THE HIGH COURT

[2021] IEHC 475

[2018 45 COS]

IN THE MATTER OF THE COMPANIES ACT 2014
AND IN THE MATTER OF PEMBROKE DYNAMIC INTERNET SERVICES LIMITED (IN LIQUIDATION)

BETWEEN

MYLES KIRBY

APPLICANT

AND

PETER CONLON

RESPONDENT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 9th day of July 2021.

Introduction

1. In this application, the applicant Mr. Myles Kirby ("the Liquidator") sought a number of reliefs against the respondent, a director of Pembroke Dynamic Internet Services Ltd ("the company" or "Pembroke"), including in particular orders imposing on the respondent personal liability for the debts of the company, and an order disqualifying the respondent from acting as, inter alia, a director or officer of any company. While the matter was initiated by originating notice of motion, a plenary hearing of the application was ultimately ordered by the court, and after exchange of pleadings and discovery, the matter was listed for trial for six days on 10th June, 2021.

2. In the event, the court was informed on the morning of the hearing that the parties had agreed a document entitled "terms of settlement". This document set out the terms of orders to which both parties consented, and which, subject to the court's approval, would be made in settlement of the proceedings. The document set out certain other terms of settlement, including certain acknowledgements and agreements as to the evidence presented to the court. Paragraph 1 of the proposed orders to which the respondent consented included an order pursuant to s. 842 of the Companies Act, 2014 ("the 2014 Act") "*…disqualifying the Respondent from acting as a director or other officer, statutory auditor, receiver, liquidator or examiner or from being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of any company within the meaning of s.819 (6) of the Companies Act, 2014 or any friendly society within the meaning of the Friendly Societies Acts, 1896 to 2014 or any society registered under the Industrial and Provident Societies Acts, 1893 to 2014".* However, the parties acknowledged that the duration of the disqualification period was not something which they could agree, and which must be assessed by the court.

3. I am satisfied that the orders which the parties have requested the court to make – subject to an adjustment to the order for disqualification to provide for the duration of same – are appropriate. Accordingly, the only matter to be decided is how long the term of disqualification should be, and that is the sole issue addressed in this judgment.

The evidence before the Court

4. By order of Allen J. on 18th May, 2021, the court ordered the Liquidator and the respondent to deliver witness statements in advance of the trial. Both parties duly

delivered extensive statements of their respective positions. At the hearing, I was invited by Rossa Fanning SC for the Liquidator, without objection from Mr. Robert Dore, solicitor, who represented the respondent, to base my decision as regards the duration of the disqualification on the matters as disclosed in the witness statements. As the matter had been settled, neither side wished to adduce evidence in order to resolve this one issue, and were satisfied that I should proceed on this basis.

5. I made the point to counsel that, if I were not expected to make findings of fact in relation to disputed matters, I would not be in a position to resolve any conflict between the two witness statements. Counsel accepted that this was so, but expressed the view that the court would nonetheless have sufficient information, in considering matters not contested, to form a view as to the appropriate duration of the disqualification. Accordingly, I approached the matter on this basis.

Background

6. In order to assess the duration of the disqualification, it is necessary to examine the company's history and the respondent's role in it, and the liquidator's investigation of its affairs.

7. The company was incorporated in Ireland on 5th October, 2005, and changed its name from Ammado Internet Services Ltd to its present name on 1st August, 2017. The Liquidator states at para. 2 of his witness statement that "… *the Company provided a technology platform aimed at the charity sector. In the course of its business, the Company handled large amounts of charitable donations in trust for a number of charities*". As we shall see, these contentions are disputed by the respondent.

8. It is not disputed that the respondent was managing director and a shareholder of the company through certain corporate vehicles at the date of the commencement of its winding up on 22nd January, 2018. The Liquidator refers to an independent expert's report provided to the High Court by the company to ground an application to appoint an examiner to the company in November 2017. This report refers to the "Ammado Group", which according to the report comprises a Swiss entity, Ammado AG, as the parent company with four subsidiaries, being Pembroke, Ammado Technology Ltd, Ammado Serbia (R &D) and Ammado Inc, which the Liquidator believes to be a Czech entity. At para. 4 of the points of defence, the respondent maintains that Ammado AG was the holding company for Pembroke, the Serbian and Czech companies, but not Ammado Technology Ltd. According to para. 5 of the Liquidator's points of claim, this latter company was a shelf company acquired to replace Ammado AG as the holding company of the other companies, but this proposed restructuring was not completed before the company went into liquidation.

