THE HIGH COURT

[Record No. 2001 294 COS]

IN THE MATTER OF 360ATLANTIC (IRELAND) LIMITED
(IN RECEIVERSHIP AND IN LIQUIDATION)
AND
IN THE MATTER OF THE COMPANIES ACT, 1963 – 1999
AND
IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT, 1990

BETWEEN

RORY O'FERRALL

APPLICANT

AND
PATRICK COUGHLAN, HERBERT HEISE,
GEORGE HOAR AND DAVID LEDE

DEFENDANTS

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

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

2. It is undisputed that the first, second and third named respondents were each directors of the Company within twelve months of the date of commencement of the winding up. Whilst the fourth named respondent, Mr. Lede, in his first affidavit stated that at no time he "knowingly consented or agreed to act as a Director of the Company" and that accordingly he had been advised that the provisions of Chapter 1, Part VII of the Companies Act, 1990, did not apply to him it now appears from his second affidavit that he does not dispute that he was a director but asserts that he resigned as a director of the Company on the 25th August, 2000, almost 11 months prior to the commencement of the winding up. I am satisfied on the facts set out in the affidavits that the applicant has discharged the onus of proof on him of establishing that as a matter of probability Mr. Lede was a director of the Company within twelve months of the date of commencement of the winding up and accordingly s. 150 of the 1990 Act applies to him.

3. It is further undisputed that the Company is and was at the date of commencement of the winding up insolvent and accordingly s.150 of the Act of 1990 applies to the Company and each of the respondents.

4. The liquidator made his report to the Director of Corporate Enforcement under s. 56 of the Company Law Enforcement Act, 2001, and was not relieved of his obligations to bring this application.

5. The first and fourth named respondents, Mr. Coughlan and Mr. Lede, were represented at the hearing of the application. The second and third named respondents Mr. Heise and Mr. Hoar have not appeared.

6. In a judgment given in *Re: Euroking Miracle (Ireland) Limited* Unreported, High Court, 5th June 2003, I concluded that s. 150 of the Act of 1990 applies to persons resident outside of the jurisdiction. Further, construing the section in accordance with the principles of constitutional justice as set out by the Supreme Court in *East Donegal Co-operative Livestock Mart Limited v. Attorney General* [1970] IR 317, it requires, insofar as practicable, that directors be given notice of an application in respect of them under s.150 of the Act of 1990 and an opportunity to be heard in relation to same prior to the Court reaching its decision.

7. I am satisfied on the affidavits of service of Louise Kruger and Aaron Boyle sworn herein that as a matter of probability each of Mr. Heise and Mr. Hoar have been given notice of this application and of the hearing date and accordingly that I should determine the application as against them as well as against the respondents appearing.

Background facts

8. The Company was incorporated under the name Vetluga Limited on the 5th May, 1999. On the 5th June, 1999, the Company changed its name to WTI Telecom (Ireland) Limited. On the 15th June, 2000, the Company changed its name to 360atlantic (Ireland) Limited. The Company is a wholly owned subsidiary of 360atlantic (Danmark) ApS (formerly Worldwide Telecom (Denmark) ApS). The ultimate parent company is 360networks inc., a Canadian company, formerly Worldwide Fibre Inc.

9. The worldwide group headed by 360networks inc. appears originally to have been primarily in the business of designing and constructing fibre optic cable networks for other telecommunication companies throughout North America and developed to providing a variety of high bandwidth services on its own worldwide cable network. As part of its worldwide network it appears that between 1999 and 2001 the 360networks group laid a broadband cable known as "360atlantic" linking Dublin with Southport, England; Halifax, Nova Scotia; and Boston, Massachusetts. It is stated by the first named respondent that on completion the cable linked Ireland with up to 50 cities in Europe and a further 50 in the USA along with major centres in Asia and South America. Further that the Atlantic cable cost approximately US$1 billion to construct.

