

THE HIGH COURT

[2022] IEHC 24
[2019 No. 193 COS]

IN THE MATTER OF INCH VIEW LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT 2014

AND

IN THE MATTER OF SECTIONS 819 AND 683 OF THE COMPANIES ACT 2014

BETWEEN

SEAN MULHERN

APPLICANT

AND

JOHN BLANEY AND NEIL BLANEY

RESPONDENTS

Judgment of Mr. Justice Quinn delivered on the 21st day of January 2022

1. Inch View Limited ("the Company") operated a restaurant called "The Water's Edge" at Rathmullen, Co. Donegal. By order of this Court (White J.) made on the 27th day of July 2015, pursuant to a petition by the Collector General of the Revenue Commissioners, the company was ordered to be wound up by the Court and the Applicant was appointed liquidator. The respondents were directors of the Company at the commencement of the liquidation, although there is controversy as to the date when the first named respondent commenced acting as a director.
2. In these proceedings, the applicant seeks declarations pursuant to s. 819 of the Companies Act 2014 that the respondents shall not for a period of five years be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless that company meets the requirements as to capital stipulated in subs. 3 of s. 819 (a restriction declaration).
3. Section 819 (2) provides that in relation to any person who has been a director of an insolvent company, a declaration of restriction shall be made unless the court is satisfied that:-
 - (a) *the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,*
 - (b) *he or she has, 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)".*
4. On this application the onus is on the respondents to establish each of the matters referred to at (a), (b) and (c) above. I have concluded that the respondents in this case

have demonstrated that they acted honestly in relation to the affairs of the company, and that they cooperated with the liquidator as far as could reasonably be expected in relation to the conduct of the winding up. However, I am not persuaded that the respondents have acted responsibly in relation to the conduct of the affairs of the company before its liquidation, and accordingly I am obliged to make the declaration provided for in s. 819.

The Company

5. The company was incorporated on 14 June 1998. It operated the Water's Edge restaurant at Rathmullen until it ceased trading in September 2013.
6. The second respondent Neil Blaney was the owner of 80% of the shares. The remaining 20% were owned by the father of the respondents, Mr. Edward Blaney.
7. The premises at which the company traded were owned by a partnership comprising the respondents, who are brothers, and their two other brothers, Micheal Blaney and Ciaran Blaney. This is referred to as the "Blaney Property Partnership" or "the Partnership".
8. The exact circumstances in which the company ceased to trade in September 2013 were not before the court, although it is said by the respondents that the business encountered trading difficulties in 2012 and 2013. On 16 May 2014 Allied Irish Banks plc, which held security over the property owned by the Partnership appointed Kieran Wallace of KPMG as receiver of the property. Following his appointment, the receiver changed the locks and retained possession of the property.
9. On 3 July 2015, a petition was presented by Revenue for the winding up of the company. By order made on 27 July 2015, (White J.) the company was ordered to be wound up by the court and the applicant was appointed liquidator.

Statement of Affairs

10. On 28 August 2015, a Statement of the Affairs of the company was sworn by the respondents, as required by the winding up order and the Act.
11. The Statement of Affairs estimated the total realisable value of assets at €25,000, being "fixtures and fittings", which were the subject of a debenture in favour of Allied Irish Banks plc.
12. Total liabilities were estimated at €975,880. This amount was comprised of preferential creditors in an amount of €23,698 (comprising only Donegal County Council for local rates), €602,425 being a net balance due to AIB, and €349,757 for unsecured non – preferential creditors. The non – preferential creditors included Revenue for VAT in a sum of €52,447, and PAYE in an amount of €68,861, making a total of €121,308.

The Respondents

13. The application is grounded on an affidavit sworn by the applicant on 23 May 2019. Replying affidavits were sworn by the respondents on 8 October 2019. A supplemental affidavit was sworn by the applicant on 21 December 2020, and two further affidavits were sworn by the respondents on 20 August 2021.

