THE HIGH COURT

[2022] IEHC 590
[2019 No. 351 COS]

IN THE MATTER OF O'CALLAGHAN TRADE FRAMES LIMITED (IN OFFICIAL LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT 2014

AND

IN THE MATTER OF AN APPLICATION BY AIDAN GARCIA DIAZ UNDER SECTION 842 OF THE COMPANIES ACT 2014

BETWEEN

AIDAN GARCIA DIAZ (AS LIQUIDATOR OF O'CALLAGHAN TRADE FRAMES LIMITED, IN OFFICIAL LIQUIDATION)

APPLICANT

AND

PETER O'CALLAGHAN AND KIERAN HYNES

RESPONDENTS

Judgment of Mr. Justice Quinn delivered on the 20th day of October, 2022

1. The applicant was appointed liquidator of O'Callaghan Trade Frames Limited ("the Company") by order of the court (Laffoy J.) made on 14 February 2011. He seeks a disqualification order against the respondents, who are directors of the Company, pursuant to s. 842 of the Companies Act 2014. That is an order disqualifying the respondents "*from being appointed to act as a director or other officer, statutory auditor, receiver, liquidator or examiner or being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of"* any company or friendly society or society

registered under the Industrial and Providence Societies Act 1893 – 2014 for such period as the court deems appropriate.

2. Section 842 identifies in subs. (a) to (j) ten grounds on which a disqualification order may be made. The applicant did not in his Notice of Motion or in his grounding affidavit identify which subsection was invoked by him.

3. At the hearing of this application counsel for the applicant stated that he was invoking s. 842 (d) which provides as follows: -

> *"(d) that the conduct of the person as promoter, officer, statutory auditor, receiver, liquidator or examiner of a company makes him or her unfit to be concerned in the management of a company".*

4. The grounding affidavit of the applicant sworn on 5 September 2019 describes the issues which are of concern to the applicant. I shall examine each of these in more detail later, but they may be summarised by reference to headings in the grounding affidavit as follows: -

(1) Difficulties progressing the liquidation by reason of conduct on the part of the respondents which the applicant describes as unhelpful, obstructive and "less than honest".

(2) Dissipation of the company's asset base in favour of a connected entity, and the operation and existence of a "phoenix" company.

(3) Monies owed to the company by its director.

(4) Misleading treatment in the company's financial statements of an investment bond.

(5) The issuance of credit notes and apparent diversion of company turnover.

(6) The position of the Revenue Commissioners.

(7) The company's overstated debtors' ledger.

(8) Increasing costs in the liquidation by reason of what the applicant describes as "entirely unnecessary remedial work".

(9) Failure to keep proper books of account.

5. Each of the respondents swore a replying affidavit on 10 January 2020 and the applicant swore a supplemental affidavit on 20 February 2020.

6. Nowhere in the applicant's grounding affidavit does he identify which of the subsections of s. 842 is invoked, and at the opening of the hearing counsel for the applicant stated that he was relying only on s. 842(d).

7. In para. 3 of his grounding affidavit the liquidator states as follows: -

"I say that during the course of my investigation it has become apparent to me that the directors have not discharged their duties in a manner which is either honest or responsible and <u>as such</u> these proceedings have become necessary". (emphasis added)

8. This paragraph is remarkable in that it reveals that the applicant approached this matter from the perspective of the test contained not in s. 842 for a disqualification order, but the test contained in s. 819 of the Act for the lesser sanction of a restriction order. Section 819 provides that a director of an insolvent company shall be subject to a restriction order unless he has satisfied the court of three matters:

(a) That he 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 the section.

9. The use of the phrase "as such these proceedings have become necessary" clearly indicates that the applicant considered these proceedings necessary in the absence of being satisfied that the respondents had acted honestly and responsibly, being the test applicable to s. 819. Disqualification proceedings do not "become necessary" by reason of the applicant concluding that the respondents did not act honestly and responsibly. They are warranted in a case where the applicant intends to go further than demonstrating an absence of honesty and responsibility on the part of the relevant respondents and prove one or more of the grounds identified in s. 842. Those grounds include such matters as respondents being guilty of fraud (subs. (a)), breach of duty (subs. (b)), the making of a declaration under s. 610 (personal liability for debts of the company (subs. (c))) or, the ground now invoked by the liquidator, namely "conduct which makes the respondent unfit to be concerned in the management of a company" (subsection (d)). Other grounds include certain findings of inspectors appointed pursuant to part 13 of the Act, repeated default in relation to statutory requirements, and repeated commission of offences. It is therefore incorrect for the applicant to state that these proceedings became necessary by reason of his view that the respondents had acted in a manner which was neither honest or responsible, which is not the test for s. 842.

10. This flawed approach on the part of the applicant permeates his affidavits when he makes repeated references to issues being a "source of concern", a phrase commonly used by liquidator applicants in restriction applications where the burden rests on the directors responding.

11. The submission of the applicant at the hearing was that the combined effect of the events described in the applicant's affidavits is that the court should declare the respondents to be persons unfit to be concerned in the management of a company and make the order sought. Although subs. (b) which concerns "breach of duty" is not specifically invoked by the applicant, it is noteworthy that nowhere in his affidavits does he identify any breaches of duty

on the part of the respondents, save for a passing reference in the grounding affidavit to breach of the statutory duty "to assist a liquidator in accordance with the Company Law Enforcement Act of 2001, being the legislation which was in place at that time".

12. As noted in numerous cases on the subject (see Re Newcastle Timber Limited, In Liquidation, and the Companies Acts [2001] 4 IR 586, and Re: Meridian Motors Limited, In Liquidation and the Companies Act 2014 [2021] IEHC 826), the burden of proof is entirely different for applications under s. 842 (disqualification) from that which applies under s. 819 (restrictions). On an application pursuant to s. 842 the burden rests on the applicant to prove the matters which he says would ground a disqualification order. By contrast, it is clear from the provisions of s. 819 quoted above that in restriction applications the onus is on respondent directors to prove that they have acted honestly and responsibly in relation to the affairs of the company, that they have cooperated with the liquidator and that there is no other reason why they should be subject to a restriction order if they are to avoid the making of a restriction order. That distinction appears to have been lost on the applicant.

Respondents' preliminary objections

13. The respondents submit that the applicant has failed to discharge the burden of proof.

14. The respondents submit that the evidence adduced by the applicant is variously selective, not probative, and in some cases based on hearsay and opinion evidence which is not admissible.

15. The respondents submit that there has been an absence of fair procedure in that they submit that they have had to meet this application without any prior notice as to which of the grounds under s. 842 are relied on by the applicant.

16. I shall consider the objections made regarding the evidence under the relevant headings below. However, it is important to note that the applicant's grounding affidavit was sworn on 5 September 2019, the respondents delivered replying affidavits on 10 January

2020 and the applicant delivered his supplemental affidavit on 20 February 2020. The hearing of the matter commenced on 7 February 2022 and resumed and concluded on 2 June 2022. There is nothing before the court to indicate that during the intervening two years after the affidavits were exchanged the respondents took any issue with the form of the notice of motion by reference to s. 842 or with the form of the affidavits. That does not preclude the respondents from making submissions in relation to the quality of the evidence at this hearing, but I cannot find that the respondents have been deprived of sufficient "particulars", albeit that this is not a plenary hearing, to understand the case which they had to meet.

Section 845

17. Subsections (1) and (3) of s.845 were the subject of extensive submissions, and I shall quote below the entire section.

18. Section 845

> *"(1) Where it is intended to make an application under section 842 in respect of any person, the applicant shall give not less than 10 days' notice of his or her intention to that person.*
>
> *(2) A disqualification order may be made on grounds that are or include matters other than criminal convictions notwithstanding that the person who is the subject of the order may be criminally liable in respect of those matters.*
>
> *(3) On 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."

19. At the hearing of this application, as part of the respondents' submissions, it was said that no notice as required by s. 845 (1) was ever given. It was submitted that this failure had

the effect of depriving the respondents of the right of due process and the right to properly defend their good name.

