THE HIGH COURT

1981 No. 7508 P

IN THE MATTER OF KELLY'S CARPETDROME LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACT, 1963, Sec. 297

BETWEEN/

KELLY'S CARPETDROME LIMITED (in liquidation)
and MONCK PROPERTIES LIMITED

CLAIMANTS

-and-

FERGAL GAYNOR and PATRICK TUFFY

RESPONDENTS

Judgment delivered by O'Hanlon J., the 13th day of July, 1984.

In these proceedings the liquidator of Kelly's Carpetdrome Limited invokes the provisions of Sec. 297 of the Companies Act, 1963, for the purpose of asking the court to make an order which would have the effect of imposing personal liability on the members of a firm of accountants - Messrs. Gaynor, Tuffy and Company - in respect of the debts or other liabilities of the company. This claim in turn is based on the contention that the two partners in the firm - Fergal Gaynor and Patrick Tuffy - were knowingly parties to the carrying on of the business of Kelly's Carpetdrome Limited with intent to defraud creditors of the company or creditors of ~~any~~ some other person or for some fraudulent purpose.

There are, accordingly, two essential features involved in the claim. In the first place it must be established to the satisfaction of the court that the business of the company was, in fact, carried on in such a manner and with such intent as to achieve one or more of the fraudulent purposes referred to in Section 297, and secondly it must also be established to the satisfaction of the court that the respondents were knowingly parties to the carrying on of the business in manner aforesaid.

The liquidator has succeeded in bringing home the charge of fraud against the company in these proceedings, just as he had already done in earlier proceedings before Mr. Justice Costello, in the course of which an order has already been made under the provisions of Sec. 297 of the Act imposing personal liability on two ~~of the directors of the company~~ other persons - Matthew Kelly and Eamonn Kelly. The most salient features of fraudulent practices as established against the company in these ~~present proceedings may be summarised briefly~~ proceedings will appear in the course of the present judgment.

A company named Kelly's Carpet Supermarket Limited was incorporated on the 6th December, 1973, and continued to trade until the year 1976. On the 28th October, 1976, Kelly's Carpetdrome Limited was incorporated and effectively took over the carpet retailing business formerly carried on by Kelly's Carpet Supermarket Limited. On the 27th May, 1977, a resolution was passed at a General Meeting of the members of Kelly's Carpet Supermarket Limited that the Company, by reason of its liabilities could not continue in business and that it should be wound up voluntarily, and that Mr. Fergal Gaynor of Gaynor, Tuffy and Company be appointed as Liquidator of the Company.

The evidence given in the course of the present proceedings ~~appeared to indicate~~ suggested that the claims of all creditors of Kelly's Carpet Supermarket Limited had been met in full, with the exception of large outstanding claims for ~~tax~~ VAT presented by the Revenue Commissioners, and it was ~~suggested~~ contended that the winding up of one company and the formation of another on that occasion was merely a device to enable the old business to continue under a new name while at the same time defrauding the Revenue Commissioners of the amounts claimed for VAT against the original company. It was further suggested that this was a course of conduct which, ~~in~~ with the passage of time, was again repeated when Kelly's Carpetdrome Limited was put into liquidation and the phoenix rose from the ashes again, on this occasion in the shape or guise of Kelly's Carpet Drive-In Limited. However, the evidence to support the allegation that the winding-up of Kelly's Carpet Supermarket Limited was part of a fraudulent scheme to which the first-named Respondent lent himself in his capacity as Liquidator of that company, is inconclusive. The Revenue Commissioners are the only creditor of the company who are still unsatisfied. The winding-up of the company has lain dormant for several years, and the VAT claim by the Revenue Commissioners,

which was disputed in its entirety by the Liquidator, has never been finally determined, although the Revenue Commissioners had at all times the means in their power to press their claim to a conclusion had they elected to do so.

For these reasons, although there is, indeed, a marked similarity between the procedure adopted for securing the transfer of the business and assets of Kelly's Carpets (Supermarket) Limited to Kelly's Carpetdrome Limited in the 1976/77 period, and that adopted later when Kelly's Carpetdrome Limited was put into liquidation and its mantle was assumed by Kelly's Carpet Drive-In Limited, I think the evidence regarding the earlier transaction remains neutral in character and cannot be relied on to implicate the Respondents in any charges of fraud brought against the various companies. For what it is worth, the evidence does show that the services of Messrs. Gaynor, Tuffy and Co., as accountants, were being availed of by Mr. Matthew Kelly and his associates as far back as the mid-seventies.

