THE HIGH COURT

[2016/403/COS]

IN THE MATTER OF IQ CONTENT LIMITED

(INVOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF SECTION 819 OF THE COMPANIES ACT 2014

AND

SECTION 683 OF THE COMPANIES ACT 2014

BETWEEN

DAVID VAN DESSEL

APPLICANT

AND

PAUL FITZSIMONS AND MORGAN MCKEAGNEY

RESPONDENTS

JUDGMENT of Mr. Justice Jordan delivered on the 8th day of May, 2019

Introduction

1. The applicant (the "liquidator") issued the present motion on 4th November 2016 seeking Orders pursuant to s. 819 of the Companies Act 2014 (the "2014 Act") restricting the respondents from acting as directors of a company for 5 years, unless the requirements provided for in sub. 819(3) were met.

2. The first named respondent did not oppose the liquidator's application for an order of restriction against him and an order was made in this regard by this Court (Barrett J.) on the first return date of the present motion on 28th November 2016.

3. The second named respondent has contested the liquidator's application for an order of restriction against him, and in this regard, he has sworn four lengthy replying affidavits and he has obtained discovery from the liquidator on foot of an order of this Court (Haughton J.) of 15th March 2018.

4. Section 683(2) of the 2014 Act obliges a liquidator to apply to the Court for a declaration of restriction under s. 819(1) of the 2014 Act, unless the liquidator is relieved of his obligation in this regard by the Office of the Director of Corporate Enforcement (ODCE) pursuant to s. 683(3)(a).

5. In the present case, the liquidator was not relieved of his obligation and he was notified by the ODCE by letter dated 7th September 2016 that he was obliged to make an application pursuant to s. 819 in respect of all of the directors of the Company within 2 months of receipt of the said letter.

6. Section 819, subsections (1) and (2) of the 2014 Act provide as follows:

> "(1) On the application of a person referred to in section 820(1) and subject to subsection (2), the court shall declare that a person who was a director of an insolvent company shall not, for a period of 5 years, be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned in or take part in the formation or promotion of a company, unless the company meets the requirements set out in subsection (3).
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> (2) The court shall make a declaration under subsection (1) unless it is satisfied that—
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> (a) the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,
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> (b) he or she has, when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and
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> (c) there is no other reason why it would be just and equitable that he or she should be subject to the restrictions imposed by an order under subsection (1)."

7. The persons referred to in s. 820(1) of the 2014 Act include, at subsection (b), "the liquidator of the insolvent company". This application is brought by the liquidator of IQ Content Limited (the "Company"), who has certified that the Company is unable to pay its debts within the meaning of s. 570 of the 2014 Act. It is common case that the second named Respondent was a director of the Company at the date of the commencement of its winding up on 2nd July 2014.

8. The liquidator has averred in his affidavit of 4th November 2016 that his investigations did not lead him to conclude that the respondents were dishonest in relation to the affairs of the Company. The liquidator has also indicated that he does not believe that any of the circumstances set out in sections 819(2)(b) or (c) arise in the present case.

9. The sole issue arising for consideration on the present application is whether the second named respondent acted responsibly in relation to the conduct of the affairs of the company, whether before or after it became an insolvent company.

10. The company carried on a professional services business, providing web design and IT strategy consultancy to blue chip clients. The applicant says that the cause of the liquidation can be attributed to an ambitious growth strategy, which failed to deliver anticipated turnover and a failure to manage rising operational costs.

11. The company was founded on 10th July 2000 and the second named respondent was managing director until September 2012. At its peak, revenues were at nearly €5 million per annum and it had fifty employees by the end of 2012. A world class team had been assembled and the company had attracted a roster of blue chip clients. The company had been established and existed without any State support, with an initial seed investment of €25,000 in 2000.

12. The company had experienced extreme cash flow problems on occasion. They occurred in the autumn of 2009 and again in November 2012 and finally in the winter/spring of 2013/2014.

13. The second named respondent says, and I accept, that the company had contributed more than €8 million to the exchequer during its existence. Between 2010 and 2012, he has satisfied me that the company paid €4,169,366 in combined PAYE/PRSI/USC and VAT contributions to the Revenue Commissioners.

14. In March 2012, the second named respondent's marriage broke down and he became embroiled in a protracted and difficult legal separation which eventually concluded in January 2014. In September 2012 he had stepped down as managing director with a view to focussing on developing the company's laboratories and venture businesses and to devote the necessary time to resolving his personal legal issues arising from the breakdown of his marriage.

15. Despite the company pursuing an ambitious growth strategy, in 2012/2013, the estimated capital spending by key clients was generally lower than anticipated and the cost of providing services was increasing. New heads of sales and marketing were recruited and the company made an attempt to broaden its service focus. This sales strategy was not successful and the expected high sales volumes did not materialise. Additionally, the margin on the business acquired was lower than anticipated. The company had grown rapidly without any significant external investment and all working capital came from its then current operations. Consequently, the losses incurred by the business at the end of 2013 and into 2014 directly affected the company's cash position.

16. In 2014 delays were experienced in closing new deals and the postponement of a number of large projects by important clients resulted in a severe billings shortfall which in turn led to significant losses being posted in that period. Members of staff, including the financial controller, indicated their concerns with the company's situation which was undermining its ability to trade. A view was formed that the company was likely to trade at a loss and a decision was taken to appoint a liquidator. The winding up commenced on 2nd July 2014.

17. In April 2014, the directors implemented some cost cutting measures such as redundancies, seeking additional support from their banks and an approach was made to the Revenue Commissioners with a view to agreeing a payment plan in respect of the outstanding tax debt which had accumulated. The situation worsened in June 2014 when the Revenue Commissioners put an attachment order on the company's bank account thus preventing it from accessing the €300,000 overdraft facility on this bank account.

18. I am required to have regard (throughout) in dealing with this application to the history of the company and to the conduct of the second named respondent during that history – throughout the life of the company both before and after it became an "insolvent" company.

19. It is the position that the second named respondent founded this company and that it enjoyed great success for most of its existence up until the time of the appointment of the liquidator. It is the position that it generated employment and contributed some €8m (approximately) to the Exchequer. It is a fact that the second named respondent suffered a personal crisis in or about 2011/2012 as a result of the breakdown of his marriage and separation. It is the position that his personal affairs became entangled with those of the company and in such circumstances he stepped down as Managing Director in September 2012. In late 2013, the company experienced a cash flow crisis which was sudden, unexpected and dramatic. In effect, the company was caught up in a perfect storm. It is undoubtedly the position that the first named respondent and other protagonists within the company (and in particular the financial controller) felt that the second named respondent was something of a 'dead weight' in the company. It is true that they decided to jettison him.

