[2020] IEHC 376

THE HIGH COURT

2014/94 COS

IN THE MATTER OF ALVONWAY INVESTMENTS LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION)
AND IN THE MATTER OF SECTIONS 819 AND SECTION 842 OF THE COMPANIES ACT 2014

BETWEEN

KEN FENNELL

APPLICANT

- AND –

JOSEPH O'DONOVAN (OTHERWISE JOE DONOVAN), BRENDAN O'BRIEN AND FERGUS APPLEBE

RESPONDENTS

JUDGMENT of Mr. Justice Quinn delivered on the 29th day of July, 2020

1. The applicant was appointed liquidator of Alvonway Investments Limited ("the Company") on 24 March, 2014. This application is for an order pursuant to s.842 of the Companies Act 2014 ("the Act") disqualifying the first named respondent from acting as a director or officer of a company, and orders pursuant s.819 of the Companies Act 2014 restricting the second and third named respondents from acting as directors of a company unless it meets the requirements as to capital stipulated in subsection (3) of that section.

2. The first named respondent has consented to a restriction order under s.819 of the Act in lieu of disqualification, and an order for the liquidator's costs. This judgment concerns only the application as against the second and third named respondents.

3. The Company's principal asset was Wilton Shopping Centre, Cork. At the commencement of its liquidation it was indebted to the National Asset Management Agency ("NAMA") in a total sum of €419 million, comprising €171.6 million pursuant to a loan granted by Anglo Irish Bank Corporation plc, and a sum of €247.4 million in respect of a guarantee of the debts of a related company, Padlake Limited.

Background

4. The Company was incorporated on 31 January, 2005. Its principal shareholder and director is the first named respondent, Mr. Joseph O'Donovan.

5. The Company was one of a number of companies and other entities owned and controlled by Mr. O'Donovan and members of his family, collectively known as the O'Donovan Group.

6. In 2005, the Company acquired Wilton Shopping Centre at a cost of €137 million with facilities from Anglo Irish Bank of €113 million.

7. At the time of its liquidation the three respondents were directors of the Company. Mr. O'Donovan was a director from 25 February, 2005, until 19 February, 2007 and from 6 April, 2010, to the time of liquidation. Mr. Applebe was a director from 25 February, 2005, continuously to the time of liquidation. Mr. Applebe holds a 3.75% shareholding in the Company, the balance of the shareholding being held by O'Donovan family entities. Mr.

O'Brien was appointed on 15 October, 2010, and he does not hold any shares in the Company.

8. As at December 2010, the O'Donovan Group was indebted to its bankers in amounts totalling €495 million. This comprised €157.5 million due by the Company, and the balance due by other entities in the Group, most of which was also guaranteed by the Company.

9. In early 2011, the Anglo Irish Bank Loan and Guarantee, together with security held by that bank transferred to the National Asset Loan Management Limited ("NALM"), a subsidiary of NAMA.

10. On 4 March, 2011, Mr. O'Donovan submitted a Connection Business Plan to NAMA concerning the continuation of the Group's activities including the operation of Wilton Shopping Centre.

11. On 29 July, 2011, Mr. John Mulcahy, Portfolio Manager at NAMA, wrote to Mr. O'Donovan informing him that the Business Plan had been rejected by the NAMA Credit Committee but that NAMA was willing to "*consider interim support for this Connection*" subject to conditions ("Connection" was the term used by NAMA to refer collectively to the borrowers and obligors in the O'Donovan Group). The conditions ranged from timeframes for certain milestones to be delivered by the Group, through to stipulations concerning such matters as levels of expenditure, approval processes for costs to be incurred and further information and disclosures to be made. The effect was to apply strict operational and financial conditions to the continuing support of NAMA while the performance of the Group was being further assessed.

12. On 14 November, 2012, NAMA issued a further Interim Support Letter to Mr. O'Donovan extending support for the Connection until 30 April, 2013, subject to conditions.

13. On 13 May, 2013, Mr. O'Donovan engaged MC2 Accountants Limited, trading as McCarthy McSweeney, ("McCarthy McSweeney"), to assist in arranging new financing to deal with the Company's indebtedness to NALM. The terms of engagement provided for a consulting fee in the sum of €250,000 together with a fee on the complete sale of all properties or loan notes in the amount of 2% of the gross consideration for such sale. The consulting fee was to be paid quarterly in advance "*or in full on delivery of a bid in excess of €55 million.*" The Company did not seek NAMA's approval prior to engaging the advisors.

14. On 28 June, 2013, John MacHale, Lead Portfolio Manager at NAMA, wrote to Mr. O'Donovan notifying him of a recommendation made to NAMA's decision-making authority that enforcement action be taken against the Company due to its failure "*to significantly progress or implement many of the terms upon which NAMA's support is conditional"* and its failure "*to act in a manner consistent with maximising the reduction of the Connection's liabilities to NAMA*". This letter invited the Connection to make representations before NAMA would decide on the most appropriate course of action to take.

15. On 1 July, 2013, McCarthy McSweeney issued an invoice to the Company for its first quarterly fee "*per the Letter or Engagement*" to the Company in the sum of €62,500 plus VAT.

16. By letter dated 10 July, 2013, Mr. O'Donovan replied to Mr. MacHale's letter of 28 June, 2013, outlining the steps he had taken to attract parties interested in purchasing the portfolio outright and requested a delay in enforcement action to afford such interested parties time to complete Due Diligence and formulate offers to NAMA for the Connection.

17. On 21 August, 2013, McCarthy McSweeney issued a second invoice to the Company for the "*balance of agreed consulting fee based on delivery of bid, as per letter of engagement"* in the sum of €187,500 plus VAT.

18. On 26 August, 2013, NALM issued letters of demand to the Company on foot of the Facility Letter for €171,631,806 and the Guarantee and Indemnity for €247,428,315. These letters were served on Mr. O'Donovan in his capacity as director and as secretary of the Company on 27 August, 2013. They were not served on Mr. O'Brien or Mr. Applebe.

19. On 27 August, 2013, Mr. MacHale wrote to Mr. O'Donovan stating that the decision making authority in NAMA had decided that "*letters of demand should be served on the debtors within the Connection and failing repayment of the full amount demanded, receivers are to be appointed over the properties forming the security for the loans*".

20. On the same day, 27 August, 2013, two payments were made from the Company's current account. These payments comprised of:

    (1) €300,000.00 to McCarthy McSweeney and

    (2) €150,032.00 to Mr. O'Donovan.

    (collectively the "August 2013 Payments"). These payments were made without NAMA's prior knowledge or approval.

21. On 28 August, 2013, NAMA appointed a statutory receiver, Eoin Ryan of McKeogh Gallagher Ryan, over the assets of the Company.

22. On 18 February, 2014, NALM presented a petition to wind up the Company.

23. On 24 March, 2014, the applicant was appointed Official Liquidator of the Company by Order of Mr. Justice Charleton.

Insolvency

24. The Business Plan submitted to NAMA in March 2011 estimated the Group deficiency at circa €300 million as at the end of December 2010. The Company's estimated deficiency in that Business Plan was €73.5 million, excluding its guarantees of Group debts.

25. The last set of Abridged Financial Statements is for the year ended 30 September, 2011. These accounts were signed by Mr. O'Donovan and Mr. O'Brien on 4 July, 2013, eight weeks prior to the appointment of the receiver.

26. The Balance Sheet shows that the Company had a net deficit of €76,510,645.00 and long term debt of €159,919,158.00 as at 30 September, 2011.