9. In addition, the group established a charitable foundation for the purpose of dealing with charitable donations. This was called the Ammado Foundation Trust, and was established on 11th January, 2008 by Irish solicitors.

10. The liquidator maintains that the company provided a technology platform aimed at the charity sector. This is denied by the respondent, who states at para. 6 of the points of defence that "*…the company's sole function was the provision of labour services to Ammado AG*". The respondent denies that the company had any involvement with the matters pleaded at para. 7 of the points of claim, which sets out the involvement that the group had in relation to charitable activities. However, the description of those activities as set out at para. 7 of the points of claim is not denied.

11. It appears that a technology platform was devised and provided to the charity sector. The Liquidator contends that the services offered involved:

    (a) Charitable Donation Technology: which involved the collection of donations from donors through the foundation. The foundation would make onward payment of those donations to the charities selected by the donors and, pursuant to donor terms and conditions, the foundation deducted an amount from each of the donations and remitted such amounts to the company by way of payment for services supplied by the company.

    (b) Donation Cards: the company marketed and sold pre-paid general donation gift cards, in which the recipient of the card could nominate the charity to whom it wished the pre-paid credit on the card to be donated. The amount of the donation would be paid to the foundation, who would hold the money until the recipient of the gift card selected a charity.

    (c) Charity Campaigns: The company ran charity campaigns on behalf of charities, with donations to the campaigns to be made to the foundation for onward payment to the underlying charity. The donor terms and conditions permitted deduction of an amount from the aggregate donation for the relevant campaign in respect of costs incurred by Pembroke in relation to that campaign.

12. In his witness statement, the respondent set out his personal background. According to this statement, the respondent is a chartered certified accountant, and also qualified at the Bar in 1980. In 1994, he carried out a period of devilling as a barrister. He appears to have joined the Industrial Development Authority in 1979, but left that body in 1987 to set up a technology company. His statement suggests that he set up a number of technology companies over the following 20 years or so, some of which were very successful; he refers to a company which he incorporated and subsequently sold "*for a cash consideration of €102 million*". He also refers to a number of business awards made to him both in Ireland and internationally for companies he founded and developed.

13. The respondent refers in his witness statement to discussing with a colleague "…the possibility of using technology to raise funds for philanthropic purposes and to raise the profiles of significant issues globally… to advance our agenda we paid a full-time researcher over a two year period and thereafter we put together a team of technology experts to design and develop all of the components necessary to build a global and

secure technology platform. This did not come cheap and both myself and [the colleague] invested considerable personal funds".

14. The respondent refers to the incorporation of Ammado Internet Services Ltd in 2007. He states at para. 16 of his witness statement that "… *[t]he purpose of this company was then to complete the development of a global technology platform which could potentially be used for a myriad of charitable purposes. To conclude this development Ammado Internet initially employed 20/25 people. Its first premises was in fact the garage of my then residence at 31 St. Mary's Road, Dublin 4. After two years the company moved to the Trinity Corporate Centre in Pearse Street, Dublin 2. At that stage the company was employing upwards of 60 people".*

15. The respondent goes on in his statement to describe how the company owned a functioning technology platform by 2008, and went about approaching international charities and generally promoting the technology platform. This ultimately led to the setting up of the Ammado Foundation with three trustees which were the respondent, his son Peter Daire Conlon, and a colleague Dr. Anna Kupka.

16. The respondent describes the setting up of four bank accounts with Ulster Bank, College Green, to which the Liquidator makes extensive reference in his witness statement. He claims that these accounts "*were held from the date of their inception by the Ammado Foundation and not by any other entity and, in particular, not [by] Ammado Internet, subsequently Pembroke".* [para. 24 witness statement].