Kelly's Carpetdrome Limited continued to trade in premises in Phibsborough on the north side of Dublin, for about five years from the date of its incorporation and built up a huge turn-over as carpet retailers and in allied lines of business. Messrs. Gaynor, Tuffy and Company acted for the company in registering it with the Revenue authorities for VAT and PAYE, and were asked by Matthew Kelly to advise on the accounting procedures of the company. Their intervention in this field, however, met with a hostile reception from the accountant employed by the company and as they were unable to take over the full responsibility of acting as accountants for the company they withdrew from the scene and were thereafter consulted only in relation to specific problems which arose from time to time. I am satisfied that they did not hold themselves out as Auditors of the company, or carry out an audit of its accounts at any time, and from what the court was told of the book-keeping practices observed by the company the completion of an audit at any time would have presented any firm of accountants with enormous difficulties.

The evidence of Mr. Brendan McGoldrick, who acted as accountant of the company during the last year or two of its existence, conveyed

that a huge proportion of the cash transactions conducted by Kelly's Carpetdrome Limited with its customers never found their way into the ordinary books of account of the company, but were recorded secretly in a different set of books. By this means the accounting system of the company was so conducted as to conceal from the Regenue Commissioners and anyone else charged with investigating the affairs of the company, sales transactions of up to ~~£3000~~ £30000 per week or £1½m. per annum. If correct,- and no one came forward to challenge or refute this part of his evidence - then it discloses the existence of fraudulent practice on a monumental scale. One consequence of such a finding is that it makes it impossible to take at their face value any of the many accounting documents which have been produced concerning the Kelly group of companies - Statements of Affairs, Balance Sheets, and so forth, compiled at different times and for different purposes. If those who controlled the destinies of the company had embarked on a scheme of fraud of the magnitude described in Mr. McGoldrick's evidence, then no document emanating from the same source and purporting to throw some light on the financial status of the company at any particular time can be regarded as reliable or trustworthy.

With regard to this first, major allegation of fraud in the conduct of the business of the company, the evidence did not implicate the Respondents in the present proceedings in any way. They were not the company's accountants, save to the extent that they were employed in a consultative capacity from time to time. Their involvement with the affairs of the company eventually led them to prepare a four-year set of draft accounts for the company, extending back to the time when it first set up in business and forward to the 31st October, 1980. The primary object of this exercise was stated to be the resolution of the tax problems of Mr. Matthew Kelly, but it seems clear to me that this very onerous task was also undertaken for the benefit of the company itself and substantial payments were made in favour of the Respondents out of the company's account from time to time in respect of work and services rendered.

Be that as it may, the evidence of Mr. McGoldrick and of the staff members employed by the Respondents to prepare the four-year set of accounts indicated quite clearly that the existence of a double-accounting system was never disclosed to the Respondents or to their representatives and that theywere allowed to proceed with the preparation of the draft accounts in blissful ignorance of the fact that much of the base material needed for the project was being deliberately withheld from them.

It may also be said, in the Respondents' defence, that when eventually the four-year set of draft accounts were prepared and made available to the Revenue Commissioners in the year 1981, these accounts, when read in conjunction with the working papers which were also made available to the Revenue Commissioners, could not fail to disclose to anyone with an elementary knowledge of accounting procedures that the affairs of the company were being conducted in a highly irregular manner. Very large sums were included in Suspense Accounts on the basis that they could not be accounted for in any way, and a clear inference could be drawn that creditors had been paid on a large-scale out of the proceeds of sales which had been left unrecorded in the accounts of the company. The draft accounts also gave rise to the inference that there were large sums owing by the company for VAT which had not been previously disclosed to the Revenue and which gave rise to a claim which later precipitated the winding-up of the company. From these points of view it might be said that insofar as the Respondents were representing the interests of the company as well as those of Mr. Matthew Kelly, they did their clients a disservice by the preparation of thedraft accounts, since the inevitable consequence was to set in train a much more vigorous investigation by the Revenue of theaffairs of the company.