27. The auditors, Hinchion & Co., deemed the ability of the Company to repay the debt from operating activities to be "*uncertain*", and that the future prospects of the business was *"dependant upon the continued support of the company's bankers and financiers".* Furthermore,

> *"The assets of the company … are less than half of the amount of its called up share capital and in our opinion, on that basis there did exist at 30 September 2011 a financial situation which, under section 40(1) of the Companies (Amendment) Act 1963, would require the convening of an extraordinary general meeting of the company."*

28. On 17 October, 2013, Mr. O'Brien delivered to the statutory receiver an estimated statement of affairs in prescribed form.

29. That statement of affairs estimated the value of Wilton Shopping Centre at approximately €45 million. The current assets of the Company consisted of cash of €4,077,234. The liabilities were €122,586,082 which were secured by debentures held by Anglo which had transferred to NAMA. This figure does not include the Guarantee also held by NAMA. The preferential liabilities of the Company amounted to approximately €33,000, and the unsecured liabilities amounted to approximately €28,000.

30. The liquidator states that at the time of the August 2013 Payments *"the Company was hopelessly insolvent"* and that this situation had "*persisted for some time."*

NAMA

31. The Business Plan submitted to NAMA on 4 March, 2011, contained a description of the O'Donovan Connection outlining its assets, debts and the Group's proposals for servicing debt and for debt reduction. Debt reduction was to be achieved by the sale of certain assets and a refinancing of a significant portion of the portfolio, including Wilton Shopping Centre.

32. The Business Plan revealed that as at 31 December, 2010, the Group's total banking debt stood at €495 million. The estimated value of the Group's global portfolio was €148.7 million. Of the total debt, €157.5 million was due by the Company to Anglo Irish Bank, and its principal asset, Wilton Shopping Centre, was estimated to be worth €84 million.

33. One of the entities in the Group was a company named Wilton Securities Management Limited. Its function was to act as the Management Company for Wilton Shopping Centre, principally involving the provision of services at the Centre and collection of service

charges, preparing monthly income and expenditure reports for NAMA, and controlling the operation of the Centre.

34. Mr. O'Brien avers that all transactions by the Company were carried out by the Management Company and "*overseen*" by NAMA's "Landlord Management Group". At the hearing, counsel for Mr. O'Brien submitted that Mr. O'Brien thought these control mechanisms were "sufficient".

35. The interim support by NAMA for the Connection was subject to several conditions. In particular;

> *"(g) In the interests of good estate management, prior to the Connection, it[s] servants, agents or employees taking any action whatsoever relating in any way to Wilton Shopping Centre or undertaking any interactions of whatever nature with the tenants or other stakeholders in Wilton Shopping Centre, the Connection will first discuss such actions and interactions with the members of the Landlord Management Group at its regular meetings and obtain the Landlord Management Group's prior written approval to the action or interaction. The Landlord Management Group may issue a list of actions and interactions that are permitted without the requirement for its further written approval."*

36. An affidavit was sworn by Mr. John MacHale of NAMA. He says that he was the "*lead portfolio manager/asset recovery manager responsible for the Connection between December 2010 and December 2016". Mr. MacHale states "… I liaised principally with Barry Doyle on financial matters concerning the Company. This was at Mr. Donovan's request" but that the "control of the Company remained at all times with the directors, subject to NAMA's approval via the Form A procedure."*

37. Mr. MacHale describes the "Form A" procedure which required the debtor to submit a "Form A" application to NAMA in order to obtain authorisation to incur expenditure. He says that Mr. O'Donovan submitted numerous Form A applications to NAMA prior to the August 2013 Payments and was familiar with the process which had been in place since NAMA took over the loans. The central function of the Form A procedure as a mechanism for the approval and control of expenditure is of importance in this case in that the August 2013 Payments were made without the submissions of such Forms, or any other notification to or approval by NAMA.

38. Coordination meetings concerning the management of the charged properties in the Connection were held quarterly and attended by Mr. MacHale, Mr. Doyle on behalf of Mr. O'Donovan, and the letting agents nominated by NAMA, DTZ Sherry Fitzgerald. Mr. O'Brien and Mr. Applebe say they were "*effectively excluded"* from these meetings as they were never invited to attend them, the Company being just one part of the wider O'Donovan Connection within NAMA.

39. Mr. O'Brien refers to the Business Plan submitted by the first respondent on 4 March, 2011, and the Interim Support Letter received from NAMA. He refers to the conditions of

that support which included the giving of certain undertakings and the credit processes. He describes the supervision regime which was put in place, and the requirement that before any actions would be taken in respect of Wilton Shopping Centre: -

> "…the Connection must first discuss such actions and interactions with the Landlord Management Group at its regular meetings and obtain the Landlord Management Group's prior written approval of the action or interaction of whatever nature concerning the property or the business."

40. Mr. O'Brien continues:-

> *"…in consideration of the support of NAMA in the continued support of the Company the first named respondent or his agents attended at monthly management meetings with NAMA's Landlord Management Group concerning all activities of the Company. However, your Deponent was not invited to attend at these said meetings, nor did I ever attend the said meetings relating to the activities of the Company pursuant to the Interim Support Letter of NAMA dated 4 March, 2011. As a result I say that I was effectively excluded from any such discussions between NAMA and the First Named Respondent concerning the operation of the Company in circumstances where the said Company formed part of the First Named Respondents Connection that is to say, a collection of Companies and/or partnerships concerning the First Named Respondent relevant to NAMA's Credit Committee's consideration."*

41. Mr. O'Brien then describes the process whereby monthly income and expenditure reports were prepared by the Management Company and submitted to NAMA, but he did not retain a copy of that documentation. The general activities of the Company were carried out by the Management Company, which was approved by NAMA and was responsible for the control and operation of Wilton Shopping Centre.

42. The submissions of the respondents require this court to consider the extent to which controls applied by NAMA impact on the performance by directors of their duties. The case also raises a question of principle as to whether any of those duties are modified where a company is trading with the benefit of support which is conditional on the operation of those controls. I shall return to these questions.

Fraudulent preference application

43. On 21 June, 2015, the liquidator issued a Notice of Motion against McCarthy McSweeney pursuant to s.286 of the Companies Act 1963 and/or s.604 of the Companies Act 2014, seeking a declaration that the payment of €300,032 constituted a fraudulent or unfair preference. The matter was listed for hearing for 2 March, 2017. However, the liquidator states that "*considering the overall lack of available assets to fund a lengthy trial*", that a settlement "*provided the best outcome for the general body of creditors*". Accordingly, the parties reached a settlement agreement which consisted of McCarthy McSweeney paying the Company a total of €150,000.

44. The liquidator decided that it was commercially not prudent to pursue Mr. O'Donovan for the €150,000 paid to himself as he "*was heavily indebted to a number of financial institutions, where judgments rank in priority to any claim which may arise from s.286 proceedings".*

45. Following the settlement of the s.286 proceedings, the liquidator submitted his report pursuant to s.682 of the 2014 Act to the Director of Corporate Enforcement (the "ODCE") on 5 October, 2017.

46. In the context of this application, before he informed the liquidator of his decision to consent to a restriction order, Mr. O'Donovan delivered a replying affidavit vigorously defending the payment to himself. The making of both of these payments features as a central issue of concern identified by the liquidator.

Issues identified by the liquidator

47. The principal matter to which the liquidator draws attention in his grounding affidavit is the making of the August 2013 Payments. He says that although the second and third named respondents were not aware of these payments they ought to have been aware of the Company's insolvent position at the time of the Payments "*and ensured that there were sufficient controls in operation to prevent them from taking place."*

48. The liquidator also complains that Mr. O'Brien and Mr. Applebe failed to respond to a request for information required by him.

