**THE HIGH COURT**

**2018 146 COS**

**IN THE MATTER OF GILLSTONE LIMITED (IN LIQUIDATION)**

**AND IN THE MATTER OF S. 683 OF THE COMPANIES ACT 2014**

**AND S. 819 OF THE COMPANIES ACT 2014**

**BETWEEN**

**ALAN KEANE**

**APPLICANT**

**V.**

**JOHN GILL AND SHARON GILL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Quinn delivered on the 22nd day of July 2019**

1. By originating Notice of Motion dated 11 April 2018 the applicant Alan Keane, liquidator of Gillstone Limited ("the Company") applied for a declaration that the respondents John Gill and Sharon Gill, being persons to whom s. 819 of the Companies Act 2014 applies, 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 set out in s. 819 (3) of the Companies Act 2014.

2. The application is grounded on affidavits sworn by the defendant on 23 March, 2018, 14 January, 2019, and 9 May, 2019. The first respondent swore one replying affidavit on 17 December, 2018, on behalf of himself and the second respondent.

3. At the outset it is to be noted that the application is presented in a most unsatisfactory manner. No meaningful account is given, either by the applicant or by the respondents as to the trading or financial history of this company. Incomplete information is provided by the applicant as to the realisation of assets by him and to the level of the deficiency in the company as regards creditors. Whilst applications under Section 819 are concerned with the role and conduct of the directors, the absence of an overall account of the findings of the liquidator, even in the absence of adequate books of account, render more difficult the task of assessing the conduct of the directors, particularly where certain allegations are made not only against the respondents but also by them against the liquidator and the petitioning creditor. These deficiencies do not relieve the respondents of the burden of showing that they acted honestly and responsibly in relation to the affairs of the Company. Were the court to decide otherwise, this would have the effect of undermining the objective of s.819, which is the protection of the public from the harmful conduct of persons controlling companies. See judgment of Fennelly J. in *re Worldport (Ireland) Limited (in liquidation)* [2009] 1 I.L.R.M. 241.

**Extension of time**

4. In his Notice of Motion, the liquidator has sought an extension of time for bringing this application. The extension of time is sought in circumstances where the Director of Corporate Enforcement, (the "ODCE"), had by letter dated 28 July, 2017, notified the applicant that he was not relieved from the requirement to bring this application, and the period of two months within which this application was required to be issued had expired.

5. The applicant stated in his grounding affidavit sworn 23 March, 2018, that he wished to apologise to the court for the delay in bringing the application, and explained that there had been a breakdown in communication between him and the office of his legal advisors, Messrs Denis I. Finn solicitors.

6. In a supplemental affidavit sworn 9 May, 2019, the applicant expanded and stated that the delay was caused by a number of matters. In particular, he said that the initial instructing correspondence to his solicitor was mistakenly overlooked as the solicitor handling the matter was on paternity leave and some time elapsed before counsel was instructed to draft the necessary application.

7. Whilst the explanation offered for this delay is weak, it would be inappropriate for the respondents to benefit from a refusal of the extension of time, particularly having regard to the prolonged history of the matter, and the difficulties which the liquidator encountered in securing any measure of cooperation from the respondents is a subject. Therefore, I shall grant the extension required to enable the application to proceed.

**Application of s. 819 to the respondents**

8. Whilst the onus is on the respondents to demonstrate that they have acted honestly and responsibly in relation to the affairs of a company and that there is no other reason why it would be just and equitable that they should be subject to the restrictions imposed by an order made under s. 819, the onus is on the applicant in the first instance to establish that the respondents concerned are persons to whom s. 819 applies, being directors of the company at the date of or within twelve months before the commencement of its winding up. The respondents have put this in issue.

9. On 14 January, 2016, the petition in this matter was presented, by a trade creditor, Sean Ó Faolain, trading as Seoige Ó Faolain and Company. It appears that the petition was opposed and the order for the winding up of the Company was made on 18 July, 2016.

10. S. 589 (1) of the Companies Act 2014 provides that: -

> *"the winding up of a company by the court shall be deemed to commence at the time of the presentation of the winding-up petition in respect of the company".*

Accordingly, the respondents are persons to whom s. 819 applies if they have been directors on or after 14 January 2015.