14. Each of the respondents was a director of the company at the commencement of the winding up and it is accepted that they are persons to whom s.819 applies. The Companies Registration Office records their appointment having been made on 31 July 2013, less than three months before the date on which the company ceased trading.
15. In his replying affidavit the second respondent states that he was appointed a director on 31 July 2013. In submissions by his counsel, it was conceded on his behalf that he was a "de facto" director operating the business of the company for several years before that, and at all times relevant to the matters canvassed in this application.
16. By contrast the first named respondent states that he only became a director on 31 July 2013 when it became necessary to replace his father Edward Blaney, who was at that time suffering from poor health. He says that it was then necessary to have two directors appointed to the company. He says that he was never a shareholder in the company. He submits that only the events which occurred after 31 July 2013 are relevant to him, and points to the fact that the company ceased trading in September 2013.
17. The first respondent acknowledged that he is one of the partners in the partnership referred to as the Blaney Property Partnership which owned the premises from which the company operated and which leased the premises to the company and charged rent.
18. The first respondent says that when it became necessary to replace his father as a director, he was asked to do so by Mr. Seamus Farren of Farren Roarty who were the Company's accountants and auditors. Whilst the first respondent states in his replying affidavit that his brother Neil Blaney was involved in the day to day running of the company and that he was not a shareholder, he does not say that he had no prior involvement in the activities of the company. He then addresses the substance of the liquidator's application, including events going back to 2011. His affidavit is adopted and relied on by the second respondent.
19. In support of his claim that the first respondent was acting as a director prior to 31 July 2013, the applicant exhibits the abridged financial accounts of the company for the year ended 31 December 2009 which were signed by both respondents as directors of the company on 24 June 2010 and a copy of the abridged financial accounts for the year ended 31 December 2011 which were signed by both respondents as directors on 31 October 2012.
20. Each of those financial statements referred to both of the respondents as directors at the time. The abbreviated accounts for the year ended 31 December 2009 include under "Company Information" the names of four directors, being each of the respondents together with Michael Blaney and Ciaran Blaney.
21. By way of explanation for having signed accounts in those years the first respondent states as follows: -

"I say that I was directed to sign those financial accounts by Mr. Seamus Farren, however, I say that I was not a shareholder in the company at the time and given the number of companies within the Blaney Group of companies, this was an oversight on the part of Mr. Farren who then regularised matters by the lodging of Form B 10 on the 6th of August 2013 with the Companies Registration Office".

22. For the reasons set out below, I am not persuaded by the first respondent's assertion that he did not act as a director prior to 31 July 2013 or by the submission that only events after that date are relevant to him. I am informed in this conclusion by the following: -
- (1) The first respondent signed financial statements of the company in the stated capacity of a director not once before 31 July 2013 but at least twice, namely on 24 June 2010 in respect of the accounts to 31 December 2009 and again on 31 October 2012 in respect of the accounts to 31 December 2011. (The financial statements for the year ended 31 December 2010 are not before the court.)
 - (2) There is no doubt that Mr. Farren, whose firm were the company's auditors, was an influential advisor to the company, to the respondents and to their brothers. However, the statement by the first respondent that he was "directed" to sign financial statements is not an adequate explanation for the serious act of signing statutory accounts and doing so as a "director" where such a person later denies having held such office. The first respondent does not say that he did not understand the implications of this act.
 - (3) The first respondent cites the fact that there were a number of companies within the Blaney Group of companies and that this was an error on the part of Mr. Farren who then "regularised matters by lodging the Form B 10 on 6 August 2013". If anything, the term "regularised" can only mean that the B 10 was filed to record the first respondent's true status as a director.
 - (4) The Companies Registration Office search exhibited by the applicant shows that when the first and second named respondents were appointed directors of the company on 31 July 2013 this followed the resignation of three persons who had been directors since 1998, the year of the company's incorporation, namely a Lucy Brock, Jackie Forde and Donna Vavasour, each having Dublin addresses and none of whom appear to have held any shareholding position. Nowhere is it suggested that these persons were anything other than nominees of the original subscribing shareholders or that they had any responsibility for the matters referred to by the applicant. Contrary to what is asserted by the first respondent in terms of replacing his father, Edward Blaney, the first and second respondents were replacing those three other persons as directors.
 - (5) On the same day as these changes took effect, namely 31 July 2013, the second respondent, Neil Blaney, was appointed secretary of the company in succession to Messrs Fletcher and Collins Limited, of Carmanhall Road, Sandyford, Dublin 18 which had been the secretary since 1998 . It is clear therefore that the appointment