49. There is no question as the company's compliance with its filing obligations under the Companies Acts. At all times the Company kept proper books and records, complied with its filing obligations in the CRO and discharged its liabilities owed to the Revenue Commissioners.

Statement of Affairs

50. When the statutory receiver was appointed the directors and the secretary were required pursuant to sections 319 and 320 of the Companies Act 1963, to submit to him a statement of affairs in a prescribed form. The only director who complied with this requirement was Mr. O'Brien, who completed a statement of affairs on 17 October, 2013.

51. In this statement of affairs, Mr. O'Brien estimated the value of Wilton Shopping Centre at €45 million, and the amount of debt charged on it at €171.6 million.

52. The order for the winding up of the Company, made on 24 March, 2014, contained the usual stipulation that the directors make and file a statement of affairs within 21 days from the making of that order.

53. On 1 April, 2014, the liquidator's solicitor, Messrs. Ronan Daly Jermyn, wrote to the respondents informing them of the making of the winding up order and that pursuant to that order each of them was required to file in court a statement of affairs *"in a similar format to the enclosed, within 21 days from the date of the order*."

54. On 3 April, 2014, Ronan Daly Jermyn wrote again to each of the respondents enclosing a copy of the order and drawing to their attention the requirement to file a statement of affairs.

55. On 8 April, 2018, Messrs. McSweeney & Partners, financial advisors to Mr. O'Donovan replied to the liquidator stating that Mr. O'Donovan had none of the Company's financial information as it was in the possession of the receiver and therefore would be unable to complete the Statement of Affairs.

56. The matter came before the court for further consideration on 12 May, 2014. On that occasion, Barrett J. granted an extension of time for the making and filing of a statement of affairs. His order states: *"And IT IS ORDERED that Fergus Applebe and Joseph Donovan and Brendan O'Brien (the directors and Secretary of the Company) are within 21 days of the date of service of this Order upon them to make out and file in Court a Statement as to the affairs of the Company in the prescribed form verified by Affidavit."*

57. By letter dated 25 May, 2014, the liquidator informed the respondents of the extension. That letter enclosed a copy of the order of Barrett J. with penal endorsement thereon, to which the covering letter draws attention.

58. On 27 May, 2014, Messrs Ronan Daly Jermyn wrote to Mr. O'Brien and Mr. Applebe stating that the date to file a Statement of Affairs had been extended by the Judge to 30 June, 2014, and attached a further Order of the Court with a penal endorsement.

59. By letter dated 20 June, 2014, Mr. Applebe responded to the letter of 27 May, 2014. He attached the Statement of Affairs compiled by Mr. O'Brien for the receiver in October 2013, and stated:

> *"Brendan O'Brien was as far as I know the person who had all of these details. I certainly was not and I can confirm on oath if necessary that I accept Brendan O'Brien's statement of affairs as completed on the 28th of August 2013 and I attach it.*
>
> *Do you require me to do an affidavit in this situation?*
>
> *What further steps to doe[s] the liquidator require. Please advise when this matter is returnable to as I consider it appropriate for me to be represented to explain my position."*

60. Mr. Applebe submitted that the Order of the High Court for the winding up of the Company dispensed with the requirement to file a Statement of Affairs.

61. Counsel for the liquidator stated that this was in fact not correct, that the requirement to file a Statement of Affairs had not been dispensed with. The Order of 24 March, 2014, as initially perfected contained an error and appeared to indicate that there was no requirement for a Statement of Affairs. Upon realising this, Messrs. Ronan Daly Jermyn, solicitors for the liquidator, had contacted the relevant registrar who amended and

reissued the Order dated 24 March, 2014, and perfected it on 26 March, 2014. This version contained the order to make and file a statement of affairs. Counsel for the liquidator says that it was only during discovery in relation to this application that Mr. Applebe found the earlier, unamended and incorrect version of the Order. The liquidator says that in the letter of 3 April, 2014, from Messrs. Ronan Daly Jermyn to Mr. Applebe, in which they notified him of the appointment of the liquidator, the correct amended version of the winding up Order was attached which required the directors to file a statement of affairs within 21 days of the date of the Order.

62. In the correspondence of April – June 2014 concerning the statement of affairs, Mr. Applebe never referred to the order having dispensed with the requirement for a statement of affairs. Nor did any of the other respondents suggest that the order contained no such direction. The liquidator says that it was only during the course of the discovery of documents in relation to these proceedings that the unamended incorrect version of the winding up order come to Mr. Applebe's attention, and this became the basis for the suggestion at the hearing, which was not made on affidavit by Mr. Applebe, that he was not directed to make a statement of affairs.

63. Ultimately the liquidator concluded that he should recommend to the court that the requirement for a statement of affairs in the winding up should be dispensed with and the court approved that recommendation by order made on 29 June, 2014. The reasons for this recommendation given by the liquidator in his affidavit grounding this application were:

    (1) The difficulties his solicitors were having in serving the directors;

    (2) Cost, and

    (3) The fact that Mr. O'Brien had furnished a statement of affairs to the statutory receiver.

Liquidator's questionnaire

64. On 2 April, 2014, the liquidator wrote to both Mr. O'Brien and Mr. Applebe requesting that they forward to him any records, documents or property of the Company that "*you may have in your possession*". The liquidator also enclosed a questionnaire to be completed and returned to him "*within 14 days of the date of this letter*." The questionnaire comprised of a Section A and Section B. Section A states in bold at the top of the page *"To be completed by one director on behalf of all directors*" while Section B states "*Separate statement to be completed by each director".*

65. No response to this letter was ever received from Mr. O'Brien.

66. Mr. Applebe responded by letter dated 4 April, 2014, to the letter of 1 April, 2014, stating:

    "Dear Sirs,

We have yours of 1st April regarding Alvonway Investments Limited. I was not aware that a liquidator had been appointed not that much turns on that.

I confirm my complete commitment to fully cooperating with the liquidator. Unfortunately I have very knowledge of what happened in this company.

Who are the other directors to whom you have written?"

Ronan Daly Jermyn responded to this query on 8 April, 2014, informing Mr. Applebe that they had also written to Mr. O'Brien and Mr. O'Donovan as directors of the Company.

67. The liquidator never received a completed questionnaire from any of the directors.

68. In paragraph 4 of Mr. O'Brien's second affidavit, he says "*I say and understand that the Liquidator required the completion of one questionnaire concerning the Company*." He said that he understood the first respondent had completed it and that he did not think it necessary for him to complete a duplicate. Nowhere in the correspondence with any of the respondents does the liquidator state that he only requires one to be completed.

69. It is unfortunate that the liquidator's covering letter did not draw attention to Section B of the questionnaire, although a full reading of the document itself made it clear that Section B was for completion by each director.

70. While Mr. O'Brien and Mr. Applebe can be criticised for their failure to return the questionnaire to the liquidator, I accept that by the time of the liquidator's appointment neither of them were in possession of the books and records of the Company, which had already been provided to the receiver by Mr. O'Brien.

Timing of the application

71. Mr. Applebe takes issue with the timing of the restriction application and says that pursuant to s.683(4) of the Act, the liquidator is statutorily barred from bringing the application as the Notice of Motion issued more than 2 months after the ODCE notified the liquidator that he was not relieved of his obligation to make the application in respect of the respondents.

