[2020] IEHC 82

THE HIGH COURT

[2017 No. 111 COS]

IN THE MATTER OF

RHS ENERGY LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

AIDAN GARCIA DIAZ, OFFICIAL LIQUIDATOR

APPLICANT

AND

MARTIN PALMER

RESPONDENT

JUDGMENT of Mr. Justice Quinn delivered on the 24th day of February, 2020

1. The applicant seeks an order pursuant to section 842 of the Companies Act 2014 ("the Act") disqualifying the respondent from being appointed or acting as a director or other officer of any company for such period as may be determined by the court. The applicant seeks in the alternative, a declaration pursuant to section 819 of the Companies Act 2014 restricting the respondent from being appointed or acting as a director or other officer of any company for a period of five years, unless that company meets the requirements of section 819(3) of the Act.

2. The application is grounded on an affidavit sworn by the applicant on 9 July 2018. Replying affidavits were sworn by the respondent on 4 and 25 March, 2019, to which the applicant has himself replied, in supplemental affidavits sworn on 19 March 2019 and 4 April 2019.

3. In the applicant's grounding affidavit, he identifies a number of matters of concern in relation to the manner in which the respondent conducted himself regarding the affairs of the company. These relate to such matters as an absence of books and records, inappropriate treatment of employees when the company ceased trading, issues arising from the taking of deposits from customers at a time when the company was said to be insolvent, concerns relating to unaccounted for turnover, VAT anomalies arising from sales invoices, lack of cooperation with the applicant following his appointment, and difficulties which the applicant says he encountered in tracing assets of the company.

4. An unusual feature of this case is that the company traded for a period of only three or four months, the cessation having occurred in dramatic circumstances which I shall describe below. The company had a very short total lifespan. It was incorporated on 10 November 2016, and ordered by the court to be wound up on 24 April 2017.

5. Another unusual feature is the series of events which occurred in the days immediately following the applicant's appointment, also described below.

Pre-liquidation chronology

6. On 10 November, 2016, the company was incorporated. On 14 November 2016, the company entered into a series of agreements with a company called ES Energy Saving

Systems Limited ("ES") whereby it acquired the assets undertaking and business of ES (the "November 2016 Transaction").

7. The directors and shareholders of ES were a Mr. Michael Keane and Mr. James Gorham. It is said that as part of the November 2016 Transaction, the respondent and the wives respectively of Mr. Keane and Mr. Gorham became the shareholders of the company.

8. The business of the company was the installation of energy efficient heating equipment in residential homes. By the November 2016 Transaction the company acquired the inventory, stock and equipment of ES, together with customer lists, the trading name *"Let's Talk Solar"*, vehicles computers and associated equipment, printers, telephones, intellectual property, customer database and work in progress. The agreement also provided for the transfer of staff, and provided that certain identified trade debts of ES totalling €130,374 would be assumed by the company. The consideration payable under the asset purchase agreement was €128,000 payable by 24 monthly instalments of €5,333.33 each.

9. On 14 November 2016, the company also entered into a short term business letting agreement with ES for the use of the trading premises known as Energy House, Lough Sheever Corporate Park, Mullingar, for a term from 14 November 2016 to 14 May 2017 at a rent of €2,000 per month.

10. On 18 November 2016 there was executed an Option Agreement conferring on the company the option to acquire the premises at Mullingar for a consideration of €220,000 less the "adopted debts" of €130,374.62.

11. At some date after the start of February 2017, ES was itself placed in liquidation.

12. Following the entry into these transactions the company commenced its trade from the premises at Mullingar. The respondent was the sole director.

13. Mr. Keane took up a position as installations manager although it appears that he performed that role through a company owned and controlled by him or his wife, namely MK Heating Networks Limited.

14. Relations between the respondent and Mr. Keane deteriorated in January 2017 and, according to the respondent, an unusual event occurred on 30 January, 2017, which on the respondent's account had a fatal effect on the business of the company. The respondent says that on that day, Mr. Keane and Mr. Gorham attended at the premises in Mullingar accompanied by their accountant, Mr. Malachy Stevens. He says that they informed him that the directors and shareholders of ES had been advised that it was appropriate to set aside the November 2016 Transaction. He says that they claimed that the transaction was a "set up" and reference was made to provisions of the Act, including section 604 (unfair preference).

15. The respondent says that on that date he was required to vacate the property. Mr. Keane and Mr. Gorham arranged to have the locks changed and he was excluded from attending thereafter.

16. Mr. Keane informed the staff that he was taking charge and made arrangements to have the locks and alarm codes changed.