20. The applicant asserts that responsibility for the insolvency of the company and its net deficiency in assets as of the date of winding up ultimately rests with the respondents.

21. The applicant asserts that his investigation into the company's affairs has focussed on essentially six issues referenced in a letter dated 4th December 2013 from the company's auditors, Baker Tilly Ryan Glennon, to the Executive Board of Directors of the Company.

22. The second named respondent states that the applicant has singularly failed to recognise the speed, severity and unprecedented nature of the collapse of the company's revenue in quarter four of 2013 and quarter one of 2014. In this regard, it does appear that the directors did find themselves in unchartered territory in circumstances where the company, which appeared to be doing well, was suddenly without cash flow.

23. The second named respondent has been detailed throughout in making his case in response to the assertions by the applicant. As a lay litigant he has presented his affidavits and his case in court in an articulate and forthright manner. He sought discovery in the hope that he would find documentation which would support the points which he was making in relation to the ultimate "insolvency" and liquidation. His application for discovery was contested but he won an order for discovery. The documentation which he obtained on discovery provides very strong support for many of the arguments that he had been proffering beforehand. The discovered documentation does show that the second named respondent was isolated within the company during its time of crisis and in particular over the last year to eighteen months. It is clear to me that he was removed from decisions which were made at that time –including that concerning the moving of employees to contractor status. It is also quite clear to me that a decision was made by the other protagonists within the company to take over its assets and to engineer "a swoop on the assets" – one of the discovered e-mails contains the following:- '*You will have to be able to say to a liquidator that you were not planning this wind down and swoop for the company'* (an extract from an advisory e-mail received from Mr. L. (accountant) by Mr. Fitzsimons and then circulated to H., B. and W. on 6th June 2014). This solution to the problems of the company is described in various places – including by the second named respondent – as the 'phoenix solution'. Throughout this, the second named respondent was utterly opposed to the 'phoenix solution'. I am satisfied that he was opposed to it for several reasons. He did not wish to see his company go in that direction and he did believe that the company was fundamentally sound. Additionally, he did not feel it appropriate to treat creditors of the company in such a way. In short, his reasons for opposing the 'phoenix solution' were reasons of business integrity and responsibility. Unfortunately, he failed in his endeavours despite behaving responsibly at a time when the company was in crisis.

24. The company was in fact bought by the new 'phoenix' company touted by the other protagonists within the company. It is clear to me that they are now running the new 'phoenix' company (Each and Other Limited) with considerable success. It seems clear, and

I find, that the assets of IQ Content moved lock, stock and barrel to Each and Other Limited in what was an almost, if not completely, seamless transition. It is worth noting that this phoenix company generated profits of approximately €600,000 in its first six months of business.

25. The second named respondent sent an email to the applicant on 2nd June 2014 in which he expressed a firm view that the business was fundamentally strong but that it was undercapitalised and had costs which were too high. The second named respondent takes issue with the fact that the forward looking projections prepared by the first named respondent which were attached to that email were not exhibited by the applicant despite having been referred to. The second named respondent makes the point that these projections painted very clearly the picture of a fundamentally viable company which was undergoing cash flow difficulties but that it was one that had a healthy future prognosis. The second named respondent states that he recollects that the applicant commented somewhat laconically on the figures, noting that they were some of the healthiest figures he had ever seen for a company in distress – or something along those lines.

26. The second named respondent recalls the first named respondent and the accounting team of the company meeting with the applicant and his team on the 4th July 2014 or thereabouts just days after the appointment of the applicant, to discuss the mechanics of the handover of documents, access to records and other practical matters pertaining to the liquidation. The meeting was held in the former offices of the company which were by then the offices of Each and Other Ltd. Each and Other Ltd. hosted the meeting in what was the company's conference room, using, literally, the assets of the company to host the meeting – the table, chairs, stationary etc. At that time Each and Other Ltd. had begun trading from the company's premises using the company's fixed and intellectual assets and engaging and servicing the company's clients – effectively continuing the company's activities in a seamless fashion, with the same staff, or many of them, from the 1st July 2014 onwards.

27. The applicant points out that the payment received from Each and Other Limited was €195,000.00 and that the amount collected from the company's debtors in the course of the liquidation was €474,227.00 – but in the context that the identified deficit as at the statement of affairs stage on 2nd July 2014 was €964,271.00. The company had remitted no tax to the Revenue Commissioners since January 2014.

28. The applicant contends that it does not seem to him that the company entered into insolvent liquidation because of the various forms of collusion which the second named respondent alleges against his former colleagues and goes on to say that it does not seem to him that the second named respondent's allegations in this regard established that he himself acted responsibly in relation to the conduct of the affairs of the company.

29. Insofar as this latter expression of an opinion on the part of the applicant is concerned, I differ from the view expressed. The agenda being pursued behind his back whilst he was endeavouring to protect the company and its interests and its creditors is a significant issue in terms of the ultimate liquidation by reason of insolvency. The applicant may well be correct that the company could not have survived given the significant liabilities owed to the Revenue Commissioners which existed in June 2014 and given the cash flow crisis or losses then apparent for the previous six months. However, the second named respondent has satisfied me that things would have been entirely different and that the company did have a good prospect of survival were it not for the 'phoenix agenda' which existed at the end stage. If the second named respondent's colleagues had acted as responsibly as he did then the position would have been entirely different in June 2014 and the company may well have avoided liquidation.