The financial difficulties of the company

17. As a result of his investigation into the affairs of the company, the Liquidator says that the books and records of the company show that approximately €4,010,057.09 is currently owed to charities around the world. These charities include well known charities such as UNCHR, the Red Cross and Save the Children. There are also Irish domestic charities which have not been paid funds which were collected on their behalf. The Liquidator sets out letters from numerous charities making complaint about the activities of the Ammado Group, and states that "...*insofar as some of the letters demonstrate that these charities believed their money was held by the Ammado Foundation or Ammado AG, in many (if not all cases), this money was actually held by the company and the debts to these charities are properly debts owed by the company*".

18. The Liquidator states that the Ulster Bank accounts – which the Liquidator claims are those of the company rather than any other entity – contain a combined total of approximately €371,000. The shortfall of monies due to the charities currently stands at approximately €3,640,000. The Revenue Commissioners presented a petition to wind up the company on 5th September, 2017. The company petitioned to appoint an examiner on 13th November, 2017. This application was unsuccessful, and the Liquidator was appointed as such on 22nd January, 2018. The liquidator maintains that the respondent has, in breach of a court order directing him to do so, failed to file a statement of affairs in respect of the company, but refers to the statement of affairs as at 31st October, 2017

presented in respect of the proposed examinership which shows creditors, which did not include the charities, of approximately €13 million.

The Liquidator's investigations

19. In his witness statement, the Liquidator sets out at length the steps he took to investigate the affairs of the company. It is not necessary for the purposes of this judgment to set those steps out in any detail. However, the liquidator's findings may be briefly summarised.

20. The Liquidator states that he "*quickly ascertained that donations received by the Company had not been passed on to the charities resulting in a significant shortfall to those charities. My basis for this included internal Company reports (the "Dashboard" in particular), conversations with former company employees, internal Company emails and correspondence from the charities. I have verified the extent of the shortfall to the charities by reference to the Company's records and a very detailed review of the transactions on the Company's bank accounts".*

21. The Liquidator states that a *"Principles and Standards Compliance document" [issued by the group]… provides that donation proceeds would not be intermingled with ammado operating finances – instead they are forwarded directly from RBW Worldpay to dedicated bank accounts owned and controlled by the Ammado Foundation*" [para. 32]. The liquidator contends that "*…in reality, monies which were properly for the account of the Foundation were actually paid to the Company and monies that should properly have been held in trust by the Foundation for charities were held in Company bank accounts and mixed with other monies that the company had for trading and out of which the Company paid its trading expenses such as its employees' salaries*…" [para. 34]. The Liquidator contends that the foundation did not have its own bank account, as he regards the Ulster Bank accounts as being those of the company rather than the foundation, a contention which is denied by the respondent.

22. The Liquidator sets out in his witness statement his methodology for examining the books and records of the company, and in particular the Ulster Bank accounts. In relation to those accounts, and by way of summary, he states as follows:

> *"43. … I have ascertained that the charitable donations were pooled with Company funds. There was no segregation of funds and absolutely no controls in place to ensure the donations were ring-fenced and protected. As a result of this pooling, the Company outgoings such as salaries, rent, and other overheads were paid directly from charitable receipts. It was asserted by the Respondent in his Points of Defence that the Company did not receive charitable donations and did not operate a bank account, but that the relevant bank accounts were operated by another entity. It is evident from the books and records that the company did in fact operate a bank account, and irrespective of the foregoing, the position remains that charitable donations were mingled with the Company's funds and that they were clearly used to fund the expenses of the Company which in my view amounts to a "fraudulent purpose" pursuant to s. 610 (1)(b) of the Companies Act, 2014".*

23. It appears that, in 2017, the company paid out salaries of €801,524.27, rent of €119,352.81 and legal and consulting fees of €105,674.98. The Liquidator contends that the earned commissions for 2017 totalled €439,165, and that the company was not entitled to deduct any sums over and above this amount, with any balance of funds requiring to be held in trust for the benefit of the charities. The net position of the company, according to the liquidator, is summarised thus:

> *"53. Notwithstanding my concerns about their accuracy, according to the financial statements, the Company had retained losses of €19,419,257 and an overall deficit of €15,249,188 at 29 February 2016. The Company was hopelessly insolvent by the time it started using charitable donations to fund its operations.*
>
> *54. The fact that the charitable donations have been used to fund the operations in this manner illustrates the seriousness of this misappropriation. The donors of this money did not knowingly extend credit to the company. They donated their money (less a small commission payable to the Company) for the benefit of the charities. The donors were told and understood that the money was held separately in a trust account and was not at risk in this manner. The charitable donations have been misappropriated without the knowledge or consent of the donors/charities and used in the Company's operations. This misappropriation happened under the direction and control of the Respondent."*

24. In his witness statement, the respondent states that there was a restructuring of the Ammado Group in 2011, by which Ammado AG acquired all of the assets of the company, after which the sole function of the company "*was to provide backup office support to various entities within the Ammado Group, on a cost plus 5% basis*". He maintains that the Ulster Bank accounts were those of the foundation rather than Pembroke, stating that the company had an overdraft facility with Ulster Bank "*which was terminated by Ulster Bank, to the best of my recollection during the course of 2016…[t]his was the only account held by Ammado Internet/Pembroke since the restructuring in 2011*" [para. 35].

25. As the respondent puts it at para. 49 *et seq* of his witness statement, "*… I accept that funds were paid from the Ammado Foundation euro account to contribute to Pembroke's running costs, to include salaries, rent and the like from time to time. These monies were lent by the Ammado Foundation to Pembroke … [50] … [o]n the date of the appointment of Myles Kirby, Pembroke was indebted to the Ammado Foundation in respect of monies lent by the Ammado Foundation to Pembroke and the Ammado Foundation is an unsecured creditor of Pembroke (in liquidation)…[51] … I acknowledge that because payments were made from Ammado Foundation to Pembroke that there is a shortfall due to charities which ought to have been paid this money by the Ammado Foundation but this is of no concern to the liquidator of Pembroke…*".

26. In short, the respondent contends that, from time to time, Ammado Foundation paid monies to Pembroke to enable it to continue in being, and that these monies were a loan which was to be repaid. His contention, as set out in his witness statement is that, if there is a shortfall on payments by charities, this is a matter for the Ammado Foundation, but is

not a matter for the Liquidator of Pembroke, which has simply failed to repay monies lent to it by the foundation.

The terms of settlement

27. The substantive orders to which the respondent has consented in the terms of settlement may be summarised as follows:

    (i) A declaration pursuant to s. 610 (2) of the Companies Act, 2014 that the respondent be responsible up to the sum of €2 million for the debts of the company;

    (ii) An order pursuant to s. 610 (6) of the Companies Act, 2014 granting judgment against the respondent in favour of the liquidator in the sum of €2 million;

    (iii) As stated above, an order pursuant to s. 842 of the Companies Act, 2014 disqualifying the respondent from acting as, *inter alia* a director or officer of any company;

    (iv) An order pursuant to s. 798 of the Companies Act, 2014 for a period of three years from the date of the order restraining the respondent from removing his assets from the State or reducing them below €2 million;

    (v) A similar order pursuant to s. 798 restraining the respondent from disposing of or dissipating or charging his assets below the sum of €2 million.

28. The orders at (iv) and (v) above are tempered somewhat by an agreement that the respondent "shall be entitled to use his combined pension income for the purpose of discharging his day to day living expenses, which said income is capped at a weekly amount of €428.50". Other than this amount, the respondent has agreed to surrender all his assets in satisfaction or part-satisfaction of the €2 million debt.

29. The declaration at (i) above imposes personal liability for the debts of Pembroke on the respondent "by reason of the respondent having acted in a manner proscribed by s. 610 (1)(b) of the Companies Act 2014". This subsection is as follows:

    "(1) If in the course of the winding up of a company or in the course of proceedings under Part 10 in relation to a company, it appears that—

    …

    (b) any person was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose,

    the court, on the application of the liquidator or examiner of the company, a receiver of property of the company or any creditor or contributory of it, has [the power to declare that such person be personally responsible for the debts of the company]…"

30. It follows that, in consenting to the making of this declaration, the respondent accepts that he was "*knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company*…".