17. On 31 January, 2017, the company's solicitors, Messrs Larkin Tynan Nohilly, wrote to ES and to Mr. Keane and Mr. Gorham. By this letter they informed them that the transactions of November 2016 were valid and that the company intended to apply to the High Court for injunctions restraining the trespass and for other reliefs.

18. Further letters were exchanged between the parties and ultimately on 7 February 2017 the company applied to the High Court for an injunction.

19. The proceedings were issued by the company against ES, Mr. Keane and Mr. Gorham. The company sought an injunction restraining trespass, and injunctions to restrain the defendants from interfering with the business of the company, including but not limited to, interfering with relations with employees, customers or suppliers, soliciting customers or employees, interfering with the daily operation of the business and interfering with the remittal of sales receipts from its agents or servants. The company also sought damages for breach of the November 2016 agreements, trespass, tortious interference with contractual relations, and certain accounts.

20. A replying affidavit was sworn in the injunction proceedings by Mr. Michael Keane on 8 February, 2017 supporting the assertion that the November 2016 Transaction should be set aside. He pointed out that, contrary to the statements to this effect in the transaction documents ES had not obtained legal advice in respect of the transaction. He said that he had been advised by ES's solicitors that the provisions of the agreement may not be honoured by a liquidator of ES in circumstances where it provided for taking only certain existing trade debts and not all of the trade debts and that this may constitute a ground to declare the transaction a preference.

21. Mr. Keane exhibited a minute of a meeting of the EGM of ES on 3 February 2017 at which a resolution was passed to the effect that "*all legal agreements executed by or on behalf of the company on the 18th day of November 2016 be and are hereby rescinded*".

22. Mr. Keane said that steps were being taken to place ES in liquidation and he believed also that a liquidator would be required to apply to the High Court to pool the assets of ES with the assets of the company and that *"the liquidation of [ES] will trigger the liquidation of [the company]".*

23. Finally, Mr. Keane stated that his main concern had been for employees who had transferred and that his wife had *"personally paid the wages of all employees last week and that I will personally be paying the wages of the employees this week…"*

24. Mr. Keane said that the company had little or no assets in the jurisdiction and that its solvency is to be questioned in circumstances where it had mixed its trading activities with those of ES which he said was "*shortly to go into liquidation*".

25. From the limited papers exhibited regarding the injunction proceedings, there is a lack of clarity as to what ultimately transpired in relation to the injunction. The respondent says in his replying affidavit in these proceedings that the injunction was granted by the High Court and upheld by the Court of Appeal. However, the injunction was ultimately discharged on 27 April 2017 and the company never thereafter regained possession of the property at Mullingar. The respondent complains that following his appointment the applicant did not take the necessary steps to maintain the injunction and pursue the proceedings, despite the respondent having pointed out to him the advantages of the injunction, the central purpose of which he claims was to protect and preserve assets of the company.

26. In these proceedings, the respondent refers throughout to the events of 30 January, 2017, as the "hijack" of the company. He says that the actions of ES and of Mr. Keane and his associates had the effect of not only trespassing and interfering with the conduct of the business of the company, but also of expropriating the assets and the records of the company and his access to employees. This description of those events by him is at the centre of his opposition to this application.

27. The plenary proceedings which were commenced by the company on 7 February 2017 would, if pursued to a trial, have depended for their determination on the fundamentals of the validity of the November 2016 Transaction which was contested by ES and by Messrs Keane and Gorham. Those proceedings were never pursued to trial, and although the matters complained of in those proceedings are at the centre of the respondent's opposition to these proceedings, this Court is not being invited to and could not in this application adjudicate on the validity of the November 2016 Transaction. I shall return later to the impact this matter has on the determination of the application.

Liquidation of the company

28. On 28 February, 2017, a statutory demand was served on the company by a creditor. On 23 March, 2017, a petition was presented for the winding up of the company. On 24 April, 2017, an order was made for the winding up of the company and the appointment of the applicant as liquidator.

29. There is a degree of uncertainty and controversy as to when exactly the company ceased trading. It seems clear that the staff were at least laid off if not actually made redundant in or around 2 February 2017. The applicant claims that one of the failures on the part of the respondent was to regularise the redundancy of staff by issuing formal notices of termination, which had the effect he claims that they were unable at that time to claim statutory entitlements.

30. The applicant says that following his appointment he was unable to identity and secure assets and records of the company. He says he visited the company's trading premises at

Mullingar to find that the premises had been "stripped, and that there were no assets or books or records there". He says that he made a number of attempts to contact the respondent in the days following his appointment and none of his calls were answered.