72. S.683(4) reads as follows: -

"(4) An application in respect of a director under section 819 (1), in compliance with subsection (2), shall be made not later than the expiry of—

(a) 2 months after the date on which the Director has notified the liquidator that the Director has not relieved the liquidator of the obligation to make the application in respect of the director, or

(b) such greater period of time as the Director may allow for the purposes of the application."

73. Subsection 3 provides that a liquidator who fails to comply shall be guilty of an offence.

74. The timeline is as follows;

(1) On 26 March, 2018, Mr. Conor O'Mahony at the ODCE wrote to the liquidator confirming that the liquidator was not relieved of his duty under s.682 of the Act to bring an application pursuant to s.819 and s.842 of the Act. He stated that the Director had issued Restriction Acceptance Documents to Mr. O'Brien and to Mr. Applebe and a Disqualification Acceptance Document to Mr. O'Donovan and that the directors have 21-days to respond; "*During this period, you are statutorily precluded from initiating proceedings for their disqualification*".

(2) On 28 March, 2018, the ODCE issued Restriction and Disqualification Acceptance Documents to the three respondents. Mr. Applebe denies having received this correspondence. The liquidator has exhibited an email from the ODCE in which Mr. O'Mahony states that on 28 March, 2018, he issued the relevant letters to the respondents. He confirmed that it is not the practice of the ODCE to issue these letters by registered post, and therefore that he does not have proof of postage or delivery. However, Mr. O'Mahony says that none of the letters in this case were returned undelivered. On this application, I cannot resolve this conflict of fact, but it is material that Mr. Applebe does not say that if he had received this letter and was thereby afforded the opportunity to give a restriction undertaking that he would have done so.

(3) On 15 May, 2018, the ODCE wrote to the liquidator informing him that none of the directors had returned the Acceptance Documents:

> "Consequently, you are obliged to make an application pursuant to Section 819 of the Companies Act, 2014 for the restriction of *all* of the directors of the above company within two months from the date of receipt by you of this letter." [*emphasis* added]

In as much as the Director's letter of 26 March, 2018, informed the liquidator that during the period of 21 days which the directors had to return Restriction Acceptance Documents, that letter effectively triggered a suspension of the time limit within which the liquidator was required to bring this application. The liquidator was not informed of the outcome of the Director's correspondence with the respondents until the letter of 15 May, 2018. Therefore the letter of 15 May, 2018 constituted for this purpose the notification to the liquidator under s.683(4)(a) of the Act and was the grant of an extension of time as envisaged by subsection 683(4)(b). The liquidator received this letter on 17 May, 2018.

(4) The liquidator issued the Notice of Motion on 13 July, 2013, less than 2 months after receipt of the letter from the ODCE of 17 May, 2018. Accordingly, it is compliant with s.683(4) of the Act.

75. Even if the liquidator had issued the Notice of Motion outside the 2 month limit and the ODCE had not granted an extension of time under s.683(4)(b), it is clear from the

judgment of Ms. Justice Finlay Geoghegan in *Re E-Host Europe Ltd (in voluntary liquidation); Coyle v O'Brien* [2003] 2 I.R. 627 that the time limit set out in s.683(4) of the 2014 Act is relevant only as to whether the liquidator has complied with his obligations and if not, he/she may be guilty of an offence. The validity of the restriction application is not affected. At paragraph 14, Finlay Geoghegan J. stated as follows:

> *"…Having given a liquidator a power, unlimited in time to bring s. 150 applications by the amendment in s.41 of the Act of 2001 it appears to me that if the Oireachtas intended the power given to be limited in time there would have been express words to that effect. Section 56 does not expressly limit the exercise of the power granted by s.41 (in amending s.150 to insert subs. 4A). Rather it imposes an obligation to exercise the power (unless relieved) and to do so within a specified time with penal consequences for failure to do so.*
>
> *15. There is no time limit on a potential application by the Director under subs. (4 A) of s. 150. Hence, regardless of the interpretation of s. 56 (2) it does not appear to have been the intention of the Oireachtas that directors, in respect of whom an application was not brought within the time specified in s. 56 (2) by a liquidator, would be exonerated from a potential application under s. 150. In circumstances where the Director has not relieved a liquidator from his obligation to bring an application under s. 150 it is probable that the Director would pursue such an application if the liquidator failed to do so. In this connection regard must also be had to the mandatory nature of the obligation imposed on the court under s. 150 (1). This again appears to me to reinforce the view that if the Oireachtas intended that a liquidator could no longer exercise the power to make an application conferred by s.150(4A) after the time limit specified in s. 56(2) that it would have expressly so provided."* [emphasis added]

76. Finlay Geoghegan J. was considering s.150 of the Companies Act 1990 as amended by s.41 of the Company Law Enforcement Act, 2001. In *Re Les Jumelles Ltd; O'Boyle v McSweeney* [2017] IEHC 826, O'Connor J. found that the same reasoning applied as between the s.56(2) of the Company Law Enforcement Act 2001 and s.683(4) in the 2014 Act. He held at para. 14: -

> *"In short, the imperative arising from s. 683(4) of the Act of 2014 does not avail the respondents because the applicant continues to have the power to bring the application. The legislature has not imposed a time limit on the exercise of that specific power. I do not discern an intention of the legislature from the Act of 2014 to change the law which has existed since 2001 so that directors could avoid an application for a declaration by a liquidator under s. 820(1) of the Act of 2014 as was argued for the respondents. The history and explanation set out by Finlay Geoghegan J. in Coyle v O'Brien remains. The words in s. 820 of the Act of 2014 which allows a liquidator to bring this type of application are clear, precise and unambiguous."*

77. Thus, Finlay Geoghegan J's reasoning continues to apply. Failure by a liquidator to comply with the time limit specified in s.683(4) of the 2014 Act does not afford a defence to a restriction application. Rather it is a regulatory measure with consequences for a liquidator who fails to comply. Therefore, even if the Notice of Motion had not issued within the prescribed period of 2 months – and I have found that it did – it is clear that the High Court's jurisdiction to hear and determine the liquidator's application is not in any way contingent upon a restriction application being brought within 2 months of notification or the grant of an extension of time by the Director.

The Constitution

78. In written outline submissions handed into court on the day of the hearing, counsel on behalf of Mr. Applebe made a submission to the effect that the provision of Section 683(4)(b) of the Act whereby the Director may grant an extension of time for the bringing of a restriction application offends Article 40.3.1 of the Constitution by failing to defend or vindicate the personal rights of the citizen and protect same from unjust attack in circumstances where the citizen's right to fair procedures, due process and natural justice *"may be unilaterally and extra-judicially offended".*

79. It was submitted that the subsection "*offends the various human rights conventions pertaining to fairness of procedures for the same reasons."* The submission did not identify the "various human rights conventions" to which it was referring.

80. It was suggested that if necessary the court should examine the constitutionality of the section and that this would require an adjournment of the application to allow the Minister for Business, Enterprise and Innovation, Ireland and the Attorney General to join issue with his submissions.

81. Mr. Applebe's counsel did not make this submission at the hearing, and in his closing submission the liquidator's counsel referred to this part of Mr. Applebe's written submission. The matter was not then pressed by Mr. Applebe's counsel.

82. If Mr. Applebe had expected the court to treat this as a substantive ground for resisting the making of a restriction order, he ought to have made a timely application to join the Minister, Ireland and the Attorney General to these proceedings. Instead, the point was made only in a written submission, handed in on the day of the hearing and referenced at the hearing only when mentioned by the liquidator's counsel. For these reasons I declined an adjournment of the hearing to join those parties for this purpose.