31. The respondent, at para. 6 of the terms, "*…agrees that the funds which were in the four Ulster Bank accounts at issue in these proceedings on 26 January 2018 (and which now amount to approximately €371,504.24 with interest and currency exchange fluctuation) are assets held in trust for the benefit of the charities and the Applicant can distribute those assets to the charities in accordance with law".*

32. However, it is important to note para. 5 of the terms of settlement, which is as follows:

> *"The Applicant accepts and shall acknowledge to the Court that notwithstanding that the Respondent's conduct was in breach of s. 610 (1)(b) of the Companies Act, 2014, the Respondent made no personal gain or profit from same".*

Period of disqualification: the law

33. Analysis of the case law relating to the length of a disqualification order was proffered by the Liquidator in his written submissions. No written or oral submissions in relation to the case law were made on behalf of the respondent, nor was it suggested that the Liquidator's submissions were in any respect incorrect. Counsel for the Liquidator concentrated his submissions on two decisions of Finlay Geoghegan J. in which the principles governing the length of a disqualification are explored, and a recent decision of O'Moore J. demonstrating an application of those principles.

34. In *Re Clawhammer Ltd* [2005] 1 IR 503, Finlay Geoghegan J. found that, given that the less onerous declaration of restriction is for a mandatory period of five years, a period of disqualification should, in the absence of countervailing evidence, ordinarily be for a period of at least five years. This principle was cited with approval by Kelly J. in *Director of Corporate Enforcement v. D'Arcy* [2006] 2 IR 163, where a court held that the serious nature of the misconduct merited a period of twelve years, with a ten-year disqualification being imposed in view of the respondent not having opposed the order.

35. In *Re Ansbacher: Director of Corporate Enforcement v. Collery* [2007] 1 IR 580, Finlay Geoghegan J. reviewed some of the authorities in relation to the appropriate period for disqualification, including in particular the decision of Kelly J. in *Director of Corporate Enforcement v. D'Arcy,* and identified the following principles relevant to determining the appropriate period:

> *"[31](1) The primary purpose of an order of disqualification is not to punish the individual but to protect the public against future conduct of companies by persons whose past record has shown them to be a danger to creditors and others.*
>
> *(2) The period of disqualification should reflect (in relation to and order under s. 160(2)(e)) the gravity of the conduct as found by the Inspectors which makes the respondent unfit to be concerned in the management of a company.*

(3) The period of disqualification should contain deterrent elements.

(4) A period of disqualification in excess of ten years should be reserved for particularly serious cases.

(5) The court should firstly assess the correct period in accordance with the foregoing and then take into account mitigating factors prior to fixing the actual period of disqualification."

36. In *Re Bovale Developments Limited, Director of Corporate Enforcement v. Bailey & Anor*. [2013] IEHC 561, Finlay Geoghegan J considered that the discussion by O'Donnell J in *Re Kentford Securities Limited: Director of Corporate Enforcement v. McCann* [2011] 1 IR 585 of the purposes of an order of disqualification and his reconsideration of earlier authorities necessitated some reformulation of the Ansbacher principles in order that they be "clearly consistent with *Kentford*". Accordingly, the court set out at para. 26 of its judgment the following as the appropriate principles to be applied:

"(i) The primary but not the only purpose of an order of disqualification is to protect the public against future conduct of companies by persons whose past records has shown them to be a danger to creditors and others;

(ii) It is also a purpose of an order of disqualification to improve corporate governance (*Re Kentford*, O'Donnell J. para. 27 and *Re Wood Products Ltd, Director of Corporate Enforcement v McGowan* [2008] IESC 28, [2008] 4 IR 498 per Fennelly J at para. 46);

(iii) A further purpose of an order of disqualification is that it act as a deterrent, both in respect of the respondent director and other directors of companies (Re *Kentford*, O'Donnell J at para. 27, quoting with approval Lord Woolf MR in *Re Westmid Packing Ltd* [1998] 2 All E.R. 124 at pp. 131 to 132. Hence, the period of disqualification should contain deterrent element;

(iv) The period of disqualification should reflect the gravity of the conduct or wrongdoing as found by the court in relation to the relevant sub-paragraphs of s.160(2) in respect of which the order of disqualification is being made;

(v) a period of disqualification in excess of ten years should be reserved for particularly serious cases;

(vi) the court should firstly assess the correct period in accordance with the foregoing and then take into account mitigating factors prior to fixing the actual period of disqualification." [para. 26]

37. In *Kirby v. Rabbitte* [2020] IEHC 703, the respondent engaged in a VAT fraud whereby goods or services are purchased at a zero rate for VAT purposes from a supplier based in another EU member state, and are then sold in Ireland for domestic consumption with

VAT charged on the sale. The importer then fails to account for the VAT due on the sale to its Irish customer.

