[2017]IEHC 542

THE HIGH COURT

2016 No. 362 COS

IN THE MATTER OF

NEWBRIDGE CREDIT UNION LTD (IN LIQUIDATION)

AND IN THE MATTER OF SECTION 682 AND SECTION 683 AND SECTION 819 OF THE COMPANIES ACT 2014

BETWEEN

JIM LUBY

APPLICANT

AND

LIAM KEOGH, BEN DONNELLY, MICHAEL MURPHY, BREDA REID, ANNA MUNKO, PADDY O'CARROLL, PAUL MAHER, PAT RUDDY, MARIA MCDONALD, CHARLIE CAWLEY AND GEORGE WILLOUGHBY

RESPONDENTS

AND

THE DIRECTOR OF CORPORATE ENFORCEMENT

NOTICE PARTY

AND

THE CREDIT UNION DEVELOPMENT ASSOCIATION

AMICUS CURIAE

Judgment of Mr. Justice Robert Haughton delivered this 25th day of September, 2017

Paragraph No Title

1. Introduction

1.1 By order of the High Court dated 16 December, 2013, (Charleton J.) the applicant ("the liquidator") was appointed Official Liquidator of Newbridge Credit Union Limited ("NCU") on foot of a petition presented by the Central Bank of Ireland ("CBI").

1.2 Proceeding on the assumption that the provisions of the Companies Acts 1963 – 2009 and/or the provisions of the Companies Act 2014 ("the 2014 Act") relating to the reporting and restriction of directors of companies applied to the directors of the NCU, the liquidator applied to the Director of Corporate Enforcement ("the DCE") to be relieved of his obligation to seek restriction orders in respect of the directors of the credit union. The liquidator was relieved of his obligation to seek restriction in respect of two directors who had been appointed shortly before the NCU went into liquidation. Despite his application to be relieved in respect of all of the directors, the liquidator was not relieved by the DCE of the obligation to seek orders in respect of the remainder of the NCU directors being the above named respondents.

1.3 Accordingly by Notice of Motion issued on 30 September, 2016, the applicant applied for restriction of the respondents pursuant to sections 682, 683 and 819 of the 2014 Act (which will be referred to as "the Reporting and Restriction Regime"), or alternatively pursuant to the previous regime provided for in s.56 of the Company Law Enforcement Act, 2001 ("the 2001 Act") and section 150 in Chapter 1 of Part vii of the Companies Act 1990 (as amended) ("the 1990 Act"). The liquidator also sought a declaration/direction under section 631 of the 2014 Act that these provisions apply to the liquidation of NCU. That issue falls to be determined by this court by way of a preliminary hearing directed by order of Barrett J. of 21 November, 2016.

1.4 One respondent, namely Ms Maria McDonald, appeared at the hearing and was represented by counsel who argued against the application of the Reporting and Restriction Regime to directors of credit unions.

1.5 The DCE, being of the considered view that the Reporting and Restriction Regime applies to the directors of a credit union, was joined as a notice party by the order of Barrett J.

1.6 The Credit Union Development Association ("CUDA") sought and was granted leave by Barrett J. to participate as an *amicus* *curiae*. CUDA was incorporated in 2003 and is one of two credit union representative bodies whose role is officially recognised by government, the CBI and the Credit Union Advisory Council, a statutory body established to advise the Minister for Finance on matters relating to the credit union movement. CUDA is owned and funded by a group of credit unions and provides services in the area of representation, strategic development and competency development. CUDA argued that the Reporting and Restriction Regime, whether pre- or post the 2014 Act, does not apply to the directors of credit unions.

2. The key arguments and statutory provisions

2.1 In written and oral submissions Counsel for the liquidator submitted that a credit union could be wound up under three separate and distinct statutory regimes: firstly under Part 7 of the Central Bank and Credit Institutions (Resolution) Act 2011 ("the 2011 Act"); secondly under Part X of the Credit Union Act, 1997 ("the 1997 Act"); thirdly under Chapter 3 of Part 22 of the 2014 Act. Chapter 3 does not apply to the present winding up.

2.2 Counsel contended that the winding up of NCU is proceeding under the 2011 Act, but argued that whether it is proceeding under the first or second regime, or a combination of both, the provisions of the Companies Acts imposing an obligation on the liquidator to report to the DCE, whether under section 56 of the 2001 Act, or sections 682 and 683 of the 2014 Act, the further provisions of the Companies Acts relating to the restriction of directors of companies apply to directors of credit unions including NCU.

2.3 Counsel contended that the natural and ordinary or literal meaning of section 76 of the 2011 Act and section 134 of the 1997 Act, whether these provisions apply separately or in combination, is that these sections apply all of the winding up provisions of the Companies Acts, including the Reporting and Restriction Regime, to directors of credit unions. It is appropriate at this point to set out the most relevant statutory provisions.

The 1997 Act

2.4 As first promulgated, section 133 empowered the Registrar of Friendly Societies, with whom credit unions were then registered, to petition the High Court for an order winding up a credit union where it was unable to pay sums due and payable to its members or creditors, or there was failure to comply with a provision of the 1997 Act, or less than half the members of the credit union "have a common bond" or in any other case where it appeared to the Registrar to be in the public interest or just and equitable having regard to the interests of all members. Under the Central Bank and Financial Services Authority Act 2003, the CBI ("the Bank" in the 2003 Act) acting through the new Registrar of Credit Unions, replaced the Registrar of Friendly Societies, and became the body entitled to petition for the winding up of a credit union under section 133.

2.5 Section 134 was similarly amended in 2003, and in its amended form reads: –

> "134. Winding up under the Companies Acts.
>
> (1) Subject to this section, a credit union may be dissolved by being wound up in accordance with the Companies Acts and, accordingly, those Acts shall, subject to any necessary modifications, apply as if a credit union were a company limited by shares.
>
> (2) In the application of the Companies Acts to the winding up of a credit union –
>
> (a) any reference in those Acts to the Registrar of companies shall be construed as a reference to the Bank;
>
> (b) any reference in those Acts to the articles of association shall be construed as a reference to the rules of a credit union; and
>
> *(c) any reference in those Acts to a special resolution shall be construed as a reference to a special resolution within the meaning of this Act.*
>
> (3) Without prejudice to subsection (2), where a credit union is being wound up as mentioned in subsection (1), the Bank shall be entitled to appear and be heard in any proceedings relating to the winding up.
>
> (4) Where a credit union is wound up as mentioned in subsection (1), the liability of a present or past member of the credit union for payment of the debts and liabilities of the credit union, the expenses of winding up and the adjustment of rights of contributories among themselves shall be qualified as follows:
>
> (a) no person who ceased to be a member not less than one year before the beginning of the winding up shall be liable to contribute;
>
> (b) no person shall be liable to contribute in respect of any debt or liability contracted after he ceased to be a member;
>
> (c) no person who is not a member shall be liable to contribute unless it appears to the Court that the contributions of the existing members are insufficient to satisfy the just demands on the credit union;
>
> (d) no contribution shall be required from any person exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a past or present member; and
>
> (e) in the case of a share which has been withdrawn, a person shall be taken to have ceased to be a member in respect of that share as from the date of his notice under section 32(1) of intention to withdraw or, as the case may be, the approval of the withdrawal under section 37(3)(b).
>
> (5) Where a credit union is wound up by virtue of this section, sections 293 to 299 of the Companies Act 1963 and sections 202 to 204 of the Companies Act 1990, so far as they relate to the liabilities of directors and officers (within the meaning of those Acts) of a company being wound up, shall apply with any necessary modifications in relation to the officers of the credit union to whom paragraph (a) of the definition of 'officer' in section 2 applies."