83. Finally, in relation to this point, it is clear from the judgments of Finlay Geoghegan J. in *Re E-Host Europe Limited* and of O'Connor J. in *Re Les Jumelles Limited*, that even a failure by the liquidator to commence the application within the statutory time limit, or the time limit as extended, does not exonerate the directors.

Relevant legal principles

84. Both Mr. O'Brien and Mr. Applebe deny any knowledge of or involvement in the August 2013 Payments. It is not suggested by the liquidator that either Mr. O'Brien or Mr.

Applebe acted dishonestly in their conduct of the affairs of the company. The liquidator's complaint relates only to irresponsibility.

85. Accordingly, the core question on which Mr. O'Brien and Mr. Applebe must satisfy the court is that they acted responsibly in relation to the conduct of the affairs of the company, and that they have "*when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and (c) there is no other reason why it would be just and equitable that he or she should be subject to the restrictions imposed by an order under subsection (1).*"

86. The onus is on the second and third named defendants as directors of the Company to demonstrate that the criteria in subsection 819(2) are satisfied.

87. The principles governing the application of this section are well-settled. The test was described by Shanley J. in *La Moselle Clothing v Soulahi* [1998] 2 ILRM 345 as follows: -

    (1) the extent to which the director has or has not complied with any obligations imposed on him by the Companies Acts;

    (2) the extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility;

    (3) the extent of the directors' responsibility for the insolvency of the company;

    (4) the extent of the directors' responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter;

    (5) the extent to which the director, in the conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards.

88. *La Moselle* was later approved by the Supreme Court in *Re Squash (Ireland) Limited* [2001] 3 I.R. 35. According to McGuinnes J. in that case, the court should "*look at the entire tenure of the director and not simply at the few months in the run up to the liquidation.*"

89. Modern jurisprudence has moved towards abolishing the distinction between executive and non-executive or passive directors. In *Re Walfab Engineering* [2016] IECA 2, Kelly J. for the Court of Appeal stated: -

    "*60. For my part, I cannot agree that the factors identified by the trial judge can be regarded as relevant to the exercise of his discretion. The whole thrust of the legislative provision is to ensure that all directors of all companies comply with their obligations. It matters not that they be directors of family companies, or be at the helm of large or quoted enterprises. Neither do the qualifications of the directors or the economic challenges that the companies may be facing affect the obligations of directors to act responsibly in respect of an insolvent company…*

70. It would be contrary to the whole notion of proper corporate regulation that passive directors would be exonerated from liability or relieved from disqualification or restriction on the basis of the passive nature of their role. There are a number of cases where that is made clear. [emphasis added]

71. In Re. Costello Doors (High Court, 21st July, 1995) Murphy J. did not accept that a director could be excused from acting responsibly merely because he or she accepted the office to facilitate the proprietor without being prepared to involve him or herself in any aspect of the management of the company. Similarly in Re. Vehicle Imports [1985] ILRM 75, the wife of an executive director who alleged that she was just a named director with no involvement in the company was unsuccessful in persuading the judge that director's duties did not apply to her. He held that there was no doubt that director's duties apply equally to non-executive as to executive directors, but on the facts of the case he found it was inappropriate to make a restriction order against her because she had adopted a responsible position in opposing the company's increased borrowings. These decisions were given in the context of s. 150 restrictions, but I am of opinion that no different test would be appropriate in the context of a s. 160 application. All directors whether passive or otherwise are required to undertake all reasonable steps to file annual returns.

72. There is no warrant to limit the disqualification or restriction of passive directors pursuant to s. 160(2)(b) to one where there is a 'real moral blame' on their part shown."

90. *In Re Laragh Civils Limited* [2016] IEHC 533, Keane J. at para. 37 of his judgment stated: -

"37. As the Court of Appeal recently confirmed in the case of Director of Corporate Enforcement v. Walsh [2016] IECA 2, it would be contrary to the whole notion of proper corporate regulation to exonerate token directors from liability or relieve them from restriction on the basis of the passive nature of their role. To limit the test for irresponsibility to cases where the evidence demonstrates, in addition, "some real moral blameworthiness" by reference to the decision of Carroll J. in Re Hunting Lodges, would be to conflate the test for fraudulent trading under s. 297 of the Companies Act 1963 (which was at issue there) with that for irresponsible conduct under s. 150 of the 1990 Act or, as is now the position, under s. 819 of the Companies Act 2014 ('the 2014 Act')."

91. Keane J. continued: -

"39. I am reinforced in that view by a consideration of the following passage from the judgment of Cooke J. in the more recent case of Mannion v Connolly & Anor [2013] IEHC 544 concerning the position of a respondent director who, while "not indifferent" to the proper management of the Company, became a co-director of the company with her husband only to fulfil the legal requirement for two directors:

"It is well settled, however, that inactivity or non-involvement on the part of a director is no answer to an application for restriction under s.150. An individual who accepts a position of director of a company even if only to fulfil the legal requirement must accept the responsibilities and potential consequences that go with it. A director who has played no part whatsoever in the conduct of the affairs of an insolvent company cannot claim to have acted responsibly in relation to them.""

92. In *Re RMF (Ireland) Limited; Kavanagh v Riedler* [2004] IEHC 334, at para. 15, Finlay Geoghegan J. held that: -

> *"…However, every person who agrees to become a director of a company, whether executive or non executive or for the purpose of bringing a particular skill to the board of directors must discharge the general duty of a director which has been summarised by Jonathon Parker J. in Re: Barings plc & Ors (No. 5) Secretary of State for Trade and Industry v. Baker & Ors (1999) 1 BCLC 433 3 and cited with approval in Re Vehicle Imports Limited (Unreported The High Court Murphy J. 23 November 2000) as follows:*
>
> > *"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."*
>
> *16. In relation to the obligation of a director to supervise and control the affairs of the company it is well established that directors may collectively delegate to executives or management certain functions but that such delegation does not absolve the directors from their obligation of ultimate supervision. In considering whether a non executive director has acted responsibly for the purposes of s. 150 of the Act of 1990 it appears to me that the courts should also recognise that, in general, a non executive director is entitled both to rely upon information provided by his fellow executive directors and to rely upon the executive directors carrying out what might be considered to be normal executive or management functions. There may be factual circumstances which will put a non executive director on notice that he should not continue to rely either upon information provided or upon executive duties being properly performed and require further action from him or her."*
> [emphasis added]

93. Reliance is placed by Mr. O'Brien on the judgment of Peart J. in Re *USIT World Plc* [2005] IEHC 285, as authority for the proposition that "*there must be a causative link between the alleged dishonesty and/or irresponsibility of a director and the insolvency of the company*." Undoubtedly Peart J. was citing with approval the tests identified by Shanley J. in *La Moselle Clothing Ltd v Soualhi* [1998] IEHC 66, which included consideration of "*…the extent of the director's responsibility for the insolvency of the company*". However, that judgment is not authority for a proposition that there is an onus on the liquidator to establish a causative link between particular aspects of the director's conduct and the insolvency. On the contrary, Peart J., in quoting also the judgment of Murphy J. in

Business Communications v Baxter, Unreported 21 July 1995, was identifying the different principle that the legislation "*imposes a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attaches to them as a result of either dishonesty or irresponsibility*". Peart J. continues: -

> *"…the burden on a director seeking to satisfy the Court as to his/her behaviour in relation to conduct in the affairs of the company for the purposes of escaping from an order under the section, includes if necessary, establishing that where there are matters about which they can be rightly the subject of criticism, there is in reality no causal link between those culpable matters and the insolvency."* [emphasis added]

94. In this case, the court is faced with examining whether the regime of control to which the Company was subject after the loans had been acquired by NAMA displaces or modifies in any way the duties of directors, having regard to the principles considered in the judgments referred to above. The key principles relevant to this case may be summarised as follows:

    (1) Each individual director owes duties to the company to inform himself/herself about its affairs and to join with his/her co-directors in supervising and controlling them (*Re Vehicle Imports Limited (In Liquidation*) per Murphy J.).