30. The second named respondent points to the discovery made as substantiating many of the arguments made in early affidavits by him. He says that papers discovered provide real clarity as to who decided what and when it was decided with regard to the decision to remove certain employees from payroll and to transfer them to contractor status. In this regard he says that the new papers provide a clear timeline to the decision and provide definitive proof that it was three named and senior figures within the company that were the architects of the scheme. He also says that the documentation does show or corroborate that he had no role in the design or execution of this scheme. The sequence he points to by reference to specific documentation is as follows:

> (1) 9th November 2012 – B. sends an email to F. and W. outlining the details and cost savings of the scheme, claiming that it, "looks detailed but is simple when you digest". This is the first written reference to this approach and the second named respondent is not copied with the email.
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> (2) In the same email B. also refers to the contractor's scheme as a mechanism by which unwanted staff can be moved off payroll before forcing exits out of the company: "Help us move the ones we need to off payroll and out of the company". The second named respondent points out that he had no prior notice or awareness or oversight of this strategy and did not know about it until he reviewed the discovered emails.
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> (3) 21st November 2012 B. sends a final mail looking for consent to proceed with the scheme to H. and W. before presenting the approach to the directors, Paul Fitzsimons and the second named respondent: - "W./H., are you happy with this? Confirm back if you are or not and I will get it out to Paul, Morgan and us". H. responded on the 21st November providing his consent to the scheme stating that: "This seems like an equitable approach towards alleviating the immediate crisis".
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> (4) The second named respondent says that it is noticeable, that in all the discovery emails provided, there is no email record of he getting the opportunity to review, comment or provide his consent to the aforementioned scheme – nor is there any indication that he contributed to the conversation in any meaningful way. Rather it is clear that B., supported by H. and W. was the key driver of the initiative.

31. The emails furnished on discovery also show that even after the decision had been made to put the company into liquidation and long after the second named respondent's involvement and responsibilities had ceased, B., H., W. and Mr. Fitzsimons continued to use contracting status as a means of managing the transition to the new 'phoenix' entity, Each and Other Ltd.

32. The second named respondent makes the point that the series of emails concerning the use of contractors in the new company and the detailed strategy in that regard was the product of others within the company and a strategy which he did not approve of or participate in in any meaningful way. He has satisfied me that he bore no responsibility for the creation of the strategy and simply made a mistake in going along with it when it was thrust upon him by e-mail at a late stage with a request for an immediate decision.

33. The second named respondent points to documentation unearthed on discovery which provides strong support for his contention that colleagues in the company acted in a considered, calculated and coordinated manner in order to drive a 'phoenix' liquidation from which they would benefit. He says that the documentation discovered shows that Mr. Fitzsimons, B., H. and other senior members of the staff, supported by L. (an accountant), did indeed coordinate just such a conspiracy with devastating effect which involved:-

(a) Creating a secret plan to drive the voluntary liquidation agenda.

(b) Secretly engaging with the company's bank, in order to undermine the company's relationship with the bank and to secure finance for the new entity.

(c) Blocking attempts to reach a settlement with the Revenue.

(d) Actively misleading the second named respondent and side-lining him in key decisions.

34. The email records indicate that the planning process for the creation of the new entity began in a formal way around 20th May 2014. The meetings progressed in two waves, with a small core group of H., Paul Fitzsimons, W. and B. driving the agenda in May, and getting the early plans in place. From 4th June 2014, or thereabouts, a broader group, involving the next tier of the company's management was involved.

35. Between 20th May 2014 and 18th June 2014 – the eventual date of the second named respondent's provisional acceptance of F's offer for the company's assets – it appears that more than twenty secret meetings took place to co-ordinate efforts to create the new phoenix entity. For example:-

(a) An email from H. on 25th May 2014 to the core group of Mr. Fitzsimons, B. and W. outlines a plan for the creation of a new entity. It outlines a series of steps and meetings, and plans about "forming the new company (Monday), getting clients on board (Tuesday), getting the future team on board (Wednesday)." The email acknowledges that "we're going to need the active support of the team to pull it off" and urges staff to "once again, leave this meeting out of your work calendars".

(b) An email from H., dated 27th May, states that the new holding company has been set up for the new entity with the name Base 10 Consulting, with directors H. and B. the same address as the then current company address (34-38 Clarendon Street, Dublin 2). The company's initial ratio of shareholders, based on 100 issued shares, was to be "Paul Fitzsimons – 25, B. – 25, H. – 25, C. – 25".

(c) An email from Mr. Fitzsimons, to a broader group of staff meeting to organise a meeting on the following day, to "plan and oversee transition to our new company", the agenda of which included, "The shape of the company from board level through practice areas", "Who are we going after – tactical (short-term revenue) and strategic long term relationships", "Financial support – banks and investment", "Team (short term and long term)", "Communication and Reporting – internal and external".

36. Amongst some of the other emails are the following references:-

(1) An email from H. to B., and B's response, dated 28th May 2014, refers to Mr. L. as "L the liquidator", and poses a number of questions regarding redundancy and employment rights for "staff coming along to the new entity".

(2) An email from Mr. L., dated 28th May 2014 to Mr. Fitzsimons and Ms. B, advises that with regard to communications with staff and clients "I would advise against detailed communication now because it will quickly lead to questions we cannot answer to their satisfaction which in turn will lead to heightened concerns". It also indicates that Mr. L. has been in contact with the company's bankers on Mr. Fitzsimons' behalf, stating that "David McCarthy called me from AIB and I filled him in".

37. An email dated 27th May2014 from B. to Paul Fitzsimons reads as follows:-

"Hi

Thanks for this. In my mind the attached is the backlog – ordered work but not done or billed in any shape or form

I need three things;

1. *Backlog – I believe the attached is that.*
2. *WIP (work in progress) Working on it but not billed.*
3. *Billed in advance – billed but incomplete e.g. VF 75% up front 25% on delivery.*

Need to chat about this am over there shortly.

Cheers

[B]"

38. A relatively long email from Mr. L. to Mr. Fitzsimons on 6th June 2014 – concerning "Paul's offer and next steps" includes the following advice;-

"You will have to be able to say to a liquidator that you were not planning this wind-down and swoop for the company. Your account will have to emphasise the suddenness of the deteriorating situation, your willingness to work with any solution Morgan could have come up with to save the company and the timing of your planning to acquire the business."

39. It is also readily apparent that the unauthorised blocking of a key payment to revenue by the financial controller of the company on 6th June 2014 was critical in terms of the subsequent need to liquidate the company. It is the position, as the second named respondent accepts, that no payment had been made to Revenue since January 2014. The company was apparently behind with three P30 payments and one VAT payment. The company had been in constant communication with the Revenue Commissioners and was proactively attempting to address the Revenue liabilities by way of reaching an instalment arrangement with Revenue. As part of this process the second named respondent had made a commitment to Revenue in early June to make a payment of approximately

€40,000 as a precursor to entering into an instalment agreement to cover the outstanding amount. The payment that the financial controller refused to execute was the €40,000 down payment. By not making this payment the Financial Controller effectively destroyed any chance the company had of reaching an agreement with Revenue about its outstanding debts. The attachment order, which Revenue then placed on the company's bank account in mid-June was a direct result of the action of the Financial Controller which in turn resulted in the withdrawal of the company's overdraft and which led to a series of events that completely destroyed any hope that the company could have been saved. The situation which transpired served to advance the Phoenix strategy which was being promoted by the colleagues of the second named respondent. The blocking of the €40,000 payment to Revenue should also be viewed in the context that this occurred at a time when those pursuing the Phoenix strategy were in direct discussion with the company's bankers concerning funding of the Phoenix company.