The 2011 Act

2.6 As its long title states, the 2011 Act is "An Act to Make Provision for an Effective and Expeditious Resolution Regime for Certain Credit Institutions at the Least Cost to the State; to Amend Certain Enactments; and for Related Matters". It applies to "designated credit institutions” which include authorised banks, building societies and “a credit union”, and it is not disputed that it applies to NCU. Part 7 sets out the powers of the CBI in relation to the liquidation of authorised credit institutions.

2.7 Section 76, headed “Application of Companies Acts to winding up of designated credit institutions” provides: –

> “The Companies Acts apply to the winding-up of a designated credit institution subject to this Part.”

Section 77 provides that the CBI may present a petition for the winding up of a designated credit union where in the bank’s opinion it would be in the public interest, or where it is unable to meet its obligations to its creditors, or where a credit union has failed to comply with the direction of the CBI, to cease to carry on banking business, or the CBI considers that it is in the interests of depositors that it be wound up.

2.8 Section 89 headed “Modifications to Companies Acts in winding up of designated credit institutions” provides –

> “A provision of the Act of 1963 mentioned in column 1 of the Table to this subsection applies to the winding up of a designated credit institution as if it were modified in the manner set out in column 2 of that Table opposite to the mention of the provision in column 1.”

The Table makes minor modifications to the 1963 Act none of which relate to the restriction regime introduced in the 1990 Act and the reporting obligations introduced by the 2001 Act, or to the disqualification of directors.

2.9 The fundamental and simple contention by counsel for the liquidator was that neither of these Acts expressly or by implication modify or otherwise disapply the provisions of the Companies Acts relating to the Reporting and Restriction Regime, whether pre or post the 2014 Act. It was contended that there was no ambiguity in the incorporation by reference in s.134 of the 1997 Act and/or s.76 of the 2011 Act of the relevant provisions, and that the court should not therefore have recourse to tools of construction such as *expressio unius est exclusio alterius* (to express one thing is to exclude another).

2.10 In written and oral submissions Counsel for the DCE broadly adopted the liquidator’s submissions but accepted that while there may be an argument for construing the 2011 Act together with the 1997 Act this does not affect the incorporation by reference of the director restriction provisions into the winding up of a credit union.

3. Respondent/CUDA arguments

3.1 In response it was argued that credit unions have distinctive features that differentiate them from ordinary companies, and that they are subjected to a very different regulatory framework. In their submissions CUDA cite *The Law of Credit and Security* (Mary Donald, second edition, 2015) at paragraph 3-81:

> “While credit unions share features with the other lenders they are, in other ways, a unique presence in the credit landscape. Set up and run on a voluntary basis, the aim of a credit union is not to make a profit but to provide services for its members, many of whom traditionally did not have a large disposable income. Reflecting the special social role, credit unions are subject to a different regulatory framework to other credit institutions.”

3.2 It is appropriate to refer at this point to some of the main statutory provisions particular to credit unions. In order to be registered under the 1997 Act credit unions must comply with the conditions in section 6 which require that the society be formed for the objects specified in subsection (2) and that its membership be restricted to persons having “at least one of the common bonds specified in subsection (3)”:

> “6 (2) The objects referred to in subsection (1)(a) are –
>
> (a) the promotion of thrift among its members by the accumulation of their savings;
>
> (b) the creation of sources of credit for the mutual benefit of its members at a fair and reasonable rate of interest;
>
> (c) the use and control of members’ savings for their mutual benefit;
>
> (d) the training and education of its members in the wise use of money;
>
> (e) the education of its members in their economic, social and cultural well-being as members of the community;
>
> (f) the improvement of the well-being and spirit of the members’ community; and
>
> (g) subject to section 48, the provision to its members of such additional services as are for their mutual benefit.
>
> (3) The common bonds referred to in subsection (1)(b) are –
>
> (a) following a particular occupation;
>
> (b) residing or being employed in a particular locality;
>
> (c) being employed by a particular employer or having retired from employment with a particular employer;
>
> (d) being a member of a bona fide organisation or being otherwise associated with other members of the society for a purpose other than that of forming a society to be registered as a credit union;
>
> (e) any other common bond approved by the Bank.”

3.3 CUDA further submitted that credit unions have different governance structures including a board with directors having different statutory functions. A credit union board must appoint a manager, a risk management officer, a compliance officer, a credit committee and a credit control committee, and the board are subject to an “oversight committee”. On 24 September, 2012, Part 3 of the Central Bank Reform Act 2010 was commenced for credit unions and provided a statutory system for regulation by the CBI of key individuals performing functions in credit unions. These are now governed by regulations set out in S.I. no.s 171 of 2013 and 97 of 2015. These regulations require preapproval by CBI of the appointment of key individuals in credit unions, and establish "Fitness and Probity Standards for Credit Unions" designed to ensure that the performance of key roles within a credit union are carried out with competency, honesty, and integrity and to standards that are ethically and financially sound. No such similar provisions apply to company directors.

3.4 CUDA also points out that credit unions are currently regulated under the 1997 Act by a division of the CBI. Under section 33AA of the Central Bank Act, 1942, as inserted by section 26 of the 2003 Act, the Registrar of Credit Unions, as delegate of the Irish Financial Services Regulatory Authority, which is itself a division of the Central Bank, is now the appropriate registrar. Under section 33AA(4)(c) the Regulatory Authority can issue directions to the Registrar of Credit Unions but in so doing must have regard to –

> "… The particular nature of credit unions, in particular, by reference to –
>
> (i) the conditions for registration of a credit union as set out in section 6 of the Credit Union Act 1997 and to the objects and common bonds referred to in that section, and
>
> (ii) the voluntary ethos of credit unions."

3.5 CUDA also point out that credit unions enjoy the benefit of –

> (1) the Deposit Guarantee Scheme put in place by the CBI pursuant to S.I. No. 516/2015 for deposits of up to €100,000 per depositor, and
>
> (2) that they are subject to the Credit Union Act 1997 (Regulatory Requirements) Regulations, 2016, which came into effect on 1 January, 2016, and which impose narrow restrictions on the operation of credit unions, for example by limiting the nature of investments that can be made, and by setting a maximum individual member savings amount of €100,000, and by regulation of the areas of reserves, liquidity, lending, investments, savings, borrowings, systems and controls. This, it is submitted, is designed to prevent credit unions from entering into transactions that are speculative or entail high commercial risk.