20. The applicant opposed this submission, but initially did not disagree with the assertion that no notice under s. 845 (1) had been given. Instead, he submitted that at no time since the commencement of the proceedings had this point been made, and that the respondents had sworn and delivered their replying affidavit, addressing the merits of the case without protesting the validity of the commencement of the proceedings by reference to s. 845 (1).

21. I directed that the parties make submissions at an adjourned hearing to address the question of the absence of a s. 845 Notice.

22. Between the first hearing and the adjourned hearing the applicant's solicitor, Mr Hunter-McGowan, swore and delivered, with the leave of the court, an "Affidavit of Service." This affidavit exhibited an exchange of letters from July 2019, none of which were before the court before the commencement of the hearing of the application. Most remarkably, this exchange commenced with letters dated 19 July 2019 (over eight years after the applicant's appointment) by the applicant's solicitor Messr. Kenny written to each of the respondents notifying them of the applicant's intention to issue disqualification proceedings. The letter was in the following terms:

> *"Dear Sir,*
>
> *We refer to the above mentioned matter and confirm that we are writing to you on behalf of the official Liquidator.*
>
> *We are instructed to institute disqualification proceedings against you as certain concerns have arisen in relation to the Company's affairs.*
>
> *The matters of concern in the liquidation and which we believe necessitates the bringing of disqualification proceedings are as follows:*

1. *We are instructed that you have failed to keep proper books and records for the Company.*
2. *We are instructed that you dissipated Company assets at undervalue.*
3. *We are instructed that you set up a "phoenix" company to take over the goodwill and assets of O'Callaghan Trade Frames at less than market value.*
4. *We are instructed that you have obstructed the liquidator in his investigations conducted as part of the liquidation proceedings.*
5. *We are instructed that you fraudulently raised credit notes and reclaimed VAT arising on some.*

We are writing to you today to outline these matters in relation to the Company's affairs and to afford you the opportunity to advance any mitigating factors which you believe may exist, and indeed rebut any assertions made above which you believe to be incorrect. Please note that in the event that you fail to reply to this letter within 10 days of today's date or fail to revert to us with satisfactory responses in relation to the questions posed, we have strict instructions to issue disqualification proceedings against you pursuant to Section 842 of the Companies Act 2014 without further notice.

Yours faithfully

Kenny Solicitors"

23. A number of questions arise in relation to this and other letters, but before leaving this letter I pause to note that the first paragraph requests responses "to the questions posed." The letter does not pose any questions.

24. It appears from the affidavit of Mr Hunter-McGowan that the respondents' solicitors Messrs. Hayden & Co. initially suggested that their clients never received the letters of 19 July 2019. They then corrected this assertion and apologised for the oversight because it

transpired that on 24 July 2019 they had replied to the letter of 19 July 2019 in the following terms:

> *"Dear Sirs,*
>
> *We refer to yours of the 19th inst. addressed to our client, a copy of which has been passed to us for reply.*
>
> *We note you call on our client to reply to the said correspondence rebutting allegations therein. Your said correspondence is entirely devoid of any details regarding the allegations against our client. It is entirely inappropriate that you should issue such correspondence containing serious allegations without at least setting out the basis upon which those allegations are being founded. Our client is unable to reply to your correspondence in any meaningful way in light thereof.*
>
> *We would ask that you at least afford our client the courtesy of detailed (sic) what exactly is alleged here.*
>
> *We await hearing from you.*
>
> *Yours faithfully*
>
> *Hayden & Co."*

25. The applicant never replied to Messrs Hayden, and the next event was that on 24 September 2019 this application was issued, grounded on an affidavit of the applicant sworn 5 September 2019, and returnable for 11 November 2019.

26. For a better understanding of the state of the correspondence preceding the commencement of these proceedings, it is pertinent to refer also to events of 2011 and 2012.

27. The applicant was appointed liquidator by order of the High Court on 14 February 2011. Following his appointment, he appears to have engaged with the respondents in relation to matters the subject of his investigation. There has been exhibited a limited selection of correspondence between the applicant and the respondents and their solicitors

and the former auditors to the company on various dates during 2011 and 2012. The last item of such correspondence is a letter dated 7 December 2012 from the applicant to Messrs Hayden & Company, solicitors for Mr. O'Callaghan concerning Mr. O'Callaghan's directors loan account.

28. It appears from the exhibited correspondence that in March 2012 the applicant brought an application for an order pursuant to Section 236 of the Companies Act 1963 directing the respondents and others to deliver up to the applicant all "books, records, cheque and lodgement records relating to the company." None of the affidavits in that application are before the court on this application and the exhibits include only the draft of the Notice of Motion showing a return date of 23 April 2012. It appears from this very limited correspondence that this motion was disposed of by an agreement or undertaking and an order for costs. Importantly, the correspondence includes a letter written on 16 October 2012 by the applicant himself to Messrs Hayden. This letter relates to contentious exchanges between the parties in which, *inter alia*, the respondents had accused the liquidator of negligence. For present purposes, the pertinent paragraphs of this letter are as follows:

> *"I would like to point out to your office that my office is (under the mandatory reporting requirements of the Company Law Enforcement Acts of 2001) required to send periodical reports to the ODCE. This is obligatory. I will also state that the bringing of s. 150 proceedings against the director of an insolvent company is also mandatory. The ODCE will only relieve a liquidator of his statutory obligations if the liquidator can demonstrate to the ODCE's satisfaction that the directors of an insolvent company have conducted their affairs free of dishonesty and irresponsibility. I will also bring to your attention that the Office of the Director of Corporate Enforcement in (sic) unlikely to grant a liquidator relief from his statutory obligations where it can be shown that a director has failed to co-operate with a liquidator.*

To date, your clients have offered little to progress the liquidation save for severely deficient books and records, (which is a breach of Section 202 of the Companies Acts) (sic) and a point blank refusal to engage with the liquidator in relation to almost all queries raised within the liquidation. Furthermore, where responses have been offered in relation to events within the Company, each version offered by your clients has been shown to be less than factual and have been subsequently followed by revisions, with each revision conflicting the last.

Clearly should this continue my office will have little option other than to bring the required proceedings against your clients. I would therefore for the final time request that your clients engage with this process and deal with all outstanding requests in a timely and honest manner.

Yours faithfully

For and on behalf of

O'Callaghan Trade Frames Limited

(In Liquidation)

Aidan Garcia Diaz

Official Liquidator."

29. The respondents are critical of the tone of this and other correspondence and it is clear that the engagement on all sides was contentious at the outset. This is not unusual where a liquidator has been appointed on foot of a creditor's petition. But in all the badly presented and non-sequential exhibits, there is no reply to the applicant's letter of 16 October 2012 or any follow up by the applicant. Apart from occasional selected letters on individual subjects, the next letter referencing or threatening proceedings is Mr. Kenny's letter of 19 July 2019, almost seven years later.

30. In summary, on 16 October 2012 the applicant warned the respondent, "for the final time" that he would have "little option other than to bring the required proceedings…", which he described as restriction proceedings pursuant to s. 150 of the 1990 Act. Then nearly seven years later, on 19 July 2019 he wrote informing them of his intention to bring a disqualification application. When the respondents' solicitor replied to that letter on 24 July 2019, he never received a reply and this application was issued on 24 September 2019.

31. Whilst this correspondence is all very unsatisfactory, the first question I am required to decide is whether the applicant has complied with the requirement in s. 845 (1) to give notice of his intention to bring the disqualification application, and if I find that he has failed to comply, what is the consequence.

32. It is clear from the reported cases concerning s. 160 (7) of the Companies Act 1990, which is the predecessor of s. 845 (1), that the requirement to give notice of intention to commence disqualification proceedings is not a mere formality, but a substantive requirement, and failure to comply will nullify the proceedings.