11. In his grounding affidavit, the applicant exhibited at Exhibit B what he described as a search conducted at the Companies Registration Office, (the "CRO"), comprising of what appears to be a single page extract from a commercial search in respect of the Company showing John Gill and Sharon Gill to be directors, and Sharon Gill to be secretary. The respondents complained that the provenance or authenticity of this was doubtful and that it was not an official search. At Exhibit F, the applicant also exhibits a

search by LawLink Legal Information Networking, which is a more comprehensive search of the filings at the CRO. It also shows the directors to be John Gill and Sharon Gill, and the secretary to be Sharon Gill. Exhibit F includes a reference to an entry said to be effective 1 September, 2015, being a Form B10 "*Change in Directors/Secretary*" although the result of that entry is not shown on the search.

12. The first respondent exhibits in reply a Form B10, filed at the CRO on 3 September, 2015, which purports to be a Notice of Change in Directors signed by a Mr. Mark Hilliard giving notice that with effect from 1 September, 2015, John Gill and Sharon Gill were removed as directors of the Company and that Mark Hilliard and Dermot Burke are appointed as directors. The notice also states that Sharon Gill is removed as secretary and Mark Hilliard is appointed as company secretary.

13. Also filed at the Companies Registration Office on 3 September 2015 was a Form G 1 purporting to be a certificate of a special resolution dated 1 September 2015, again signed by Mr. Mark Hilliard, the effect of which was to remove John Gill and Sharon Gill as directors with immediate effect and appointing Mark Hilliard and Dermot Burke as directors, and removing Sharon Gill as secretary and appointing Mark Hilliard in her place.

14. The position adopted by the respondents on this issue is somewhat ambivalent. On the one hand they submit that they were no longer directors of the Company when the winding up order was made and cite the Forms B10 and G1 filed on 3 September, 2015. On the other hand, they call into question the validity of the shareholder resolution of 1 September, 2015.

15. In his affidavit of 17 December, 2018, Mr. Gill swears that these returns came about by reason of a "purported" extraordinary general meeting of the company held at the Osprey Hotel Naas. He says that the only shareholders who ever existed in respect of the company are the respondents and that they had not convened any general meeting of the company to be held on that date. He then continues to say that the appointments of Messrs Hilliard and Burke are a fiction, and that Mr. Hilliard has serious questions to answer concerning his certification of the content of the Form.

16. The applicant has also recited the fact that in proceedings postdating 1 September, 2015, Mr. Gill represented the Company and held himself out to be a director. The order for the winding up of the Company recites that counsel appeared for the Company and that on counsel's application the court declared that Messrs Behan and Barry Solicitors ceased to be the solicitor acting on behalf of the Company. It further recites: -

> *"And the matter proceeding.*
>
> *And on hearing what was alleged by counsel for the practitioner.*
>
> *And on hearing John Gill.*
>
> *And there being no attendance on behalf of the Company or any other creditor or contributors thereof.*
>
> *And the court being satisfied that the advertisements are good and sufficient.*
>
> *And it appearing to the court that John Gill of Ballybrack, Carbury, Co. Kildare, and Sharon Gill of Ballybrack, Carbury, Co. Kildare are directors and that Sharon Gill of Ballybrack, Carbury, Co. Kildare is the secretary of the Company".*

17. The order recites that the affidavits sworn by Mr. Gill were filed in the petition proceedings on 11 April, 2016, and 27 May, 2016.

18. If Mr. and Mrs. Gill had wished to protest at that time that they were not directors of the Company, they could have done so at the petition hearing. Furthermore, it was open to them to make an application to be relieved from the obligations imposed on them by the Order of 18 July, 2016, which included the obligation to make and file a statement as to the affairs of the Company as required by s. 593 of the Companies Act, 2014.

19. The evidence of the applicant is that when he wrote to the respondents after his appointment requesting their cooperation in relation to the affairs of the Company, he initially received no helpful responses and after follow up correspondence, Mr. Gill met with the applicant and undertook to cooperate with him in the conduct of the winding up. The applicant says that at no point in those communications did Mr. Gill indicate that he was not a director of the Company.

20. I shall return later to the controversy regarding the events of 1 September, 2015, and the filings made in the CRO on 3 September, 2015. However, it is clear that the respondents do not deny that prior to that date they were directors. Accordingly, they were directors within 12 months prior to the commencement of the winding up and are persons to whom the provisions of s. 819 apply.