10. The incorporation of the Company is explained by advice from Price Waterhouse Coopers that in order to meet local regulatory requirements a separate corporate structure should be created in each country in which the group operated. Further that there should be an operating company which would hold the assets and operate the network and an overall "reseller" company which would purchase capacity from the operating companies, package it to contiguous network products and sell it to the end customer. In Ireland two companies were incorporated, the Company and 360networks (Ireland) Limited.

11. In Ireland, a 25,000 sq. ft. cable landing station and network switching facility was constructed at the Clonshaugh Industrial Estate, Dublin, at, it is stated, a cost of $70 million. The Company owned the site at Clonshaugh, was involved in the construction thereon and was involved in the business of selling capacity on the 360atlantic cable to users.

12. The liquidation of the Company appears to have been caused by the following. Firstly, a global downturn in the telecommunications industry about the same time as the completion of the 360atlantic cable resulting in a significant decrease in value of capacity in such cables. In May 2001 as a result of the collapse of the worldwide market for the leasing of cable capacity an American company within the 360networks Group, 360networks Holdings (USA) Inc., defaulted on an interest payment in its loans. Thereafter an attempt appears to have been made to restructure group borrowings but this failed and on the 28th June, 2001, 360networks Inc., the ultimate Canadian parent, filed for bankruptcy protection under Canadian company Law. Simultaneously the

Group's US companies including 360networks Holdings (USA) Inc. filed for Chapter 11 bankruptcy protection in the US.

13. In May/early June 2001 Mr. Coughlan states that the Company's employees in Ireland were given notice of termination of their employment and on the 19th June, 2001, the Company instructed John Sisk & Son Limited who were carrying out construction work at Clonshaugh that the work should cease, as it then appeared that restructuring was unlikely to be successful.

14. On the 9th July, 2001, Mr. Coughlan, on behalf of the Company invited Chase Manhattan Bank to appoint a receiver over the Company pursuant to a debenture given on the 29th September, 2000, to which reference is made below. On the 18th July, 2001, John Sisk & Son Limited presented a petition to wind up the Company.

15. The statement of affairs sworn by Mr. Coughlan shows an estimated deficiency of £23,368,484 (punts). The gross assets were estimated at £15,801,034 (punts) with an equal amount due to the secured creditors and no sums available even for preferential creditors.

16. Mr. Coughlan was at all material times the only director of the Company resident in this jurisdiction and the liquidator states that he has cooperated fully and assisted when required in relation to the winding up of the Company.

Applicable law

17. Section 150 of the Act of 1990 imposes a mandatory obligation on the High Court to make a declaration of restriction unless the Court is satisfied "as to any of the matters specified in sub-s. (2)". The relevant matters to this application are "that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company..."

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

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

> "(a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts 1963-1990.
>
> (b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.
>
> (c) The extent of the director's responsibility for the insolvency of the company.
>
> (d) The extent of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.
>
> (e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards.

20. In a judgment given in the matter of *Tralee Beef and Lamb Limited (In Liquidation)*, Unreported, High Court, Finlay Geoghegan J., 20th July, 2004, I concluded that the court should under para. (a) above also have regard to the duties imposed on a director at common law. Further, in that case I agreed with the general formulation of the duty of an individual director as stated by Jonathan Parker J. in *Re Barings plc. and Ors. (No.5)*; *Secretary of State for Trade and Industry v Baker and Ors* [1999] 1 BCLC 433 in the following terms:

> "Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them."

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

> (i) "Directors had, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.
>
> (ii) Whilst directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation did not absolve a director form the duty to supervise the discharge of the delegated functions.
>
> (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, depended on the facts of each particular case, including the director's role in the management of the company."

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

23. The purpose of the English disqualification legislation and the required responsibility of an individual director was addressed by Lord Woolf M.R. in *Re Westmid Packaging Services Limited* [1998] 2 BCLC 646 where at p. 652 he stated:

> "Mr. Davis started from the proposition that (as *Nicholls V-C said in Secretary of State for Trade and Industry v Ettinger*; *Re Swift 736 Ltd*. [1993] BCLC 896 at 899), Parliament's purpose in enacting [The Company Directors Disqualification Act, 1986 and its predecessors starting with s. 28 of the Companies Act, 1976] was to raise standards in the conduct and responsibility expected of those who manage companies incorporated with the privilege of limited liability. That parliamentary purpose, and its importance, are further emphasised by the mandatory minimum period introduced by s. 6 of

the present Act. Mr. Davis also submitted, correctly, that the collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under English company law. That collegiate or collective responsibility must however be based on individual responsibility. 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.