of the respondents on 31 July 2013 was never anything other than an overdue replacement of the original officers as of the incorporation of the company, and to use the first respondent's own words, "regularisation of matters by lodging a Form B 10".

- (6) The first respondent swore the principal replying affidavit. In doing so he did not limit his evidence to events after 31 July 2013. Nor does he suggest that his knowledge of the affairs of the company before that date is secondary. In para. 25 of his second affidavit sworn 20 August 2021, he states, in response to the applicant's allegation regarding trading whilst insolvent the following: -

"...the position was that we were desperately trying to restructure the company's finances with the bank from 2011 onwards (as well as other loans owed by other companies in the Blaney Group) until the bank pulled the company's funding and appointed receivers.

I say that at all times we were attempting to keep the company afloat in circumstances where we were firmly of the opinion that we would be able to trade out of the company's financial difficulties". (emphasis added)

23. The applicant does not refer to any "commencement" date for the tenure of the first respondent, and relies largely on the signature of the accounts for the year 2009, signed 24 June 2010. Nonetheless, it is clear that events from at least that time onwards are relevant to the examination of the conduct of both respondents.

Cooperation with liquidator

24. The applicant says that the directors of the company failed to cooperate fully with the liquidation process. He says that this lack of cooperation "greatly hindered our investigations".
25. In his second affidavit sworn 1 December 2020, the applicant refers to a letter which he says that he wrote to the respondents on the day of his appointment on 27 July 2015 proposing a meeting on 29 July 2015. No such letter is exhibited. The only contents of the exhibit referred to by the applicant are the winding up order itself.
26. The applicant says that in his letter of 27 July 2015 he had proposed a meeting to take place on 29 July 2015. The respondents say that they believe that the requirement for such a meeting was overtaken by the interaction with Mr. Farren referred to below.
27. On 27 July 2015, the day on which the applicant was appointed, Mr. Farren contacted the applicant by telephone to advise him that the company was not trading and that he, Mr. Farren, held the most recent books and records of the company. He informed the applicant that he was instructed to prepare a statement of affairs for the company and to liaise with the applicant on behalf of the directors. In response to this phone call, the applicant wrote to Mr. Farren enclosing a copy of the winding up order and noting that Mr. Farren, had been instructed to prepare a statement of affairs and stated that he was authorised to hold the records for that purpose.

28. There is also exhibited a copy of Mr. Farren's letter of engagement with the respondents in relation to the statement of affairs. The applicant confirms that on 27 August 2015 he received from Mr. Farren a copy of the sworn statement of affairs sworn by the respondents.
29. The applicant met with Mr. Farren on 14 September 2015 when Mr Farren handed over to him books and records for the financial year 2013 and a laptop. The applicant says that he then raised queries in relation to the statement of affairs and requested copies of the financial statements for the last two years of trading together with other working papers and schedules. He says that he also requested books and records of the company for the previous four years.
30. On 25 September 2015 the applicant emailed Mr. Farren confirming his receipt of the statement of affairs and requesting further information including financial statements and relevant schedules and nominal ledgers.
31. The applicant says that after liaising further with Mr. Farren he received some further documentation and raised queries. Without providing any detail of this engagement, he then moves forward two years and says that he received a reply to his queries concerning a directors' loan account in a letter of 6 October 2017.
32. The applicant continued:

"I say that the aforesaid lack of cooperation from the respondents greatly hindered my investigation and I was unable to determine the accuracy of the Statement of Affairs presented on 27 August 2015 in a timely fashion. I was also unable to determine with any reasonable accuracy the assets, liabilities and financial position of the company until after 7 October 2017".