    (2) Directors may collectively delegate certain functions but such delegation does not absolve the directors from their obligation of ultimate supervision (*Kavanagh v Reidler*, per Finlay Geoghegan J.).

    (3) A non-executive director is entitled both to rely upon information provided by his fellow executive directors and to rely upon the executive directors carrying out what might be considered to be normal executive or management functions *(Kavanagh v Reidler*).

    (4) Passive directors cannot be exonerated from liability or relieved from disqualification or restriction on the basis of the passive nature of their role (*Re Walfab Engineering Limited,* per Kelly J., Court of Appeal).

    (5) There is a distinction between "*abdication of responsibility" and "delegation of responsibility*" (Re Laragh Civil Limited, per Keane J.).

    (6) Where a company has become insolvent the directors owe a duty to the creditors to preserve the assets for the benefit of its creditors *"or at least not to dissipate them" (Re Frederick Inns Limited,* per Blayney J.).

    (7) Compliance with the duty described in *Re Frederick Inns Limited* is material to the consideration of a restriction application (*Re Mitek Holdings Ltd,* Fennelly J.).

95. The liquidator does not contradict the evidence of the second and third respondent that they were unaware of the arrangements which led to the August 2013 Payments. Nor is it

contradicted that they were excluded from the engagement between NAMA and the Company. The liquidator's submission is that neither of these two had sought to demonstrate that they took any steps to apprise themselves of the Company's affairs at the crucial time when it was insolvent. He relies on the authorities to submit that it is no defence to a restriction application to claim, without more, to have been a "*passive director"*.

96. Where a company whose indebtedness exceeds €419 million (including guaranteed debt) and where its balance sheet deficit exceeds €300 million, and its loans are acquired by NAMA, as occurred with the Company in early 2011, its directors cannot, consistently with their duties as summarised above, claim that the degree of influence applied by NAMA is such that a lower standard applies to them. Such entities operate under a regime of close monitoring by NAMA, and this can have a limiting effect on the choices available to them in their decision making. However, as Mr. MacHale avers, NAMA does not assume full control and management of the Company. This changes if a receiver or liquidator is appointed, but unless and until such an event occurs the directors retain their responsibilities and duties. Far from relieving or lessening the duties of directors, the transfer of loans to NAMA would for any such entity heighten the need for directors to make themselves aware of the Company's status and proactively engage with each other, both generally as to the affairs of the Company and in particular to ensure it remains compliant with the conditions of NAMA's support on which the Company is dependant. As Murphy J. put it in *Re Vehicle Imports Limited,* a director's duty in such circumstances is *"to inform himself about its affairs and to join with his co-directors in supervising and controlling them."*

97. In analysing the conduct of individual directors, the court will recognise the different roles and responsibilities allocated as between directors, and the differences between executive and non-executive directors. However, none of the directors can be exonerated by virtue of being either non-executive or "passive".

98. Each of Mr. O'Brien and Mr. Applebe says that he was excluded from the discussions between NAMA and Mr. O'Donovan. Mr. MacHale's affidavit confirms that his engagement was for the most part with Mr. O'Donovan and he says that "*on financial matters*" he liaised principally with Mr. Barry Doyle at the request of Mr. O'Donovan.

Mr. O'Brien

99. Mr. O'Brien has been a director of 17 companies in Ireland from 1999 up to July 2017, excluding the Company. He was never a shareholder.

100. The liquidator stated in his report to the ODCE that Mr. O'Brien had been a director of the Company since 2005. Mr. O'Brien says that he was appointed on 15 October, 2010. His appointment arose in circumstances where the former Secretary of the Company, Mr. Cahill, who was also a director, had suffered a bereavement necessitating the appointment of a new director. In his second affidavit the liquidator acknowledged that the reference to Mr. O'Brien being appointed in 2005 was an error.

101. In the context of the life of the Company, this difference is significant. The Company was incorporated on 31 January, 2005, and in early 2011 its loans were acquired by NAMA. Therefore, Mr. O'Brien was a director for only two months before its affairs came under the degree of direct scrutiny which followed the transfer of the loans to NAMA.

102. In the Connection Business Plan submitted to NAMA on 4 March, 2011, Mr. O'Donovan set out the organisational structure of the "*7 full time people employed in the group*" and described Mr. O'Brien as a Bookkeeper, reporting to the Finance Director of the Group, Mr. Barry Doyle. At paragraph 9 of Mr. O'Donovan's affidavit he describes the management team over the Connection as follows:

> "*The employees consisted of your deponent, Gary Donovan, Barry Doyle, Brendan O'Brien, Noel Crowley, Michael Cahill, and Con O Neill. The employees were required to manage and administer these properties in matters such as organising and managing leases, negotiating and collecting rent, making planning applications, development of sites, building, construction, renovation and liaising with all relevant professional advisors as required."* [emphasis added]

103. At the hearing, Mr. O'Brien described himself as a bookkeeper for the other companies in the Connection but not for the Company itself. In his affidavit, at para. 16, Mr. O'Brien states that he had no involvement in the collection of rents or the discharge of liabilities for the Company but that he did supervise the collection of certain rents of other companies in the Connection.

104. Mr. O'Brien was not aware of the terms of engagement of McCarthy McSweeney, of the proposed payment schedule to them or of the fact that the Company failed to seek the authority of NAMA to engage that firm. He says that he understood that the retention of any expert required approval by the monthly Landlord Management Group meeting, and that invoices for such services should have formed part of the monthly reporting structure to that Group. Finally, he says that he relied on the opinion of the auditors, Messrs. Hinchion & Co. *"together with the controls established by the Company's agent, Wilton Securities and the reporting mechanisms established therein with the Landlord Management Group established by NAMA together with the monthly meetings carried out between the said group and the first named Respondent*."

105. Mr. O'Brien avers that he fully co-operated with the receiver and that furnished all books and records of the Company sought by the receiver and prepared and delivered to the receiver a Statement of Affairs on 17 October, 2013. It is not in dispute that Mr. O'Brien co-operated with the statutory receiver.

106. Mr. O'Brien says that he was the person who informed the receiver of the August 2013 Payments. In support of this averment he exhibits an email he sent to a member of the receiver's staff on 7 October, 2013 as part of his assistance to the receiver. In that email he addresses certain VAT and other property related queries. He then says: -

"Also I today received a copy of the AIB Statement for Alvonway Investments Limited. Before you ask me who MC2 Accountants Ltd are I would only be guessing if I said it related to Jim McCarthy: Will fax this to you."

107. It is not accurate to say that by this email Mr. O'Brien was responsible for bringing the receiver's attention to the August 2013 Payments. In fact, the receiver had brought these, and other payments to the attention of NAMA by an email of 2 October, 2013. Nonetheless, it is clear that Mr. O'Brien was not aware of the payments, and that he co-operated with the receiver when such matters were being investigated.

108. Co-operation with the receiver is not the same as co-operation with the liquidator. As regards co-operation, the principal criticisms the liquidator makes of Mr. O'Brien relate to the failure to make a statement of affairs and his failure to return a completed questionnaire.