Similarly, when Mr. Tomas Tiúit of the Investigation Branch of the Revenue Commissioners came to give evidence concerning his personal contacts with Mr. Fergal Gaynor, it showed that Mr. Gaynor had been more than candid in disclosing the total unreliability of the books of account and accounting systems of the company and of Matthew Kelly himself. At different times Mr. Gaynor said to him,

(1) that in his opinion, Matthew Kelly had made substantial cash withdrawals from the business, and that he would seek to make full disclosure; (2) that the company showed losses for six years, but that there were no proper accounts, and that he would not certify them; (3) that, in relation to Matthew Kelly's personal tax liabilities, he was at the mercy of Matthew Kelly as to what went into statements of income, because of lack of records; (4) that he could not give an opinion on the accounts of the company as the back-up information was not there; (5) that the accounting systems left a lot to be desired and that he could not be sure that all transactions were recorded in the books of account.

Accordingly, having commenced by finding that the involvement of Mr. Fergal Gaynor in the winding-up of Kelly's Carpet Supermarket Limited does not establish complicity on his own part or that of his firm in a scheme of fraud, I can follow that up by making the further finding that neither he nor his partner has been shown to have been fixed with knowledge of the fraud which was taking place in the week-to-week running of the business of Kelly's Carpetdrome Limited, and which involved the deliberate exclusion from the ordinary books of account of the company of all information concerning cash sales totalling over £1m. in the course of a single year.

The closest the evidence came to implicating the Respondents in these fraudulent practices of the company came when Mr. McGoldrick testified that when Gaynor, Tuffy and Co. were brought in to prepare the four-year set of draft accounts, he informed Mr. Gaynor that "there was a bit of a fiddle going on". His account of this conversation, which he said took place at the company's premises in the first week of June, 1980, was as follows:-

> "I showed Mr. Gaynor a Statement Document showing liabilities of £650,000 and told him I had grave doubts about the solvency of thecompany. He pushed the document aside.... Later, on the sales floor, I told him that if he was doing the accounts of Carpetdrome, he would have to take into account the accounts of Roundwood Carpets Limited because of the relationship between Matthew Kelly and Roundwood. There was £¾m. due by Carpetdrome not shown in their books - £750,000 invoiced to Carpetdrome, but only £500,000 shown in the Carpetdrome books.

> Mr. Gaynor said he did not want to know anything about Roundwood. I said: 'There is a bit of a fiddle going on'. He said: 'Never discuss the affairs of Carpetdrome with anybody.' I told Fergal Gaynor there was a firm in England called Roundwood, connected with Matthew Kelly and Carpetdrome and if doing accounts for Carpetdrome he could not do so without access to the accounts of Roundwood. There was money in the accounts of Roundwood which belonged to Matthew Kelly and the Directors had given an undertaking to bring it into the Carpetdrome accounts. I told Fergal Gaynor he should go to Leeds and have a discussion with Dobby. He said he did not want to know about Roundwood and would not be concerning himself with Roundwood in his work. The discussion ended there."

The Respondent, Fergal Gaynor, when he came to give evidence, denied that any such conversation had ever taken place between himself and Brendan McGoldrick and there is a sharp conflict of evidence between the two parties in this respect. Were I to accept in full what was said in evidence by Brendan McGoldrick, and reject what was said in refutation by Fergal Gaynor, it would lead to a finding that Fergal Gaynor was put on notice that there were serious irregularities in the accounts of the company and that he chose to ignore this information when the draft four-year accounts were being prepared in order to meet the claims of the Revenue Commissioners. It is, therefore, necessary to assess the weight which should be attached to the evidence of Brendan McGoldrick on this and on certain other issues and to consider his reliability as a witness.

Mr. McGoldrick was employed by the company from mid-August 1979 as an accountant at a rather low salary having regard to the size of the business and the complexity of the accounts he was to be called upon to regulate. No final accounts had been made up for previous years and there were no books of record available which could form the basis for such accounts. No Balance Sheet had been made up; no Profit and Loss Accounts and no Trading Accounts. He had to commence by trying to write up the accounts from the time the company started up in business on the 1st November, 1976.