3.6 Furthermore the Credit Union Acts 1997 and 2001 were extensively amended and strengthened by the Credit Union and Cooperation with Overseas Regulators Act, 2012 ("the 2012 Act") which imposes further measures to reduce the possibility of risky lending, to control credit union investments, to ensure credit unions have adequate reserves, to regulate the election and term of office of directors and members of the board oversight committees (12 year maximum), and further regulate board meetings. Section 15 inserts a new section 53, and subsection (10) lists the persons who are ineligible to become a director of a credit union. Of the 13 classes of persons rendered ineligible, a person subject to a restriction or disqualification order under the Companies Acts is not among them. Section 72 of the 1997 Act also provides that persons adjudicated bankrupt are disqualified from acting as an officer of a credit union, and if already a director such person ceases to hold office forthwith.

Section 17 introduces a new section 55 setting out the functions of the board which centre on strategy, the appointment, oversight and monitoring of the manager and other key officers, and the setting and monitoring of plans and policies including a risk management process. The amendments also strengthen the separation of the directors and chair from the management and day-to-day operations of the credit union, and empower the CBI to prescribe that the board appoint an audit committee, risk committee and a remuneration committee, and require that there be a nomination committee. The role and functions of the manager, credit officer and credit control officer are prescribed. Section 23 substitutes section 66 in the 1997 Act and empowers the board oversight committee to suspend a director and convene a special meeting of the credit union to remove that director.

Section 25 substitutes section 69 and prescribes that officers and directors "act in a manner free from conflicts of interest" and sets out detailed provisions aimed at avoiding conflicts of interest along with provisions governing the strategic plan, risk management systems and control, management information and so forth.

Section 27 amends the provisions relating to the board oversight committee. Its members are elected but there are now strict requirements on eligibility for election; for example employees and voluntary assistants of the credit union, members of the board and other persons who could have a conflict of interest cannot be elected. It must meet once a month, and with the board four times each year, and is entitled to access to all the books and documents of the credit union, and its members have the right to attend all meetings of the board, and at least one of its members must attend each Board meeting. It is apparent that within a credit union this is a powerful committee with the mandate and power to exercise close oversight on all board activity.

This Act also strengthens the powers of the CBI to make regulations in relation to credit unions generally, to appoint additional directors to a credit union, and to remove an auditor and apply to court for an order confirming such removal.

3.7 Against this background, CUDA and the ninth named respondent submit that it is fundamentally illogical and incongruous that the DCE, which does not have a regulatory role in relation to solvent credit unions, should be tasked with determining whether or not a liquidator should bring an application to restrict directors of a credit union which is in liquidation. They submit that the logical parties to supervise and regulate the conduct of officers of credit unions, whether solvent or insolvent, are the Registrar of Credit Unions and the CBI.

3.8 Secondly they argue that Part 7 of the 2011 Act is not a stand-alone statutory basis for the winding up of a credit union, but rather introduces regulation that overlays the winding up provisions of section 134 of the 1997 Act. Thus the objectives of a liquidator of a credit union introduced by section 80 of the 2011 Act apply to any liquidation carried out under the 1997 Act.

They further submit that this must be so because if Part 7 was stand-alone, section 134(5) of the 1997 Act, which applies certain penal sections of the Companies Acts to officers of credit unions but *excludes* volunteers and employees from this application, would not apply (because there is no similar modification in the 2011 Act), which would be clearly contrary to the intention of the Oireachtas as expressed in the 1997 Act.

3.9 Thirdly, they submit that insofar as Part 7 of the 2011 Act and section 134 of the 1997 Act modify the application of the Companies Acts in the context of the winding up of credit unions, it is not clear what those modifications are, or which portions of those acts are to apply to liquidations of credit unions. This gives rise to such uncertainty and potential absurdity that the court is entitled to look beyond the natural and ordinary meaning of the words used in section 76 of the 2011 Act and section 134(1) of the 1997 Act in order to ascertain whether the Oireachtas intended to apply the Reporting and Restriction Regime to credit unions.

3.10 They argue that section 134(5) expressly applies specified portions of the Companies Acts, including sections dealing with the offences of fraudulent and reckless trading, to officers of credit unions. They submit that if the construction contended for by the liquidator/DCE is correct, this section is redundant in circumstances where they argue that all offences or sanctions applicable to directors of companies are applicable to officers of credit unions by virtue of the general provisions of Part 7 of the 2012 Act and/or section 134 of the 1997 Act which they contend apply the winding up provisions of the companies acts as a whole to credit unions. In this respect they also rely on the rule *expressio unius est exclusio alterius* submitting that by stipulating in section 134(5) the penal sections of the Companies Acts that are to apply to officers of credit unions, the Oireachtas must be considered to have intended to confine the application of sections of this type to those specified, and not to bring about any wider expansion of the potential liability of directors of credit unions under the director restriction regime .

3.11 They submit that an absurdity arises from the fact that if a restriction order was made in respect of a credit union director this would not have the effect of restricting such person from being or becoming a director of a credit union, and thus would not afford protection to persons dealing with credit unions. It is no answer to this, they submit, to suggest that the CBI could refuse to approve the appointment of a restricted person as a director of a credit union as that would be a mere possibility. They submit that an attempt to modify section 819 to extend the probation to a credit union directorship would founder because of the impossibility of adjusting the capitalisation requirements of section 819 to fit the structure of a credit union. They submit that it is absurd and illogical to prohibit the director of a credit union from becoming a promoter or director of a company.

4. The constitutional arguments
4.1 The ninth named respondent and CUDA also sought to rely on arguments that if the court were to construe the relevant statutory provisions as extending the Reporting and Restriction Regime to directors of credit unions this would be unconstitutional and/or that where two statutory interpretations were available the court should choose the one that would not be in breach of the Constitution or unenumerated constitutional rights. The thrust of the constitutional argument seemed to be twofold: firstly that the director restriction regime is penal in effect and that it would be unconstitutional to extend this regime to credit union directors by construction of the relevant provisions of the 1997 Act (as amended) and the 2011 Act which are uncertain, and clearly avoid express application; secondly, that in the context of a penal regime the reversal of the usual onus of proof in section 819 of the 2004 Act, by placing on credit union directors in restriction proceedings the obligation to satisfy a court that they acted honestly and responsibly and cooperated with a liquidator, would be unconstitutional.