33. No reported case has been brought to the court's attention concerning the notice requirement in the context of a liquidator's application. The question has been considered in a number of judgments relating to applications for disqualification orders brought under s. 160 of the Companies Act 1990 (the predecessor of s. 842) by the Director of Corporate Enforcement (*Director of Corporate Enforcement v. Byrne* [2010] 1 IR p. 222; *The Director of Corporate Enforcement v. Walsh* [2016] IECA 2) and by shareholders (*Permanent TSB PLC & Ors v Skoczylas & Ors* [2013] IEHC 42; [2019] IESC 78).

Permanent TSB v. Skoczylas

34. The most extensive consideration of this question was made in *Skoczylas*. Mr. Skoczylas and other shareholders in Permanent TSB Group Holdings plc initiated a series of proceedings challenging steps being taken in a restructuring and recapitalisation of

Permanent TSB and its holding company. In the course of the pending proceedings Mr. Skoczylas caused notices to be served on a number of parties who were defendants and respondents in his proceedings referring to intended disqualification applications. It is relevant to note the terms of this notice:

> *"Notice pursuant to s. 160 (7) [predecessor of s. 845 (1)] of the Companies Act 1990"*
>
> > *Section 160 (7), of the Companies Act 1990, states: -*
> >
> > *When it is intended to make an application under subsection (2) in respect of any person, the applicant shall give not less than ten days' notice of his intention to that person.*
>
> *Take notice that, as part of the intended proceedings in the High Court,* inter alia*, against you as a former director, the undersigned members of Permanent TSB Group Holdings plc (formerly Irish Life and Permanent and Group Holdings plc) intend,* inter alia*, to seek relief against you pursuant to subsection 160 (2) of the Companies Act 1990."*

35. Permanent TSB PLC and a number of current and former directors of that bank applied for and were granted by Cooke J. an interlocutory injunction to restrain the initiation by the defendants of applications under s. 160 for orders disqualifying them as company directors. The defendants appealed and the injunction was upheld by the Supreme Court.

36. Cooke J. found that the giving of not less than 10 days' notice in a form which is adequate and valid for the purpose of subsection (7) [now s. 845 (1)] is a necessary precondition to the making of any admissible application under the section. He cited Fennelly J. in *DCE v. Byrne* where he said:

> *"The [Notice] provides him with an opportunity to respond, as he did in the present case. This provision illustrates the general principle that any person*

who is to be the subject of an application under the section must be given clear notice of that fact and of the grounds on which the application is to be made."

37. Cooke J. noted that in 'Byrne' there had been given a 10 day notice containing detailed particulars as to the basis for the intended application, and continued:

"That is in stark contrast to the notices quoted above at paragraph 5 of this judgment. No grounds are set out and no indication is given as to which of paragraphs (a), (b), (c) or (d) of subs. (2) under which a member of a company can bring an application, were to be relied upon or to form the basis of the charges against the director-plaintiffs. Having regard to the statement of Fenelly J. quoted above and to the importance attached by the Supreme Court to the serious nature of the misconduct required to justify making a disqualification order under the section, the Court is satisfied that it is strongly arguable that a notice under sub-section (2) must contain an accurate if minimal identification of the grounds of the proposed application if the mandatory pre-condition of ss. (7) is to be fulfilled…"

It is clearly necessary that the ten days' notice should particularise the grounds by, at the very least, referring to one or more the paragraph headings (a) – (d).

38. The court rejected arguments by the defendants that the plaintiffs would have known well from extensive prior correspondence and from grievances and claims canvassed in earlier litigation what the basis of a disqualification application would be. He found that the purpose of the statutory notice is to enable the recipient to tell from it the grounds he or she is likely to face and to have to answer.

39. Cooke J. referred to the reliance placed by the defendants on previous correspondence and found that to be misplaced. He referred to previous letters written by the defendants and appendices running to hundreds of pages and said:

> *"…the sheer volume of that material and the vast range of the issues raised and allegations made, rendered it more rather than less imperative that any notice given under ss. (7) identify the actual grounds relied on."*

40. Apart from that content of the Notice, the *Skoczylas* case involved a number of other issues, including a doubt as to whether the defendants were giving notice of a "genuine and fully formed or settled intention to initiate the statutory procedure."

41. O'Donnell J. (as he then was) delivered the Supreme Court judgment upholding the injunction granted by Cooke J. He noted the following observations relevant to this case:

> *"… it would make little sense to have a requirement of notice of the fact of proceedings without giving some indication of the circumstances relied upon, including the relevant sub-paragraphs of s. 160 (2) of the 1990 Act. As Fennelly J. observed in the extract already quoted, the giving of at least ten days' notice to the person of the intention to apply for a disqualification order provides the person "with an opportunity to respond", as indeed occurred in that case.*
>
> *"It should be said that no particular formality is prescribed by the section or required by an interpretation of it consistent with the general obligation of fairness. As already discussed, in many cases, the application will follow on from a detailed factual dispute and the degree of detail required in any s. 160 (7) notice may not be extensive. However, <u>in a case such as this</u> I have no doubt that the plaintiffs had established a strong prima facie case that a notice under s. 160 (2) was required to contain more than a notification that*

proceedings would commence, to identify the relevant subsections of s. 160 (2) and to identify, at least in general terms, the matters relied upon."

42. As to the effect of a defective notice, O'Donnell J. was very clear in his view that it would nullify the proceedings:

"In this case, given the importance that Irish law generally accords to fair procedures and the good name and reputation of citizens, I can see no reason to think that the Oireachtas considered the notice requirement to be trivial or unimportant. Section 160 of the Act as originally drafted, and as it subsequently evolved, was an amalgam of a number of different parts, which meant that an application for disqualification could be brought in very different circumstances, and even by different applicants. Furthermore, since the application could have a very significant consequence for an individual's career, livelihood and reputation, it is unsurprising that some formal and precise steps were required. Accordingly, I would conclude that there is no reason to depart from the general principle that nullification was the natural and usual consequence of disobedience to a formal requirement of the statute. Looked at from the other perspective, why should the Oireachtas have included the requirement of notice if non compliance with it had no effect? That is particularly so given the fact that the consequence of such nullification would not prevent the bringing of an application which was properly notified. Accordingly I agree with the conclusion of Cooke J. that the deficit in the s. 160 (7) notices delivered meant that any proceedings commenced would in turn be defective and invalid."

43. The effect of this judgment is that if no notice is given pursuant to s. 845 (1) or if a notice is given which is not valid or effective to fulfil the requirement of that subsection,

proceedings issued pursuant to s. 842 will be a nullity, which in turn means that they are not properly before the court and the court has no jurisdiction to make a disqualification order.

44. The section makes no distinction between categories of applicants. I see no basis on which this requirement would not apply as much to a liquidator as to any other applicant.

Application of s.845

45. Later in this judgment is my analysis of the evidence in this case. I have found that the applicant has not discharged the onus of proving the grounds for a disqualification order. At first pass, this would mean that I do not need to decide whether the letter of 19 July 2019 constitutes a valid notice for s. 845 (1). However, the question is still relevant because, applying Skoczylas, an invalid notice is no notice and the proceedings are a nullity. The respondents submit that this means that the court has no jurisdiction at all pursuant to s. 842 and therefore that the discretion to impose the lesser sanction of restriction conferred by s. 845 (3) does not arise.

46. The respondents also submit that s. 845 (3) means that only where a court finds that there are grounds for disqualification, does it have discretion in the circumstances of a given case to impose the lesser sanction of a restriction order.

47. In Skoczylas multiple allegations and claims were made against the plaintiffs in various letters and various court proceedings. The defendants served a warning notice pursuant to s 160 (7) without giving any indication whatsoever of the grounds of complaint which would be relied on for a disqualification. It was this total absence of reference to grounds which Cooke J. found rendered the notice ineffective.

48. The judgments of Cooke J. and O'Donnell J. refer variously to requirements to state the grounds to be relied on "or at the very least, referring to one or more the paragraph

headings (a) – (d)" (emphasis added), which are the subsections of s. 160 which outline the categories of conduct which would warrant a disqualification.