31. The applicant says that on information received by him from an ex-employee, he was given to believe that the respondent had removed the company's assets outside of the jurisdiction to Northern Ireland and this led to a series of events on 27 April, 2017.

Events of 27 April 2017

32. The applicant says that following his unsuccessful efforts to locate the respondent, he received information that the company had been trading from a location within the premises of Kingspan in Newry, Northern Ireland. He says that he attended there on 27 April 2017 and was told that although the respondent had been negotiating for a period of time to rent office space adjacent to a factory there, these arrangements had not come to fruition and instead the applicant was informed that the respondent had rented a room at the Mourne Court Hotel in Newry.

33. The applicant says that when he arrived at the Mourne Court Hotel he inquired at reception if any rooms had been booked in the name of the company or of the respondent. The receptionist informed him that a meeting room had been booked in the respondent's name and directed the applicant to that room. The applicant says that entering that room he saw a number of people, some of whom he says that he knew to be ex-employees of the company, working at laptops. He announced that he was looking for the respondent who then identified himself to him. The respondent said that he had been looking to speak to the applicant and suggested that they leave the room to discuss matters.

34. In these discussions the respondent said that assets of the company had been taken by *"his former business partners in ES Energy Saving Systems Limited".* He denied that he had been involved in the removal of any assets from the company's premises.

35. The applicant says that he informed the respondent that unless he was willing to assist with the voluntary return of assets to the company, he would bring the matter to the attention of the Police Service of Northern Ireland whose nearest office was only 300 metres from the hotel.

36. The applicant then describes a series of further encounters during which he overheard the respondent speaking with a Mr. Joe Carroll, a former employee of the company, at which the applicant says they were discussing what versions of events they would present to the applicant as to why they either were not in possession of assets of the company or why it was appropriate that they were retaining them.

37. Ultimately, after a number of further conversations the respondent brought the applicant to a lock up unit in Newry where it was revealed that there were retained at that location two company vans, along with certain office furniture and stock of the company. The

applicant then arranged for these items to be taken away for realisation by him as liquidator.

38. Apart from the tangible assets such as vans, office equipment and company stock, the applicant says that he was not afforded any access to books and records of the company or any computerised records.

39. The respondent says that the events of 30 January, 2017, or, the “hijack”, had the effect of depriving him and the company of access to critical trading assets which were seized by ES and Mr. Keane.

40. The respondent’s account of the events of 27 April, 2017, is entirely different to that of the applicant. He says that insofar as any of the assets of the company were still in his possession when he met the applicant on 27 April, they had been brought to these locations by him only as a method of protecting against any further expropriation of assets by Mr. Keane and his associates. He says that the persons working in the room at the Mourne Court Hotel were not, with the exception of one person, Joseph Carroll, employees of the company. He says that the others in the room were residents of Newry, had never been to Mullingar, and had never worked for the company.

41. The respondent claims that after the liquidator was appointed he had been available if the applicant had sought to make contact with him. He says that the reason the applicant had difficulty accessing company assets, books and records, including computerised records, was that all assets of material value had been removed by Mr. Keane as part of the events of 30 January 2017.

42. The respondent says that it was his strategy after the “hijacking” to move the business of the company to Newry as part of a link up of Kingspan, with whom he had a good relationship. He says that he believed that it was within his remit to move assets in circumstances where he believed that he was acting “*honestly and reasonably” in what he says that were “the best interests of the stakeholders and customers who had paid deposits”.*

43. The respondent says that his initial move in early February had been to set up a new call centre, employing Joseph Carroll, and using a room at the Carrigdale Hotel in Co. Louth from which he had started successfully, he says, selling product. He then says that as he did not have the readily available cash with which to pay Mr. Carroll, he agreed to give Mr. Carroll the two vans which were the property of the company. He says that this was necessary in order to “get the company working again” and that in any event the vans were old, sign written, dented, rusty and scruffy. He said that the company at that stage had no further use for them, as they would be using Kingspan – approved installers.

44. The respondent says that there was nothing sinister therefore about the activities at the Mourne Court Hotel and that when Mr. Carroll gave directions to the location of the lock up premises at Newry and they arrived at that location and found the vans there the respondent claims to have been surprised to find also the office furniture and other items.

45. I now turn to the individual headings of complaint relied on by the applicant in these proceedings.

The business name "Let's Talk Solar"

46. As early as 19 April, 2017, an advertisement for jobs appeared on a digital "jobs board" in Northern Ireland, in the name of "Let's Talk Solar".