21. As regards their status as directors at the date of the winding up order, it is clear that the first named respondent at least met with and engaged with the liquidator after his appointment without protesting that he was not a director. It appears that it was only in response to this application that the respondents sought to deny that status. I accept that they were directors at the time the winding up order was made and accordingly the requirement to make a statement of affairs and the obligation of cooperation applies to them.

22. It is unsatisfactory that the liquidator in his responding affidavit did not address the matter of the filed B10 and G1 Forms to further inform the court as to the position concerning the identity of the directors. This failure on his part does not alter my conclusion that there is sufficient evidence to conclude that the respondents were directors within the meaning of s. 819 and at the commencement of the winding.

**Statement of affairs**

23. The liquidator refers to the fact that neither respondent complied with the requirement in s. 593 to present a valid statement as to the Company's affairs. The first respondent states that as he was not a director at the time of the winding up, he had no such obligation. He refers to the fact that the order for the winding up of the Company, directing the filing of a statement of affairs, erroneously recites: - "*that it appearing to the court that John Gill and Sharon Gill are directors."*

24. I have already rejected the submission that the respondents were not directors at the date of winding up order. It should also be noted that under s. 593 (4) of the Companies Act 2014, the obligation to make a statement of affairs can be extended to persons who have within twelve months before the appointment of the liquidator, been directors of a company. Whilst it is unusual for this obligation to be imposed on former directors and officers, if the respondents wished to be relieved of this obligation expressly imposed

on them by the winding up order itself, they had sufficient opportunity to make such an application and failed to do so. Accordingly, I find that they are in breach of this order.

**Cooperation with the liquidator**
25. The applicant states that on 15 August 2016, he wrote to the respondents advising them of their obligations regarding the filing of a statement of affairs under s. 593 of the Companies Act 2014, and of their obligations under the Act to assist the liquidator and to deliver the Company's books and records to him.

26. The form of this letter is somewhat unsatisfactory in that it concludes by stating that: -

> "Alan Keane and Company *may commence legal action against you under all or any of the above sections without further notice if you fail to contact the liquidator within seven days from the date of this letter or of you fail to cooperate to the extent of your legal obligations as the director of a company in liquidation".* (Emphasis added)

27. The winding up order recites that the applicant is of "Alan Keane and Company". The appointment of the liquidator is personal to him, his firm would not be the plaintiff or applicant in any such proceedings. The reference to "Alan Keane and Company" is repeated where he states the following: -

> *"The failure of a director of a company in liquidation to assist the company's liquidator may be taken into account by Alan Keane and Company in deciding whether a person should be disqualified from managing a corporation. If you feel you have legitimate reasons for failing to meet the requirements of the Act, you should immediately raise these with the liquidator. If you have concerns about your legal obligations, you should immediately consult your solicitor and inform the liquidator of your actions. If you have any questions in relation to this letter, please contact me on [phone number]".*

While the references to Alan Keane and Company are unsatisfactory, the contents of the letter are clear in that they call on the respondents to cooperate with the liquidator of the company.

28. It appears that on 2 September, 2016, a meeting took place between the applicant and Mr. John Gill. The applicant says that at that meeting, Mr. Gill agreed to provide him with the books and records of the Company together with a statement of assets and liabilities.

29. A follow up letter was written on 4 September, 2016. On 8 September, 2016, the applicant wrote to the second respondent stating that the applicant had not received any communication from the first respondent and notifying her that if he did not receive cooperation from the directors he would have no option but to apply to the High Court "*citing the non – compliance of the creditors in this matter*".

30. On 12 September, 2016, the applicant received a letter from "Grimes and Company" of Grianan House, Tramore Road, Cork. This letter is extraordinary and I quote it in full: -