I believe that he made a conscientious effort to restore some order out of the chaos in which he found the company's accounts and would probably have succeeded had he been given more co-operation by the Directors and had time not run out on him before his task was completed. He said, and I am prepared to accept, that he was not made aware of the fraudulent system of double accounting already referred to, for some time after he took over as company accountant, and when it did come to his knowledge he was faced with a choice of giving up his employment or going along with the fraud which was being perpetrated.

He chose the latter course and by this means he was drawn into a network of fraud, and must be regarded as having actively participated in it from that time forward. When he gives evidence tending to implicate others in the fraud with him, such evidence has to be treated with the reservations which must always exist when one person claims that others were fellow-conspirators or fellow-accomplices with him in some criminal enterprise. Secondly, while Mr. McGoldrick impressed me as a person who was doing his best to assist the Court and to give a full account at this late stage of the dubious practices of the company, his recollection of dates and events was shown to be faulty in some respects, and this must tend to undermine one's confidence in the accuracy of his account in other parts of his evidence.

I am not prepared to hold that the alleged conversation between himself and Fergal Gaynor never took place, but I am left in considerable doubt as to the nature and extent of the disclosures made by Mr. McGoldrick. If his purpose was to put Mr. Gaynor on notice that no reliance whatever could be placed on the books and records of the company in seeking to prepare draft accounts for the Revenue Commissioners, all that was necessary for him to do was to let Mr. Gaynor in on the secret of the dual accounting system and the fact that sales of up to £30,000 per week were being effected without being put through the normal books of account of the company. He concedes, however, that he never mentioned this all-important fact to Mr. Gaynor but claims that instead of doing so he embarked on an account of a complicated inter-company transaction involving the manipulation by Matthew Kelly of the affairs and finances of a company in England. I think that what probably happendd is that Mr. McGoldrick hinted at irregularities in the accounting systems of the company without being bold enough to reveal the true picture which was well-known to him at the time, and that Mr. Gaynor, in common with anyone with any inside knowledge of the workings of the company, was already well-aware of the fact that the accounting systems of the company were highly irregular and were not calculated to withstand close inspection.

Fergal Gaynor's bona fides in relation to this episode can best be tested by reference to what happened afterwards. Members of his staff spent several months endeavouring to compile the four-year set of draft accounts and even with the wisdom of hindsight it has at no stage been suggested

that these accounts, or the working papers which formed the basis for them, were designed to cover up any irregularities in the company's affairs or were calculated to do so. Instead, as already indicated in an earlier part of the present judgment, they were calculated to put the Revenue on notice that there were serious irregularities in the conduct of its affairs by the company. The compilation of the draft accounts and the working papers in this form does not seem to be consistent with the suggestion that at the same time the principal of the firm of accountants was bent on ignoring or suppressing other important information about irregularities in the company's accounts.

For these reasons I have come to the conclusion that the evidence has failed to establish any involvement of the Respondents or either of them in the fraudulent practices of the company up to the time when the decision was made to wind up the business of Carpetdrome and to start again under the auspices of yet another company - this time, Kelly's Carpet Drive-In Limited.

The real gravamen of this part of the Liquidator's claim against the present Respondents is based upon the contention that the Respondents "devised, advised upon and assisted in implementing a scheme whereby the first-named Claimant" (Kelly's Carpetdrome Limited)"was to be placed in liquidation and its trade creditors paid off but where the substantial indebtedness of the Revenue Commissioners would be left deliberately undischarged." It is also claimed that a similar scheme had previously been implemented in respect of Kelly's Carpet Supermarket Limited, but I have already indicated that I regard the evidence given in relation to the winding-up of that company as neutral in character.

The developments which led to the winding-up of Kelly's Carpetdrome Limited appear to be as follows. The four-year set of draft accounts to 31 October, 1980, prepared by the Respondents with the primary purpose of negotiating a settlement of Matthew Kelly's tax liabilities with the Revenue Commissioners, put the Revenue on notice that the company appeared to have an outstanding VAT liability of £327,612, and the Revenue proceeded to press for payment of the outstanding sum, which had been reduced by payments on account to about £230,000 in the early months of 1981.

