers in the premises. However, while prosecutions were brought, the charges were dismissed.

The liquidator sought from the Gardai inspection of the documentation which they had seized but that was declined, although a list of documents held by them was provided. After the charges were dismissed, the liquidator was provided with some material, but only in May 2005. The second named respondent has exhibited some cash sheets, and these consist of thirteen sheets of paper, each being described as a "Dance Sheet", for that number of days during April 2003 and June 2003. The liquidator has stated that the documentation provided, such as it is, has been insufficient to enable him to investigate the trading affairs of the lap-dancing side of the operation.

In relation to that side of the business, he states that he has been informed by the first named respondent that receipts from that side of the business were made up of about 50% by credit card, and the other 50% by cash. He was told also that the total receipts were split as to 50% to the company and 50% to the dancers, and that this resulted in the entire cash receipts being paid to the dancers. However, there are scarcely any records to back this up. There is no evidence that the cash was lodged to any bank account, and the liquidator says that he has been

informed that the credit card payments were lodged to the bank account. The liquidator has been able to ascertain that there were regular payments made to the bank account, he has been unable to locate any evidence to support the cash receipts or the manner in which the cash receipts were dissipated. He has not been provided with adequate back-up for the lodgments as compared with the sales receipts during the last three months of trading, and he says that there is a shortfall of €26,000 for which the first named respondent informed him there was back-up documentation available but that same had not been provided as of the date of swearing of his grounding affidavit.

2. The last set of audited accounts was filed for the Company for the year ended 31st August 1999, and furthermore an annual return was outstanding from the 30th May 2002 until the date of the winding up resolution in October 2003. The liquidator does however acknowledge that the company was "largely up to date with its tax returns".

Respondents' responses

1. Gerry Wright

9. He states that at all times he was a non-executive director of this company, but that he has always concerned himself with the affairs of the company and that he was involved in all decisions other than those concerning the day today running of the business. He goes on to state that he has always considered the accounts of the company and has approved of their contents. Apart from this attention to the affairs of the company he states that he has invested substantial sums in the company and has assumed personal responsibility for some of the indebtedness under the personal guarantee to Bank of Scotland, and that he himself is the principal creditor. He states that until near the date of the winding up of the company he believed that the company could trade out of its financial difficulties.

10. In relation to accounts for the company he states that while the last set of audited accounts filed was for the year ended 31st August 1999, there were accounts prepared for the following year also but that these were not filed because of what he refers to as "excessive fees" charged by the auditors for the accounts for the year ended 31st August 2002. This difficulty had a knock on effect in relation to the non-filing of the Annual Returns for 2001 and 2002 as audited accounts would have been required to be filed with these returns.

11. Finally he states that he believes that at all times proper records were maintained by the company, and that he agrees with what his co-respondent, Mr Long, states at paragraph 8 of his affidavit to which I shall refer in due course. He believes that he has acted honestly and responsibly in relation to the affairs of the company.

David Long

12. He states that he tried to manage the affairs of the company in such a way as to enable the company to trade out of the financial difficulties, but he states that the location of the premises prevented sufficient turnover to be generated.

13. In relation to the absence of audited accounts after the year ended 31st August 1999 he states that this was because there was a difficulty with the auditors over what he calls excessive fees due to the auditors, but he says that at all times he had access to weekly figures so that the directors were fully aware of the financial position and continued to support the company financially.

14. He states that proper books of account were maintained at all relevant times, and that a book-keeper was employed from 2001 to maintain records for the company. He goes on to state that she maintained meticulous records in relation to the bar side of the business, and also that the management accounts to which he was able to refer at the meeting of creditors in October 2003 had been made by reference to those records. He states also that overheads had been stabilised since the year 2000, but that a turnover of €25,000 was necessary in order that the company would break even.

15. In relation to the lap-dancing side of the business he states that the records for this were maintained by Ms. Keane, but that all these records were seized by the Gardai in a raid in June 2003, and that at the time of the liquidation in October 2003 the records from June to September 2003 were in the possession of Ms. Keane "for processing and analysis" and that she has since relocated in Galway. However he goes on to state that he has managed to recover part of these records which he has passed over to the liquidator. He then gives details of how the credit card payments were paid into the bank account, and that the cash receipts were divided as to 50% to the dancers and the other 50% being used "to pay the expenses of the business". He does not say what these are or give any figures. At another part of his affidavit he states that coming towards the end of the life of the company certain essential suppliers had to be paid in cash and that essential members of staff were paid in cash also. The source of this cash, he states, was the cash receipts of the bar. He states that even though this was how matters operated at that time, all cash receipts were recorded. He then sets out four items of cash payments which he can recall which amount to €11,500, and he states that he cannot be more specific.

16. Lastly he states that he has assumed personal responsibility for €425,410 due to Bank of Scotland. He believes that he has acted honestly and responsibly.

17. He also gives details of the proceedings commenced by the Gardai against the company and that these were dismissed and that he has now given to the liquidator as much documentation and information as he can retrieve from the Book of Evidence. This is the documentation to which the liquidator referred in his second affidavit, namely the thirteen daily sheets for thirteen days in April and June 2003 which were exhibited in Mr Long's affidavit, and which the liquidator said did not assist him.