> *"Dear Mr. Keane,*
>
> *RE: Gillstone Limited*
>
> *I have been handed a letter by Mr. John Gill from you and the following is the situation;*
>
> *1. I am the reciever of Gillstone Limited*
>
> *2. I have sold all the assets.*
>
> *3. The company has not traded for almost ten years.*
>
> *4. Your appointment is based on a fraud by Seoige Ó Faolain, Mark Hilliard and Dermot Burke and because of your past association the inevitable conclusion is that you knew of the fraud and are a party to it by being liquidator.*
>
> *5. Because of a legal situation I was unable to intervene in the appointment hearing but I can assure you that I will fight you every inch of the way and break you in cost, as if there is one thing that I cannot stand it is a crooked liquidator.*
>
> *6. Your appointment is a scam to steal company assets on behalf of Ó Faolain and Partners and it won't work.*
>
> *7. I will give you the opportunity of a libel suit – another €250,000 in costs – by stating publicly what I have already said and making sure that every accountant and solicitor in the country in the country (sic) knows about it.*
>
> *8. As for the company books you will have to drag them out of me by court hearing after court hearing – at your cost of course, - and these hearings are going to be fun because I am totally insane.*
>
> *Now we can deal with this case one of two ways:*
>
> *(1) We meet at your office and work out a solution that involves minimum conflict, or*
>
> *(2) Fight like dogs to the death and you go broke.*
>
> *So which is it?*
>
> *Think about it before you commit suicide,*

*Your sincerely,*

*Dr. Michael Grimes,*

*Reciever, Gillstone Limited"*

31. The CRO later confirmed to the applicant that no notice of appointment of a receiver had been registered for the Company.

32. Mr. Gill stated in his replying affidavit that he regretted ever having consulted Mr. Grimes and that he did so at a time when he was suffering from a lack of necessary funds and had available to him little or no readily available professional assistance. He says that it was out of desperation and misplaced faith that he became involved with Dr. Grimes at a time when he believed him to be a qualified and experienced individual. He says that he sincerely regrets his relationship with him. He says that he was not aware of the correspondence issued by Mr. Grimes until he received the applicant's affidavit in this application and whilst he does not retreat from the contents of his own correspondence seeking information and expressing frustration at the applicant, he regrets the tone of his writing.

33. At a certain level this explanation may have been acceptable, but it appears that on 4 January, 2019, Mr. Grimes wrote a further letter, this time to the applicants' solicitors, Denis I. Finn and Company, enquiring whether the liquidator purports to have sold the property. The respondents have not explained this by any supplemental evidence.

34. The applicant states that the failure to receive any meaningful cooperation from the respondents continued. As an illustration of this he refers to a series of emails exchanged between himself and Mr. Gill on 20 October, 2016. The first of these emails written by Mr. Gill is headed by the subject "My pit", a reference to the quarry which was the Company's remaining asset. In this email, he criticised the applicant for putting a lock on the gate to the property and called on him to remove it. In these exchanges, the applicant refers Mr. Gill to the powers conferred on him by the Companies Act 2014 and states that he has secured the asset in accordance with his obligations as liquidator.

35. The complaint by the applicant that the respondents have not cooperated with him in the performance of his functions as liquidator is met only by general averments on the part of Mr. Gill, relating to the conduct of the applicant himself and a number of general allegations to the effect that the liquidation was in some way "contrived". He alleges that the purpose of the original debt recovery proceedings by the petitioner was to act as a vehicle to achieve the appointment of the liquidator, which "*allowed those concerned to gain control of the two sandpits in the property in Folios 8826 and 11306 Co. Offaly*". He makes a number of other allegations to which I shall return, but this does not contradict, and in fact corroborates, the applicant's account of the obstruction encountered by the liquidator.

**Failure to file annual returns and failure to maintain proper books of account**

36. The applicant states that annual returns in respect of the Company were only ever filed at the CRO once, namely on 15 September, 2006.

37. The Company had been struck off the register on 17 January, 2009, for failure to file statutory returns. It was restored subsequently by an application by a creditor, Bank of Scotland (Ireland) Limited in December 2009, apparently with a view to giving effect to the transfer of loans and security from Bank of Scotland (Ireland) Limited to Bank of Scotland plc.

38. The respondents say that the Company was dormant and non – trading after 2009. That of itself is clearly not a justification for the failure to comply with the Companies Acts requirements to file annual returns.

39. The respondents also say that for most of the life of the Company, the governing provision regarding maintenance of books of account was s.202 of the Companies Act, 1990, and that subsection 9 of that section required that books and records of the Company be retained only for a period of six years. They say that since more than six years have elapsed since any entry could have been made in respect of activities or transactions of the Company, the legal obligation on the respondents to maintain such records had expired.