109. Whilst the liquidator's recommendation to the court to dispense with the requirement for a statement of affairs in the winding up was based on a number of factors, including his difficulty in serving the directors with orders and cost, a material factor in that recommendation was the existence of a statement of affairs delivered to the receiver, made by Mr. O'Brien. Therefore, at the least Mr. O'Brien was the only director to take the trouble to complete a statement of affairs, albeit for the earlier receivership.

110. In relation to the questionnaire, Mr. O'Brien did not engage with the liquidator, and says in this application only that he believed one was being completed by Mr. O'Donovan and that he does not understand what his "*non-completion of a duplicate questionnaire in these circumstances constitutes a failure to co-operate as far as could reasonably be expected*." This is clearly not a full or satisfactory explanation for this failure.

111. Mr. O'Brien was appointed a director on 15 October, 2010. The court has not been informed of the exact state of the Company's finances as of that date. However, the Business Plan submitted to NAMA shows that as at 31 December, 2010, the liabilities of the Company, including guaranteed liabilities, exceeded the estimated value of its assets by a sum of approximately €300 million. I am not willing to infer that this deficit accrued in the short space of time between Mr. O'Brien's appointment on 15 October, 2010, and 31 December, 2010. Therefore, he was appointed at a time when the Company was insolvent to this large extent, and when a transfer of its loans to NAMA was imminent.

112. Mr. O'Brien has assisted the court with a description of his understanding of the state of the Company's affairs and of the fact that the Company had continued to trade in the anticipation that a favourable outcome mitigating the Company's borrowings could be achieved either by a redevelopment of Wilton Shopping Centre or its sale. He then refers to the engagement with NAMA following its acquisition of the loans and the regime which governed the operation of the Group as a condition of support by NAMA.

113. Mr. O'Brien goes so far in his description as to say that NAMA was "*responsible for the control and/or operation of Wilton Shopping Centre".*

114. In his affidavit, Mr. MacHale confirms that as part of NAMA's normal process in dealing with NAMA debtors, approval was required via the "Form A" process for payments such as the August 2013 Payments. Mr. MacHale however contradicts an assertion made by Mr. O'Donovan that NAMA "*assumed control and full management of the Company."* He says that is not correct. He says that although "*co-ordination meetings concerning then management of the charged properties*" were held quarterly in accordance with the Interim Support Letter, *"control of the Company remained at all times with the directors, subject to NAMA's approval via the Form A process."*

115. As regards Mr. O'Brien's assertion that he was effectively excluded from discussions between NAMA and the first respondent concerning the operation of the Company, Mr. MacHale says: -

> *"…it is the case that I liaised principally with Barry Doyle on financial matters concerning the Company. This was at Mr. Donovan's request."*

116. Mr. O'Brien says that he was "*effectively excluded*" from the coordination meetings concerning the management of the charged properties in the Connection as he was never invited to attend.

117. Mr. MacHale states that he has "*no reason to disagree*" with Mr. O'Brien's averment that Mr. O'Brien cooperated as far as could reasonably be expected with NAMA and the receiver in relation to the affairs of the Company.

118. It is regrettable that Mr. O'Brien appears to have failed to correspond with the liquidator in response to the request for a complete questionnaire. However, he was the only director to make a statement of affairs for the receiver and he handed over books and records to the receiver.

119. Mr. O'Brien came from a background of having the more junior role in the O'Donovan Group of being a bookkeeper reporting to the Finance Director. On his appointment as a director, Mr. O'Brien assumed a suite of duties which I have considered earlier. However, his affidavit evidence demonstrates that, having held such junior role, he continued to function under the constraint both of Mr. O'Donovan's dominance and of the exclusion of him from participation in the engagement between the Company and NAMA.

120. The liquidator says that Mr. O'Brien and Mr. Applebe were blameworthy for not ensuring that there were sufficient controls in place to prevent the making of the August 2013 Payments. For two reasons I am not persuaded that such blame can be attached to Mr. O'Brien and Mr. Applebe:

    (1) There is no evidence of a wider pattern of payments made outside the NAMA approved system and therefore the control system was functioning in the Company with the exception of these two payments.

    (2) Mr. O'Donovan was clearly the driving force in the entire Group, and dominant in decision making about its affairs. In exercising this dominance, the August 2013

Payments, one in favour of himself, were effected by him without the knowledge of his co-directors.

121. I summarise my findings in relation to Mr. O'Brien as follows:

(1) He was appointed a director of the Company on 15 October, 2010.

(2) At the time of his appointment the Company was already heavily indebted to Anglo Irish Bank and its loans transferred to NAMA two months later.

(3) In his affidavits, Mr. O'Brien describes the status of the Company and its intended strategy to alleviate losses to creditors.

(4) He describes the engagement between the Company and NAMA, albeit asserting that he was excluded from participating in that engagement.

(5) He had no knowledge of the August 2013 Payments.

(6) He co-operated with the statutory receiver including the delivery of the required statement of affairs.

(7) When the liquidator ultimately determined that a statement of affairs should not be required, he did so partly because he had the benefit of the statement of affairs delivered to the receiver by Mr. O'Brien. Therefore, the only outstanding item required of Mr. O'Brien was to complete the liquidator's questionnaire, which he failed to do.

122. Mr. O'Brien has met this application by demonstrating at least that he had knowledge of and an understanding of the Company's business, its strategy and the constraints under which it operated. When NAMA appointed the receiver on 28 August, 2013, it did so because it was not satisfied that a significant number of the conditions for its support had been complied with. The relevant conditions identified by NAMA in communicating this decision were principally the failure to deliver on "*milestone*" matters particular to certain assets in the portfolio and particular information requirements. Notably, the decision did not appear to be informed by any complaint about expenditure or any failure to adhere to the payment control mechanism through the "Form A" process. The August 2013 Payments only came to NAMA's attention after the receiver was appointed.

123. Taking all these factors into account Mr. O'Brien has persuaded me that he acted honestly and responsibly in relation to the affairs of the Company. I cannot find that the failure to deliver a completed questionnaire is of itself a justification for finding that Mr. O'Brien did not co-operate as far as reasonably could be expected in relation to the conduct of the winding up. There is no other reason why it would be just and equitable that Mr. O'Brien be subject to the restrictions imposed by s.819(1) of the Act.

Mr. Applebe

124. Mr. Applebe was appointed a director of the Company on the same day as Mr. O'Donovan, 25 February, 2005, 25 days after its incorporation and was a director up to the time of

liquidation. He held a 3.75% shareholding in the Company. He has been a director of 11 other companies in Ireland from to 1990 to the present. He is a solicitor in practice since 1969.

125. The first point made by Mr. Applebe is that this application was commenced outside the time prescribed by the Act. I have considered this earlier and found that the application was commenced within the time extended by the Director of Corporate Enforcement put to Section 683(4). I have also concluded that the case law (*Re E-Host*) establishes that such an objection cannot, of itself, exonerate the respondent directors.

126. Mr. Applebe was not actively engaged and took no part in the day-to-day running of the Company.

127. Before turning to Mr. Applebe's affidavits, it is instructive to consider the letters he wrote to the liquidator when informed of his appointment. On 4 April, 2014, he wrote to Ronan Daly Jermyn as follows:

> *"…I was not aware that a liquidator had been appointed, not that much turns on that.*
>
> *I confirm my complete commitment to fully co-operating with the liquidator. Unfortunately I have very little knowledge of what happened in this company.*
>
> *Who are the other directors to whom you have written?"*

128. When pressed by the liquidator regarding the statement of affairs Mr. Applebe wrote on 20 June, 2014: -

> *"… we have checked with the receiver Mr. Eoin Ryan and he has furnished me with a statement of affairs prepared on the 28th of August 2013 and completed by Brendan Ryan* [sic].
>
> *Brendan O'Brien was as far as I know the person who had all of the details. I certainly was not and I can confirm on oath if necessary that I accept Brendan O'Brien's statement of affairs as completed on the 28th of August 2013 and I attach it.*
>
> *Do you require me to do an affidavit in this situation?"*

129. Mr. Applebe concluded that letter enquiring "*what further steps doe* [sic] *the liquidator require."*

130. In his replying affidavit Mr. Applebe says the following:

(1) He is a stranger to the August 2013 payments and had no involvement in relation to them,

(2) He had no connection whatsoever with any of the other entities and was a director only of the Company.