40. The second named respondent fully accepts that the actions of the first named respondent and the Financial Controller were not solely responsible for the difficulties that the company was experiencing. His contention is that the behaviour of them both and indeed of the others working to the same end within the company to pursue the Phoenix strategy occurred at a crucial time and, in undermining the company's relationship with its bankers and with Revenue, fatally undermined what were sincere efforts on the part of the second named respondent to find an alternative solution to liquidation with a view to securing the company's future and ensuring that all creditors were paid in full.

41. Contrary to the central assertion on the part of the applicant that there was on the part of the second named respondent a participation in a plan or knowledge of a plan to divert funds from Revenue to fund the company I am satisfied that there was no such knowledge or participation on his part. Indeed, it seems to me that it is stretching matters to suggest that such a systematic plan did exist – but if it did it was not known to the second named respondent nor, in my view, is it something that he would have tolerated had he known about it.

42. The second named respondent points out that the company's audited accounts for 2012, which are exhibited by the second named respondent, at tab 24 of his first affidavit, shows that the company had a loss of just €1,493 in 2012, on a turnover of €4.36m. In effect, the company broke even in 2012. The second named respondent makes the point that the company had approximately €2m of future revenue confirmed although not yet invoiced as of the 5th May 2014 and he says that this strong sales pipeline in May of 2014 was a direct consequence of the work which he did in early 2014. He goes on to say that had a reasonable proportion of this invoicing issued in a timely manner in May and June of 2014 that it could have reversed the company's decline and secured the company's future. It is worth repeating the somewhat extraordinary and unexplained success of E&O. in its first half year of trading – reporting profits in excess of €600,000 for its first six months in business. The most logical inference or explanation for this success on the part of E&O is that the majority of the company sales pipeline was captured by E&O and converted into revenue.

43. The applicant says and repeats the fact that the second named respondent was prepared in July 2014 to recommend the sale of the assets of the company to E&O Limited for €100,000. In response to this the second named respondent says that he received new information after he made this recommendation, under extreme duress, on the 2nd July, 2014. Following receipt of the new information he became deeply sceptical about the appropriateness of the E&O bid for the company's assets and changed his view. I accept that this is what occurred and that the new information which the second named respondent received caused him to change his mind – for good reason.

44. I accept that there is a causal relationship between the management teams failed bid for the assets of the company in April 2014 via a management buyout, and their ultimately successful bid for the assets of the company via an insolvency event. It does seem quite clear that it was because the management bid failed that the management team composed of Mr. Fitzsimons, B., W. and H. pushed so hard to drive the company into liquidation in May/June of 2014. It is correct that this management team were better placed than anyone to assess the true value of the company knowing, as it did, its cost structure, liabilities and potential.

45. It is a fact that the company was effectively sold as a going concern but valued as a distressed asset. It is a fact that the figures on which the price was based were largely provided by Mr. Fitzsimons and his management team.

46. It seems to me that the second named respondent is correct in attributing the collapse of the company to three separate factors. Firstly, there was an unprecedented collapse in revenues with a resultant cash flow crisis. Secondly, this precipitated a build-up in revenue debts. Thirdly, there was a splintering in the executive team which resulted in Mr. Fitzsimons and B. (Financial Controller) driving the Phoenix solution.

47. I accept that the collapse in invoicing in quarter four of 2013 and quarter one in 2014 was unprecedented and incredibly sudden.

48. The second named respondent has satisfied me that Mr. Fitzsimons and B. believed that they would benefit significantly from a Phoenix liquidation solution (as appears to have happened) and that they and others within the company proactively worked to undermine and torpedo the attempts of the second named respondent to save the company and to see to it that all creditors were paid (including the Revenue) by:

> (a) Actively obstructing attempts to engage with and reach an accommodation with the Revenue in relation to Revenue arrears.
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> (b) Proactively working to get the company bank overdraft withdrawn, in order to limit their own exposure, and with a view to securing new banking facilities for the new entity which they proposed to set up.
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> (c) Actively blocking attempts to raise fresh investment whilst at the same time rallying support instead for investment in the new Phoenix company.
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> (d) Actively scapegoating and undermining the second named respondent with the result that he lost all staff support within the company and simultaneously damaged morale within the company.
>
> (e) Delayed the commencement of new projects in order to garner those new projects as clients/Revenue and working capital for the new Phoenix company which they intended to set up.

49. The company was a high valued added business in terms of VAT and PAYE with a turnover in access of €4.5m. It had typical monthly billings in excess of €400,000 and relatively small VAT for purchases to offset against its billings. It had a workforce of approximately 50 employees.

50. Year-end accounts for the company in 2011 and 2012 show that the company closed the year out with revenue debts of

€281,653 and €344,873 respectively.

51. Accounts for Each & Other Limited show the company carried Revenue debts of €228,524 at the end of 2015.

52. The applicant is correct that the Revenue abilities continued to accrue and increase for around 20 months before the company entered into liquidation in July of 2014. However, it is a fact that the second named respondent was working tirelessly throughout this period to get the company back on track. I am satisfied that he firmly believed that this could be achieved and that all creditors would be paid. I find also that his best efforts in that regard and the responsible actions which he took to that end were utterly frustrated by forces completely outside his control acting against him within the company – which forces ultimately succeeded in setting up the Phoenix company which took over almost all of value which IQ Content owned at a small cost and substantial benefit to themselves.