40. It is clear from the established case law that for the purpose of s. 819 of the Companies Act, 2014, it is the entire tenure of the directors which is taken into account in assessing whether they had acted honestly and responsibly in relation to the affairs of the Company. Accordingly, the six-year rule which previously applied under s. 202 of the Companies Act 1990, is no answer to the failure to keep proper books of account or to file statutory annual returns. Nor have the respondents otherwise denied that there has been a failure to keep comprehensive books and accounts and they have not offered any explanation other than the reference to the six – year rule under s. 202 of the Act of 1990.

41. The respondents also say that because other persons took control as directors following the resolution of 1 September, 2015, they cannot be faulted for the failure to produce adequate books and records to the liquidator. In circumstances where contradictory versions have been given of the events of September 2015, and where the respondents deny the validity of the resolution of 1 September, 2015, this is a wholly inadequate explanation for what is clearly demonstrated to be a gross failure on the part of the directors to comply with their duties.

**The judgment debt**

42. The petition for the winding up of the Company was grounded on the failure to pay a statutory demand served on 15 December, 2015, which in turn followed the grant of a judgment for the sum of €72,385.40 on 23 October, 2015, in favour of Sean Ó Faolain trading as Seoige Ó Faolain.

43. It appears that following this judgment, application was made on behalf of the Company to have it set aside. The result of that application was an order of the court to the effect that the judgment would be set aside on condition that a sum of €60,000 be paid within 21 days. That condition was never fulfilled and accordingly the judgment was never set aside or vacated.

44. The respondents say that the circumstances behind the obtaining of that judgment illustrate: -

(i) That the petitioner was a creditor of Mr. Gill himself and not of the Company, partly because the creditor knew that the Company was insolvent.

(ii) That the creditor had held himself out as a specialist insolvency adviser and that the respondent knew no better than to consult him.

(iii) That insofar as that judgment was grounded on fees or professional fees incurred, they had not been itemised or agreed in advance.

(iv) That the debt was not a bona fide debt but merely a vehicle to achieve the appointment of a liquidator which "allowed those concerned to gain control of the two sand pits".

45. This Court was not shown the papers filed in that prior litigation or the judgment itself.

46. These claims appear to be linked to a certain conspiracy theory advanced by the respondents and described below in relation to the property of the Company. The respondents have offered only vague assertions as to this theory and arguments which they wished to make in relation to this issue could have been made in response to the winding up petition at which the first respondent appeared. Furthermore, no steps were taken to appeal the winding up order and it is not appropriate for this Court to go behind that order.

**The Property**

47. The respondents raise a number of issues concerning the manner in which the property of the Company has been disposed of since the appointment of the liquidator. Very limited information is provided in relation to this matter either by the respondents or by the liquidator, and any information that was advanced was incoherent. When this matter first came before the court on 8 and 9 April, 2019, I directed that the liquidator file a supplemental affidavit in which he would account comprehensively for the disposal of the asset of the Company with a description of the proceeds realised and the application of those proceeds, together with an estimate of the outcome of the winding up having regard to the realisations. This was not done.

48. In the grounding affidavit the applicant refers to his first meeting with the first named respondent on 2 September, 2016, when he advised the first respondent that it was his intention as liquidator to sell the main asset of the Company, a sand and gravel pit at Shinrone, Co. Offaly, as quickly as possible. He also says that in late September / early October 2016 he proceeded to secure the Company property. No further information is contained in that affidavit regarding the realisation of the property.

49. In the supplemental affidavit of the applicant sworn on 14 January, 2019, he states as follows at para. 23: -

> *"I say that the sale of the assets of the company was undertaken in the standard manner whereby the property was advertised, solicitors for both your deponent and the purchaser were appointed. I say that the sale closed in March 2017".*

Remarkably, this is the totality of the applicant's description of the asset realisation.

50. It was this very limited information which prompted this Court to direct the provision of further information in relation to the disposal of the property and in a supplemental affidavit sworn on 9 May, 2019, the liquidator stated as follows in para. 3: -

> *"I say that the property was sold via Leinster Property Auction and ultimately sold on the 16th March 2017 in the sum of €140,000 prior to the deduction of all fees and expenses. The property was sold to Loadwise Logistics Limited who are not in any way connected to the parties in the within proceedings".*

51. Despite having been directed to do so, the liquidator provided no information as to the gross amount of the realisations, and what payments, if any, were made to secured lenders, in respect of taxes or otherwise out of those proceeds. No description was given as to the net amount now available for creditors and nor was any information given as to the quantum of creditors' claims, as had been directed by this Court. This is wholly unsatisfactory. In circumstances where the liquidator was appointed on 18 July, 2016, some three years ago, it is unacceptable that a liquidator should not be in a position to provide to the court information describing the realisation of assets and potential outcome for creditors, thereby assisting the court in understanding the extent of the deficiency, particularly where these matters have been put in issue by the respondents.