33. The respondent states that after the statement of affairs had been delivered to the applicant on 28 August 2015, the next he heard from the applicant was when he received a letter on the 24 July 2017. In that letter, the applicant refers to the statement of affairs which he had received and to certain queries which he had raised with Mr. Farren. The applicant stated that he did not receive a response to all of his queries, and he refers in particular to outstanding financial statements and to certain explanations in relation to the directors' property partners loan.
34. The applicant says that after receiving the statement of affairs on 28 August 2015 he was "liaising with Farren Roarty Accountants at all times regarding the respondents". He continues: -

"At no stage between those dates (28 August 2015 and 24 July 2017) did either respondent contact me to indicate that Farren Roarty did not represent their interests and seek to provide me with the requisite information (details regarding director's loans, financial statements etc.). In any event I wrote directly to the respondent on 24 July 2017 indicating that despite requesting same from Farren

Roarty I had not yet received financial statements from 2012 onwards or a response to my query regarding a directors' loan in 2012".

35. On 28 July 2017, the first respondent replied to the applicant's letter of 24 July 2017.. He expressed his surprise at this correspondence. He said that Mr. Farren was no longer his accountant and he requested copies of the correspondence so that he could follow up with Mr. Farren. He said that the accounts for 2012 should be available from Mr. Farren and that he would follow up in any event. He stated that no accounts were filed after 2012 and that the company had ceased to trade around September 2013. He continues: -

"I was never directly involved in the operation of the company and according to my records, I was only appointed as a director on the 31st July 2013 which was to replace my father Eamonn Blaney, who was suffering from dementia at the time and has subsequently passed away recently. It was only to facilitate the requirement of having two directors on the board. I am not a shareholder.

I certainly never received or borrowed any monies from Inch View Limited and I have gone through the accounts to try understand how this figure appeared but am unable to understand where Mr. Farren got his figures from. In fact, Inch View should owe me money".

36. The first respondent concluded that letter by stating that if the applicant did not receive a reply from Mr. Farren within 14 days of that date he, should make contact with the respondent directly because he was anxious to bring the matter to a conclusion.
37. It is clear from what followed that after receiving the letter of 24 July 2017 the respondents followed up proactively. Mr. Farren wrote to the applicant on 6 October 2017 to address the outstanding query in relation to the directors' loan account, which is considered in more detail below.
38. As a general rule, it would not be sufficient for respondents to simply say that matters were left in the hands of their accountant, advisor or agent and that they believed that all matters were up to date as far as concerns correspondence with the liquidator. Nonetheless, it is clear that Mr. Farren, acting on the instructions of the respondents, took the several initiatives of contacting the applicant on the day of his appointment, preparing the statement of affairs, meeting with the applicant and attending to a number of queries which the applicant had raised.
39. Whilst it is also not open to respondents to simply say that they have not received requests or further requests from a liquidator, it is very clear that in this case they took the trouble to give instructions to Mr. Farren to cooperate immediately on the applicant's appointment and again in July 2017 when the applicant identified outstanding information. This is not the conduct of un-cooperative directors.

40. I find that the respondents cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the company, thereby meeting the requirement contained in s. 819 (2) (b) of the Act.
41. Before leaving this subject, I have noted that the report of the applicant to the Director of Corporate Enforcement pursuant to s.682 of the Act, following which the Director declined to grant relief from the obligation to bringing this application, was delivered on 1 June 2017. That report contains a statement that the directors failed to co-operate fully with the liquidation process. There is no evidence before the court of any complaint by the applicant to the respondents that matters were outstanding when this report was made.
42. The applicant does not cite any instances of dishonest conduct. He identified the following substantive issues regarding the affairs of the company: -
- (1) Failure to provide adequate accounting records
 - (2) Failure to prepare financial statements or file annual returns with the Registrar of Companies
 - (3) Failure to comply with tax obligations
 - (4) Directors' loans in breach of ss. 239 to 240 of the Companies Act 2014
 - (5) Trading while insolvent.