49. The letter of 19 July 2019 cited five issues which the applicant stated he believed "necessitate the bringing of disqualification proceedings." The five issues are at the centre of the application which was ultimately issued. The only issue identified in the applicant's grounding affidavit and which is not referred to in that letter is the reference to the misleading treatment in the financial statements of the value of an investment bond. The letter is minimal in its content, but it identifies the core issues on which the applicant relies in the proceedings. I find that the letter of 19 July 2019 is a notice meeting the requirement of s. 845 (1).

50. In circumstances where the respondents' solicitor replied on 24 July 2019 to the letter of 19 July 2019 requesting further detail, there is an argument that the failure of the applicant to reply to that letter undermines the purpose of the notice, as emphasised by Fennelly J. in Byrne, namely to afford the respondents the opportunity to address the issues raised. However, I am not persuaded that the obligation in s. 845 (1) to give notice extends, in a case where grounds for the intended proceedings are stated in the notice, to an obligation to respond to questions put by the respondents before proceedings can be validly commenced. The failure to do so may have consequences as regards costs, but it does not invalidate the notice.

51. The court is faced with the following:

(a) on 16 October 2012 the applicant warned the respondents that if their conduct continued he "will have little option other than to bring the required proceedings (detailed in the letter as restriction proceedings)" against them.

(b) on 19 July 2019 the applicant warned the respondents that he intended to bring a disqualification application, giving no explanation to this court as to what has changed to elevate the matter from a restriction case to a disqualification case.

(c) on 24 July 2019 the respondents requested details of the matters cited in the the letter of 19 July 2019

(d) the applicant never replied to the letter of 24 July 2019 and commenced these proceedings on 24 September 2019.

52. It was only after this court adjourned the matter and directed submissions on the question of s. 845 that the letters of 19 July 2019 and 24 July 2019 came to light. Having originally submitted that no s. 845 (1) notice has been given, the respondents then altered their submission to claim, in what I describe as a "fall back" that the letter of 19 July 2019 was not a valid notice for the purposes of the section. I am not impressed with that submission and reject it.

53. The objection by reference to s. 845 (1) was never made by the respondents until their closing submission at the hearing of the application, replying affidavits having been delivered two years earlier addressing the merits of the application.

54. For his part, the liquidator has not explained either what happened between 2012 and 2019 or why he never replied to the respondents' letter of 24 July 2019.

55. The correspondence in this case does no credit to either party. At this stage no more needs to be said about the correspondence and the conduct of the respective parties. I have found that the letter of 19 July 2020 meets the requirements of s. 845 (1). Therefore, the court has jurisdiction to consider the evidence.

Delay

56. The respondents submit that they have been prejudiced by delay on the part of the applicant in bringing this application eight and a half years after his appointment. There is force in their submission, although it is rooted not so much in prejudice, but in their complaints about the progress of the liquidation generally. The court would be sympathetic to the claim of delay, were it not for the fact that there is evidence before the court of direct

obstruction of the liquidation continuing at least up to 2017. On 17 May 2017 the second respondent took it upon himself to write a letter to a third party contractor, Warrenhill Contractors, purporting to confirm on behalf of the company that there were no monies due to the company by Warrenhill at the date of liquidation. This event is considered further at paragraphs 121 and 122 below. It is only one of a number of unexplained acts of the respondent, but it illustrates a level of obstructive conduct persisting more than six years after the appointment of the applicant. In the light of such conduct, I am not persuaded that it is appropriate to preclude this application on the ground of delay.

Hearsay and Opinion

57. When considering the evidence in relation to individual allegations I shall consider the particular objection concerning hearsay and opinion where relevant. This question was considered in the context of disqualification cases by Irvine J. (as she then was) in Re: Bovale Developments Ltd. (The Director of Corporate Enforcement v. Bailey & Anor) [2007] IEHC 365. In that case, a preliminary application was made, and orders granted directing the exclusion from grounding affidavits of certain elements of the evidence put forward by the applicant. Two important points emerge from that judgment of relevance to this case.

58. Firstly, Irvine J. quoted the provisions of O. 40, r. 4 of the Rules of the Superior Courts as follows: -

> *"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall not be allowed".*

Irvine J. continued: -

"Order 40, r.4 appears almost mandatory in its terminology when referring to non-interlocutory matters and seems to be designed to ensure that there is no falling short of proper evidential proof when proceedings are to be disposed of on affidavit rather than by way of oral evidence".

59. Although this application, like most applications pursuant to s. 842 of the Act, has been heard on affidavit, it is essential that the provisions of O.40, r. 4 are observed, in particular the prohibition on hearsay evidence.

60. Secondly, in Bovale Developments it was argued that the application to curtail the evidence admissible by affidavit was premature. The court found that: -

" . . . the appropriate time for a party to object to the admissibility of evidence in an affidavit supporting proceedings brought by way of originating notice of motion is the time at which that affidavit is delivered".

61. In this case, the applicant's grounding affidavit was sworn on 5 September 2019. The respondents delivered replying affidavits on 10 January 2020, and a supplemental affidavit was delivered by the applicant on 20 February 2020. Thereafter, no application to exclude evidence was ever made, although in relation to at least one of the allegations, the first named respondent made the point in his replying affidavit (para. 19) that parts of the allegations concerned contained hearsay. One of the fair criticisms which the applicant has made of the respondent's replying affidavits is that they contain substantive tracts of submission as opposed to evidence. The observation concerning hearsay is such a submission, but it reveals that the respondents were alert to the question of hearsay but took no steps to move to exclude any of such evidence. I shall nonetheless consider the application of the rule against hearsay when considering the individual aspects of the evidence.

62. I now turn to the grounds relied on by the applicant.

Difficulties progressing the liquidation

63. The applicant says that from the outset the respondents have been unhelpful, obstructive and "less than honest" in their dealings with him as liquidator. He says "this has been a source of frustration and has entirely unnecessarily added to the costs of the liquidation and the time taken in relation to same".

64. The applicant refers to his first visit to the Company's premises and he states that he found there a fully functioning and stocked factory that bore the name O'Callaghan Trade Frames and which was staffed with employees, although he does not say whose employees they were. He says that neither of the respondents were present on the day of his first visit but that he later found out that the entity which was operating on the date of his visit was not the Company but a different entity Deerpark Windows Gateway Limited ("Deerpark"). The directors of Deerpark were the second named respondent and Anthony Grehan. Mr. Grehan was a former employee of the Company. It is said that the shares in Deerpark were held or controlled by the second respondent and by Mr. Grehan. The applicant continues: -

> *"The circumstances giving rise to Deerpark's occupation of the premises and trade from same were a source of concern, with subsequent events, which I deal with later on in this affidavit, showing such concerns to be well founded".*

65. The applicant states that on the 9th March 2011 he spoke with the second respondent. He said that the second respondent initially informed him that there were no books and records of the Company and that they all had been washed away in a flood which occurred in and around November/December 2008. The applicant states that this statement had to be untrue because audited accounts for the year 2008, being the last year in respect of which financial statements were produced, were produced in 2010. The applicant says that this would not have been possible if books and records for prior years including 2008 had been lost in the flood. The applicant says that when he pointed this fact out to the second

respondent Mr. Hynes rescinded the previous statement and stated that he would produce books and records within a week. The applicant said that this did not occur.

66. The applicant then states that correspondence was entered into between him and his solicitors and the directors. He exhibits a selection of this correspondence and he refers also to the motion which was brought pursuant to s. 236 of the Companies Act 1963 seeking to compel the directors to deliver to him books and records of the Company. None of the affidavits in relation to that application are before this court. It appears from the correspondence exhibited that this application was commenced in March 2012 and it was disposed of in by 2012 an agreement to hand over records and the making of an order for costs against the respondents, which costs the applicant says have never been discharged.