53. The Revenue liabilities at the time of the liquidation were estimated at €729,184.

54. I am satisfied that part of the Phoenix strategy involved the first named respondent with the assistance of others on the executive team (other than the second named respondent) misrepresenting the intentions of a number of the company's key clients in order to systematically undervalue the work in progress of the company and to transfer live projects across to the new entity at the expense of the company. Mr. Fitzsimons, for example, delayed the kick-off of at least two projects (Rabo Bank and Zurich) so that they could be transferred to the new Phoenix company. He represented that certain clients had withdrawn their services from the company when they had not (such as Liberty Insurance) and he underrepresented the value of the work in progress for a key client – Vodafone. These were significant actions. Delaying the kick-off of key projects caused a total collapse of the company's revenues in May and June of 2014 making it impossible for the company to survive. The postponement of projects with reduced income and inflated losses made it much more difficult for Revenue and other creditors to be paid in a timely manner. These actions also resulted in a significant undervaluation of the value of the company's work in progress which was a key element in the valuation of the company at the time of its liquidation – resulting in less being paid for the company assets than should have been paid.

55. This story of intrigue would have been largely a bald and unsupported narrative but for the documentation unearthed on discovery by the second named respondent.

56. As part of the management buy-in negotiations that were conducted in March and April of 2014 the second named respondent and his senior management team composed of Mr. Fitzsimons, B., H. and W. engaged concerning the full value of the company. In mid-April 2014, just two months before the eventual liquidation of the company, the management team led by the first named respondent, valued the company at €1.28m. At that time the second named respondent believed that this figure undervalued the company and rejected the offer which was made to him for his shareholding on the basis of that valuation. The second named respondent points to the profits reported by the Phoenix company in its first half year of operations from July of 2014 to December of 2014 in excess of €600,000 as supporting his view concerning the actual value of the company. The case made by him in that regard is well founded.

57. It is my view, having carefully considered all of the evidence, that the second named respondent is correct in describing the sale of the assets of the company to Each & Other Limited as a murky transaction with connected parties and which fundamentally undervalued the business.

58. The sales update provided by the first named respondent on 5th May 2014 showed that the company had booked (i.e. committed) sales of €1.2m at that point with a further €1.1m strong qualified sales in the pipeline at that time. The second named respondent says that as of the 5th May 2014 the company had approximately €2m of future revenue confirmed although not yet invoiced. No invoicing occurred in June of 2014 and the second named respondent states that he believes that this was because the first named respondent and the financial controller were holding this income over for their new entity E&O Ltd. which started trading on 1st July 2014. Given the extraordinary success of E&O Ltd. in its first half year of trading, reporting profits in excess of €600,000 for its first six months in business, the second named respondent asserts that there can be little doubt but that the majority of the company's confirmed sales and sales pipeline was captured by the Phoenix entity and converted into revenue. I find that this argument is persuasive. It is troubling that while the second named respondent has lost everything from the liquidation of the company - his job, income and reputation the position is that the first named respondent and the financial controller have actually prospered and gained from it. The first named respondent has increased his personal shareholding from approx. 20% of the company to 25% of the new entity, E&O Ltd. The financial controller was neither a director nor a shareholder in the company but through the liquidation and the establishment of the Phoenix entity is now a director and 20% shareholder in E&O Ltd.

59. It is a fact that the second named respondent's role in the company changed fundamentally in September 2012. After then he was no longer acting as the executive director of the company's finances, sales or strategy – areas that he had previously managed. The first named respondent had assumed full executive responsibility for these functions and devolved a significant amount of autonomy to the financial controller, B, in this regard.

60. The second named respondent from September of 2012 became side-lined within the company. He had endeavoured in early 2014 when the cash flow problems became acute to enhance sales and profitability and to engage outside experts to assist in that regard. He received no support from anyone else within the management of the company. He then instigated a management buy in process which failed. It broke down in rancour in mid-April of 2014 because the second named respondent felt that he was not being offered a fair price for the shareholding he was offering to sell in the company. It is worth reiterating that the offer which he rejected in April of 2014 for 28% of the business was €350,000 which was based on a valuation of €1.280 million.

61. In early 2014 the finance team revealed figures which showed a collapse in sales and revenues.

62. By May 2014 the situation had become critical. L. (a chartered accountant and insolvency practitioner) was invited to advise the company by the financial controller. The second named respondent says, and I accept, that L. recommended the phoenix solution. This was an immediate voluntary liquidation of the company and it would be bought back by a new entity immediately with new shareholders and directors who would then run the new entity as a normal going concern with none of the legacy debts of the old entity.

63. As of 15th May 2014, the second named respondent believes that the business was fundamentally solid with excellent clients – a strong debtors list and a reasonable level of confirmed invoicing. In addition, there was a strong book business and sales pipeline. In discussions with the first named respondent around the 21st May, 2014 the second named respondent and he agreed that the company's continued survival was contingent on the following three conditions being met:

(a) Agreeing an instalment agreement with Revenue to spread the company liabilities over a period of time.

(b) Maintaining the company's overdraft limit of €300,000 with its bankers.

(c) Sourcing an injection of fresh capital – whether in the form of fresh equity or a bank loan – to cover the company's short term losses.

64. The second named respondent drafted a letter for the first named respondent to send to revenue around this time informing them of the company difficulties and outlining a plan for engagement with them. Despite repeated promptings from him to finalise and send the letter, and he promising to do so, the first named respondent never sent the letter to Revenue nor did he communicate directly with them.

65. The second named respondent reached out to potential investors and other sources of support in late May of 2014, including Enterprise Ireland. Around the same time the company's overdraft was reinstated as Revenue temporarily withdrew its attachment order on the bank account.

66. By the 29th May, 2014 the first named respondent still had not talked to the Revenue nor had he sent on the letter which the second named respondent had prepared advising the Revenue about the current crisis in the company. The second named respondent believed that this was odd since Mr. Fitzsimons had said that he would send it and also had ultimate responsibility for finance given his role as managing director.

67. Ultimately the second named respondent sent the email to Revenue instead and rang Revenue to confirm that the company would be making a down payment for €40,000 on the outstanding taxes in the next day or so, in advance of reaching a full settlement with them.

68. On the 30th May, 2014 the company received notice from its bankers (AIB) that the Revenue Commissioners had again put an attachment order on the bank account and that it had been temporarily frozen. The second named respondent called Revenue that day and was informed that the attachment order had been placed because the company had not followed through on the promise to engage directly with them regarding the debts nor had the company paid the down payment that it had agreed to make.

69. At a company meeting with staff on 4th June 2014 Mr. Fitzsimons spoke in favour of the liquidation as did B. (the financial controller) and the phoenix company solution was suggested.

70. The second named respondent spoke at the meeting and spoke against the voluntary liquidation. He presented the view that the company was fundamentally sound and salvageable.