A proper degree of delegation and division of responsibility is of course permissible, and often necessary, but total abrogation of responsibility is not. A board of directors must not permit one individual to dominate them and use them, as Mr. Griffiths plainly did in this case. . .".

24. The same analysis may be applied to the purpose of Chapter 1 of Part VII of the Companies Act, 1990, and the minimum individual duty which must be discharged if the court is to be satisfied that a director has acted responsibly in relation to the conduct of the affairs of a company.

25. A further point which arises in this application is whether there are any additional or differing matters to be considered by the court in considering whether a person who is a director of a wholly owned subsidiary has discharged the onus of establishing that he has acted responsibly in relation to the conduct of the affairs of the Company.

26. Finally of particular relevance to the applications as against Mr. Coughlan and Mr. Lede is the determination by the Supreme Court in *Re Squash Ireland Limited* that the court should look at the entire tenure of the director and not simply at the twelve months in the run up to the liquidation.

Issues
27. On the facts set out in the liquidator's affidavit the issue in this application is whether the respondents have satisfied the Court that they acted responsibly in relation to the conduct of the affairs of the Company.

28. The Court is satisfied that Mr. Coughlan and Mr. Lede have satisfied the Court that they acted honestly and no issue arises on the liquidator's affidavit as to the honesty of the other respondents.

29. On the facts set out by the liquidator it is submitted on his behalf that the primary issue for consideration by the court is whether the respondent directors of the Company have satisfied the court that they discharged the minimum duties as directors of the Company identified above and in particular whether they each informed themselves about the financial affairs of the Company and whether they joined with their co-directors in supervising and controlling the affairs, and in particular the financial affairs, of this Company. It is submitted that the facts referred to suggest that the Company was operated as a division of the 360atlantic Group rather than as a separate company and was managed and controlled from Barbados and that there was an abdication of responsibility by the respondents to the financial management team in Barbados. A number of specific matters were drawn to the attention of the Court:

(1) the execution by and on behalf of the Company of a guarantee and debenture creating a fixed and floating charge over the assets of the Company in favour of Chase Manhattan Bank on the 29th September, 2000, as part of Group wide financing without receipt by the Company of any apparent consideration for the security and without any proper consideration of the benefit if any to the Company of such transaction.

(2) The apparent approving on the 12th June, 2001, of accounts for the year ended December 2000 which make no reference to such guarantee and charge.

(3) The request to the Bank to appoint a receiver on the 9th July, 2001 without the Bank having made any demand under the guarantee.

(4) The lack of any clear information as to the financial transactions of the Company after September 2000.

(5) Certain confusions in the statement of affairs sworn by Mr. Coughlan and differences between it and the information given in his affidavit.

(6) The failure to make certain regulatory returns and keep books of accounts in Ireland as required by s. 202(6) of the Companies Act, 1990.

30. Mr. Coughlan is the only respondent who substantively has sought to satisfy the court that he acted responsibly as a director of the Company. Submissions were made on his behalf contesting the above inferences from the facts.

31. On the facts as set out in the liquidator's affidavits and the affidavits of Mr. Coughlan and submissions made I have reached the following factual conclusions.

(1) The operations of the 360network Group in Ireland were financed managed and controlled as part of worldwide operations on essentially a group divisional basis. The management of the construction on the Clonshaugh site appears to have been primarily under the control of the 360atlantic Group whose management team were primarily based in Barbados.

(2) The company was formed by reason of professional advice relating to worldwide operations of the 360network Group with the intention that there be a separate corporate structure in each jurisdiction which would hold assets and operate the network. There must have been a perceived advantage to the group of such structure.