4.2 For two reasons I ruled in the course of the hearing that it was not appropriate to entertain such arguments in this module. Firstly in the absence of any formal pleading, it was not clear what constitutional provisions or rights might be engaged or infringed, or the precise grounds relied upon. Secondly the Attorney General was not on notice and no application had been made pursuant to Order 60 of the Rules of the Superior Courts. However I indicated that in the event that the court without reference to constitutional arguments was disposed to construe the relevant legislation as applying the director restriction regime to credit union directors, I would afford the ninth named respondent/CUDA an opportunity to apply to court for liberty to make constitutional arguments and to seek appropriate orders and directions under Order 60.

5. The Issues
5.1 The wider issue of whether the Reporting and Restriction Regime under the 2014 Act applies to the respondents as directors of NCU therefore involves the court interpreting the legislation to answer the following questions:

(1) whether Part 7 of the 2011 Act and section 134 of the 1997 Act are entirely separate and distinct statutory frameworks for the winding up of credit unions, in particular whether section 134(5) applies to the winding up of NCU;

(2) whether sections 682 and 683 of the 2014 act, concerning the obligation of reporting by a liquidator to the DCE in respect of an "insolvent company", and the obligation, unless relieved, of a liquidator to apply for restriction of directors, apply to NCU; and by extension, whether the provisions of section 819 of the 2014 Act, which (like s.150 of the 1990 Act before it) mandate restriction of a director of an insolvent company unless the court is satisfied that such director should not be restricted, apply to directors of credit unions including NCU.

6. Principles of statutory interpretation
6.1 The general approach that the court should take to statutory interpretation was usefully set out by Noonan J. in *Fingleton v. The Central Bank of Ireland* [2016] IEHC 1, at paragraph 71:

> "71. At its heart, this case is essentially concerned with statutory interpretation. The court's task in construing any piece of legislation is to give effect to the intention of the legislature. The legislation in this case and in particular s. 33AO(2) of the Act was minutely parsed and analysed by the parties by reference to a number of different well settled cannons of construction to assist the court in determining the legislative intent. The applicant referred to these and other matters as "hurdles" that the respondent had to surmount to establish the meaning contended for by the respondent. It was said that if the respondent fell at any of these hurdles, the court would be left with no option but to prefer the applicant's construction.
>
> 72. However, many, and perhaps all, of these aids to construction do not arise if the natural and ordinary meaning of the words of the section is otherwise readily ascertainable. In construing any statute, the provision as a whole must be examined to determine the context in which particular words or expressions are used so as to accord them their natural and ordinary meaning. Individual words or phrases may mean different things in different contexts and often cannot be analysed in isolation. To have regard to the scheme and purpose of a statute to construe its meaning is not necessarily the same thing as adopting a purposive approach to an otherwise doubtful provision. In construing statutes, as in understanding ordinary language, context is everything."

6.2 I respectfully adopt this statement. It follows that the Court should first look to the ordinary and natural meaning of the words that are to be construed. It should do so in context, and in particular in the context of the relevant sections read as a whole. In the present case, parts of the Companies Acts incorporated (or said to be incorporated) by reference are an important and integral part of the context. If this leads to uncertainty or ambiguity, or an absurd result, the court can look to the legislation as a whole to assist in ascertaining the intention of the Oireachtas and construing the relevant provisions. In such circumstances the court can also call in aid rules of construction, such as the maxim *expressio unius est exclusio alterius*.

6.3 A related question arise in the present case as to whether section 5(1) of the Interpretation Act, 2005, applies, or whether the court should apply the stricter rules of construction applicable to a statute imposing a penal sanction.

6.4 The Interpretation Act 2005 provides: –

"5. (1) In construing a provision of any Act (*other than a provision that relates to the imposition of a penal or other sanction*) –

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –

(i)… the Oireachtas…

…

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole." [Emphasis added.]

Subsection (2) applies a similar provision to statutory instruments.

6.5 It is well established, and was not disputed, that the primary purpose of the Reporting and Restriction Regime is to protect members of the public . However it is also clear that a restriction order is damaging to a person's reputation. In *Re Tralee Beef and Lamb Ltd: Kavanagh v Delaney* [2008] 3 IR 347 at page 354, Hardiman J. giving the judgment of the Supreme Court characterised a restriction order as –

"…draconian in the sense… [that it] is gravely damaging to the reputation of a person thus afflicted. Indeed, a number of the cases on the topic use the words "stigma" and "stigmatised"…".

The effect of a restriction order may also be penal insofar as it restricts a person from remaining as a promoter or director of any company, or becoming a promoter or director within the five year restriction. In many cases a restriction order forces a person to resign one or more existing directorships. Restriction orders will also carry with them potential costs liabilities, including costs related to the investigation carried out by the liquidator. Furthermore, the 2014 Act provides for criminal sanctions to apply to a person acting in breach of a restriction order. Moreover if the restriction regime applies to credit unions, and if it follows from that that the disqualification regime under the Companies Acts also applies, it is clear that a disqualification order in its effects and consequences is more serious than a restriction order. In *Re Kentford Securities Ltd* [2010] IESC 59, O'Donnell J., delivering the judgment of the court, stated:

"It has also been observed, that given the penal consequences of a disqualification order for any director or other officer, that a court must feel a high degree of confidence before making any such disqualification order."

6.6 I am satisfied that a restriction order usually has penal effect, and does in effect amount to a form of "sanction" within the meaning of section 5 of the Interpretation Act, 2005. It follows that section 5 does not apply in the present case.

6.7 CUDA in their submissions argued that the strict rules of construction that apply to penal statutes are engaged because of the "potential imposition of a detriment on officers of credit unions [from] orders of restriction or disqualification and potential costs liabilities", and that such strict rules are not confined merely to criminal statutes. They cite *Bennion on Statutory Interpretation* (Francis Bennion, 5th Ed. Lexis Nexis, 2008) at page 825: –

"Although often referred to as though limited to criminal statutes, the principle in fact extends with varying emphasis to any form of detriment, whether criminal or civil."

CUDA argued that this was accepted by O'Higgins J. in *Mullins v. Harnett* [1998] 4 IR 426, where he said –

"Penal statutes are not only criminal statutes, but any statutes that impose a detriment".

6.8 I accept these submissions as correct. In *Mullins*, O'Higgins J. considered what principles might be applied in the interpretation of penal statutes. At paragraph 6, referring to "The Principle Against Doubtful Penalisation" he stated (page 434) –

"According to this principle nobody suffers a detriment by the application of a doubtful law."

However he conceded that this principle "… is largely, if not entirely concerned with the creation of *ex post facto* law in, and is bound up with, the seventh canon of construction, namely, the so – called principle of strict construction."

As to that canon of construction he cited with apparent approval the following passage at page 246 of the 12th edition of Maxwell: –

"The effect of the rule of strict construction might be summed up by saying that, where the equivocal word or ambiguous sentence leaves a reasonable doubt which the canons of interpretation failed to solve [my underlining], the benefit of the doubt should be given to the subject against the legislature which has failed to explain itself. If there is no ambiguity and the act or omission in question falls clearly within the mischief of the statute, the construction of the penal statute differs little if at all from that of any other."