71. Unknown to the second named respondent the first named respondent and the financial controller were at this time having meetings with the AIB in relation to the "future". Late in the afternoon of the 6th June and again on the Monday, 9th June, 2014 B. and Mr. Fitzsimons had meetings with the company's relationship manager in AIB and sought AIB support in financing the bid for the assets and for providing banking facilities for the new entity. Late on the 9th June, 2014 AIB withdrew the company's overdraft of €300,000. The second named respondent states that Mr. Fitzsimons and B. knew of the withdrawal of the company's overdraft on the 9th June, 2014 but did not inform him of this.

72. At 5 pm on Monday, 9th June 2014, Mr. Fitzsimons and the second named respondent met with the applicant at his offices seeking advice. This was Mr. Fitzsimons's first meeting with the applicant. Although nothing turns on it the second named respondent had met the applicant for advice on 3rd June 2014 at his former offices. After the meeting on 9th June 2014, in the presence of the second named respondent and at his request, the first named respondent rang the financial controller to instruct her to make the €40,000 payment to Revenue. The second named respondent states that this occurred and I accept that it did. He goes on to point out, and I accept, that this phone call was a complete sham, because at this point, the first named respondent already knew that the company's overdraft had been withdrawn and that the funds were not there to meet the request. Later that evening, the first named respondent sent an email to B. retracting the request and apologising for putting her under such pressure.

73. As of Tuesday 10th June 2014, the second named respondent was aware that the company's overdraft had been withdrawn and took the view from that point that any chance of rescuing the company was lost. Not alone was the company overdraft gone but there was no agreement with the Revenue and the second named respondent was completely alienated within the company.

74. On 17th June 2014, the second named respondent met with Mr. Fitzsimons and agreed that, given the withdrawal of the company's banking facilities, that a rescue of the company was no longer possible, that the company was insolvent and that it had no viable route to trade out of its current situation. On the 18th June, 2014 the first named respondent reissued his offer for the assets and goodwill of the company on behalf of E & O Ltd. Believing that it was the best remaining option for creditors and employees the second named respondent agreed that this offer of Mr. Fitzsimons for the assets of the company had to be accepted subject to liquidator and Revenue approval. In truth, he could see no other option.

75. The applicant does say that on a cash flow test the company could be said to have been insolvent in quarter four of 2012. With the benefit of hindsight, it is easy to say so. I am satisfied that the evidence at the end of 2012 did not suggest insolvency or the critical state which manifested itself much later to the directors, or to the second named respondent in particular.

76. The applicant says that as at May 2014 the company could only have been saved by it entering an examinership process and even then a rescue was not guaranteed.

77. Turning to the debt owed to the Revenue Commissioners, I reject the applicant's contention that the company habitually traded off monies due to Revenue. That is entirely at odds with the facts deposed to on affidavit in relation to the entire trading history of the company. It had revenue difficulties in 2009 which it dealt with by agreement with the Revenue Commissioners. In relation to the instalment arrangement entered into with the Revenue on the 30th October, 2009 it is worth pointing out that the arrears in question were as follows:

PAYE/PRSI for the period 1/10/2009 to 31/10/2009 in the sum of €47,630 VAT 1/9/2009 to 31/10/2009 €70,134,

Total:	€117,764
Interest:	€5,959.96
Grand Total:	€123,723.96.

78. During the last 20 months of its existence (approx.) its Revenue liabilities increased whilst it was in the midst of the perfect storm which I have referred to above.

79. The sum received into the liquidation bank account is stated to be €870,000. Of this €139,000 represents funds received from the Department of Social Protection for onward transmission to former employees who were made redundant. Deducting this figure one is left with a figure of €731,000.

80. It is broadly accepted that the purpose of s. 819 of the 2014 Act is to protect the public. This was made clear by Finlay Geoghegan J. in *Re Colm O'Neill Engineering Services Ltd* [2004] IEHC 83 where she said of the legal framework provided by the predecessor of s 819 that:

> '…it is well established the purpose of the section is to protect the public against the future supervision and management of companies by persons whose past record as directors of insolvent companies have shown them to be a danger to creditors and others. It is also established that it is not the purpose of the section to punish the individuals concerned.'

81. As appears from the terms of s. 819, the effect of an Order under s. 819(1) is to restrict a person, for a period of 5 years, from being involved in a company unless that company meets the requirements specified in s. 819(3), namely, in the case of any company other than a public limited or unlimited company, having an allotted share capital of nominal value not less than €100,000, with each allotted share to be paid up to an aggregate amount not less than the said sum including the whole of any premium on that share and each allotted share and the premium on same to be paid for in cash.

82. In this regard, Dr. Courtney states as follows in relation to the nature of a restriction Order:

> *"...the respondent will not be found to have committed a criminal offence or even a civil wrong: he or she will not be deprived of the liberty to become a director of another company or prevented from re-establishing in business (i.e, they are not disqualified). Rather, if they want to manage a company they must either capitalise that company themselves or convince others to capitalise that company so as to provide a €100,000 'buffer' for creditors."*

83. It is submitted that the present capitalization requirement of €100,000 is a relatively modest sum when viewed as the capital for a commercial enterprise and represents only a small fraction of the estimated deficit of the Company referred to in its Statement of Affairs of 2nd July 2014. Against that, the second named respondent has lost everything as a result of his company going into liquidation. He is now living at home with his mother and he is trying to start again. €100,000 is clearly more than a modest sum to him as things now stand.

84. A restricted person has an entitlement to apply for relief from restriction pursuant to s. 822 of the 2014 Act and such relief may be granted, if the Court considers it appropriate, on such terms and Conditions as the Court sees fit.

85. Whatever of any hardship or stigma, a Court cannot be relieved of its obligation to make an Order of restriction by reference to the nature of such perceived or actual effects of the Order on a respondent. It is also well established that the respondent to a restriction application bears the burden of proving that he or she acted responsibly. As Murphy J. said in *Business Communications Ltd v Baxter and Parsons* (21st July, 1995, unreported):

> '…it does seem that the most important feature of the legislation is that it effectively imposes a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attaches to them as a result of either dishonesty or irresponsibility."

86. In *La Moselle Clothing Ltd v Soualhi* [1998] 2 I.L.R.M. 345, Shanley J. set out the following principles at p. 352:

> "Thus it seems to me that in determining the "responsibility" of a director for the purposes of s.150(2)(a) the court should have regard to:
>
> (a) the extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts 1963 – 1990.
>
> (b) the extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.
>
> (c) the extent of the directors responsibility for the insolvency of the company.
>
> (d) the extent of the directors responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.
>
> (e) the extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards.