The Revenue claim came as a shook to the Directors of the company and to their accountant, Brendan McGoldrick, who appear to have had little if any knowledge of the contents of the draft accounts up to that time, and it produced some kind of crisis in the affairs of the company. Even before this claim came in, however, Brendan McGoldrick claims to have prepared a Balance Sheet of Carpetdrome as of the 28th February, 1981, showing the company to be insolvent. When this was presented to one the Directors, Paul Jackson, he, (according to Mr. McGoldrick) consulted with Eamonn Kelly and Matthew Kelly, and told Mr. McGoldrick to go ahead with a plan which had already been devised to transfer the business of the company to Kelly's Carpet Drive-In Limited.

At this time, Fergal Gaynor was away in the United States for about one month and the first steps to secure the transfer of the business were taken in his absence, and without his knowledge or advice. The bank account of Carpetdrome was closed on the 3rd March, 1981, by means of a transfer of funds from Drive-In Ltd. The new company, which had been incorporated on the 17th February, 1977, but had been allowed to lie dormant in the meantime, started up in business immediately, making use of the stocks of Carpetdrome and continuing to trade under the same style or title as the former company.

Mr. McGoldrick said that his intention was that the new company should take over the assets and liabilities of the old company, so that no one should be the loser as a result of the change-over. Carpetdrome had had a number of judgments registered against it and although these had been satisfied, its creditworthiness had been damaged, particularly on the English market and the English Export Guarantee Board was no longer willing to underwrite the company's indebtedness to its English suppliers. This made its trading position very difficult and Mr. McGoldrick felt that if a new company were to take over the business, without being encumbered with large directors' loans and with a better-looking Balance Sheet, the situation could be retrieved. This is the scheme which he claims to have set in motion in the absence of Mr. Gaynor and which he says was designed to leave all creditors of the old company in at least as good a position as there they were previously.

When Mr. Gaynor returned from the United States a meeting took place in his office in the month of March, 1981, with Mr. McGoldrick and Matthew Kelly, Eamonn Kelly and Paul Jackson. Both Mr. Gaynor and Mr. Tuffy were present. There is a conflict as to the date of the meeting, which I do not regard as important. Mr. McGoldrick said there were two meetings with the Accountants in March; Mr. Gaynor said only one meeting took place, and that on the 24th March. It is common case that Messrs. Gaynor and Tuffy were informed that the Carpetdrome bank account had been closed on the 3rd March, 1981, and that Drive-In had taken over the business as and from the 1st March, 1981. Mr. McGoldrick says that he informed the accountants that Drive-In had taken over Carpetdrome because of the insolvency of Carpetdrome, and that he produced a Balance Sheet he had prepared for Drive-In as of the 1st March, 1981. Mr. Gaynor says that Mr. McGoldrick told them that Carpetdrome was solvent. "I thought everything was alright. Mr. McGoldrick said the business was solvent and four of them were putting money in."

As to the advice given by the accountants at that stage, there is not a great deal of conflict between the parties. Mr. McGoldrick's account is as follows:

> "Mr. Gaynor said I should not have closed the bank account - it would cause problems. He asked had any stocktaking taken place. I said, No. He told me to prepare an analysis of the sales of Drive-In from the 1st March, 1981 and identify between the sales of Carpetdrome stock and its own stock; to ignore the Drive-In sales, take VAT out of the Carpetdrome sales, identify the cost price to Carpetdrome and names of customers and date of sales as long as sales of Carpetdrome stock continued."

He said he undertook this task, which he described as "very heavy". "I was bringing the books of Drive-In over continually and Mr. Gaynor was monitoring the work I was doing. In early-May Mr. Gaynor arrived around 1.30 pm at North Circular Road. We were closing down at the time. He said the Revenue were on the warpath. They had got wind of the transfer between Drive-In and Carpetdrome and it had better be completed fast. A final stock-taking took place in mid-May and the remainder of the stock was transferred around the 17th May, 1981, after the value of the stocks had been gerrymandered."

Mr. Gaynor, on the other hand, said that he had never been told about Mr. McGoldrick's plan to transfer the business to Drive-In on the basis that the new company would take over the assets and liabilities of the old company and simply stand in its shoes in relation to the creditors of Carpetdrome. He said he told them to make sure the stock was transferred at not less than cost, and to attach the suppliers' invoices

- that the Revenue would investigate the affairs of Carpetdrome sooner or later.