Adopting this as the appropriate approach in the present case, it would seem to differ only in emphasis from the approach summarised by Noonan J. in the passage quoted above.

7. Issue (1) – do the 1997 Act and 2011 Act establish separate and distinct frameworks for winding up credit unions?

7.1 Although the 2011 Act does not state that it is to be read and construed as one with the Credit Union Act, 1997, it is clearly not in itself a self-contained or comprehensive statute governing credit unions. The principal enactment governing the establishment, registration and operation of credit unions remains the 1997 Act (as amended). The 2011 Act defines "credit union" by reference to the 1997 Act, and makes references to the 1997 Act, for instance in section 77(c)(iii). The provisions of Part 7 are limited in scope, and indeed that part bears the heading "Bank's powers in liquidation of authorised credit institutions (ss.75 – 90)". Part 7 does not repeal or replace Part X of the 1997 Act relating to winding up. Part 7 is principally concerned with the CBI and its power to present a petition to wind up a "designated credit institution" (s. 77 – 78), to approve the liquidator (s. 79), to make money available (s. 81 - 82), to establish a "liquidation committee" with two CBI nominees and one Ministerial nominee to whom the liquidator must report (s. 83 – 85), which committee is effectively replaced by the CBI when it ceases to exist.

7.2 Section 80 of Part 7 establishes "Objectives of liquidator of designated credit institution" which are significantly different to those of the liquidator an insolvent company: –

> "80(1) The liquidator of a designated credit institution has 2 objectives, as follows:
>
> (a) Objective 1 –
>
> (i) To facilitate the Bank in ensuring that each eligible depositor receives the prescribed amount payable under Regulation 11(1) of the Regulations of 2015 from the Fund or, where appropriate, the legacy fund, or
>
> (ii) To facilitate the Bank in transferring that amount from the Fund or, where appropriate, the legacy fund to another designated credit institution or to a recognised credit institution approved by the Bank, to hold that amount on behalf of each such eligible depositor;

(b) Objective 2, to wind up the affairs of the designated credit institution so as to achieve the best results for that recognised credit institution's creditors as a whole.

(2) In the event of a conflict between Objective 1 and Objective 2, Objective 1 takes precedence.

(3) The liquidator of a designated credit institution shall begin working towards both objectives immediately upon his or her appointment. The liquidator and the Bank shall cooperate in the pursuit of those objectives.

(4) The duties of a liquidator under this Part are in addition to the other duties of a liquidator.

(5) The liquidator of a designated credit institution –

> (a) shall comply with a request of the Bank for information in relation to the liquidation, and
>
> (b) may provide the Bank with any other information that the liquidator thinks might be useful for the purpose of co-operating in the pursuit of Objective 1."

7.3 It will be noted that the protection of depositors under Objective 1 is expressly given precedence over winding up for the benefit of creditors. Subsection (4) is also noteworthy in that it expressly provides that the duties of a liquidator under Part 7 "…are in addition to the other duties of a liquidator". While this refers to the duties of a liquidator under the Companies Acts, it can apply equally to the duties of the liquidator of a credit union under Part X of the 1997 Act.

7.4 Section 89 of the 2011 Act sets out certain minor modifications to the Companies Acts applicable to the winding up of credit unions under Part 7. It does not contain any provision similar to that set out in section 134(5) of the 1997 Act.

7.5 If the submission of counsel for the liquidator to the effect that Part 7 is a separate and entirely distinct regime for the winding up of credit unions is correct, then section 134(5) has no application to Part 7 liquidations. This would mean that sections 293 to 299 of the Companies Act 1963 and sections 202 to 204 of the Companies Act 1990 (as amended), concerning frauds by officers and fraudulent and reckless trading, and now the equivalent sections in the 2014 Act , could be applied without restriction by a liquidator to all officers of a credit union, including employees and voluntary assistants.

7.6 Considering Part 7 of the 2011 Act as a whole, and in the context of the 1997 Act as the principal legislation governing credit unions, I cannot accept that this was the intention of the legislature. The fraudulent and reckless trading sections provide for civil and criminal sanctions, and if it was the intention of the Oireachtas that these should apply to the liquidation of a credit union under the 2011 Act *such that the volunteers and employees should henceforth have new civil and criminal liability*, this would have required new, clear and express statutory provision, and at least express modification or amendment of section 134(5) of the 1997 Act. The legislature cannot have intended such different treatment of volunteers and employees simply based on the petitioner's choice of statutory provision as the basis for seeking a winding up order.

7.7 Section 134(4) is also significant in limiting the liability of present or past members of a credit union for the payment of debts and liabilities of the credit union, and the expenses of a winding up. Thus, for example, under subsection (4)(a) "no person who ceased to be a member not less than one year before the beginning of the winding up shall be liable to contribute" and under subsection (4)(b) "no person shall be liable to contribute in respect of any debt or liability contracted after he ceased to be a member". Nothing in Part 7 of the 2011 Act suggests that members or former members of credit unions were not to enjoy the benefit of subsection (4) in a winding up initiated under the 2011 Act.

7.8 Furthermore if the submission of the liquidator was correct, it would mean that Objectives 1 and 2 set out in section 80 of the 2011 Act, which are clearly designed to protect eligible depositors by the use of the Insurance Guarantee Fund, would not apply to the winding up of a credit union under the 1997 Act. It cannot have been the intent of the Oireachtas to disapply these fundamental new objectives to a winding up which happened to be brought under the 1997 Act.

7.9 I am therefore of the view that the 2011 Act does not establish a separate and distinct winding up regime for credit unions, but rather consists of additional provisions – or, as counsel for CUDA put it, a further layer of regulation - that apply not only to a winding up initiated under Part 7 but also to a winding up arising under Part X of the 1997 Act. Thus subsections (4) and (5) of s.134 of the 1997 Act apply to the winding up of a credit union arising or initiated under Part 7 of the 2011 Act. It also follows that the appointment of a liquidator to wind up a credit union arising or initiated under Part X of the 1997 Act is also governed by the applicable provisions of the 2011 Act which enhance the powers of the CBI, and the liquidator must seek to attain Objectives 1 and 2 set out in section 80(1). To this extent the provisions of the 1997 Act and Part 7 of the 2011 Act must be construed together.

7.10 This is sufficient to reject the liquidator's first submission, and to conclude that the liquidator of NCU is bound not only by Part 7 of the 2011 Act, but also by the provisions of sections 134(4) and (5) of the 1997 Act. However I note that the order of Mr Justice Charleton dated 16 December, 2013, recites in its title both the 2011 Act and the 1997 Act, although the order itself is that the NCU be wound up pursuant to the provisions of the Companies Act 1963. This is a further reason for concluding that subsections 134(4) and (5) of the 1997 Act also apply to this particular winding up.