47. The respondent says that in March he had commissioned the Newry job centre to advertise for call centre staff in Newry for "RHS". He says that although there were applicants, none were interviewed and after the company ceased trading these applications were taken no further.

48. The respondent says that he renewed the instruction to the Newry job centre on 19 April, 2017. He says this was intended for a different company owned by him in the U.K. but says that the job centre simply did not change the name on the relevant website.

49. The applicant's evidence is that the business name Let's Talk Solar was still registered in the name of the company and yet was being used in an advertisement for employees, as of the time of the applicant's appointment, and in the weeks prior to the applicant's appointment, being times when the respondent claims that he no longer had access to the assets and personnel required for trading the business of the company.

50. The respondent offered an explanation that this trading name was now being used by a company of a similar name incorporated in the UK. No verification was provided for this explanation, and the balance of the evidence is to the effect that at a time when the company had ceased trading, the respondent was deploying this asset either for his own benefit or for the benefit of another company being promoted by him.

Ascertainment and retrieval of assets following liquidator's appointment

51. The respondent's explanation for the events in the days immediately following the appointment of the applicant is almost entirely dependent on his own account of what he describes as the "hijack" of 30 January, 2017, and he refers to the grounds on which the injunction was sought. He attaches all responsibility for the difficulty of access to assets to others, notably Mr. Keane and his associates. This court cannot determine the merits of the issues which were the subject of the plenary proceedings. However, even taking his account of the "hijack", the respondent cannot escape the obligation, as the sole remaining director at the time of the appointment of the applicant, for the safe custody of assets and records and the return of those assets to the liquidator immediately following his appointment. In his replying affidavits, there is at a minimum an acknowledgement that certain of the assets which were located in the lock up premises near Newry were in fact assets of the company. In relation to the trucks, albeit that they had a limited value, he acknowledged that his "*purpose*" was to make them available to Mr. Carroll in lieu of wages. Of particular note in relation to this item is that this explanation was offered only as an alternative after he had initially indicated that he had no further information as to the whereabouts of assets at that time.

Books and records of the company

52. The applicant says that books and records of the company were not made available to him on his appointment. He emphasised that as a director it is the respondent's responsibility to maintain and protect the company's books and records prior to the appointment of a liquidator and that he has failed to carry out this task.

53. The respondent identifies other parties as responsible for this issue.

54. Firstly, he says that a person Wiola Mazurek, who he describes as a "part qualified accountant" who had been employed as an accountant in ES was responsible for all the books and records. Inconsistently with this, he says that when the company acquired the assets of ES, Ms. Mazurek: -

> *"Transferred as an employee to RHS and retained the title of accountant, but I took away the responsibility for keeping all the books and records and the payroll except for issuing invoices in accordance with the RHS procedure 002 for invoicing and banking".*

55. The respondent says that Ms. Mazurek kept the sales ledger of the company on a computer on her desk and accessed it from a laptop "that she took home occasionally".

56. Secondly, the respondent also says that all the other books and records including the payroll, VAT and PAYE accountability and calculations were kept and carried out by Michael Dolan & Company, Chartered Accountants, an external firm based in Ferbane, Co. Offaly, and a sister business of that practice, Handy Dolan Consultants. The respondent says that his instructions to Ms. Mazurek and to Messrs Dolan were to have weekly meetings to pass over all relevant sales information and copy invoices. The respondent then says that after the events of 30 January 2017, he was informed by Messrs Dolan that "*Due to excuses by Wiola they had had no weekly meetings with her during January 2017*". He says that he was totally unaware that the weekly meetings were not happening because he was concentrating on sales installations and procurement and he refers to this discovery as a *"serious lapse of governance by both Wiola and the accountants".*

57. The respondent then says that apart from certain sales ledger invoices which have been available to the applicant, "*the remaining books and records were with the chartered accountants appointed by RHS".*

58. Throughout the affidavits of the respondent, the dominant theme in relation to books and records, both hard copy and electronic, is that they were the responsibility of others, whether Ms. Mazurek, or Messrs Dolan. In taking this approach the respondent ignores the fundamentals of the duty to ensure that adequate accounting records of the company are maintained.

