

THE HIGH COURT

[2017 No. 421 COS.]

IN THE MATTER OF BEAUTY HOLDINGS LIMITED

(IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

JIM LUBY

APPLICANT

AND

WARREN LOGAN

RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 30th day of April, 2019

1. This is an application by the liquidator of a company for an order pursuant to s. 819(1) of the Companies Act, 2014 that the respondent, as a person to whom Part 14, Chapter 3, of the Companies Act, 2014 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 of a company, or be concerned in or take part in the formation or promotion of any company, unless that company meets the requirements set out in section 819(3) of the Companies Act, 2014.
2. I heard this case at the same time as a similar application in the case of Hairspray Wholesalers Limited ("*Wholesalers*") (2017 No. 420COS), in which I have delivered a long judgment. The facts in both cases are very similar and the issues virtually identical and this judgment is to be read in conjunction with that in *Wholesalers*.
3. Beauty Holdings Limited ("*the Company*") was incorporated on 4th July, 2006.
4. Mr. Warren Logan, the respondent, was appointed as a director at the time of incorporation and has continued in office up to the date of liquidation. The shares in Beauty are held equally by Mr. Logan and Ms. Dolores MacKenzie, his mother.
5. Beauty carried on the business of selling hair and other beauty accessories.
6. On 31st May, 2013 Beauty resolved that it should be wound up as a members' voluntary winding-up and that Mr. Gary Lennon be appointed liquidator.
7. On 30th May, 2013 the directors of the Company, Warren Logan and Biba Logan, swore a declaration of solvency, declaring that having made a full enquiry into the affairs of Beauty, they had formed the opinion that it would be able to pay its debts in full within twelve months. This was supported by a report of Robinson Stewart & Company, a firm of accountants and auditors with an address in England, who were the auditors of the Company.
8. The statement of affairs showed estimated realisable assets of €610,855, made up of €393,355 in cash, €205,000 in stock, and furniture and fittings of €12,500. The liabilities were shown as €143,781 owed to the Revenue and €535,743 for "*other liabilities*". The statement of affairs showed a surplus of €31,331.
9. The last annual return for Beauty was made up to 31st March, 2011 when the accounts for the year ended 30th June, 2010 were filed. The auditors declined to express any opinion of the financial statements on the basis that they had been unable to obtain adequate evidence to allow them to conduct an audit.
10. All of the employees of Beauty had been transferred on 31st March, 2013 to other companies owned and controlled by the directors.
11. On 6th May, 2014 Mr. Lennon reported to the creditor's meeting that Beauty was insolvent.
12. Shortly after his appointment Mr. Lennon was provided with a file of documents. Mr. Lennon had computed the VAT liability for the first half of 2013 at €48,314, while the declaration of solvency showed a liability of €73,450. The cash at bank was in fact €387,958, which was €5,397 less than was shown on the declaration of solvency. Mr. Lennon reported that he had never been provided with any stock records.
13. Mr. Lennon reported to the creditors' meeting that there were serious shortcomings in the Company's books and records and that he had calculated that Beauty had an outstanding VAT liability of €511,352 and had filed VAT returns accordingly. Mr. Lennon estimated that Beauty had a corporation tax liability of €286,772; so that the total Revenue liabilities were €798,124.
14. Mr. Lennon reported that no evidence had been provided in support of the "*other liabilities*" of €435,743 but that on 2nd May, 2014 he had been provided with a new schedule of transactions showing that the directors and Ms. McKenzie were collectively owed €312,084. Mr. Lennon was satisfied to admit a total of €120,203.12 in respect of the other liabilities.
15. Mr. Lennon reported that on 2nd May, 2014 a firm of solicitors on behalf of Henry Street Hairspray Limited had claimed to be owed €96,347.
16. Mr. Lennon reported that Beauty's stock had been distributed, without payment, to other companies under the control of the directors and that he had recovered nothing in respect of it. He reported that he had, on 17th April, 2014, formed the opinion that Beauty would not be able to pay its debts in full and that on 22nd April, 2014 he had convened the creditors' meeting.
17. Mr. Lennon collected €393,084 and disbursed €224,448, of which €158,069 plus VAT was in respect of his own fees.

18. On 6th May, 2014 Mr. James Luby was appointed liquidator.

19. On this application Mr. Luby expresses similar concerns to those he expressed in relation to Wholesalers, namely, that no accounts or returns had been made since 31st March, 2011; that the Company had not kept proper books and records; that the Company's Revenue liabilities had been understated in the statement of affairs and had been recalculated by Mr. Lennon at €517,682 and later by Guardian at €265,364; that he could not reconcile the Company's stock; and that he could not vouch or reconcile the claims in respect of directors' loans.

20. The Company's stock, which had been estimated to realise €205,000 had not been sold by the time Mr. Luby was appointed. Mr. Luby was shown stock in a storage unit in Ballymount with a cost of €191,012 and appointed a firm of auctioneers to value and market it. The best offer that could be obtained was from the respondent, to whom it was sold for €29,455 plus VAT.

21. On 21st August, 2014 Mr. Luby was told by the respondent that stock of €13,988 had been transferred to Henry Street Hairspray Limited in April, 2013 and that Henry Street was owed €96,348 by the Company. All that could be produced in support of this alleged liability was a printout from a nominal ledger.