Mr. McGoldrick says that the value of the stock transferred from Carpetdrome to Drive-In was "gerrymandered", and if this is so, and the new company did not assume any liability for the debts and liabilities of Carpetdrome then a further fraud on creditors was perpetrated. However, Mr. McGoldrick did not suggest in the course of his evidence ~~by~~ that the Respondents were, or either of them was was, at any stage made aware of the fact that the figures shown in relation to these transactions were spurious and there was no other evidence tendered which would implicate them in this manner. Mr. Gaynor denied that the meeting with Mr. McGoldrick at the Carpetdrome premises in early-May, 1981, ever took place, and in particular denied that he had ever used expressions to suggest that the Revenue Commissioners "were on the warpath" and that the transfer should be completed without further delay. I do not find it necessary to resolve this conflict of evidence as between Mr. McGoldrick and Mr. Gaynor, as even were I to accept unreservedly what was said by Mr. McGoldrick and reject the account given by Mr. Gaynor, the content of the conversation would appear to me to be neutral in its tone, insofar as it could be relied on to show participation in fraud. I have no doubt that the Revenue Commissioners were, in a sense, "on the warpath", whenever they first had an inkling of the departure from the scene of Carpetdrome, and not without justification, and even if the transfer of the business from one company to the other were carried through in a completely bona fide manner they would have been bound to investigate it very closely. In this kind of situation I feel an accountant would be perfectly justified in advising his client that there was a full Revenue investigation on the way and the sooner the transaction was finalised the better for all concerned. This appears to me to stop far short of advising the client to carry through any scheme of arrangement in a fraudulent or improper manner.

The next development was brought about by the Revenue demand for VAT arrears as against Carpetdrome. It is not clear from the evidence when and why Mr. McGoldrick's plan for a take-over by Drive-In of the assets and liabilities of Carpetdrome was finally abandoned. He says in effect that he was brow-beaten at the meeting in April, 1981, both by his own employers and by the accountants, and was not given an opportunity to explain what was involved in his own proposals or to press for their adoption. Mr. Gaynor, on the other hand, says that on his return

from the United States he was ~~faced~~ presented with a fait accompli, with the Carpetdrome bank account closed and its business already taken over by Drive-In and that all he could do was to endeavour to ensure that the transfer of assets from one company to the other would stand up to scrutiny when the inevitable investigation took place. There may have been some breakdown in communication between the two sides at that stage, brought about in part by the diffidence of Mr. McGoldrick in fighting his own corner, and the overbearing attitude adopted towards him by Matthew Kelly.

What does emerge from the evidence is that the change-over from Carpetdrome to Drive-In was initiated from within the company itself and without consulting the Respondents, and had been largely put into effect by the time the Respondents were first made aware of what was proposed, or consulted about the steps which should be taken. Up to the time when Carpetdrome was put into liquidation the extent of the participation of the Respondents in the transfer seems to have been confined to advising that full records should be kept of transfers of stock, and monitoring the implementation of that advice. There is no suggestion that Matthew Kelly or his associates went to the Respondents and asked them to devise a scheme which would enable Carpetdrome to dispose of all its assets while remaining in good standing with its g trade creditors and leaving nothing available to meet any claims of the Revenue Commissioners, nor was there any evidence to suggest that the Respondents had produced such a scheme on their own initiative.

The Respondents, however, became more directly involved in the affairs of Carpetdrome when a decision was taken in May 1981 to wind up the company. Mr. McGoldrick said the VAT demand for £230,000 came as a complete surprise to the company as he considered they were only four months in arrear at the time and only claims for credits had been contested by the Revenue authorities. He continued:

> "On the 23rd May, 1981 I went to see Mr. Tuffy with Paul Jackson. Mr. Tuffy said Carpetdrome was going into liquidation - did I know what a Statement of Affairs was. I was asked to furnish him with the information for one, together with £700 for fees. The Statement of Affairs was prepared in front of me by Mr. Tuffy when I brought over the materials. The figure for stock was suggested by Mr. Gaynor before he handed over the liquidation to Mr. Tuffy. He said to put in £3000 for stock so that money could be generated to pay the liquidator's fees. Mr. Tuffy asked did I know about the debtors. I made a guess - he put in half....He went down the list of creditors

and eliminated disputed claims and other claims such as Monck Properties - people who were not expected to prove or appear."