59. Section 281 of the Act confers on the company the obligation to maintain adequate accounting records. Sections 286 and 609 impose sanctions – criminal and civil respectively – on directors where they fail to take reasonable steps to secure compliance with section 281. In the context of both of these sections, the Act affords a defence in

circumstances where a director establishes that he has taken all reasonable steps to secure compliance with section 281 or had reasonable grounds for believing, and did believe, that a competent and reliable person acting under the supervision or control of a director of the company who has been formally allocated such responsibility was charged with the duty of ensuring that those sections were complied with and was in a position to discharge that duty. Nowhere in the replying affidavits does the respondent proffer evidence that such a regime was in place. If anything, the persistent references to the role of Ms. Mazurek, Mr. Keane and the external auditors reveal, at its most benign, a level of delegation without the attendant supervision or control of a director which amounts to an abandonment of responsibility for compliance with this duty.

Employees

60. The applicant notes that redundancy claims were made by employees as of 2 February, 2017, but that company's payroll records were poor and staff were not supplied with P45's. He says therefore that redundancy entitlements and other entitlements on termination such as arrears of holiday pay, payment *in lieu* of notice or arrears of wages remained unpaid.

61. The respondent says that as a consequence of the events of 30 January, 2017, he had no alternative but to make staff redundant or at least lay them off. He said that in circumstances where the assets and trade of the company were "hijacked" funds would not be available to pay staff and the decision to lay them off was taken in order to curtail further debts being incurred which he believes to have been an honest and reasonable decision.

62. That explanation may have had some force were it not for the inconsistent assertion he makes that while formal redundancy notices and paperwork were not attended to, Mr. Keane had by that time moved to take over the business of the company and therefore employees would have transferred under "TUPE rules" (Protection of Employees (Transfer of Undertakings) Regulations).

63. This is another aspect of the case where a definitive finding would depend on which version of the events of 30 January, 2017, is accepted. It seems to the court however that whether the employees transferred to another business were "hijacked" and transferred out of the company or whether the respondent simply believed that it would be improper to continue their employment by reason of the company's inability to trade after the "hijacking", the processing of statutory notices and certificates to enable employees to reclaim redundancies and arrears of statutory entitlements were never put in place. The excuse proffered by the respondent that he was forcibly removed from access to books and records, including payroll information, does not, it seems to me, afford a credible justification for failure to ensure that such statutory information was duly processed.

The decision to apply for interlocutory injunctive relief

64. The applicant says that the decision of the respondent to initiate on behalf of the company an application for an injunction was made at a time when there was a serious doubt as to the ability of the company to meet the undertaking as to damages.

65. In the affidavit grounding the application for the injunction, which was sworn on 7 February, 2017, the respondent states: -

> *"I say that I am prepared to give an undertaking as to damages on behalf of the plaintiff if required for the purposes of the interlocutory injunctions sought."*

66. The applicant says that in giving this undertaking at a time when the company knew or ought to have known "*that it was entirely unlikely to be in a position to meet any such undertaking, the company, at the direction of the respondent, did not comes before the court with clean hands."*

67. The applicant's concern as to the propriety of giving such an undertaking is focussed, not on the substantive matters complained of in those proceedings, but on the trading and financial status of the company when the undertaking was given. The substantive matters which were the subject of the proceedings have never been the subject of a final determination by a court of law and *prima face* the respondent appears to have been taking measures to restrain what he characterised as unlawful measures being taken to destroy the business of the company. I shall return to this issue, but I am not prepared to find that the commencement of those injunction proceedings, including the giving of the undertaking, was so inappropriate a measure as to, of itself, justify the making of the orders sought in this application.

The taking of deposits

68. The applicant refers to instances of the company receiving deposits from customers or potential customers on a series of dates when it ought to have been clear to the respondent that the company was at the very least in financial difficulty, and unable to complete the orders.

69. He refers in particular to a series of deposit payments made between 27 January 2017 (a deposit of €2,500 made by a Mr. Niall O'Connor) through to dates in March 2017.

70. In fact, the evidence exhibited by the applicant refers to deposits paid by customers from as early as 29 November 2016 and the applicant has exhibited correspondence from these customers protesting that they had been unable to contact the company to secure either return or the deposit or that the relevant installation would be made.

71. The respondent put forward a variety of explanations in relation to this issue. In relation to the earlier deposits, he says that the relevant installations would have been made were it not for the intervention of Mr. Keane on 30 January 2017. In respect of deposits made after that date, he says that insofar as the installations were not made the deposits were directed to be paid to the company's bank account and therefore ought to have been available to the liquidator. He says that there was no intention or action on his part to take those deposits without being able to make the installations, and that the deposits

may have been capable of being returned were it not for the freezing of the company's account on the appointment of the liquidator.