7.11 As to the liquidator's argument that Chapter 3 of the 2014 Act provides yet another separate and distinct regime for the liquidation of a credit union, the present liquidation did not arise and was not ordered under the 2014 Act and it is not therefore necessary to address that argument.

8. Issue (2) – does the Reporting and Restriction Regime apply to the directors of NCU?
8.1 It follows from the foregoing that in considering whether the reporting and restriction regime applies to credit union directors the court must have regard to the provisions of both the 1997 Act and the 2011 Act and the relevant parts of the Companies Acts in order to ascertain the overall intention of the Oireachtas.

8.2 Section 76 of the 2011 Act provides that –

> "The companies acts apply to the winding up of a designated credit institution subject to this Part".

Prima facie in its ordinary and plain meaning this section read alone applies all the provisions of the companies acts relating to winding up, including those relating to the reporting and restriction regime. Part 7 does not exclude such provisions, and none of the modifications set out in section 89 have any particular relevance. However as the 1997 Act also applies to this liquidation its provisions must also be construed, and the intention of the legislature ascertained – in the context of credit unions as regulated at that time by that act, and in the context of the Companies Acts (to the extent that s.76 incorporates these by reference) and the regime for the restriction of directors as it existed at that time, and in the light of amending legislation relating to credit unions and the Companies Acts.

8.3 It will be recalled that section 134(1) of the 1997 Act provides –

> "Subject to this section, a credit union may be dissolved by being wound up in accordance with the Companies Acts and, accordingly, those Acts shall, subject to any necessary modifications, apply as if a credit union were a company limited by shares."

While section 249(1) of the Companies Act, 1963, provides that when the affairs of the company have been completely wound up the company will then be dissolved, it is of some significance that section 134(1) emphasises the *dissolution* of a credit union in the context of applying the companies acts. The purpose of section 134 appears to have been directed primarily at the orderly winding up of a credit union.

8.4 It should be noted that section 150 as first promulgated in 1990 did not specify who could apply to the court for a restriction order, nor did it require the liquidator to make any report (the office of the DCE was only established by the 2001 Act). The 1990 Act gave no role to the Registrar of Friendly Societies in respect of 'restriction' or 'disqualification' of directors in respect of bodies such as credit unions or industrial and provident societies. This is the position that prevailed when the 1997 Act was enacted. No mention of section 150, or section 160 and concerning disqualification of directors, is made in section 134 of the 1997 Act.

8.5 In considering context I accept the broad submissions made on behalf of CUDA and the ninth named respondent to the effect that historically credit unions were very different in many respects from a private company registered under the Companies Acts, and these differences are reflected in the 1997 Act . As s.6 shows, credit unions were not-for-profit credit institutions whose members enjoyed the "common bond" of a particular occupation, employer or locality, and whose objects centred on "the promotion of thrift", "the creation of sources of credit for the mutual benefit of its members at a fair and reasonable rate of interest", and "the use and control of member's savings for their mutual benefit". The operation of credit unions in terms of lending, borrowing, investment, share declaration etc. was constrained by the 1997 Act, and they were obliged to maintain insurance to cover loss from any fraud or dishonesty by officers or voluntary assistants (s.47), who were also required to provide a bond or other security (s.73). Governance by unpaid (save for expenses) directors, elected by secret ballot (s.53(3)) was overseen by a "Supervisory Committee", and credit unions were required to have a credit committee to decide on lending and a credit control committee to ensure loan repayment.

8.6 Of particular relevance is Part VI of the 1997 Act which sets out extensive provisions relating to the control and supervision of credit unions by the Registrar of Friendly Societies, including the power to give regulatory directions and prohibition orders (s.87) and to inspect books and documents (s.90) and appoint inspector(s) (s.92), and, following an inspector's report, to appoint a director (s.95) or remove or suspend a director or member of a Supervisory Committee (s.96), and even to cancel or suspend the registration of a credit union. Under s.94, the Registrar, following investigation of a credit union where it appeared that any offence had been committed, had the obligation to refer the matter to the DPP.

8.7 It is also noteworthy that the duties of company directors established under common law do not necessarily apply to directors of credit unions, and were not extended in their scope replication to credit unions in the 1997 Act.

8.8 In this overall context, and having regard to the penal effect of restriction or disqualification, if it was the statutory intention of the Oireachtas to extend the new regime for the restriction and/or disqualification of directors of companies and to directors of credit unions, one would expect to have seen one or more specific provisions in Part X of the 1997 Act to effect such extension. The liquidator and DCE argue that section 134(1) incorporated the restriction regime by reference and applied it to credit union directors "subject to any necessary modifications". However "modification" of the 1990 Act restriction and/or disqualification regime to credit union directors sits uneasily with the material differences between ordinary companies and their directors and the distinct and particular features of credit unions and the functions of their directors. The dangers and difficulties of this method of drafting are highlighted by *Bennion on Statutory Interpretation* -

> "While this method may be convenient for the drafter, it is not so for the reader. Moreover it has dangers. Drafters seldom know what they are attracting if when they require their Act to be construed as one with earlier Acts… Construction as one often causes great difficulty for the interpreter. This is because it is a "blind" form of drafting, far inferior to contextual amendment. Applied by the drafter more or less haphazardly, it is bound to give rise to puzzling conjunctions."

8.9 The foremost 'puzzling conjunction' that arises is the fact that restriction ordered under section 150 of the 1990 Act extended only to companies established under the Companies Acts, and not to credit unions. Section 150 (1) provides: –

> "(1) The court shall, unless it is satisfied as to any of the matters specified in subsection (2), declare that a person to whom this Chapter 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 and take part in the promotional formation of any company unless it meets the requirements set out in subsection (3)…"

The case was not made by the liquidator or the DCE that a restriction order made under section 150 could extend in effect to a credit union. Nor is the case made that under a restriction declaration made under section 819(1) of the 2014 Act would extend to a credit union .

Counsel for the liquidator argued that this court is not concerned with the consequences of extending the director restriction regime to credit unions, but only with the jurisdiction of the court to entertain a restriction application. That submission is unduly limiting of the court's approach to construction of the relevant provisions, and is rejected. The provisions of the 1990 Act as to consequences were part and parcel of the restriction regime that applied to company directors as of 1997, and clearly fall to be considered as part of the courts task in seeking to construe section 134 of the 1997 Act.