The witness went on to say that when the meeting of creditors was being convened for the 3rd June, 1981, Mr. Tuffy said he would put the advertisement in the "Evening Press" for the last Friday in May - that he would bury it in the sports pages on a Bank Holiday week-end, where the least number would notice it, and this was what happened in point of fact.

He described the meeting of creditors which took place in the Sunnybank Hotel, Botanic Road, at 10 am on the 3rd June, 1981 and which was attended by only two creditors' representatives apart from himself, representing Drive-In. Before the meeting commenced Paul Jackson succeeded in satisfying the other two creditors that their claims would be met and they left. The "creditors' meeting" then went through with the appointment of Mr. Harding as liquidator - his name having been put forward by the Respondents as a suitable person, and with no one else present save Mr. Tuffy, Mr. Harding, Mr. Paul Jackson (a director of Carpetdrome and of Drive-In), and one other person who hoped to be appointed as liquidator.

This was indeed an extraordinary performance in relation to a trading company whose annual turn-over was reckoned in millions rather than thousands; which was clearly insolvent, and which a short time previously had a very large number of creditors with claims against it totalling hundreds of thousands of pounds. It was suggested in the course of the present proceddings that it was no more than a charade. The Statement of Affairs presented to the meeting was an attenuated document giving stocks at £3,000, total assets as £6,000, and liabilities of almost £500,000 - most of it due to the Revenue Commissioners.

For the Respondents, Mr. Gaynor denies that he ever told Mr. McGoldrick to put in a figure of £3000 for stock "to generate fees for the liquidator" and Mr. Tuffy denies that he dealt in the cavalier manner described by Mr. McGoldrick with the lists of creditors and debtors. The Respondents must, however, accept responsibility for the preparation of this Statement of Affairs and for its presentation to the meeting in compliance with the statutory obligation imposed on the directors by the provisions of the Companies Act, 1963.

I have a strong impression that this Statement of Affairs was prepared in great haste and without any great regard to its accuracy by anyone who was involved in the work of compiling it. A Balance Sheet of sorts had been prepared for the Company by the Respondents as part of their work in preparing the four-year set of draft accounts, which purported to show the position of the Company as of the 31st October 1980, and the reconciliation of that document with the Statement of Affairs as of the 29th May, 1981, would be a task of considerable magnitude, if, indeed, it could be attempted at all. While no more credence can be attached to that Balance Sheet than to any other statement of the company's position based on the inaccurate and incomplete information the directors were making available to their accountants, I think the discrepancies between the two documents were of such an order that the Respondents should not have concurred in the production of the Statement of Affairs of the 29th May, 1981, without first making the most searching inquiries about the material to be included therein.

~~The conclusion~~ I have come to the following conclusion regarding the part played by the Respondents in the winding up of Carpetdrome when the decision was finally made to put the company into liquidation. I believe the initial decision to transfer its business to Drive-In was taken without consulting the Respondents, and I also believe that the decision which followed a few months later to put Carpetdrome into liquidation was also made by the directors without the direct involvement of the Respondents. Once the decision had been taken, the Respondents were brought into the picture - as happened previously during the history of Matthew Kelly's companies when some point of particular difficulty or crisis was reached. On this occasion, however, it must have been apparent to the Respondents that a very tricky situation was arising both for themselves and for the company. They had a client who had paid very substantial sums in fees to the firm over a period of years and whom they would not wish to ditch in an unceremonious fashion, but they were now being asked to become involved in the winding up of a company whose affairs, to their knowledge, had been conducted in a highly irregular manner from the time it first commenced in business and which was in the process of divesting itself of all its assets at a ~~the~~ time when it was faced with enormous, unsatisfied claims by the Revenue Commissioners.