67. The applicant continues: -

> *"Having regard to correspondence laid before the court the directors extremely belatedly handed over additional documentation. I also say, forced as I was to institute proceedings for books and records, costs were awarded against Mr. Hynes and Mr. O'Callaghan personally in relation to this matter. I therefore say there is little doubt that the directors have been less than helpful and their unwillingness to cooperate with the official liquidator left them in breach of their statutory duty (as directors of an insolvent company) to assist a liquidator in accordance with the Company Law Enforcement Act of 2001, being the legislation which was in place at that time".*

68. The applicant says that a week after his initial conversation with Mr. Hynes he met Mr. Hynes on 18 March 2011 to collect books and records of the company and to discuss other issues. The applicant says that the books and records provided were in a poor condition, loose leaf and "in no chronological order and were covered in builder's dust. The books and records were also totally deficient". The applicant exhibits photographs of the books and

records with which he was provided. The photographs exhibited are poor illustrations of bundles of documents apparently in bags or boxes.

69. These allegations are denied by the respondents. They say that from the very outset of the liquidation the applicant acted in a confrontational and accusatory manner.

70. The respondents also say that they were not appraised of the status of the liquidation "in any shape or form and that the liquidators acted in a manner which has been oppressive".

71. The respondents refute all the allegations contained in the grounding affidavit. They make a particular allegation that the applicant during the course of the liquidation ignored his duties and obligations regarding the pursuit of debtors of the Company which they claim would have secured sufficient funds to discharge the claims of all creditors.

72. It appears that from an early stage of this liquidation the relationship between the applicant and the respondents has been contentious. The allegation made against the liquidator regarding the pursuit of debtors is denied by the liquidator and I shall return to that subject in the context of the treatment of debtors below.

73. Neither party has placed before the court the full sequence of correspondence from the date of the liquidator's appointment onwards. The court does not expect to see every single item of correspondence between a liquidator and the directors. However, the court has not been given any account of what transpired after 2012 in terms of exchanges between the parties. The selective correspondence exhibited by each of the parties and the contradicting averments on the subject leave the court in no position to adjudicate on this application as to very general allegations made as between them regarding their respective conduct, and whether the exchanges between them were unnecessarily confrontational.

Dissipation of the company's asset base in favour of a connected party

74. The applicant states that the accounts of the Company had for all relevant years included reference to an asset base including plant and machinery, as one would have

expected to see in a window and door manufacturer. The applicant says that on his appointment he could not find any plant and machinery. He says that over the course of conversations with Mr. Hynes he was given three different versions of what happened to the plant and machinery.

75. The applicant says that Mr. Hynes initially informed him that the Company's machinery had been washed away in a flood in 2008 (although elsewhere the flood is referred to as having occurred in 2009). He says that in further conversation Mr. Hynes informed him that a person had come and taken all of the machinery away "for free".

76. The applicant says that in response to these statements, he furnished to Mr. Hynes a report by a company called CPD Machinery Sales Limited which he says reflected their attendance at the premises of the company for the purpose of repairing machinery on 2 June 2010. He says that when he produced the report and invoice of CPD Machinery Mr. Hynes immediately changed his position and stated that the machinery had been sold to Deerpark "lock stock and barrel". He said that the machinery was to be found at the premises of the Company (leased from the first respondent) but now is in the ownership of Deerpark.

77. The note from CPD Machinery Sales Limited as exhibited is a very poor quality copy of a document described as an "Engineer Report" dated 2 June 2010 which states: -

> "*Arrived onsite reinstalled saw, levelled and calibrated bearings gone on 3 hand welder* [illegible] *4-hand welder replaced* [not legible]".

78. The evidence produced by the second respondent of the sale of the equipment to Deerpark was in the form of an invoice addressed to Deerpark dated 28 June 2010 described as follows: -

> *"Amount due in respect of flood damaged plant and machinery and fixtures and fittings including flood damaged computers, fax machine* (illegible), *Forklift – 1999 Sprinter van".*

The total amount of the invoice was €3,350 together with VAT making a total of €4053.50.

79. The second respondent denies that he ever said that the machinery had been "washed down the street". He says that the reference to the machinery having been "taken away" was a reference to the fact that the machines were brought to a warehouse for assessment at the request of the insurance company assessor. He says that the relevant machines were effectively "condemned" by the insurance company and that the company subsequently received the insurance monies in relation to them which were lodged at the company's account. He says that thereafter the relevant machines were purchased by Deerpark at a time when the machines had been written off in terms of value and that Deerpark had to expend considerable sums of money to have the machines working again.

80. The applicant says that he has evidence to the effect that an inventory of machinery was taken on 21 January 2010 by CPD Machinery identifying 30 items, including for example the three head welder and the four head welder referred to in the "Engineer Report". He said that he also received from a Mr. Gerry Power of CPD Machinery a statement to the effect that the four head welder is worth about €10,000. He asserts that this proves that the relevant machinery was on the premises in January 2010 in working order and was later given to Deerpark for the mere sum of €4,053.50. He states that this was a transaction at undervalue.

81. The evidence on which the applicant relies for this is an email from Mr. Power of CPD to a "Mr. Paul McCarthy", who I infer to be a member of the applicant's staff, forwarding a copy of an email or letter given to the first respondent on 21 January 2010 listing the 30 items and stating as follows: -

> "*Dear Peter, further to my recent visit please accept this list of machinery. (Item nos. 1 – 30 listed).*

Trusting this is to your satisfaction. Should you require any further information please do not hesitate to contact my office?

Signed

Mr. Gerry Power

Sales Director

CPD Machinery Sales".

82. On the subject of value, the applicant exhibits an email dated 13 May 2011 which he received from Mr. Power, (in response to an earlier email from the applicant himself, which is not included in the exhibited exchange), stating as follows: -

"*Hi Aidan,*

The three head welder is not worth anything. The 4 head welder is worth about €10,000.

Regards,

Gerry".

83. The full context of the emails which the applicant received from Mr. Power is not explained or described. The communication of 21 January 2010 is nothing more than a list and is not evidence that the itemised equipment was at the premises in January 2010 or on any other date.

84. Insofar as the applicant relies on Mr. Power's email of 13 May 2011 quoted above, this cannot be regarded as evidential as to value. It is a comment made by Mr. Power to the applicant in response to a question which has not been shown to the court.

85. The attempt by the applicant to rely on these communications as the evidence grounding his allegation of a transaction at an undervalue is in breach of all of the requirements of O. 4, r. 4 for admissible affidavit evidence and bears no scrutiny.

86. As regards the allegation that three different explanations for the absence of plant and equipment were given in conversations between the applicant and the second respondent the court is presented with affidavits giving two wholly contradictory accounts of the conversations and no other evidence. The applicant has exhibited his own typed attendance note of the discussions, but they are simply quoted in his affidavit and are not probative.

The operation and existence of a phoenix company

87. The first observation made by the applicant to support this allegation is to refer to the fact that Deerpark "had taken over the trade and asset base" of the Company "at undervalue". He says as follows: -

> *"I say that the existence of Deerpark Windows Gateway Limited is in fact a phoenix company which has stepped into the shoes of O'Callaghan Trade Frames and had taken over its trade and asset base at undervalue and in other cases at all for no consideration whatsoever. I further say that this assertion is supported by the prima facie evidence which exists showing the machinery base to have been transferred at less than market value and the fact that Deerpark moved into the premises of O'Callaghan Trade Frames who, as advised by solicitors acting for Mr. O'Callaghan operated via a verbal lease over same without paying any consideration for same. I also say that Deerpark took over the phone number of O'Callaghan Trade Frames and client listing and began to manufacture and produce windows and doors in exactly the same fashion as O'Callaghan Trade Frames previously had. I say that in fact what occurred was simultaneously to the cessation of trade of O'Callaghan Trade Frames, Deerpark Windows Gateway began to trade using the entire asset base, including machinery and stock along with the goodwill of O'Callaghan Trade Frames without adequate consideration passing for same".*

88. These allegations are denied by the respondents. Before considering their affidavits, I pause here to observe that the applicant says that his assertion "is supported by the prima facie evidence which exists . . .". This is not an interlocutory or interim application. It is the final determination of an application for disqualification orders. Under no circumstances could the court contemplate the making of such an order based on "prima facie evidence".