8.10 This limitation on the nature of a restriction order gives rise to uncertainty and ambiguity in the construction of section 134(1) of the 1997 Act, and the extent to which all of the winding up provisions of the Companies Acts were to apply. It defies logic and reason that the Oireachtas would empower the liquidator of a credit union to apply to the court for an order restricting the director of a credit union from becoming the director, secretary or promoter of a company as defined in the Companies Acts, yet permit the same director to become or remain as a director or officer in another credit union. Also having regard to the distinct statutory role and function of a credit union director, as compared with a director subject to a different legal regime under the Companies Acts, it is illogical that some failure to act honestly or responsibly in the context of a credit union board should result in them being restricted from acting as a company director. This is especially so when it is considered that credit union directors are volunteers and cannot be remunerated, while the same persons may be dependant on company directorships for income or livelihood. The logical and rational restriction, had the legislature decided to introduce one, would have been restriction from being a credit union director for a period of 5 years. This might attract stigma but would not affect income or livelihood. It would have accorded with the power vested in the court by s.96(5) of the 1997 Act whereby the court could declare a credit union director removed from office by the Registrar should not for a period of 5 years be an officer, auditor or voluntary assistant in a credit union.

8.11 Nor has this position changed in subsequent legislation. It will be recalled that s.53(10) of the 1997 Act, inserted by s.15 of the 2012 Act, lists the persons who are ineligible to become a director of a credit union. Of the 13 classes of persons rendered ineligible, a person subject to a restriction or disqualification order under the Companies Acts is not among them. The law therefore still treats a restricted company director as eligible for appointment as a director of a credit union. Even if the respondents were subject to restriction orders they could still be appointed directors of another credit union immediately or at any time within the 5 year restriction period! If, for example, in the course of the winding up of NCU members deposits were transferred by the liquidator to another credit union, a former NCU director even though they might be restricted under the Reporting and Restriction Regime could be appointed a director of that other credit union. On its face this absurdity raises doubts as to what "necessary modifications" of the Companies Acts the Oireachtas intended by the use of that term in s.134(1), and whether the Reporting and Restriction Regime was to apply. Moreover the further tightening of the regulatory regime applying to credit unions and their directors, officers and committees, in post-1997 legislation, as outlined earlier in this judgment, further distinguishes them from companies and company directors under the Companies' Acts.

8.12 In coming to this conclusion I have considered the decision of the Supreme Court in *Irish Commercial Society Ltd v. Plunkett and others* [1986] I.R. 258, cited by counsel for the DCE, as analogous and authority for the proposition that where the meaning is plain the court should not seek to impose a purposive interpretation. The plaintiff was an Industrial and Provident Society subject to registration and oversight by the Registrar of Friendly Societies who enjoyed the power under s.14(8) of the Industrial and Provident Societies (Amendment) Act, 1978, to commence proceedings in the name of the plaintiff seeking damages for breach of trust/breach of duty and ancillary declarations. Section 19 of that Act applied the provisions of Part VI of the Companies Act, 1963, to the winding up of such a society, "subject to any necessary modifications". An order winding up the plaintiff was made on 27th February, 1985, and with leave of the court under s.231 of the Companies Act, 1963, the official liquidator brought proceedings against the same defendants seeking reliefs and the preservation of assets for the benefit of the liquidation. Notwithstanding this, the Registrar sought to bring his own proceedings pursuant to s.14(8), claiming it created a cause of action vested in him. Barron J. in the High Court disagreed, holding that once the society went into liquidation the cause of action under s.299 of the 1963 Act passed into the control of the liquidator, subject only to the sanction of the court. The Supreme Court agreed, holding that s.14(8) was procedural in nature and did not create or vest in the Registrar a cause of action not previously known to law. Finlay CJ. stated, at p.271:

> "With regard to the general contention made on behalf of the Registrar that, in the absence of a specific provision, a restriction on the right of the Registrar should not be implied, I am satisfied that the position is as follows. The provisions of s.19 of the Act of 1978 applying Part VI of the Act of 1963 and the provisions with regard to winding up of companies therein contained to a friendly society are quite clear and explicit. Save for the special amendments made by s.19, the application of Part VI of the Act of 1963 is unconditional. Having regard to my view of the true interpretation of s.14, sub-s 8 of the Act of 1978, the survival beyond the time of an order for compulsory winding up of the Registrar's right to institute proceedings under that subsection would be a fundamental alteration of the provisions of s.231 of the Act of 1963, and indeed of the entire machinery provided by Part VI of the Act of 1963, which envisages that every step and transaction in relation to a company being wound up by the court is under the control and direction of the court…".

I consider this case distinguishable. To state the obvious it preceded the introduction in 1990 of the regime for restricting directors. Section 19 of the 1978 Act, although it had some minor "special amendments" adapting sections 213 (circumstances in which a society may be wound up) and 215 (allowing the Registrar to petition for winding up) of the 1963 Act, had no provision comparable to section 134(4) or (5) of the 1997 Act relating to credit unions. The issue before the court did not demonstrate the sort of ambiguity or absurdity that the court has identified in the present case.

8.13 Turning to section 134(5) of the 1997 Act this expressly extends the application of the sections 293 – 298 of the Companies Act, 1963, and sections 202 –204 of the 1990 Act to the winding up of a credit union. The wording used is "shall apply". Counsel for the liquidator argued that the fraudulent and reckless trading provisions of sections 293 – 298 relate to asset realisation and the collection of assets, and that these were already encompassed by the general incorporating provision in section 134(1) of the 1997 Act, and that subsection (5) is only included so that volunteers, employees and the credit union auditor are not made subject to such provisions.

8.14 I cannot accept that the purpose of section 134(5) was so limited. Taken collectively sections 239 – 298 of the Companies Act 1963 and sections 202 – 204 of the 1990 Act extend beyond asset realisation – they create criminal and penal sanctions for company directors guilty of fraud or reckless trading, as well as civil liability. In my view, the primary object of section 134(5) of the 1997 Act was to give credit union liquidators a clear pathway to pursue rogue directors who, for example, may have stolen credit union assets or been responsible for reckless trading such as unsecured lending. The limitation placed on this power was secondary in nature, and recognised the distinction established by the 1997 Act between the powers and functions of a credit union board – who had the power *inter alia* to approve lending– and mere volunteer assistants or employees, or the credit union auditor.

8.15 In contrast to s.134(5), the remainder of section 134 of the 1997 Act, and section 76 of the 2011 Act, are silent on whether the Reporting and Restriction Regime is to extend to credit union directors. Having regard to the uncertainties and ambiguity in the construction of section 134, the court is entitled to have recourse to the maxim *expressio unius est exclusio alterius* to assist interpretation of the section. Section 134(5) expresses the intention of the Oireachtas to apply the fraudulent/reckless trading provisions of the Companies Act 1963 and the 1990 Act to directors of credit unions. The regime for the restriction of directors established by the 1990 Act was comparable in that it led (potentially) to consequences for directors, namely restriction, where they could not show that they acted honestly or responsibly. Although primarily intended to protect the public, this regime also has penal effect. Had the Oireachtas intended it to apply to credit union directors, it would have expressly referred to it in the 1997 Act. The fact that it didn't do so indicates that the legislature did not intend the restriction regime, or indeed the more serious disqualification regime established by section 160 of the 1990 Act, to apply to credit union directors.