Conclusions

18. I am satisfied that the collapse of this company was not due to any dishonesty on the part of the respondents, and that each director has satisfied the court that he acted honestly. I believe that to be the case, and there is certainly no evidence produced to the contrary by the liquidator. I am satisfied that the collapse of the company has resulted primarily from a decision made to locate the business in Parnell Street - which decision with the benefit of hindsight was the wrong decision according to both the liquidator and the respondents themselves. I have no evidence to support any different view.

19. I am also satisfied that the pub, disco-bar and off-licence side of the business was run in a way which was responsible in as much as at least there appears to have been a competent, albeit part-time, book-keeper employed by the company and who kept detailed and up to date financial records for that side of the business. Mr Long has said that this information was the source of the management information which he had available to him at the meeting of creditors in October 2003. To that extent I am satisfied that each of the respondents acted responsibly in the affairs of the business. It is also a fact that both respondents, but particularly the

second named respondent, are the main losers in this collapse. That of itself is not sufficient to satisfy the Court that they have acted responsibly, though the continued support of the company as the need arose indicates very serious commitment to the continuation of the business and to the perhaps over optimistic policy of trying to trade out of the difficulties

20. However, the Court's primary concern is the question of the books and records of the company and the inability of the liquidator to investigate the affairs of the company to the extent which he considers necessary, especially in relation to the lap-dancing side of the business. This was a mainly cash business, and the manner in which, according to the only evidence which the Court has been given, the records of the company were kept and preserved, and the manner in which, even on the evidence of the first named respondent himself, the cash which came into the company's hands was dealt with, cannot be regarded as in any way adequate and in accordance with good corporate governance. In my view there is a heavy onus upon directors of a company which generates a significant amount of cash transactions, to ensure that records and systems within the company are sufficient to ensure that it is possible to track those cash receipts through the records of the company, including the bank account(s), and to avoid an otherwise inevitable conclusion that cash received was not recorded and was used to defray expenses which also are not properly vouched and recorded, either by way of wages to employees, sub-contractors, suppliers, directors' drawings and suchlike.

21. The paltry amount of records of cash transactions which have come into the hands of the liquidator in this case, namely the thirteen daily dance sheets to which I have referred are testament to the scrappy and unsatisfactory nature of the records kept in this regard. It is not possible for respondents to attempt to exculpate themselves from the strictures of s. 150 of the Act by saying things like that one of the staff members disappeared with some of the records to process and analyse them. There appears to have been no attempt to have Ms. Keane swear an affidavit to assist in this matter. What has been stated is not sufficient in my opinion to satisfy the Court that these respondents have acted responsibly in relation to that side of the business, even if it is the case that the pub, disco bar and off licence side was handled in a more satisfactory way. Neither am I satisfied that the gap in the records which has been identified by the liquidator can be explained away by the raid on the premises by the Gardai in June 2003. These in my view are simply excuses being produced by the respondents to try and explain away the fact that this essentially cash side of the business was run in a very loose way and not in accordance with any proper procedures from a records point of view.

22. There is no evidence that this lack of a paper trail in respect of the cash transactions has been the cause of the collapse, but in my view that is not dispositive. If it could be shown, and in this case it has not been, that the faulty accounting procedures, or lack of proper records, were faulty only to a minor degree and that basically they existed to some satisfactory level, then the respondents might be regarded as generally having acted responsibly, although perhaps inefficiently. But there is no evidence in this case which goes anywhere near satisfying the Court that there was anything approaching adequate books and records especially in relation to the lap-dancing side of this business. That has resulted in the fact the liquidator is unable to establish the precise trading history up to the date of his appointment. The fact that the second named respondent may be the main loser among the creditors of the company is neither here nor there as far as this is concerned. Equally the fact that he was a non-executive director is neither here nor there. He was a director and as such shares the responsibility to ensure that all is in order, and I venture to suggest that in a company where there are but two directors, the obligation on the non-executive director is even higher than a non-executive director of a much larger company who may have certain identifiable and particular responsibilities within the company, but who may rely on other directors to carry out their particular functions, even though he would be remiss not to be concerned and satisfied as a member of the Board of directors that all the affairs of the company were being properly attended to.

23. In the present case, one director, the first named respondent, was basically running the company in Dublin on a day to day basis, while the second named respondent, the main financial backer, was in British Columbia. In my view it was not responsible behaviour for the second named respondent not to make absolutely certain that all books and records were being maintained, especially in a situation where so much of this side of the business was generating cash. The absence of books and records, even in his case, cannot be explained away by the alleged actions of Ms. Keane or members of An Garda Síochána.

24. In relation to the non-availability of audited accounts, and the non-filing of annual returns, it cannot be adequate for the respondents to justify this by reference to a dispute with the company's auditors over fees. Whatever the source of that dispute, the evidence is insufficient to explain it away. The respondents carried a serious responsibility as directors to ensure that these accounts were audited in a timely manner, and that annual returns were filed. These are responsibilities which matter, and simply because some dispute breaks out with the auditors over fees is not a reason to remove the need to have these accounts available.

25. The Court is therefore not satisfied that the respondents each acted responsibly in relation to the affairs of the company overall, and in these circumstances the Court is obliged to make the order sought in respect of each of them, and I so order.