Failure to provide adequate accounting records

43. The applicant states that the directors failed to provide adequate accounting records. He identifies as the items not made available to him (a) details of debtors; (b) stock sheets and (c) details of fixed assets.
44. The applicant states that on 12 October 2017, over two years after his appointment, he received financial statements for the year ended 31 December 2012 and 31 December 2013. He states that no supporting documents or accounting records were provided with these financial statements to allow him to substantiate the accuracy of the financial statements.
45. The only answer which is made by the respondents to this complaint is to say that the applicant does not exhibit correspondence seeking the information which he alleges was not provided. The first respondent states that he would have expected that if the applicant had been seeking such documents he would have contacted either the respondents or Mr. Farren seeking them.
46. The respondents also rely on the correspondence with Mr. Farren, who they say had informed the applicant that he held the most recent books and records of the company. The respondent says that he was not aware until receiving the letter of 24 July 2017 that any such items were outstanding.

47. Although there is no evidence before the court that the company maintained the records identified by the applicant under this heading, notably details of debtors, stock sheets and details of fixed assets, the applicant makes the remarkable statement in para. 10 of his supplemental affidavit of 1 December 2020 as follows:

"I was also unable to determine with any reasonable accuracy the assets, liabilities and financial position of the company until after 7 October 2017". (emphasis added)

48. It is clear from this statement that the applicant had reached a point after 7 October 2017 when his concerns regarding the accuracy of financial statements had been met with "reasonable accuracy". Whilst there was undoubtedly some delay before that point was reached, there is no evidence that the respondents caused this delay. Therefore I do not find this complaint to be evidence of a want of responsibility on the part of the respondents.

Failure to prepare financial statements or file annual returns with the Registrar of Companies

49. The applicant says that the company failed to prepare financial statements for the years ended 31 December 2014 and the period ended 27 July 2015, as required by ss. 290 to 292 of the Companies Act 2014.
50. The applicant states also that the company failed in its obligation pursuant to s. 343 of the Act of 2014 to file an annual return with the Registrar of Companies for the year ended 31 December 2013 and year ended 31 December 2014.
51. The respondents say that there was no trade from 2014 onwards. In fact, the evidence before the court was that the trade of the company ceased in September 2013. They refer to the appointment of the receiver over the property on 16 May 2014 and the first respondent says that he was "under the belief that since KPMG had taken over the premises, that no accounts could be produced. I say that the company's accountants, Farren Roarty, did not advise otherwise".
52. It is clear from all of the evidence in this case that the respondents placed heavy reliance on Messrs Farren Roarty. That in itself is understandable but is not an answer to this complaint. There is before the court no evidence of any consideration by the respondents of their obligations to comply with ss. 290 to 292, (being the obligation to prepare financial statements in accordance with the requirements of the Act) and s. 343 (the obligation to make annual returns to the Registrar of Companies). These core obligations are not lessened by the fact that a receiver had been appointed over an asset owned, not by the Company but by the respondents and their other two brothers. Nor is it sufficient to state that Mr. Farren did not advise otherwise. It is clear that the company was in breach of these obligations and the explanation proffered does not show that the respondents acted responsibly.