(3) As was stated by Mr. Coughlan, "the Company was part of a closely intertwined group of companies who activities were in reality centrally planned. It was not open for the Company to operate independently of the other companies in the group…"

(4) The financing of the Irish operation including that part being done through the Company was determined in Barbados under the direction of Mr. Heise who appears to have been the chief financial officer of the Group or the Atlantic division of the Group. Whilst Mr. Coughlan was furnished with financial information in relation to the Irish project, such information was consolidated for all the Atlantic operations and did not identify the financial position of the Company.

(5) The minutes of the meetings of the directors of the Company exhibited suggest that they related primarily to regulatory matters which required compliance in this jurisdiction. There is no evidence of any meeting which included a

consideration of any substantive issue (other than the approval of Annual Accounts) relating to the operation or business of the Company.

(6) The accounts presented for approval in June 2001 for the year ended December 2000 appear to have been inaccurate. Whilst I note that the accounts exhibited by the liquidator are marked "draft" they are accounts which appear to be attached to signed minutes and Mr. Coughlan has not been able to produce a copy of any other accounts approved at that meeting.

(7) Mr. Lede, whilst a director of the Company, did not knowingly participate in any substantive decision relating to the operation or business of the Company. He appears, when requested, to have executed certain documents and fairly acknowledges in his second affidavit that he did "not give the requisite attention to reviewing and appreciating the affairs of the Company".

32. An issue raised by the above facts is whether and to what extent the Court should have regard to the fact that the Company is a wholly owned subsidiary within a worldwide group of companies and to what extent if any that fact alters the matters to which the Court should have regard when determining whether the respondents acted responsibly as a director of the subsidiary company.

33. Section 150(2)(a) of the Act of 1990 requires the respondent director to satisfy the court that he/she "has acted . . . responsibly in relation to the conduct of the affairs of the Company…". It has previously been held and determined that this confines the Court to considering the respondent's conduct as a director in relation to the affairs of the Company in liquidation in the sense that the court may not take into account when considering whether or not it must make a declaration of restriction the fact, for example, that the respondent is acting or has acted responsibly as a director of other companies.

34. The fact that the Company is a wholly owned subsidiary within a worldwide group does not appear to alter the legal principles applicable to the duties of directors but rather to create a particular factual scenario which must be taken into account when considering the discharge of those duties.

35. The Company was at all material times effectively in a start up situation. It appears to have been dependent entirely for the financing of the operation in which it participated on other companies within the group. Its operation was also closely intertwined with operations being carried out by other companies within the group. The business which it was intended to conduct does not appear to have had any real separate identity or potential from the overall business of the Atlantic division of the group.

36 However, the Company had its separate corporate and legal identity. It had its individual employees and had its separate and distinct creditors. The employees and creditors do not appear to have had any rights against or access to other companies within the group. Each respondent agreed to act as a director of that separate corporate entity.

37. In such a factual scenario it would appear totally permissible and indeed a proper exercise of the duties of directors in the interests of the Company for the directors to fully take into account and indeed to even to follow the policies adopted for the entire group when managing the business of the Irish Company. However, notwithstanding such a factual scenario and indeed the almost total dependence of the Company on other companies within the group it does not seem permissible for directors of the Company to effectively abdicate all decision-making in relation to the affairs of the Company. They must be considered to remain under a duty to inform themselves about the affairs of the Company as distinct from any other corporate part of the group and to join with each other in supervising and controlling the affairs of the Company. Otherwise their position as directors is meaningless. In real terms the directors may have a very small margin of discretion in the decisions to be taken but this cannot absolve them of the obligation to take the decisions.