38. O'Moore J. referred to the principles identified by Finlay Geoghegan J. in *Re. Ansbacher* as modified by her in *Re. Bovale Developments Ltd* [2013] IEHC 561, and also referred to the decision of Keane J. in *Re. Custom House Capital Ltd* [2016] IEHC 689, in which the court identified the following factors as justifying a period of disqualification of fifteen years:

> *'The conduct of the respondents … was deeply dishonest; continued over a protracted period of time until, for a variety of reasons, it could no longer be concealed; and was devastating on those innocent persons who had the grave misfortune to entrust the company with their pensions or savings. This is, undoubtedly, a particularly serious case.'*

39. Applying those principles to the case before him, O'Moore J. found that the respondent had:

> *"… participated in a systematic fraud sustained over a period of time. … The activities of Mr. Rabbitte were deeply dishonest, … While it is the case that the benefit to Mr. Rabbitte appears modest (being payments to him variously described as €7,000 and €10,000), if anything this heightens the need for a lengthy period of disqualification; the public needs proper protection from someone prepared to allow his company to be used as a vehicle for fraud in return for such inconsequential amounts. In addition, it is important that the only trade carried on by Westman as described to me was the unlawful use of its VAT number to defraud Revenue. In other words, the business of Westman was the business of fraud. Mr. Rabbitte has not identified a single legitimate trade by the company in its lifetime and, indeed, has asserted in his evidence that Westman never traded and never utilised the bank account which it had opened. While the loss caused by the fraud was not directly to pensioners or savers, I do not believe that this assists Mr. Rabbitte. The loss to the public purse is a significant one, and inevitably restricts the Exchequer's ability to provide for public services. The harm caused by the fraud was not in the same order as the loss to Revenue in Re Bovale, but again that appears to be because Revenue cancelled the VAT number. Certainly, Mr. Rabbitte has given no evidence that the fraud would [have] stopped but for Revenue's actions." [para. 58 of judgment]*

The Liquidator's view

40. It was submitted on behalf of the Liquidator that the respondent should be the subject of a disqualification order at the higher end of the scale, commenting that "*it is difficult to think of conduct more grave than that of the respondent in this case*". In this regard, it was submitted that "*…[m]isappropriating monies donated in good faith for the benefit of charities to his own personal benefit and that of the Company when there was no reasonable chance that those monies would be repaid is grave. It is also submitted that a lengthy disqualification is merited to deter any other director considering such conduct. It*

is submitted that this is in the category of particularly serious cases that merits a disqualification period in excess of ten years". [para. 6.11 submissions]

The respondent's view

41. Mr. Dore made succinct and helpful submissions on behalf of the respondent. He sought to differentiate the present case from the Rabbitte case – in which he coincidentally represented the respondent – on the basis that Mr. Rabbitte was a middle aged man, whereas the respondent in the present case is 67 years of age. He said that the respondent had been a very successful businessman whose motivation in embarking upon the Ammado venture was to "give something back to society". He had invested significant funds in the development of the technology platform: as the respondent put it at para. 15 of his witness statement, this development "…*did not come cheap and both myself and Dr. Kupka invested considerable personal funds*". It was suggested that the platform had given rise to "*enormous good",* although Mr. Dore accepted that there was no evidence of this before the court. It was submitted however that the respondent had persevered with a loss-making company in the belief that investment would ultimately be attracted which would enable the company to emerge from its financial difficulties.

42. It was submitted that the respondent had spent approximately a year in prison in Switzerland awaiting fraud charges in what Mr. Dore described as a sort of preventative detention, and that this had particularly deleterious effects on his health and well-being. In advance of the trial, the respondent had settled on "*draconian terms*", although it was readily conceded that the settlement was effected at almost the last possible moment.