Failure to comply with tax obligations

53. The applicant exhibited a table of tax returns and payment deficiencies which recited a sum of €65,122.79 (less €1.86) due as at the end of 2012 made up as follows.
54. In respect of VAT the applicant stated that returns for periods going as far back as the last two months of 2008 were overdue. The table showed a balance of VAT unpaid in respect of the six-month period ended 31 December 2012 of €23,768.60.
55. Outstanding balances of PAYE were due in respect of the full years 2011 and 2012 in amounts totalling €41,352.33 and a figure of €1.86 for the year ended 31 December 2013.
56. The amount estimated by the directors in their own statement of affairs as at the date of liquidation is €121,308. The applicant states that he is unable to determine if all taxes due were accurately returned. He states that the company failed to file corporation tax returns for 2013 and 2014. He says that *"the substantial unpaid taxes were used to fund the working capital of the Company"*. Returns are also overdue in respect of earlier dates, going back as far as the last two months of 2008 in respect of VAT.
57. He concludes: *"It is possible that unreturned liabilities exist which I am unable to ascertain given the quality of the underlying records"*
58. The only answer made by the first respondent in relation to this issue is that these taxes had fallen due before the date on which he states that he was appointed a director namely 31 July 2013. He therefore does not offer any evidence as to what measures or steps were taken by him or any directors to address these failures. The only evidence before the court is that unpaid balances continued to accrue interest until the Revenue Commissioners intervened by petitioning on 3 July 2015 for the winding up of the Company.
59. The balances of tax cited are modest by contrast with amounts seen in many other applications pursuant to Section 819. Nonetheless, it is clear that the company was in long-term continuing breach of its obligations under the Taxes Consolidation Act. I have already rejected the first respondent's submission that events prior to 31 July 2013 are not relevant to his position. Furthermore, the company remained in breach of these obligations for a further two years after that date. There is therefore no evidence that either of the respondents acted responsibly in relation to this aspect of the company's affairs

Directors' loans

60. The financial statements for the year ended 31 December 2013 record a debtor in the amount of €58,812, which the applicant says Mr Farren confirmed to him was an amount owed to the company from the Blaney Property Partnership. The applicant states that as the value of net liabilities reflected in the previous year's statutory financial statements was €794,294, the amount of this loan exceeded 10% of the company's net assets and accordingly was in breach of the provisions of ss. 239 to 240 of the Companies Act 2014.

61. The applicant refers also to a loan balance appearing in respect of the year ended 31 December 2012 in the amount of €115,812, again in excess of 10% of the net relevant assets at that time.
62. The first respondent states that he never received or borrowed monies from the company and that having examined the accounts he is unable to understand where these figures came from. He asserts that he was owed money by the company.
63. In a letter of 6 October 2017 from Mr Farren to the applicant Mr. Farren confirms the existence of the loan balance "due by the Blaney Property Partners as per the accounts as of 31 December 2012." Having given this confirmation Mr. Farren asserted that there should be deducted from this balance amounts due by the company to the Partnership for rent in 2013, 2014 and the first four months to April 2015, when it is said that the receiver was appointed to the interest of the Blaney Property Partners.
64. Mr. Farren stated that when these amounts are offset, there is a balance due to the Partnership of €5,112.
65. The applicant states that in circumstances where the receiver was appointed not in April 2015 but in May 2014, there can be no basis for offsetting rent after May 2014. Therefore he says that on any view of the matter, there would still be a balance due to the company by the Blaney Property Partnership, even if rent is deducted up to April 2014, a sum of €49,054.
66. The applicant says that

"irrespective of the date of the receiver's appointment, an alleged loan was advanced by the Company at some stage during 2012. Furthermore, it appears that the loan was never repaid despite the fact that the Company was trading at a loss and was insolvent by at least 31 December 2012 when it incurred accumulated losses of €744, 421."

In essence the applicant says that a breach of s. 239 occurred and was never remedied.

67. The only response made to this complaint is that the figures quoted by the applicant were calculated by Mr Farren. If anything, Mr Farren's calculations confirm the existence of the directors' loan. The clear breach of s.239 of the Act is nowhere addressed by the respondents. In circumstances where this loan balance first appears in the financial statements for 2012 and where the loan was never repaid, I find that this breach evidences a want of responsibility on the part of the respondents.