38. Accordingly it appears to me that where a group corporate structure exists, such as in the present case, and the issue under s.150 of the Act of 1990 is whether a director of the wholly owned Irish subsidiary company acted responsibly in the sense of discharging the minimum common law duties, he must be able to establish at a minimum that he did inform himself about the affairs of the Irish subsidiary company as distinct from any other company within the group and together with his fellow directors that he did take real steps to consider and take decisions upon at least significant transactions to be entered into or projects undertaken by the Irish subsidiary company. There must be evidence of a real consideration by the directors of whether significant transactions or operations to be undertaken were desirable in the interest of the Irish subsidiary company or could be said to be for the benefit of the Irish subsidiary company. I readily recognise that in many instances the interests of the Irish subsidiary company may be so intertwined with the affairs of the group as a whole that the answer may be obvious. However, the fact that the answer is obvious does not appear to absolve the directors from at least addressing the question.

39. If the issue of the responsibility relates to the nature of decisions taken (which it does not on the facts of this application) as distinct from the absence of any decisions different and further considerations may apply. It is not necessary to consider those on the facts of this case.

Conclusions
Mr. Coughlan
40. Applying the above principles to the facts relating to Mr. Coughlan, I have concluded that he has not satisfied the court that as a director he acted responsibly in relation to the conduct of the affairs of the Company. I am not satisfied that he has discharged the onus of establishing that he performed and discharged the minimum duty imposed on him at common law to inform himself about the affairs of the Company and to join with his fellow directors in supervising and controlling them in the sense explained above. Regretfully I have reached the conclusion on the affidavits that in material respects Mr. Coughlan was not aware of the financial affairs of the Company. The delegation to Mr. Heise and the financial team in Barbados went beyond the permissible. There appears to have been "total abrogation of responsibility" for the financial affairs of the Company by Mr. Coughlan. Further there is no evidence that Mr. Coughlan either collectively with his fellow directors or individually at any stage prior to July 2001 addressed in a substantive way or determined whether significant transactions to be entered into by the Company were in the interests of the Company. This includes the guarantee and debenture of 9th September, 2000, which was a transaction of particular significance to the Company and its creditors. It created security over the assets of the Company for group borrowings when the Company already had the benefit of substantial borrowings and advances from companies within the Group on an unsecured basis. As a result in the liquidation notwithstanding gross assets in the order of £15m there is no dividend available even for preferential creditors. In reaching this conclusion I have taken into account in Mr. Coughlan's favour steps he took to appoint a receiver in June 2001. Whilst the liquidator queries the appropriateness of the decision and the absence of a Board decision it appears to have been done following legal advice and is indicative at least of a step taken by Mr. Coughlan to manage the affairs of the Company. It is not necessary for me to consider whether it was appropriate in the absence of a demand from the Bank.

Mr. Heise and Mr. Hoar
41. Neither of these respondents has sought to put any evidence before the court. On the facts set out on the affidavit of the liquidator sworn herein and in the absence of any evidence from them, the Court cannot be satisfied that they acted responsibly as directors of the Company in relation to the conduct of the affairs of the Company. I am not satisfied that they discharged the minimum duties of a director set out above in relation to the Company. In addition no books of account appear to have been maintained in Ireland as required by s. 202(b) of the Act of 1990.

Mr. Lede
42. It is now undisputed that Mr. Lede was a director within twelve months of the date of commencement of the winding up. As such he is a person to whom s. 150 of the Act of 1990 applies. Once the Act applies then in accordance with the decision of the Supreme Court in *Re Squash Ireland (Limited)* [2001] 3 IR 35 this Court must consider his entire tenure as a director of the Company. On Mr. Lede's affidavits the Court cannot be satisfied that he acted responsibly in relation to the conduct of the affairs of this Company whilst a director of same. He did not discharge the minimum duties imposed on him at common law as a director of the Company.

Limit of Court's Jurisdiction
43. Mr. Coughlan and Mr. Lede each have sought in their affidavits to put facts before the Court which suggest that they may be prejudiced in their continuing commercial life if the Court makes the declaration of restriction. This is not a matter which the Court may take into account under s.150 of the Act of 1990. The restriction for five years is mandatory where a respondent fails to satisfy the Court that he acted responsibly in relation to the conduct of the affairs of the Company. The only discretion in the Court is where an application is subsequently made under s. 152. It is important to emphasise that in this application the Court is only considering the discharge of responsibilities as a director of the Company and not any other position.