My impression isthat the main concern of the Respondents at that stage was to extricate themselves as quickly and as gracefully as they could from all further involvement in theaffairs of ~~the Kelly group of companies~~ Carpetdrome. When thewinding-up of Carpetdrome was mooted, Mr. Gaynor later told Mr. Tiuit of the Revenue Investigation Branch that he had put Matthew Kelly in touch with is partner, Patrick Tuffy, as the expert in liquidation matters, while at the same time warning Mr. Tuffy to have nothing to do with it. The Respondents, in evidence, said they felt it would be inappropriate to be involved in the liquidation as they had acted for Matthew Kelly and some of his companies, but this did not deter Mr. Gaynor fromacting previously as liquidator of Kelly's Carpet Supermarket Limited. I think Mr. Harding was brought in to get the partners "off the hook" while not giving offence to their clients, and I also think that in their anxiety to dissociate themselves from further involvement in the affairs of Carpetdrome the partners did, in fact, lend themselves to the preparation of a completely inadequate Statement of Affairs, and the holding of a Creditors' Meeting which could fairly be described as a charade.

Their attitude at that stage was that it was now over to the liquidator, Mr. Harding, to sort out the mess in which the affairs of Carpetdrome were to be found, and I think tney regarded the preparation of the Statement of Affairs and the convening of the Creditors' Meeting as merely a formal compliance with the requirements of the statute, which in no way fettered the liquidator or the creditors in the examination of all claims which thereafter could be made against the company.

I have no reason to believe that Mr. Harding, although his experience in the field of company liquidation was of a somewhat limited nature, would have shirked the responsibilities of his office in any way, or would not have carried out his duties in a competent manner, and I do not accept the suggestion that his name was put forward by the Respondents as a person who would not be sufficiently-equipped to investigate the affairs of the company in a thorough and effective manner.

This concludes the summary I have made from the evidence in the case of the involvement of the Respondents with the affairs of Kelly's Carpetdrome Limited and while I am satisfied that they were employed in an important consultative capacity from time to time not only by

Matthew Kelly but also by the company, and while they have laid themselves open to a good deal of criticism ~~[illegible]~~ for their failure to adopt a much tougher line with clients who gave many indications of sailing windward of the law, I have come to the conclusion that the evidence in the case stops well short of satisfying me that they~~[illegible]~~ were, or either of them was, knowingly party to the carrying on of the business of Carpetdrome with intent to defraud the creditors of that company or creditors of any other person or for any fraudulent purpose.

The onus of proof assumed by the Liquidator in pressing such a claim must be a very heavy one. Conduct of the type described in Sec. 297 of the Companies Act, 1963, as well as giving rise to a possible civil liability on the part of the wrong-doer, is also made a criminal offence by the provisions of sub-sec.(3) of the Section. Consequently, what is involved when civil liability is sought to be imposed under the provisions of Sec.297 is an allegation of crime in civil proceedings, and there is some authority for the proposition that in this kind of situation the same standard of proof is demanded as would apply in a criminal prosecution, that is to say, proof beyond reasonable doubt, and not merely proof on the balance of probabilities, such as would apply in the ordinary run of civil actions. See Thurtell v. Beaumont, (1823) 1 Bing.339; Chalmers v. Shackell, (1834) 6 C. & P. 475; Willmett v. Harmer, (1839), 8 C. & P.. 695; Statham v. Statham, (1929) P. 131.

The final word may not have been said as yet on this subject, but in Hornal v. Neuberger Products Ltd., (1956) 3 AER 970, the Court of Appeal in England held that in a case where an action was based in the alternative on breach of contract or fraudulent misrepresentation, the same standard of proof should be applied in each case, and the standard of proof applicable was the civil standard of a preponderance of probability. The Court went on say however, that this was not an absolute standard, since within it the degree of probability required to establish proof might vary according to the gravity of the allegation to be proved . The Court further approved the observations of Lord Justice Denning in Bater v. Bater, (1950) 2 AER 458, in the course of which he remarked as follows:

"Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a prepondrerance of probability, but there may be degrees of probability within that standard. The degree depands on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

In the present case I can resolve this legal difficulty by stating that even applying the somewhat lower standard of proof required in civil proceedings I would still feel bound to exonerate the Respondents from the charges brought against them of knowing participation in fraudulent transactions of the company.

I must therefor refuse the Liquidator the relief sought by him in the present proceedings under Section 297 of the Companies Act, 1963.

R. J. O'Hanlon.

R. J. O'Hanlon.
13th ~~March~~ July, 1984.