Trading while insolvent

68. The applicant refers to the accumulated losses recorded in the financial statements to year ended 31 December 2013 in an amount of €947,877. He says also that accumulated losses were recorded in the accounts for 2010 at €523,789, for 2011 at €595,857, and for 2012 at €794,421. He states as follows: -

"The respondents continued to trade up to September 2013, despite the fact that he [sic] knew, or ought to have known that the company was insolvent and would not be able to pay its creditors as debts fell due, including substantial amounts due to the banks and the Revenue Commissioners".

69. The deficit as regards creditors recorded in the statement of affairs sworn by the directors on 28 September 2015 was €975,880, of which €602,425 represented an estimated net amount due to AIB, and €349,757 represented a balance due to unsecured creditors, including an unsecured revenue balance of €121,308.
70. The first respondent says that premises at which the Company traded was located in Rathmullen, Co Donegal, *"a seaside town which relies very heavily on tourists from Northern Ireland to survive"*. He continued *"The business of the company encountered difficulties in 2012 and 2013 as did many other businesses in this sector"*
71. In December 2013 the company retained Mr. Sean Carr of Vision Accountancy, a corporate restructuring expert, to try and restructure the business. The first respondent says that Mr. Carr was to negotiate on behalf of the partnership with Allied Irish Banks which had lent the money to the partnership and held the charge over the premises and he continues: - *"And he was also to advise in relation to an overall restructuring of the business"*. The first respondent states that *"the fact that such an advisor had been appointed by the company to look at restructuring the business was an indication of the seriousness that the directors took the financial situation that the company found itself in"*.
72. He then refers to the appointment on 16 May 2014 of the receiver who changed the locks and excluded the company from the premises.
73. In his second affidavit sworn 20 August 2021 the first respondent says that during the relevant period the company was encountering trading difficulties *"like a lot of companies in the industry during this time frame and had to rely on bank funding in order to continue to trade"*. He says *"I say that it was always envisaged that the company could recover, in line with the general recovery in the economy"*.
74. The first respondent continues by saying as follows: -

"The position was that we were desperately trying to restructure the company's finances with the bank from 2011 onwards (as well as other loans owed by other companies in the Blaney group) until the bank pulled the company's funding and appointed receivers.

I say that at all times we were attempting to keep the company afloat in circumstances where we firmly were of the opinion that we would be able to trade out of the company's financial difficulties. I say that it was after the bank appointed the receiver that the company became unviable".

The respondent does not address the fact that the receiver was appointed eight months after the company ceased trading.

75. The second respondent adopts the statements made by the first respondent. He makes the same point in relation to the retention of Mr. Carr as evidence of the directors taking seriously the financial situation of the company.
76. Much emphasis is placed on the appointment of Mr. Carr in December 2013. In many cases, evidence of the appointment of a restructuring professional would support an argument that directors have taken the position sufficiently seriously and acted responsibly. However, I am not persuaded that the references to Mr Carr's appointment are of such weight in light of the following:-
 - (1) The company was incurring serious losses from as early as 2010, to the extent of €523,789, and yet continued trading at increased losses for almost three years thereafter.
 - (2) The respondents state that they were engaged in restructuring efforts from 2011 onwards. Mr. Carr was only appointed in December 2013, and no evidence is put as to what restructuring efforts, were made before then.
 - (3) It is clear from the evidence that Mr. Carr's role was to restructure the debt position between the Blaney partnership as a whole and Allied Irish Banks. By the time he had been retained, the company itself had already ceased trading.
 - (4) No evidence was proffered as to what efforts were made to address the trading and financial status of the company itself, other than efforts to negotiate between the partnership and AIB, the failure of which led to the receiver's appointment over the Partnership's asset. It is not said that the liability to AIB was the cause of the company's insolvency, although AIB was ultimately the creditor owed the highest balance of debt.
 - (5) Despite the retention of Mr. Carr in December 2013, and the fact that the company had ceased trading, no steps were then taken by the respondents to initiate an orderly winding up of the company and it was only when Revenue intervened with the petition to this Court that the winding up occurred.
77. It is well settled that this court should not apply the benefit of hindsight to this analysis. However, the high point of the respondent's description of their expectations was that they "envisaged" that the company could recover "in line with the general recovery in the economy".
78. I therefore accept the applicant's description that the respondents permitted the company to trade for a period of at least three years while it was insolvent, despite the fact that they knew or ought to have known that it was insolvent and would not be able to pay its debts.