43. Mr. Dore submitted that the respondent was "*coming to the end of his commercial life*", and facing a retirement which would not be what he would have envisaged for himself in more successful times. If a term of five years were imposed by the court, the respondent would be 72 by the time the period expired. It was submitted that the respondent "*believes that he will not be a director of any company"* after the expiry of the disqualification period.

44. I asked Mr. Dore whether, given that Finlay Geoghegan J. had held that a period of disqualification in excess of ten years should be reserved for particularly serious cases, he considered this to be a particularly serious case. Mr. Dore submitted that it was not a particularly serious case, in that the respondent did not benefit personally from the activities complained of, and remained adamant that the position was that Pembroke simply owed money to the foundation, rather than the charities themselves. It was submitted that disqualification is not punitive in nature, and although it is partly intended as a deterrent, the respondent in the present case was unlikely to pose any risk or threat to the public even if a relatively modest period of disqualification were to be ordered.

The appropriate period of disqualification

45. In accordance with the principles set out by Finlay Geoghegan J in *Bovale Developments*, the court should firstly assess the appropriate period of disqualification. This period should reflect the gravity of the conduct or wrongdoing of the director in question.

46. In the case of the respondent, and as pointed out above, the respondent, in accepting the imposition of personal liability under s.610(2) of the 2014 Act, has acknowledged that he was "knowingly a party to the carrying on of…business of the company with intent to defraud creditors of the company…". This is notwithstanding that, in his witness statement, he had previously sought to deny any fraudulent intent, and to contend in particular that the four Ulster Bank accounts were not the property of the company, and that the shortfall to the charities concerned was the liability of the Ammado Foundation and was "…of no concern to the liquidator of Pembroke…".

47. It is difficult to conceive of a more egregious and reprehensible fraud than the diversion of charitable donations from their intended purpose. Most charitable bodies are dependent significantly or entirely on the goodwill of donors, and many expend substantial and precious resources on attracting donations to fund their activities. The loss of donated funds constitutes a serious depletion of resources for charities, with the victims of such actions being the vulnerable persons whose interests charities represent.

48. Where, as is often the case in Ireland, the charities in question receive little or no governmental or institutional funding and are mainly or wholly reliant on donations, the loss of such monies is all the more serious. In addition to the monetary loss, the widespread publicity which such frauds attract may have the unfortunate effect of weakening the trust of the public in charities in general, and the collection of donations in particular. People who donate money to charity want to be sure that their donation will find its way to the charity of their choice. There is a disquieting risk that a fraud of the magnitude perpetrated in the present case may have a "chilling" effect on potential donors who may be concerned at even the possibility that their offerings may not reach the selected recipient.

49. In these circumstances, it seems to me that the respondent's conduct was grave indeed, and that his wrongdoing is comfortably within the "particularly serious" category which Finlay Geoghegan J in *Bovale* suggested might attract a period of disqualification in excess of ten years. The respondent has, by agreeing to a disqualification order in the terms set out above, effectively conceded that he was "knowingly a party to the carrying on of …[the] business of the company with intent to defraud the creditors of the company…". He has made this concession at the eleventh hour, causing the liquidator to incur the expense of preparing fully for a six-day hearing of the application in the expectation that it would be fully defended.

50. Moreover, the defence to the application offered in the respondent's witness statement was not impressive. The respondent asserted that the company was not the owner of the Ulster Bank accounts, and that the company had no bank account since 2011, other than an overdraft facility which the bank terminated in 2016. In light of the concession of fraud made by the respondent, I do not have to make findings in relation to this assertion, other than to remark on its utter implausibility, having regard to the findings of the very detailed investigation by the liquidator of the affairs of the company. In addition, the assurances given to a number of charities, who inquired as to donations

which they were assured by donors had been made, that the monies were ring-fenced proved to be entirely hollow.

51. The experience and success of the respondent in business matters, far from being a point in the respondent's favour, make his conduct all the more reprehensible. He cannot suggest that his actions were due to inexperience or naivety, and indeed now accepts that he was aware ("knowingly") of the actions taken by the company with intent to defraud creditors.