52. Apart from the absence of information, the first respondent drew to the attention of the court a number of transactions affecting the property which appear from an inspection of the Folios at the Property Registration Authority.

53. The property comprised in Folio 8826, Co. Offaly, which had been owned by the company until 19 September, 2017, when Loadwise Logistics Limited was registered as the full owner.

54. An inspection of Part 3 "Burdens and Notices of Burdens" of the Folio reveals that charges held originally by Bank of Scotland (Ireland) Limited and by Bank of Scotland plc. were cancelled on 1 July 2015.

55. It reveals also that on 19 September, 2017, – being the day on which the purchaser, Loadwise, was registered as new owner – a charge which had been registered on 12 September, 2007, in favour of Mark Hilliard was cancelled.

56. On Folio 13306, Co. Offaly, the full owner was the Company until 19 September, 2017, on which date Loadwise Logistics Limited became the registered full owner.

57. Charges previously registered in favour of Bank of Scotland (Ireland) Limited and Bank of Scotland plc. had been cancelled on 1 July, 2015. However, on 19 September, 2017, being the date on which the purchaser from the liquidator became registered as owner, there was cancelled a judgment mortgage which had been registered in favour of Sean Ó Faolain, trading as Seoige Ó Faolain and Company, the petitioner in these proceedings.

58. The first respondent claims in his replying affidavit that the sequence of transactions, charges and releases of charges which appear on the Folios suggest that there may have been a transaction on or about 17 September, 2017, either as part of, or in some way coinciding with, the sale of the property by the liquidator, whereby charges previously held by Mr. Hilliard and Mr. Ó Faolain were vacated, and that this requires an explanation.

59. The first respondent refers to the fact that Mr. Hilliard is the same Mr. Hilliard who was purportedly appointed a director of the c=Company on 1 September, 2015, and that Mr. Ó Faolain is the same Mr. Ó Faolain who obtained a judgment against the Company and petitioned for its winding up. He refers to the fact that the charges of Mr. Ó Faolain and Mr. Hilliard were cancelled on the same day that the sale to Loadwise Logistics Limited became registered and he says that these coinciding events mean either that the property was acquired by way of an unsecured loan or that it was a cash purchase by Loadwise Logistics Limited or in the alternative if there were no proceeds of sale, an issue arises as to the circumstances by which the assets of the company were transferred for

no value other than the cancellation of Mr. Hilliard's "*fictitious charge*".

60. The liquidator gives no meaningful account of the disposal of the property or of the fact of the release of charges to these parties - Ó Faolain and Mr. Hilliard – occurred on the same day. The description given by the first respondent is unclear and inconsistent, raising only a series of questions.

61. This application had previously been adjourned by the court to enable the provision by the liquidator of clear information on this subject. I have considered whether the application can be determined without this information and concluded that I have sufficient other information and evidence that the absence of a clear narrative on the property transaction does not preclude me from making a conclusion on the proceedings under s.819. This does not excuse the liquidator for his failure to address these points.

**Liquidators' solicitors**
62. In the grounding affidavit of the applicant, no reference is made to the fact that the solicitor acting for the liquidator is the same solicitor who acted for the petitioner Mr. Sean Ó Faolain.

63. In the first respondent's affidavit of 17 December, 2018, at para. 42, he refers to the fact that the applicant's solicitors, Messrs. Denis I. Finn, were the solicitors on record for the plaintiff in the summary debt proceedings which precedes this petition. He claims that when requested to do so, Messrs. Dennis I. Finn declined or refused to reply to certain requests made for documentation.

64. In the supplemental affidavit of the applicant sworn 14 January, 2019, the applicant seeks to "assuage the concerns of the first named respondent" and he refers to the fact that his solicitors had been previously instructed by the creditor in the summary proceedings, Mr. Ó Faolain, and in the subsequent petition to wind up the Company.