87. McGuinness J. in the Supreme Court approved the above dictum in *Re Squash Ireland Limited* [2001] 3 I.R. 31 at p. 40 stating that she found this "*passage of considerable assistance in the instant case...*" and also stated as follows regarding the inquiry as to whether a director had acted responsibly:

"The question before the court is whether they acted responsibly and this, as was correctly stated by counsel on behalf of the respondent must be judged by an objective standard. In the cases of all companies which have become insolvent it is likely that some criticisms of the directors may be made; but to categorise conduct as irresponsible I feel that one must go further."

88. In *Re Swanpool Ltd. – McLaughlin v. Lannen* [2006] 2 I.L.R.M. 217, Clarke J. stated as follows at p. 224, as follows:

> "One of the most important obligations of any director is to ensure that when a company is facing an insolvency situation, its assets are dealt with in accordance with law. For the reasons identified by McCracken J. in Gasco the actions taken at such a time must be subject to particular scrutiny. While understanding the pressures, which may have been on the directors it does have to be noted that all directors in insolvent circumstances are likely to be subjected to significant pressure. It is their job to resist such pressure and to ensure that the company's assets are properly dealt with. Any significant failure in that regard has to be taken as demonstrating a level of irresponsibility sufficient to warrant making an order under the section."

89. A failure to make tax returns may also be regarded, in certain circumstances, as amounting to evidence of irresponsibility on the part of a director. In *Digital Channel Partners Ltd. (In Voluntary Liquidation)* [2004] 2 I.L.R.M. 35, Finlay Geoghegan J. stated as follows at pp. 40 to 41:

> "There are, I think, two ways of looking at the failures to make tax returns. The failure to make tax returns are clearly in breach of the relevant Taxes Acts. Similarly, the failure to make the payments are in breach of the Taxes Acts. The mere fact that a company is in breach for, as in this case, a relatively limited period will not of itself, it seems to me, indicate that the directors of the company have acted either dishonestly or irresponsibly in such a way as to preclude my concluding that overall they acted responsibly and honestly in relation to the conduct of the affairs of this company. Unfortunately and inevitably where companies are under significant financial pressure, this may occur.
>
> It appears to me that in relation to tax liabilities there must be something more than a limited failure over a period to indicate that the directors have acted irresponsibly. This has been put in a number of different ways and certainly insofar as there may be evidence that there either has been selective distribution or selective payment of liabilities of a company or indeed a total disregard of obligations to the Revenue, or even a decision to effectively seek to use taxation liabilities for the purpose of financing a company, that of itself will normally be indicative of the fact that directors have been acting at least irresponsibly."

90. In *Tailored Homes (Navan) Limited & Companies Act: O'Donoghue v. Taggart & Anor.* IEHC 76 475, Barrett J. noted that the PAYE/PRSI liabilities owed by the company had arisen over a three-year period prior to liquidation and went on to state at para. 36:

> "So these were not PAYE/PRSI liabilities incurred in the dying days of a fully trading company, when fevered efforts were being made to find new business and directors were liaising with the Revenue Commissioners and seeking to do right by all as a company's revenue stream went wrong for good."

Barrett J. went on to observe:-

> "The court does not doubt that the Taggart brothers were seeking to do what they thought best in the very challenging economic circumstances presenting. Even so, it cannot conclude that their actions when it came to a protracted failure to discharge PAYE/PRSI liabilities arising in three successive calendar years were responsible. Had there been meaningful and proper engagement with the Revenue Commissioners during this period concerning how and when those liabilities would be settled, the court might well have concluded differently."

91. It is important to make a distinction between actions or decisions that are mistaken, inappropriate or ill-considered, as opposed to decisions that are irresponsible. Not all bad decisions are irresponsible decisions and the authorities have applied much care and attention to distinguish between poor decisions and irresponsible decisions.

92. Peart J. in *USIT World plc & Companies Acts* [2005] IEHC 285, at para. 172 stated:

> "……I find the link between the conduct of the directors and the collapse of the companies in question to be one which requires the most careful scrutiny. It follows in my view that the burden on a director seeking to satisfy the Court as to his/her behaviour in relation to conduct in the affairs of the company for the purposes of escaping from an order under the section, includes if necessary, establishing that where there are matters about which they can be rightly the subject of criticism, there is in reality no causal link between those culpable matters and the insolvency. This would certainly apply in my view in relation to irresponsibility, since irresponsibility can be a matter of degree. Where honesty is at issue and the Court has not been satisfied that the director has acted honestly, that dishonesty is more fundamental and goes to the core of a person's integrity. I say that even though the section draws no distinction between honesty and responsibility. But it is significant that both words have been used in the section."

93. Peart J. expands further on hindsight, and its relationship with decision-making, at para. 177 wherein he states:-

> " With the benefit of hindsight it is natural perhaps that a liquidator can look at the situation at a particular time and form a perfectly proper view that a situation should have been looked at differently or that a different decision ought to have been made. But that is not the point in my view when this Court must decide whether it is satisfied whether directors acted honestly and responsibly. It does not mean that decisions taken must turn out later to have been the right decisions. What is at issue is whether it was irresponsible to have taken the decision at the time."

94. In the matter of *Greenmount Holdings Limited & Companies Acts: Stafford -v- O'Connor & Ors.* [2007] IEHC 246, McGovern J. makes a distinction between a legal responsibility with regard to a decision, and whether or not an applicant was actually a party to the decision. In this instance, McGoven J. held at p.6, para. iv, that:

> "Although the third named respondent had a legal responsibility in regard to this decision it seems that effectively she was not part of the decision and the evidence suggests that the decision was made by the second named respondent. Accordingly I make no order restricting the third named respondent in respect of that action".

95. In *USIT World*, Peart J., at para. 184, explores the connection between areas of management and responsibility and quotes McCracken J. in *Re: Gasco (In Liquidation)* [2001] IEHC 20:-

> " ……regard must be had to the area of management in the company for which the director was personally responsible. This does not mean, of course, that a director can disclaim responsibility altogether on the basis that financial matters were the responsibility of another director, but nevertheless one of the matters to be considered in assessing whether he acted responsibly was whether his reliance on the actions of another director was itself responsible."