22. On 6th June, 2018 Mr. Logan filed a long affidavit which largely mirrors that filed on the Wholesale application - rehearsing his difficulties with Mr. Doyle, Bawnogue and Mr. Lennon, and in which he grouped the assets and Revenue liabilities of the two companies.

23. Mr. Logan blamed Mr. Lennon for the overvaluation of the stock and for the delay in realising it and stood over the intercompany balance with Henry Street. By reference to Guardian and Easy Does It calculations, he asserted that the directors' loans were €312,083, rather than the €435,743 calculated by Mr. Lennon and Bawnogue, and which he had no idea where it came from. By reference to a Guardian calculation, he asserted that the Company's VAT liability was €255,057, which, he says, correctly, was significantly lower than Mr. Lennon's calculation of €509,223, and, which, he does not say, was significantly higher than the liability shown in the statement of affairs. Mr. Logan offers the same explanation for the gulf between the estimated realisable value for stock shown in the statement of affairs and the amount realised.

24. For the reasons given in my judgment in Wholesalers, I have come to substantially the same conclusions in this case.

25. On the respondent's account of events, a significant part of the reasoning for the liquidation was the historical issues, for which first Mr. Doyle and later Bawnogue, are blamed. Those historical issues were that proper books and records had not been kept and that there was an issue as to the extent of the Company's liabilities. I do not understand how it was hoped that the liquidation would obviate the need to deal with the deficit in books, records and returns but, on the respondent's account of events, the choice was between making up the books and records, and liquidation: and the respondent chose liquidation.

26. The keeping of books and records and compliance with statutory obligations are matters which the directors are entitled to delegate but for which they remain responsible.

27. To the knowledge of the respondent, the Company did not keep proper books and records, did not prepare annual accounts, and did not make any returns after 31st March, 2011. To the knowledge of the respondent, the deficit in the books and records and returns which dated back to at least 2011 was not addressed before the Company went into liquidation on 31st May, 2013.

28. The fact that the Company paid for its stock in advance and had no bank borrowings is said to show a sober and conservative approach to finance. I do not disagree but I do say that to avail of credit, whether from suppliers or banks, upon terms that a company can meet, is perfectly sober and conservative. The fact that the directors had only a vague (and in the event, quite wrong) idea of the extent of the Company's Revenue liabilities and none at all of the liability to directors, in my view, is evidence of irresponsibility.

29. The respondent makes the case that his formal education was limited and that he has dyslexia. I do not see how that is relevant to the concerns identified by the liquidator, which engage the duties of directors at the very basic level. The respondent is very experienced businessman. The fundamental problem in this case is not the ability of the respondent to understand complex documents but the absence of relatively straightforward books and records.

30. I am not satisfied that the respondent carried out the full enquiry into the Company's affairs which would have allowed him to reasonably form the opinion that the Company would be able to pay its debts within twelve months.

31. In the absence of proper books and records or a forensic analysis of the Company's bank accounts of the kind much later undertaken by Guardian, the hope that the Company would be able to pay its debts in full could only have been based on guesswork.

32. Even on the basis of the figures given in the statement of affairs, any prospect of the Company being able to pay its debts was entirely dependent on the accuracy of the estimated realisable value of the stock.

33. By reference to the explanation much later given to Mr. Luby, the nominal value of the Company's stock at the date of liquidation was €13,988 less than the €205,000 shown in the statement of affairs. The transfer of stock to the value of €13,988 to Henry Street Hairspray Limited has not been adequately explained. The liability of the Company of €96,348 to Henry Street has not been adequately explained.

34. On the respondent's account, the estimate of realisable value failed to take into account the fact that much of the stock was out of date and out of fashion. The need to make a realistic assessment of realisable value is something which should have been discussed at the time of preparation of the statement of affairs, but I cannot see how the respondent might reasonably have expected that out of date stock could be sold for what was paid for it.

35. The delay in the delivery of the stock to the liquidator and, consequently, in the realisation of the stock has not been adequately explained.

36. The respondent admits that the statement of affairs showed the Company's Revenue liabilities to be less than what he believed them to be.

37. The respondent admits that the Company's Revenue liabilities are nearly twice what he thought them to be at the date of liquidation.

38. The respondent admits that he had no idea where the figure of €535,743 shown in the statement of affairs for directors' loans came from.

39. I reject the argument that the absence of proper books and records did not contribute to the insolvency. On the respondent's case, the Company always met its Revenue liabilities and, if the extent of the VAT liability had been known, it would have been paid. That being so, the failure to pay the VAT can be traced directly to the failure to keep records and make tax returns.

40. As far as the making of VAT returns, and the payment of VAT, is concerned, this is not a case of a limited failure over a limited period. Without proper books and records, it was not possible to make correct returns. Without correct returns, it was not possible to make the correct payments. On his own case, the respondent was aware of the deficit in the books and records, and in the returns, and in the payments which had been made. Throughout the life of the Company, the VAT returns showed a fraction of the true liability.

41. While the respondent's case is put in terms that the inability of the Company to pay its Revenue liabilities is attributable to the costs of the liquidation, it is, in truth, that the liabilities, if known at the time, could and would have been paid at the time. In my view, it follows inexorably that the cause of the insolvency is the fact that the Revenue liabilities were not identified and discharged when they should have been.

42. For the reasons given, I am not satisfied that the respondent acted responsibly in relation to the conduct of the affairs of the Company and I must make an order in the terms sought.