72. The liquidator has exhibited the correspondence from the relevant customers and the company's bank statement showing the payment of certain of these deposits from time to time, and thereafter payments made out of the relevant account. Therefore, it is clear that insofar as installations were not delivered matching deposits made, no measures were taken to ensure that such funds would be available for return to the relevant customers.

73. Whatever the merits of the events of 30 January, 2017, it is clear that at a time when the business of the company had been, to put it at its very least, disrupted by those events and when there was at the very least serious uncertainty as to the ability of the company to deliver the installations deposits were still being received.

74. The respondent asserts that the company was still solvent in March and that payments were being lodged to the bank account which was ultimately frozen.

75. In support of the claim that the company was still solvent when receiving deposits, the respondent places significant reliance on the following: -

    1) The option in relation to the premises at Mullingar.

    2) Draft accounts prepared by Messrs Dolan.

76. The respondent says that the principal asset still available to the company even at the time when the liquidator was appointed was the option to purchase the property at Mullingar which he says was worth in net terms over €100,000. The applicant says that it was wholly unrealistic to believe that he as liquidator would be in a position to fund the payments necessary under this option in the speculation that the property could be realised for an excess over its encumbrances and money mentioned by the respondent.

77. The reference to draft accounts prepared by Messrs Dolan is a reference to a set of draft financial statements for the company, apparently prepared by Messrs Dolan & Company, Ferbane Co. Offaly.

78. The document exhibited is described as draft "*Management Accounts for the period ending 31 December 2017*". Reliance is placed on this document by the respondent in that he states that it shows a projected gross profit for the year ended 31 December 2017 in the sum of €1,888,588, yielding a net profit after administrative expenses of €807,973.

79. This document is a draft. It bears no signature and no information is provided as to when or by whom it was created. No direct evidence was proffered as to the provenance of these "*Draft Management Accounts*" or when they came into existence. They are therefore of no assistance in the context of understanding the solvency or otherwise of the company in the period immediately prior to the appointment of the applicant.

Unaccounted for turnover

80. The applicant exhibits an extract from a sales ledger covering the period from 16 November, 2016, through to 2 February, 2017. He says that based on his investigations of lodgements made to the company's bank account during that period there is a shortfall of some €558,206.45 and that this discrepancy has not been explained.

81. On this issue the respondent again refers to the firm of chartered accountants having been "*running this and ensuring compliance with VAT rules*". He says that much of the discrepancy would be accounted for by reference to installations made or delivered by the company pursuant to orders which had previously been placed with ES and that there was a transition period of "*parallel trading*".

82. The respondent says that he believes that the figure referred to by the applicant is excessive and that the cash deficit that he can best calculate is in the order of €100,000.

83. The respondent again attributes responsibility for this discrepancy to everyone else involved in the company expect except himself. He says that Ms. Mazurek was responsible for arranging that payments from sales would be paid to discharge accounts of ES, and to discharge certain revenue debts owed by the company, and that the applicant had not recognised these as costs which ES was obliged to discharge pursuant to the November 2016 Transaction. He then asserts that the unaccounted for turnover was a lower amount of €100,000 and attributes this "*misappropriation*" to the conduct of Ms. Mazurek and Mr. Keane whom he says were "*working together*".

84. The respondent places reliance on the fact that he had instructed that Ms. Mazurek to work with the external accountants Messrs Dolan to implement an invoicing procedure and a form of "*weekly audit*" by Messrs Dolan. The premise of this reliance is the proposition that by doing so he did not need to concern himself with the supervision of sales and due application of receipts. He acknowledges that significant cash receipts were unaccounted for but attributes responsibility to Messrs Dolan and Ms. Mazurek. Again, this is to ignore his overall responsibility as the sole director of the company.

Raising of sales invoices and VAT anomalies

85. The applicant says that after the November 2016 Transaction the company continued to raise invoices using the VAT number of ES. He says that this was inappropriate and a breach of VAT law. He says that included in the sales turnover listings provided to him in respect of the company were an extensive number of invoices referenced not in the name of customers but in the name of "ES Energy" and that these in fact corresponded to sales of the company using the ES VAT number.

86. The respondent makes no meaningful attempt to explain why the ledger sales invoices would include sales made by ES, other than to refer again to the November 2016 Transaction and to state that a parallel trade was being undertaken, pursuant to the company's obligations to honour orders which had been placed with ES. Even taking this explanation at its best having regard to the terms of those agreements, this would not explain why the sales ledgers of the company would include sales properly attributable to

ES or why such a large number of items within the sales ledger are referenced “ES” in such a basic or simplistic form.