89. When the applicant says that Deerpark began to trade using the entire asset base "simultaneously to the cessation of trade of the Company" he does not say when this occurred and offers no evidence to support the allegation of a simultaneous commencement of trade.

90. The allegation is addressed in para. 17 of the first respondent's affidavit. He says that the building owned by him: -

> *"was always going to be utilised for the purpose of my trade and it is unrealistic to envisage that I was going to open a different business at that premises. Deerpark windows did not take over any customers of O'Callaghan Trade Frames. There were no orders on the books of O'Callaghan Trade Frames at that time. The country was at the height of recession. During the latter months of trading, O'Callaghan Trade Frames was little more than a debt recovery business. The window trade is not conducive to repeat custom as products would normally have lifespan in excess of 20 years. Any builders on the books of O'Callaghan Trade Frames at that time had gone out of business or were not actively trading. The fact that the phone number was not changed was an oversight on my part and again the foregoing facts apply with regard to business activity and that time".*

91. The acknowledgement by the first respondent that the building was always going to be utilised for the purpose of "my trade" is suggestive of the continuance of the business or trade of the Company.

92. The evidence gives rise to a suspicion of a "phoenix" activity in that the second respondent is a shareholder in Deerpark and his fellow shareholder and director in Deerpark is a former employee of the company. However, in light of the onus of proof which rests on the applicant, his reliance on the very weak and piecemeal evidence which I have considered earlier, particularly with reference to plant and machinery, is misplaced.

93. The first respondent has also sworn that he no longer acts as a company director, officer, or promoter of any corporate entity and that he does not have any interest in "a phoenix company as is alleged". The applicant has not advanced evidence to contradict those sworn statements.

The existence of monies owed to the company by its director

94. The applicant says that the Company is owed money by the first respondent and he exhibits a director's loan reconciliation and certain correspondence on the subject. The director's loan reconciliation shows an opening balance for the year 2010 of €9,682.17 owed to the Company by the first respondent. The loan account contains a number of entries which include an amount *("Received from insurance claim re flood damage to Peter's building: €74,000 ???".)*

95. A number of other entries are made and the closing balance shows Mr. O'Callaghan as a creditor of the Company for a sum of €24,525.78. The applicant states that the sum of €74,000 received from the insurance company was on foot of an insurance policy in the name of the Company and that it was the company which paid the premiums. He refers to correspondence from the first respondent's solicitor confirming that the Company occupied the premises "on a full repairing and insuring basis" meaning that the Company was obliged to expend insurance monies towards the repair of the building. The applicant states that it was inappropriate that the first respondent's director's loan account should be credited with the sum of €74,000 and that if the account is adjusted by deduction of that lodgement the balance

owing by the first respondent to the Company, after reflecting other entries during the course of the year 2010 is a sum of €49,474.22.

96. The first respondent exhibits a letter from his solicitors Messrs. Hayden & Co. to the liquidator dated 11 July 2011 which states :

> *"You will be aware that Mr. O'Callaghan is the owner of the premises and approximately €75,000 of the insurance claim was in respect of damage to the said premises. At the time that this money was received Mr. O'Callaghan had a director's loan with O'Callaghan Trade Frames. €75,000 was lodged into the account of O'Callaghan Trade Frames Ltd., account no. 86414281 on 24 March 2010. A portion of the €75,000 which was belonging to Mr. O'Callaghan was used to clear the director's loan. The balance of monies remained in the account of O'Callaghan Trade Frames. In the circumstances, Mr. O'Callaghan remains a creditor of O'Callaghan Trade Frames in the sum of approximately €24,526".*
>
> (Emphasis added)

97. This is the full extent of the evidence proffered by the parties on this subject.

98. Counsel for the first respondent submitted that because he was the owner of the building and because the Company was under an obligation to repair the building and to apply the proceeds of the insurance claim for that purpose, it was appropriate to treat the monies which were paid out by the insurance company as the first respondent's money and therefore that the lodgement to the Company's account could be properly applied against and the director's loan account.

99. Counsel for the applicant properly and correctly submitted that this is to ignore the separate legal personality of the company from the affairs of the first respondent. In circumstances where the company was the tenant and occupier and the insured party there was no basis for the crediting of that amount against the director's loan account.

100. In light of the foregoing it was not appropriate for the director's loan account to be credited by this payment. Insofar as the exhibited reconciliation of the director's loan account treated that payment as such a credit, it purported, wrongfully, to conceal the balance owed to the Company by the first respondent.

Investment bond

101. The applicant says that the Company had historically invested in a bond via its bankers PTSB. The value of the original investment was €500,000. He says that in the years leading up to the insolvency the value of the bond decreased dramatically.

102. The unabridged financial statements for the year 2008 include in the description of "current assets" the "property portfolio bond" at a sum of €500,000.

103. Note 9 to those financial statements reads as follows: -

> *"This is an investment in Irish Property Fund Series 8 through Irish Life and is stated at cost. The Market Value at the Balance Sheet date was slightly higher than this but it has fallen significantly since then and is now worth approximately 40% less than the initial investment"*.

104. Note 15 reads as follows:

> "*TSB holds an Irish Life Investment Bond and a Letter of Guarantee signed by Peter O'Callaghan and Kieran Hynes for €310,000*."

105. The accounts filed at the Companies Registration Office were the abridged accounts for the same year but do not contain these notes.

106. The applicant says that in this important respect the accounts filed and therefore available to creditors and counterparties of the Company are misleading for two reasons. Firstly, the value of the bond has been reduced by approximately 40%. Secondly the bond itself is subject to a lien in favour of TSB Bank.

107. The applicant says that the failure to disclose in the publicly filed accounts the reduction in value and the fact that the bond is subject to a lien means that the filed accounts were misleading.

108. This matter is addressed briefly in the replying affidavit of the first respondent where he refers to the fact that the value of such an investment "can either rise or fall dependent on market conditions". This is to ignore entirely the point of the applicant's complaint namely that the filed accounts do not reflect the true position as to the value and availability of this asset.

109. The applicant states also that he has been informed by the petitioning creditor in this matter, Profile System Holdings, that when they became concerned about the extent of their exposure to the Company, they were given assurances that this bond remained in force and was available for the benefit of the Company's creditors. The amount recorded in the statement of affairs as due to Profile Systems was €191,367. They are by a clear margin the largest creditor of the company. I accept the objection made by the respondents that this particular element of the complaint is hearsay.

110. In submissions, not grounded by averments in any affidavit, counsel for the respondents said that insofar as the filed accounts did not disclose these limitations, this was an error by the auditors. I cannot accept such a justification, and it is clear that the respondents permitted the filing of accounts which were misleading as to the availability and value of this asset.

The issuance of credit notes and apparent diversion of company turnover

111. The applicant states that in the year 2008 credit notes were issued by the Company for amounts totalling €501,089.20. He says that the turnover during that year stood at €1,880,958 and therefore the credit notes represented almost 27% of the company's turnover for that year. He says that this is outside any industry norm.

112. The applicant then focuses on credit notes granted to "Warrenhill Contractors". One credit note was issued to Warrenhill in May 2008 for a sum of €156,174.88 and a second to Warrenhill in November 2008 for €56,750, making a total of €212,924.88.

113. The applicant states that when he spoke with the second respondent on 18 March 2011 and inquired about this, Mr. Hynes stated that Warrenhill had requested these credit notes and requested that another entity be invoiced instead. These credit notes were issued but the respondents have failed to identify the entity which was to be invoiced in place of Warrenhill.

114. The applicant corresponded with Warrenhill and was informed by it that there were ongoing issues with the quality of window and door installations.

115. The applicant also corresponded with the auditors to Warrenhill who stated that they could find no reference to or evidence of their client having received the credit notes.

116. The applicant says that he has repeatedly corresponded with the respondents, with Warrenhill and with their auditors and has received only contradictory and unsatisfactory responses.