Conclusion as regards s. 819

79. This is a classic case of respondents placing their focus on s. 819 (2) (b), namely to demonstrate that they have cooperated with the liquidator. I have found that they did so co-operate, but they have not adduced evidence to establish that they acted responsibly in relation to the affairs of the company as required by s. 819(2)(a).
80. The undisputed evidence is that the company was returning losses since at the latest the year 2010, and that the losses grew steadily over the following years culminating in a final deficiency in excess of €975,000. In their description of the affairs of the company itself, the respondents essentially say three things. Firstly, that the company encountered trading difficulties like others in the industry, secondly that they tried desperately to restructure it and they hoped, "like others in the industry" that it would recover; and thirdly that they retained Mr. Carr for a restructuring.
81. Having made these assertions, the respondents proffer no evidence as to what actions were taken to protect the interests of creditors of the company. Mr. Carr was retained in December 2013, some three months after the company had ceased trading. His focus was principally to negotiate with AIB across the entire exposure to that bank of all of the Blaneys. Those efforts failed when AIB appointed a receiver in May 2014. There is no evidence before the court of what was then done until the Revenue Commissioners intervened a year later with the presentation of the petition for the winding up.
82. I have taken into account also the failures to make annual returns in accordance with the Companies Act, failures to comply with tax obligations, breaches of s. 239 of the Act in relation to the directors' loan, and the continuance of trading whilst the company was insolvent. I am not persuaded that the evidence adduced by the respondents discharges the burden of establishing that they have acted responsibly in relation to the affairs of the company. Accordingly I shall make the declaration in the terms sought by the applicant.

The first named respondent

83. After addressing the substantive issues raised by the applicant, counsel for the first named respondent Mr. John Blaney informed the court in submissions that the first respondent is a postmaster. He submitted that if a declaration is made under s. 819 the respondent will lose this appointment with grave consequences for his livelihood.
84. Mr. Blaney refers to himself in his replying affidavit as a "shop manager". Counsel submitted that the post office is within the shop from which he carries on business.
85. It was fairly acknowledged by counsel that this matter was not in evidence before the court on this application. Having found on the evidence that the respondents have failed to establish that they acted responsibly in relation to the affairs of the company, this court has no discretion but to make the declaration of restriction (see Section 819(1) and (2)). The submission as to the status of the first respondent may be relevant if an application were ever made pursuant to the discretionary provisions of Section 822, which concerns relief from restriction.

86. Applications under section 822 are rare, but have been made in the past (see re: Ferngara Associates Limited; Robinson v. Forest (11 February 1999, Laffoy J.) re: Exnet Information Systems Limited; Higgins v. Stafford [2006] IEHC 289 and re: MDN Rochford Construction Limited; Fennell v. Rochford and Rochford [2009] IEHC 397. (all cited in Courtney: The Law of Companies, 4th Ed)
87. It would not be appropriate in this judgment to comment as to whether an application under s. 822 would have any prospect of success in the circumstances of this case, save for the following. Firstly, it seems to me to be unlikely that the mere fact of the first respondent being the holder of a position of post master would, without more, justify the grant of such relief. Secondly, it is questionable whether relief pursuant to s. 822 would, even if granted, prevent or mitigate the consequence referred to, which I understand from counsel's submission to be a consequence outside company law. Those questions and others, would fall for consideration on the hearing of any such application if it were made.

Declaration

88. I shall make a declaration that the Respondents shall not for a period of five years be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless that company meets the requirements set out in subsection (3) of section 819 of the Companies Act 2014.