Cooperation with the liquidator

87. Under this heading the applicant refers to the events of 27 April, 2017, when he met with the respondent at Newry. He exhibits also certain email correspondence exchanged between him and the respondent on the same day.

88. It appears that the respondent emailed the applicant after their meeting on that day identifying what he described as assets which would assist the liquidator in his realisations. He referred the liquidator to the option to purchase the building at Mullingar which would have required the liquidator to source a buyer for the property, exercise the option and make a payment of, he says, €90,000 to ES Energy, which would have resulted in a surplus for the liquidator.

89. He refers also to payments which were lodged in the account of ES at Bank of Ireland, in respect of cheques payable to “Let’s Talk Solar”, suggesting that the culpability in this regard was with the bank.

90. The respondent referred the applicant to the existence of the injunction proceedings, informing him that he ought to pursue that matter so that those responsible for depriving the company of its trading assets could be “brought to account”.

91. Reference was also made to certain other bank accounts into which funds of the company had been lodged by Mr. Keane and Ms. Mazurek and to potential claims for damages and compensation against Mr. Keane, including a claim that Mr. Keane was starting up a business again in breach of a two – year exclusion provision in the November 2016 contracts or in breach of a non – compete clause which he had entered with the company.

92. A predominant feature of this correspondence, as with many of the other claims made by the respondent, is the suggestion that every other person associated with the business of the company was responsible for the insolvency of the company and for the difficulty of realising valuable assets, again ignoring his duties as the sole director of the company.

93. The applicant replied to the respondent with a number of queries and says that he received no ongoing cooperation from the respondent.

94. This correspondence led ultimately to a further communication from the respondent on 2 June, 2017. The respondent stated that he had been unwell, and he purported to provide more information regarding assets and their whereabouts. Again, however, the respondent said that he had been unable to exercise authority or responsibility in relation to assets of the company after the events of 30 January, 2017, and that following those events he had “*made the very reasonable and correct decision to move them to a safe location which has proved to be in the interests of the creditors*”. He continued: “*you have subsequently been told where the remaining assets are. If you are expecting me to be responsible for the recovery of company data. I cannot accept that. Since obtaining access to the office after the injunction was put in place, I have made no attempt to*

check any data, records etc remaining as it was clear from the lack of assets remaining on the evening of re-entry that all the data, records and key asset had been removed."
Again, the recurring and predominant theme is to fix Mr. Keane and his associates with responsibility for all of these issues.

This application

95. In the notice of motion, the liquidator seeks an order of disqualification under section 842 or in the alternative a restriction order under section 819. In his grounding affidavit he says that in all of the circumstances referred to by him in the affidavit

> "It is appropriate that I seek both Mr. Palmer's disqualification and ask that the court holds him personally liable for the debts of the company."

96. That statement is made in a very general fashion without identifying which aspects of the respondent's conduct would justify declarations of personal liability for the debts of the company. Nor does the liquidator identify anywhere which provision of the Companies Act 2014 he would invoke to fix the respondent with personal liability for the debts of the company.

97. Although seeking a disqualification order the liquidator states in his conclusion that he believes that the respondent has not demonstrated that he acted either honestly or responsibly in the management of the company, which is the lower test referable only to restriction applications. This conclusion is repeated in his second and third affidavits.

98. Unhelpfully, the applicant does not, either in the notice of motion or in the grounding affidavit, identify which of the subsections of section 842 are relied on for a disqualification order. During the hearing the applicant's solicitor indicated that the grounds being invoked were sub-sections 842 (b) and (d). Section 842(b) relates to breach of duty and section 842(d) concerns conduct rendering a person "*unfit to be concerned in the management of a company*".

Conclusion regarding section 842 - disqualification

99. Much of the narrative relied on by the respondent to resist the making of any orders in this application concerns the actions taken by ES and by Messrs Keane and Gorham in moving to set aside the transactions of November 2016.

100. The applicant states that in applying for the injunction the company did not come before the court with clean hands, particularly in giving an undertaking for damages when the respondent knew or ought to have known that it was unlikely to be in a position to meet any such undertaking. He continues as follows:

> *"Having crystallised the company's redundancy obligations as well as the other substantial liabilities that had been booked in the company's name, there was never any substance to the undertaking for damages given."*

He continues: -

"the court was not advised of the fact that the company's staff had been made redundant and as such would not be in a position to continue to trade. This fact appears to have been withheld from the court for reasons unknown to me".