117. The respondents in their replying affidavits stand over the explanation initially given to the applicant to the effect that Warrenhill had requested that a different party be invoiced. However, they did not provide the identity of that party.

118. During the hearing counsel for the respondents informed the court that he had instructions as to the identity of that party but acknowledged that as this was not in evidence the court could not take account of any new explanation offered.

119. The applicant refers to the existence of ongoing legal proceedings against Warrenhill which have not been determined.

120. Mr. O'Callaghan states in his affidavit that: -

"*Warren Hill Contractors have now provided an alternative explanation in the course of proceedings against them. However, I say that that is not factually correct. There were only very limited credit notes issued for work quality issues*".

121. The final piece of evidence relevant to this subject is a curious document exhibited by the applicant which is a letter written on the letterhead of Warrenhill Contractors itself but signed by the second respondent, dated 17 May 2017, six years after the appointment of the applicant and in the following terms: -

"*Project – All projects*

Description: Windows and Door contractor O'Callaghan Trade Frames Ltd.

Date: 17 May 2017

To Whom It May Concern.

I advise that at the time O'Callaghan Trade Frames Ltd. went into liquidation there were no monies outstanding from R&P Builders Ltd., T/A Warrenhill Contractors for any contracts carried out by O'Callaghan Trade Frames on their behalf.

Signed,

Kieran Hynes

O'Callaghan Trade Frames".

122. No explanation has been offered by the respondents for this document and it is not denied that Mr. Hynes signed this letter. The applicant says that this constitutes clear obstruction with the conduct of the liquidation in circumstance where they respondents were informed by letter on 16 February 2011 that all their powers as directors of the Company ceased with effect from his appointment. At best the existence of this "letter" adds much confusion regarding the state of the Company's account with Warrenhill. But, more seriously, it is an act of disregard for the applicant as court appointed liquidator, and can only be treated

as evidence of disruption to the statutory authority and functions of a liquidator. In the absence of any explanation for the issue of that letter and the failure to offer any explanation in relation to the extensive credit notes or the substitution of a debtor I can only conclude that in this serious respect the respondents have obstructed the applicant in the performance of his functions.

Revenue Commissioners

123. The applicant says that the Company reclaimed VAT on the credit notes issued by it despite the fact that the auditors to Warrenhill had stated that they had seen no record of the credit notes being received by their client.

124. The applicant exhibits a VAT control account and says that he can see no evidence of the company having declared the VAT on the sales invoices to Warrenhill in the initial instance in the absence of books and records.

125. The applicant says that the Revenue Commissioners have paid over VAT refunds in respect of which the company had no entitlement.

126. The "VAT control account" is a document in respect of which no information is provided as regards its provenance, apart from certain initials who are not identified.

127. Although the respondents do not address the VAT position at all in their replying affidavits, I accept their submissions that no evidence has been placed before the court regarding the VAT treatment of the credit notes issued or the true position with Revenue.

Overstated debtors' ledger

128. The applicant states that the Company's debtors' ledger was materially incorrect and overstated. He says that the debtors' ledger in accordance with the 2008 accounts stood at €871,541.30, prior to bad debt adjustments made for that year.

129. The applicant exhibits an "aged debtors' analysis summary as at 31 December 2008".

130. The applicant says that it appears from the debtors' ledger that three debts were written off as bad debts in respect of companies or debtors which had been dissolved many years earlier namely Athlone Glass and Window for a sum of €65,367.50, which had been dissolved on 9 June 2000, Messrs. P. Kenny Groundworks for a sum of €95,290, which had been dissolved on 25 March 2005 and HL Properties for a sum of €105,913.38, a debtor which had been dissolved on 24 June 2005. The applicant says that this represented adjustment in a total amount of €266,570 in respect of debtors which had been dissolved on the various dates mentioned above. Thereafter for a number of years, and at least since 2005, the company had been carrying debtors on its ledger which were uncollectable. He says that this means that parties contracting with the company from 2005 onwards did so based on an overstated set of financial statements filed at the Companies Registration Office and he says that it was "manifestly dishonest to have done so".

131. The applicant exhibits a table showing a decrease in the net assets of the Company in the years 2005 – 2007 at a time when the debtors' figure in accordance with the accounts was increasing, in the year 2007 to a total sum of €1,073,625.

132. The respondents offer no evidence to counter the complaint made by the applicant in relation to the debtors save to make a general denial and to say that any deficiency in records was not deliberate because of the flood.

133. Counsel for the respondent submitted that there was no evidence that third parties relied on or advanced credit to the Company in reliance on financial statements which improperly stated the value of debtors.

134. It is not necessary for the applicant to refer to any individual counterparties who may have extended credit in reliance on those accounts. In circumstances where the value of the Company's assets has been overstated to the extent referenced, in particular in circumstances

where debtors exceeding €266,000 had been dissolved, this was a clear failure on the part of the respondents.

135. It was also submitted that in the absence of evidence of the dissolution of those debtors the court should not attach weight to this issue. The fact that these debtors had been dissolved is not denied and I accept that the applicant is entitled to refer to the dissolution of these companies as a matter of record.

136. No evidence has been proffered in the replying affidavits to contradict this description by the applicant.

Increasing costs in the liquidation

137. The applicant states that his office has been caused to carry out extensive additional remedial work in relation to the pursuit of debtors including those which it transpired had been dissolved. He says that this caused additional costs to the liquidation and he says that no debts at all were collectible.

138. It appears that one of the contentious matters in the early years of the liquidation has been the question of whether the liquidator duly and diligently pursued debtors. The directors' statement of affairs sworn on 9 May 2011 contains a schedule of trade debtors having a book value of €225,735, and an estimated realisable value of €1,500. This was the total estimated realisable value after recognising that "doubtful" debtors amounted to €225,735 and "bad" debtors amounted to €66,601.

139. The court has not been provided with any detail in relation to the debt recovery efforts undertaken by the liquidator or of the complaints made by the respondents on this subject. However, in their sworn Statement of Affairs the respondents themselves only estimated debts recoverable at a total sum of €1,500. A notable feature of this by way of example was that one of the debtors which had been dissolved, namely HL Properties was described as "doubtful" at a sum of €105,913, when in fact the debtor had been dissolved. It is clear

therefore that the directors caused additional unnecessary costs to be incurred by the applicant by their persistence as regards debtors, and the unsubstantiated allegation that if the applicant had been diligent in the pursuit of debtors the creditors of the Company would have been paid.

Failure to keep proper books of account

140. No details have been provided to the court in relation to the proceedings which were brought by the applicant against the respondents pursuant to s. 236 of the Companies Act 1963 requiring them together with Nancy O'Callaghan and Enda Gavin to deliver up all books, records, cheque and lodgement records relating to the company. Most unsatisfactorily, among the exhibits presented by the applicant himself is a draft of the notice of motion pursuant s.236 from which it appears that the initial return date for this application was 23 April 2012.

141. I have not been informed of when exactly these proceedings were disposed of or of the outcome other than in two respects. Firstly, it appears from correspondence that a costs order was made on this motion against the respondents.

142. Secondly, it was said in submissions that the motion was disposed of by an agreement to produce records. The applicant has exhibited certain letters which were exchanged between his solicitors and Messrs. Hayden & Co. during the course of 2012 and he places extensive reliance on a letter of 12 June 2012 from Messrs. Hayden Solicitors acting for the respondents to Messrs. Creavin Solicitors then acting for the applicant. In this letter Messrs. Hayden confirm among other things that the company never had cash receipt books. In this letter, Messrs. Hayden state as follows: -

> "*We would advise that our clients instruct us that they are not in possession of any further documentation relating to O'Callaghan Trade Frames and that all documentation held by them has been handed over to the liquidator. We have taken*

our clients instructions in relation to your said correspondence and they would reply as follows:

- *The company never had cash receipt books. Upon receipt of cash, invoices would have been issued to customers and the cash lodged*".