65. In the past, it had been the practice of this court to require that in circumstances where a liquidator appointed by the court sought to retain as his solicitors the solicitors who acted for the petitioning creditor or petitioner, he should first obtain the leave of the court so to do, on an application made to the court for that purpose. It appears that this practice has fallen into disuse and in an affidavit sworn by Mr. Nuding of Denis I. Finn on 8 July, 2019, he states that the failure to obtain such leave prior to issuing the proceedings under s. 819 was due entirely to "an oversight as to the appropriate procedures or practice operated by this honourable court, and I apologise to both the court and the respondents for such error".

66. Mr. Nuding continues and says: -

> *"I say and believe that it is now right and proper for my firm to seek the leave of this honourable court to continue to represent the applicant in these proceedings and I humbly pray this honourable court for such leave".*

67. In light of the fact that the practice of obtaining such leave appears to have fallen into disuse, I accept the explanation offered on the subject by Mr. Nuding. However, in circumstances where highly contentious issues and litigation arose between the petitioner, the Company and its directors prior to the making of the winding up order, and having regard to the allegations of incomplete information and disclosure now made by the respondents against the applicant, this case illustrates why it will not always be appropriate for a liquidator to retain the petitioners solicitors. At the very least, an application for leave to do so should have been made, in which all relevant circumstances would be disclosed, including, in this case, the history of dispute between the petitioner and the Company and the respondents, and the fact that the applicant intended to retain the petitioner's solicitor. This should at least eliminate the scope for allegations of the nature now made, and leave no room for doubt as to the independence of the liquidator from all interested parties. The failure of the liquidator to provide a comprehensive narrative concerning the property, even after he was directed by this Court to do, aggravates this aspect of the case.

68. None of these matters excuse the respondents from their conduct and breach of duty.

**Conclusion**
69. Only one affidavit was sworn by the first respondent on behalf of both respondents, and no additional evidence was proffered by the second respondent. Apart from the inadequate narrative about the property of the Company, this application is characterised by a dearth of evidence concerning the stewardship of the Company's affairs before its winding up. Even where the liquidator provides limited information, as here, the onus under s.819(2) is clearly on the respondents. Therefore, if they are to avoid a declaration under this section, they must evidence their conduct of the affairs of the Company in the period before the winding up. They have not done this. Instead, the central feature of the evidence and submissions for the respondents has been criticism of the liquidator, the petitioning creditor and other parties, and submissions to the effect that the respondents were not subject to the duties imposed by the Companies Act, 2014. The evidence of disputes with the petitioning creditor and others does not alter the fact that this Court made an order for the winding up of the Company on 18 July, 2016, and that no appeal was made against that order and no application was made to relieve the respondents from their obligations thereunder. There has been no evidence to contradict the following: -

1. That the company was ordered to be wound upon the grounds of insolvency.

2. That since the incorporation of the Company on 10 March 2006, Annual Returns were only ever filed for one year of its existence.

3. No books or records, documents or other such information were provided to the liquidators by the respondents.

4. The respondents failed to cooperate with the liquidator and engaged a Mr. Michael Grimes, whose correspondence to the applicant displayed disregard for the statutory functions, power and authority of the court appointed liquidator.

5. The respondents failed to comply with the order of 18 July, 2016, directing that they make out and file a statement of affairs.

70. I am not satisfied that the first respondent has demonstrated that he has acted honestly and responsibly in relation to the conduct of the affairs of the Company, or that he has cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the Company. Therefore, I shall make a declaration under s. 819 of the Companies Act 2014 that the first named respondent shall not for a period of five years be appointed or act in any way whether directly or indirectly as the director or secretary of a company or be concerned or take part in the promotion or formation of any company unless that company meets the requirements set out in s. 819 (3).

71. No affidavit has been sworn by the second respondent, and the replying affidavit of the first respondent states that he makes that affidavit on his own behalf and on behalf of the second named respondent, with her knowledge authority and consent. No additional information or evidence or submissions having been proffered on behalf of the second named respondent and for the reasons outlined above, I shall make a similar declaration in respect of the second respondent Sharon Gill.

72. The duty of the liquidator under s. 682 of the Companies Act 2014 and under the guidelines issued by the ODCE to report on the conduct of the directors is a continuing duty and includes a duty to report on the outcome of this application. For the avoidance of doubt, I direct the applicant to forward this judgment to the ODCE.