8.16 Nor in the courts view is there anything in the legislation post 1997 to suggest that section 76 of the 2011 Act should be interpreted as incorporating the reporting and restriction regime into the liquidation of a credit union. Indeed the contrary is the case when the reporting obligation and the position of the DCE are considered. The 2001 Act established the office of the DCE, and section 56 compelled liquidators of companies to seek restriction unless relieved of that obligation by the DCE. I accept as correct the submission of CUDA and the ninth named respondent that it is fundamentally illogical and incongruous that the DCE, which does not have a regulatory role in relation to solvent credit unions, should be tasked with determining whether or not a liquidator should bring an application to restrict directors of a credit union which is in liquidation. The logical parties to supervise and regulate the conduct of officers of credit unions, whether solvent or insolvent, were the Registrar of Friendly Societies, now replaced by the Registrar of Credit Unions and the CBI.

It is notable that the Oireachtas did not avail of the opportunity in 2001 or thereafter to extend the application of the reporting and restriction regime to credit unions. Section 134(5) therefore continued to govern the position, and by implication, as found by this court, the legislature did not intend the restriction and reporting regime to apply to credit unions. The presumption that section 76 of the 2011 Act incorporated the reporting and restriction regime into the winding up of credit unions therefore, does not arise.

8.17 These conclusions are reinforced by a number of factors. First, counsel for the liquidator tended to accept that the logic of applying the reporting and restriction regime to credit union directors would be that the regime for disqualification of company directors, originally established by section 160 of the 1990 Act, now governed by Chapter 4 of Part 14 of the 2014 Act, would also apply to credit union directors. Disqualification is more serious than restriction both in terms of legal consequences and stigma. Specific grounds for disqualification are set out in section 160 (as amended) and largely replicated in section 842(a) and (b) of the 2014 Act. Some of these grounds *could* only apply to a company registered under the Companies Acts. For example in section 160(2) ground (d) is that "the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company". This requires examination of a person's conduct in a company, not a credit union. Ground (e) is "in consequence of a report of inspectors appointed by the court or the Director under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company". Clearly this could never have any relevance to a credit union. Ground (f) is "a person has been persistently in default in relation to the relevant requirements" being requirements of the Companies Acts in relation to returns, accounts or other documents required to be filed or delivered or sent to the registrar of companies. Ground (h) is very company specific and relates to a director of a company who fails to take appropriate steps following receipt of a letter under s.12(2) of the Companies (Amendment) Act, 1982, warning of striking off the register in consequence of non-payment of annual returns, in consequence whereof the company is struck off. Similar points may be made in relation to the grounds set out in section 842 of the 2014 Act.

Counsel for the liquidator suggested that section 76 of the 2011 Act must be read as applying the Companies Acts to the winding up of a designated credit institution "with necessary modification". But how is this to operate? Is the liquidator entitled to ignore provisions that are exclusively referable to a company, and read others as if they refer to a company or a credit union? It is surely the role of the legislature to give clarity to these matters if it's intention is to extend a reporting and disqualification regime to directors of credit unions.

8.18 Secondly, a restriction order under section 150 of the 1990 Act restricts a director in relation to "any company", which is defined to mean a company formed under the Companies Act, 1963, or an existing company (section 2 of the 1963 Act). It did not extend to credit unions. As has been mentioned, section 819(6) of the 2014 Act provided its definition of "company" for the purposes of restriction orders made under that act, and extended this to "(f) an unregistered company". The liquidator and DCE did not seek to argue that the NCU comes within this designation, and with good reason. In the 2014 Act in Part 22 headed "Unregistered Companies and Joint-Stock Companies", Chapter 1, section 1312 (1) extends certain provisions of the 2014 act, as listed in Schedule 14, and including chapters 3 – 6 of Part 14 concerning restriction and disqualification of directors, to "unregistered Companies". However section 1312(2) expressly provides that this should not apply to *inter alia*–

> "(a) any body incorporated by or registered under any public general statute, [and]
>
> (b) any body corporate not formed for the purpose of carrying on a business which has for its object the acquisition of gain by the body or by the individual members thereof…"

NCU would appear to come within (a) or (b) above, and therefore does not come within in the definition of "unregistered company" for the purposes of s.819(6).

8.19 Thirdly the Oireachtas had a further and obvious opportunity to expressly extend the reporting and restriction regime to credit unions when undertaking extensive amendment of the 1997 Act and in the Credit Union and Cooperation with Overseas Regulators Act, 2012. It did not do so.

8.20 Fourthly in placing this issue of construction in context I have already mentioned Part VI of the 1997 Act, in particular the sections 92 – 96, which provided a statutory regime for the investigation of credit unions by the Registrar of Friendly Societies. The Registrar's inspectors, and the power of the Registrar under section 96 to remove or suspend directors and members of a Supervisory Committee. Section 96(5) provided:

> "(5) If the courts declares, a director or member of the Supervisory Committee of a credit union who is removed as mentioned in subsection (4) shall not, for a period of five years from the date when the removal takes effect, be an officer, auditor or voluntary assistant of a credit union."

As amended section 96 now vests this power of removal and suspension in the CBI, whose decision at first instance can be appealed to the Irish Financial Services Appeals Tribunal. Section 96(4) now provides for automatic disqualification consequent on removal: –

> "(4) A director or member of the board oversight committee of a credit union who is removed from office under this section is, for 5 years from the date when the removal takes effect, disqualified from holding office as an officer, or

auditor of a credit union."

While it must be accepted at the outset that this provision can be triggered only in the period prior to winding up of a credit union, if the credit union is wound up soon after then the disqualification will extend beyond the date of the winding up. This clearly demonstrates the intention of the legislature to provide a mechanism for an inspector to report to the Registrar, now CBI, and for the Registrar, now CBI, to suspend or remove a credit union director, and to provide a mechanism for such director to be disqualified from becoming involved as a director or other officer in the operation of a credit union for a five year period. Section 96 shows that in 1997, and again in 2011, the Oireachtas did address the restriction/disqualification of credit union directors yet did not see fit to take the further step of extending the Restriction and Reporting Regime, or disqualification under the Companies Acts, to the liquidation of credit unions.

9. Conclusion

9.1 It must therefore be concluded that section 134(1) of the 1997 Act and section 76 of the 2011 Act cannot be construed as incorporating by reference and applying to directors of credit unions the Reporting and Restriction Regime established by the Companies Acts, and now comprised in sections 682, 683 and 819 of the 2014 Act.

9.2 It is not therefore necessary for the court to consider whether to permit further pleadings or argument, or the joinder of the Attorney General, as to the constitutionality or otherwise of the application of the Reporting and Restriction regime were it to be applied to credit union directors.

9.3 As the preliminary issue is determined against the liquidator it follows that the court has no jurisdiction to grant to the liquidator as applicant the declarations of restriction sought in the Notice of Motion, and the application should be struck out.