143. Further assertions and explanations are offered in relation to such matters as sales invoices, wage slips, wages records, employee information and it is said that no list of documents or other records concerning Relevant Contracts Tax were maintained. It is said that the company was not a principal contractor in any works undertaken and that all relevant information concerning RCT in their client's possession had been furnished but that the Revenue Commissioners would be in a position to provide copies.

144. In further correspondence, reference is made to the belated production of certain further information which had been in the possession of the bookkeeper Enda Gavin. It appears that all of this further correspondence was exchanged in the context of the outstanding issue regarding the costs of the s.236 application.

145. The applicant relies on this correspondence to express his concern that the Company did not keep cash receipt books or information concerning Relevant Contracts Tax and says that he regards the absence of this information as "*highly irresponsible as the Company in effect had no visibility on any withholding tax available to it, which could have been used to offset against other tax liabilities or be refunded to the Company were there no other liabilities to the Revenue*".

146. The applicant also states that he is surprised that he found "no corporate governance file, minutes of any director's meeting where insolvency or otherwise was reviewed".

147. The applicant continues: -

"*I say that hardly if any board meetings took place at all during the company's period of poor trading. I say the company's books and records were kept in*

disgraceful condition, loose – leaf and in some cases black bags and that this would have seriously impeded any attempt to review the company's financial position . . .

. . . I say that quite simply the lack of books and records does not allow any type of review of trading position to be conducted. This is highly unsatisfactory, particularly in circumstances where the deterioration in financial position has been so extreme".

148. The first respondent exhibits a letter dated 8 July 2011 in which Messrs. Hayden assert that their clients have furnished to the applicant "all the books and records of the company which included the statement of affairs, bank statements, cheque journals, bank reconciliations of all bank accounts, sales books, cash books, list of debtors, purchase books, list of creditors, wage records and details of the director's loan account".

149. Messrs. Hayden refer to the fact that the applicant was also seeking such items as used chequebook stubs and lodgement books but it was said that these were in the possession of the bookkeeper Mr. Gavin.

150. Most serious under the heading is the absence of evidence of meetings of the directors or other documents concerning corporate governance. The respondents proffer no evidence to controvert the statements made by the applicant regarding the absence of such records apart from general statements that they believe they acted responsibly in relation to the affairs of the company.

151. The respondents' affidavits contain identical and formulaic paragraphs regarding their conduct generally. In relation to the concluding observations of the applicant regarding maintenance of books and records, they simply say that they abided by their statutory functions and obligations "and did so to the best of our ability with the guidance from our accountants and auditors". Each of them says the following: -

"*I say that the bookkeeping exercises were carried out in a sufficient and adequate manner and do not give rise to any inference of dishonesty or fraud on the part of*

your deponent. Accordingly, I say and believe that the company's accountants and auditors were at all times fully appraised of all matters pertaining to the tax affairs of the company and all other financial dealings".

152. It is not sufficient for respondents to simply say that they had guidance from their accountants and auditors and that they kept the accountants and auditors appraised of all matters. No information is provided as to the nature of the advice or assistance obtained from these professionals.

Conclusion

153. I have concluded that the liquidator has failed to discharge the burden of proving that the respondents' conduct warrants disqualification. This failure is largely rooted in the difficulty I described at the outset of this judgment, namely that the applicant approached the matter from the perspective that he was required only to outline "matters of concern", such as an applicant for a restriction declaration would do. His evidence is replete with hearsay, selective correspondence and reliance on random documents which are not properly explained by him, let alone proved.

154. Having found that the proceedings are properly before the court pursuant to a valid notice complying with s. 845 (1), the court has the discretion to consider whether the sanction of a restriction declaration should be imposed pursuant to s. 843 (3). (See Walfab Engineering Limited & Companies Acts; DCE v Walsh [2016] IECA 2).

155. The respondents submit that the discretion conferred by s. 845(3) to impose a restriction declaration may only be exercised in a case where the court first finds that grounds for a disqualification are made out, but the court is persuaded that the circumstances warrant the lesser sanction of restriction.

156. I was referred to the judgment of Kelly J. in Re Walfab Engineering Limited & Companies Act; DCE v Walsh [2016] IECA 2. That case concerned a disqualification

application grounded on the fact that the respondents were directors of a company which was struck off the Register of Companies, a ground now prescribed in s. 842 (h). Reliance was placed on the following passage:

> *"In my view s. 160(9A) [predecessor of s.845 (3)] does nothing more than provide an option to impose a more lenient sanction than that prescribed under section 160. Thus if there is an entitlement to make an order under section 160(2)(h) there is, depending on the facts, an entitlement to make an order under s. 160(9A). From its plain wording s. 160 (9A) is concerned with a penalty to be imposed. The penalty need not be that prescribed under s. 160 but, as an alternative, the court may adjudge that a declaration under s. 150 will suffice."*

157. The section quoted by Kelly J. was different to s. 843(3), in the important respect that it provided that

> *"... <u>in considering the penalty to be imposed under this section</u>, the court may as an alternative, where it adjudges that disqualification is not justified, make a declaration under section 150."* (emphasis added)

158. That section put the reference to the alterative sanction of restriction in the particular context of 'the penalty to be imposed'. S. 843 (3) contains no such wording and confers a wider discretion to make a restriction declaration once the application is properly before the court.

159. I am reinforced in this conclusion by the decision of the Supreme Court in DCE v. Seymour [2011] IESC 45. In that case the court allowed an appeal against a disqualification order and substituted for it a restriction order. Macken J. found that on a proper application of the test for disqualification the allegation of unfitness which grounded the application for a disqualification order was not established. Having so held, Macken J. continued: -

"It is nonetheless appropriate to mark this Court's finding of fault in failing to make proper returns to the Revenue, or to ensure the same, pursuant to the Finance Act 1986. In that regard I consider that a less draconian order, to be made pursuant to s. 150 of the Act may and should properly be made."

160. The approach adopted by the Supreme Court in Seymour was to mark the failings of the respondent by imposing the lesser sanction of restriction, having found that the allegations which grounded the disqualification application were not established.

161. Finally, the respondents submitted that because an alternative relief of a restriction declaration was not claimed in the Notice of Motion, they are taken by surprise and should not be subjected to the prospect of that alternative sanction. The language s. 843 (3) is clear, and the cases referred to above (notably Walfab and Seymour) illustrate that the court's discretion is not limited by the absence of such a claim in the Notice of Motion. Importantly, this has the effect that in defending a disqualification application, it is not sufficient for respondents to simply rebut particular allegations, which is what these respondents have sought to do. Being persons to whom Part 14 Chapter 3 of the Act applies and having regard to s. 845(3), they must address the onus imposed by s. 819(2) of establishing three things:

(a) That they have acted honestly and responsibly in relation to the affairs of the company;

(b) That they have when required to do so co-operated as far as could reasonably be expected in relation to the conduct of the winding up; and

(c) That there is no other reason why it would be just an equitable that they be subject to a restriction declaration.

162. In this judgment, I have identified the following matters which I conclude on the evidence demonstrate a want of responsibility on the part of the respondents:

a) The balance of monies owed to the company by the first-named respondent, a balance which the first respondent sought to reverse or conceal by crediting to his director's loan account the payment by insurance of money owed to the Company.

b) The misleading treatment in the financial statements filed at the Companies Registration Office of the investment bond through Irish Life

c) The wholesale issuance of credit notes which remain unexplained

d) The overstatement of the debtors' ledger and attempts to conceal the recoverability of debts by alleging negligence on the part of the applicant.

e) The failure to keep proper books of account and records of corporate governance, notably the absence of any evidence of directors' meetings or of due consideration by the directors of the decline in the financial status of the company.

163. On each of these matters I have found a want of responsibility on the part of the respondents. I cannot find that they have discharged their burden of proving that they acted responsibly in relation to the affairs of the company. I shall make a declaration in the terms provided for in s. 819, namely, that each of the respondents shall not, for a period of five years, be appointed or act in any way, directly or indirectly as a director or secretary of a company or be concerned in the formation or promotion of a company, unless such company meets the requirements set out in subsection (3) of the section.