(3) NAMA dealt exclusively with Mr. O'Donovan,

(4) NAMA had no contact of any kind with him and he received no correspondence or request to assist or engage with NAMA.

131. He continues by stating: -

> *"I was excluded by the Applicant [sic] and his predecessors and their agents"*

132. In paragraph 12, Mr. Applebe says "*Neither NAMA nor Mr. MacHale, nor indeed anyone else felt that I should be made aware of what was going on*." This appears from the context to be a reference to Mr. O'Donovan having informed Mr. MacHale on 27 August, 2013, that he would not obstruct the appointment of the receiver.

133. Mr. Applebe says:

> *"I say now that during the period about which the complaint is made, I had little knowledge of what was happening in this company because I was deprived of it by the Applicant, his predecessors and those who he represents and their predecessors."*

134. In response to the liquidator's assertion that Mr. O'Brien and Mr. Applebe ought to have been aware of the Company's insolvent position at the time of the August 2013 Payments and to have ensured that there were sufficient controls in operation to prevent them, Mr. Applebe says: -

> *"I say that the insolvent position of the company was not evident and when it was evident NAMA chose to engage in relation to the company with the first named respondent and chose to ignore me and deprive me of any input in relation to the matter."*

135. Finally, on the subject of information, Mr. Applebe says:

> *"…shows my full commitment to assist in relation to this matter, the absence on my part of any worthwhile information in relation to the affairs of the Company, and my adoption of the statement of affairs."*

136. It is unclear whether Mr. Applebe is suggesting that he was unaware of the insolvency at the time of the August 2013 Payments or from any earlier date. His averment that he had little knowledge of what was happening "*during the period about which the complaint is made"* reveals a most fundamental misunderstanding of the serious duties of directors. He appears to believe that in order to avoid the making of a restriction order he need only show that he was unaware of the transactions of which the liquidator makes particular mention. The case law clearly establishes that the onus is on a respondent director to

demonstrate that he has acted honestly and responsibly in relation to the affairs of the company during his tenure as director. Mr. Applebe simply states that he was not aware of particular transactions and that he had no *"worthwhile information in relation to the affairs of the Company."*

137. Mr. Applebe was a director of the Company from its inception. Of the three respondents he was the only one to have served as a director continually from the inception of the Company in 2005 to the time of its liquidation. He has adduced no evidence as to his contribution to the decisions of the directors at any time in the life of the Company. He does not address at all the response of the directors to the development of the deficiency and the transfer of its loans to NAMA.

138. Mr. Applebe does not demonstrate any active steps that he took as director to keep himself informed of the affairs of the Company. He does not elaborate on the role he had or steps he carried out to keep abreast of the Company's affairs. Instead he states only that he was never "*called upon*" by Mr. O'Donovan, NAMA, NALM or the Statutory Receiver "*to partake in, engage in or otherwise adopt an active role in the management of the Company".*

139. As Haughton J. held in *Re Shemburn Limited; Wallace (Liquidator) v Edgeworth* [2017] IEHC 475, at para. 32: "*It seems to me that this ignores the second named respondent's general duties as a director, even as a non-Executive Director, to exercise supervision over the affairs of the Company"*. In circumstances where there is an absence of evidence on Mr. Applebe's part of any attempt to be involved or kept abreast of the Company's affairs, I cannot find that the imposition by NAMA of conditions for its support absolves Mr. Applebe as a director from performing his duties in supervising the affairs of the Company. In the words of Keane J. in *Re Laragh Civils Ltd,* Mr. Applebe *"did not purport to discharge any responsibility whatsoever*" in relation to the conduct of the Company's affairs.

140. If anything, the limitations which the NAMA influence applied to the management of the Company, and the critical consequences of any failure to comply with those conditions heightened the importance for directors of ensuring that so far as the Company was concerned, it was meeting the terms set out in the Interim Support Letters upon which NAMA's conditional support was dependant. Mr. Applebe himself acknowledges that *"NAMA's continued limited support of the Company was entirely contingent upon the Company adhering to all requests, checks and balances as required by NAMA being implemented by the Company*."

141. It is clear that as the driving force Mr. O'Donovan directed all of the engagement with NAMA. Nonetheless, Mr. Applebe is totally silent on his activities as a director apart from denying knowledge of the insolvency and of the August 2013 Payments. Having regard to the scale of the deficit when the loans transferred to NAMA, it is remarkable that Mr. Applebe provides no information as to whether he took steps to inform himself of the Company's financial status at that time or of its strategy and its engagement with NAMA, and what actions were taken to mitigate losses to creditors. In the absence of any

evidence of Mr. Applebe's actions at any time during his tenure as a director I cannot find that he acted honestly and responsibly in relation to the affairs of the Company.

The Petition

142. The petition by NAMA for the winding up of the Company was grounded on the Company's insolvency. It recites the demands dated 26 August, 2013 for sums then totalling €419,060,122.00. Unusually, the petition and the verifying affidavit of Aideen O'Reilly, a director of National Asset Loan Management, refer also to the August 2013 Payments. It is said that NAMA intends to request the liquidator, if appointed, to issue proceedings pursuant to s.286 of the Companies Act 1963 to him one or both of these transfers declared invalid.

143. It is not unusual for a winding up to be initiated by a creditor in circumstances where it is known or intended that particular provisions of the Companies Acts will be invoked to investigate, and if appropriate, to reverse pre-liquidation transactions and thereby "*swell*" the pool of assets available for the benefit of creditors. It is however, relatively unusual that the petition would recite the particular transactions intended to be reversed. As NAMA had already utilised the remedy of receivership, I infer from those references that one of the reasons for the petition, if not the sole reason, was to invoke the application of s.286. This in turn led to the emphasis on these payments by the liquidator in this application.

144. In light of this emphasis by the liquidator it is understandable to a degree that Mr. O'Brien and Mr. Applebe have focussed largely on these transactions. This does not however mean that simply asserting that they were not aware of them demonstrates that they acted responsibly in relation to the affairs of the Company. In the case of Mr. O'Brien, I have found that he has met this application by adducing sufficient evidence to illustrate an awareness of the affairs of the Company and to demonstrate the role he performed, notwithstanding his exclusion by Mr. O'Donovan from the important business of engaging with NAMA, and it would be unjust to make a restriction order in respect of him. By contrast, Mr. Applebe says only that he was not aware of the payments and that he lacked *"any worthwhile information in relation to the affairs of the Company"*. He therefore provides no information which would enable the court to conclude that he acted honestly and responsibly in relation to the affairs of the Company.

Conclusion

145. Mr. Applebe has not satisfied the court that he has acted responsibly in relation to his conduct of the affairs of the Company, and I shall make an order pursuant to s.819 that he shall not, for a period of 5 years, be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned in or take part in the formation or promotion of a company, unless the company meets the requirements set out in subsection (3) of that Section.

146. No order will be made in respect of Mr. O'Brien.