101. Although the applicant expresses his view that the injunction proceedings were inappropriate, this concern appears to derive from the giving of the undertaking in the prevailing circumstances. Importantly, he does not say that the plenary action commenced was wholly without merit or that the grounds on which the injunction was applied for were fictitious or not stateable.

102. The narrative of the dispute between the company and the respondent on the one hand and Messrs Keane and Gorham on the other hand is unusual. The affidavits exchanged at the interim injunction stage are likely to reflect only a part of the true narrative of all the matters in dispute between the respective principals. Whilst the unilateral "rescission" actions of Messrs Keane and Gorham were clearly aggressive, it seems to me that for the respondent to lay all of the blame for the misfortunes of the company and for his inability as a director of the company to be in a position to deliver assets and books and records of the company to the applicant is implausible.

103. Where the truth lies as between the positions adopted by the protagonists in that dispute cannot be determined by this court. Therefore, however implausible may be the respondent's reliance on the position taken by the company in those proceedings, in the absence of a finding that the injunction application was based on a fictitious account, this court should recognise that the actions of Messrs Keane and Gorham at least contributed to the deficit and the insolvent liquidation of the company. For this reason I conclude that this is not an appropriate case for a disqualification order.

Section 819 - restriction

104. Section 845 (3) of the Act provides that on the hearing of an application for a disqualification order the court may as an alternative, *"if it considers that disqualification is not justified, make a declaration under section 819"*.

105. This brings the court to a consideration as to whether the respondent has established that he acted honestly and responsibly in relation to the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by the section. This requires an analysis of those issues by reference to the test set out in the seminal judgment of Shanley J. in *Re La Moselle Clothing Ltd* [1998] 2 ILRM 345, approved in numerous judgments of the Supreme Court and this court. The factors identified by Shanley J. to be taken into account were as follows:-

"(a) the extent to which the Director has or has not complied with any obligation imposed on him by the Companies Acts

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

(c) the extent of the director's responsibility for insolvency of the company

(d) the extent of the director's responsibility for the net deficiency in the assets of the company disclosed at date of the winding up or thereafter and

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

106. In *Re Tralee Beef and Lamb Limited* [2005] 1 ILRM Finlay Geoghegan J. added the further criteria of considering whether the director had complied with his common law obligations.

107. I have already considered all of the areas of concern identified by the applicant, and stated my views on them. In summary:-

(1) The explanations offered for the absence of books and records of account of the company are all based on attaching responsibility to the employee Ms. Mazurek, the external accountants Messrs Dolan & Co. and to Mr. Keane. The persistent narrative on the part of the respondent is that these and other third parties are responsible to the exclusion of himself for his inability to produce comprehensive books and records to the applicant. In this regard, he has failed to establish that as the sole director with ultimate responsibility for such matters he acted responsibly.

(2) The respondent relies on what he describes as a period of "parallel" trade as a justification for the practice of raising invoices in the name of ES and using its VAT number. I am not persuaded that this practice was justified by the agreements entered into in November 2016.

(3) I am not satisfied that the respondent has demonstrated he co-operated as far as could reasonably be expected in relation to the conduct of the winding up. In particular, the respondent caused the applicant to undertake a "search" for the respondent and for assets by his visit to Newry on 27 April, 2017, leading ultimately to the tracing of assets of only very limited value at that location.

(4) The discrepancy between the value of sales recorded in the sales ledger and the payments received into the company's bank account, over the limited duration of the company's trading is not satisfactorily accounted for. Even on the respondent's own account he acknowledged that sums in the order of €100,000 were unaccounted for but attaches responsibility for this discrepancy to persons other than himself most notably Ms. Mazurek and the external accountants.

(5) The respondent sought to explain the continued practice of taking deposits from customers throughout January, February and into March by asserting that the company was solvent at the time. The evidence proffered to support this explanation was that the company was "*trading well*" and that the accountants had estimated significant profits for the full year 2017, a wholly speculative proposition.

(6) The applicant's evidence that the trading name "Let's Talk Solar", which was a registered business name of the company, was being used by the respondent for

the benefit of the company itself, was not contradicted by any evidence of the respondent having acquired rights to the use of the name independent of the company.

108. Taking into consideration all of the above matters, and the factors identified by Shanley J. in Re La Moselle Clothing Limited (*op. cit.)* I have concluded that the respondent has not demonstrated that he acted honestly and responsibly in relation to the affairs of the company, or that when requested to do so by the applicant, he has cooperated as far as could reasonably be expected in relation to the conduct of the winding up. Accordingly, I shall make a declaration pursuant to section 819(1) that he shall not, for a period of 5 years, he 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 section 819(3).