52. As regards the permissible period of disqualification, Kelly J in *D'Arcy* pointed out that there was no upper limit under s.160 of the Companies Act 1990, the statutory predecessor of s.842 of the 2014 Act, unlike the equivalent statutory provisions applicable in England and Wales, to which reference is made in the cases to which Kelly J referred in that judgment; those cases concerned a provision with an upper limit of fifteen years. This Court has under s. 842 no such limit on its discretion, although it should be said that all of the reported cases in this jurisdiction opened to me involved disqualification periods of fifteen years or less.

53. It seems to me that the most serious view of the respondent's conduct requires to be taken. Having regard to the principles set out by Finlay Geoghegan J in *Bovale*: -

    (i) I consider that the actions of the respondent are such as to require that the public be protected against future conduct by the respondent of companies, as his actions show him to be a danger to creditors and others;

    (ii) this Court has a responsibility to promote effective and honest corporate governance, and wilful failures in this regard are to be strongly deprecated;

    (iii) I am strongly of the view that the judgment of this Court should send a clear message, not just to the respondent, but to directors in general, that fraudulent activities in the conduct of companies, and in relation to charities in particular, if proved or admitted before the court, will attract heavy sanctions;

    (iv) as I have indicated, I regard the conduct and wrongdoing of the respondent in this matter as being particularly grave and at the most serious end of the scale.

54. I have had regard to the periods imposed by this Court in other cases. In the D'Arcy, *Ansbacher, Bovale* and *Rabbitte* cases, all of which fell within the "particularly serious" category, the periods of disqualification, before deductions for mitigating factors, were twelve, twelve, fourteen and fifteen years respectively. The latter period, imposed by O'Moore J, and which was reduced by nine months after consideration of mitigating factors, represents the longest period in the reported cases of which I am aware to have been considered appropriate by this Court for disqualification of a director. As we have seen, the very purpose of the company in that case appears to have been the perpetration of a fraud on the Revenue Commissioners. The fraud in that case caused a loss of approximately €1.2m to the taxpayer. While it does not appear that the company

in the present case was set up to carry out a fraud, the effect of the company's activities was to deprive charities of donations for a sustained period, with a consequent shortfall to those charities of €3.64m. By any objective measure, this shabby and repugnant fraud is of an even more serious nature than that perpetrated in *Rabbitte*.

55. Accordingly, I am of the view, taking all matters into account, that an appropriate period of disqualification prior to considering mitigating factors would be eighteen years. In coming to this conclusion, I have borne in mind the respondent's age. His solicitor urged the court that the respondent was "coming to the end of his commercial life", and that he "believes that he will not be a director of any company" after the disqualification period expires. However, no assurances were offered in that regard, and I am strongly of the view that the protection of the public and the necessity to provide a deterrent against similar future frauds require a very substantial period of disqualification, given the nature and extent of the respondent's actions.

Mitigating factors

56. It is to the respondent's credit that he agreed terms of settlement with the liquidator, who thus avoided the further depletion of the company's resources by the costs of a six-day hearing. As against that, the agreement was concluded just prior to the hearing, when all of the costs of preparation for the application had been incurred.

57. It is not disputed that the respondent spent approximately a year in prison in Switzerland awaiting the trial of fraud charges. In his affidavit of 1st April, 2019, he refers to having been "held in prolonged solitary confinement for 365 days", and he contends that he suffers from a number of medical complaints since his release on 22nd December, 2018. The court was not apprised of the detail of the charges against the respondent – although they appear to have been connected to an alleged diversion of charitable donations – or indeed of the outcome of the legal process in Switzerland.

58. There is no doubt that, given the apparent success which the respondent achieved in his business career, he has suffered a very significant and public "fall from grace". It does not appear, given the orders to which he is consenting, that he will reap any benefit from his involvement from what may have started out to be a well-intentioned venture, and any assets which he has other than the agreed amount for living expenses are likely to be required to discharge in part at least the sum of €2m for which he is now personally liable in respect of the debts of the company. The liquidator readily acknowledges that, notwithstanding his knowing involvement in the carrying out of the business with an intent to defraud creditors, the respondent made no personal gain or profit from these actions.

59. Taking these factors into account, I am of the view that a discount of two years should apply. There will therefore be an order disqualifying the respondent pursuant to s.842 of the 2014 Act for a period of sixteen years, in addition to the other orders which the parties have agreed.