96. Peart J. goes into some detail considering the variety of different directors and their behaviour, the importance of risk-taking in driving entrepreneurial behaviour, and suggests that the Court, when considering restriction, should consider the likelihood that the Director will be a danger to the public if allowed to practice unrestricted, at para. 234 he states as follows:-

> " If an entrepreneur were to be obliged, on pain of being found to be irresponsible and of being restricted under the section, to avoid taking any decision which at some date in the future might be found to have risk attached to it, the business life and a large component of the economic driver of the economy of the State would stultify. I do not believe that this is what the legislature had in mind when enacting section 150."

Referring to the effect of the legislation when wrongly applied, (specifically in the instance when a director accepts a restriction because he does not have the means to protect himself against it), Peart J. commented as follows, at para. 264:-

> "In my view, justice requires that the court, even where there is no response by the respondent, should first consider whether it can be satisfied from the facts placed before it by the liquidator that the respondent has acted honestly and responsibly. If it is so satisfied, then it follows that no order should be made, even in the absence of participation by the respondent, as to do otherwise is to presume that an absence of participation gives rise to a presumption of dishonesty and irresponsibility, and the Act provides for no such presumption. It is undesirable that a director should be deemed to have conceded a matter about which the court can be satisfied to the contrary on the documentation before it, especially where the consequences of so doing are penal in nature, if not intent. The effect is to provide protection to the public against someone in respect of whom the public has no need to be protected. That is nonsensical, absurd and unjust."

97. During the second respondent's first 12 years as Managing Director of IQ Content, from a brand new start-up company in 2000 to a scaling business in 2012, I am satisfied he acted responsibly by;-

a) Being fully tax compliant throughout almost all of the period with a minor issue in 2009 and the major issue at the end of the company's trading period;

b) Building a high quality and engaged team and always at all times respecting the highest standards in employment law;

c) Keeping accurate books and records and making timely returns;

d) Being fully compliant with all aspects of Company law;

e) Seeking out the best possible advice wherever possible;

f) Establishing good accounting standards and practices, and employing reputable accountants and auditors and working closely with them;

g) Ensuring all suppliers and creditors were treated in a fair and equitable manner, and that all debts were paid in a timely manner;

h) Building and maintaining good relations with Revenue and with the company's bankers, Bank of Ireland, Ulster Bank and AIB;

i) Willingly stepping down from his position, once he knew personal issues would impact on his ability to do the job well.

98. During the last twelve months, when the company got into severe trouble, the second named respondent did act responsibly by proactively seeking advice to fix the underlying profitability issues in the business by :-

a) Engaging in good faith in a management buy-in process that would extend the capital base of the business;

b) Proactively attempting to analyse and fix a broken sales engine;

c) Seeking out external supports and fresh investment;

d) Seeking out the best insolvency advice possible, and engaging with insolvency professionals;

e) Attempting to engage with Revenue to resolve the outstanding liability issues;

f) Being the lone voice that opposed a Phoenix liquidation solution because it would be bad for creditors and employees;

g) Engaging proactively and positively with the Liquidator, and supporting that decision once it became clear that the Company was insolvent;

h) Trying at all times to do the right thing by both employees and creditors;

i) Finally accepting voluntary liquidation when all other options had been exhausted and the company's insolvency was beyond doubt.

99. The applicant asserts that his investigation into the company's affairs has focussed on essentially six issues referenced in a letter dated 4th December 2013 from the company's auditors, Baker Tilly Ryan Glennon, to the Executive Board of Directors of the Company.

Conclusions.
I will now turn to examine each of these matters in light of what I have said above.

Removal of key employees from the payroll

100. The evidence establishes that a decision was made to move a number of key employees from the payroll to contractor status in November 2012. The motivation for this decision appears to have been to reduce payroll costs in respect of PAYE, PRSI and the like. Although this move of the employees to contractor status took place the company, somewhat curiously, continued to identify the payroll costs in its books as revenue debts.

101. If the employees in question truly became contractors than one would have thought that they would have been responsible for their own income taxes. While there is some dispute in relation to the appropriate tax treatment of these new "contractors", it does seem to me that the applicant's assertion is the correct view – i.e. that these key employees never became contractors and that the strategy adopted was no more than a name change in their status which was designed to improve cash flow by reducing revenue outlay – for a period at least. Significantly however, it is quite apparent, and I find, that this strategy and decision was devised by the financial controller in consultation with other protagonists in the company and in circumstances where the second named respondent was not involved in devising the strategy.

102. It is also apparent from the affidavit evidence and the documentation exhibited that the second named respondent was bounced into a decision in terms of giving approval to this strategy. After the matter had been devised and discussed between the Financial Controller and other protagonists in the company the second named respondent received an email requesting his approval of the strategy with a request that he respond before the following morning so that the payroll changes could be made for the following week. The email which he received in relation to the strategy was succinct and gave little detail apart from indicating the change proposed. The second named respondent says, and I accept, that he contacted the Financial Controller inquiring of her if it was legal and he was told that it was. It was on that basis that he gave his approval and in circumstances where the strategy was intended to be left in place for a three-month period – at which stage the position would be reviewed. It is clear to me that the second named respondent was given very limited information or input into the scheme.

103. It is easy to take the decision which he made out of context in terms of the affairs of the company. I find however that he did act responsibly at the time in relation to this decision although it is manifestly obvious that he made a mistake in approving of this strategy.

104. The potential revenue issue was identified to the company in the Baker Tilly letter in December, 2013. Somewhat belatedly, the company did, in acting upon the recommendation of these auditors, make voluntary disclosure to the Revenue in June, 2014 in relation to the issue.

Tax on bonuses which were paid to employees

105. In 2011, a number of Christmas bonuses were paid net to employees without any taxes being collected and returned to the Revenue Commissioners on the bonuses. The Baker Tilly letter advised the respondents that amounts owing on these bonuses should be paid within six months of the company year end and that a disclosure should be made to the Revenue Commissioners where this had not occurred. The applicant asserts that this appears to have been a measure adopted by the respondents which had the effect of withholding monies which were properly due to the Revenue. In this regard, I have to say that there is insufficient evidence to satisfy me that such was the intention of the respondents. The bonuses were small and the tax which ought to have been paid on the bonuses were modest in the overall context. It is a fact that the second named respondent was somewhat removed from payroll responsibilities within the company. He ought to have seen to it that payroll ensured that tax was paid on the Christmas bonuses in question. It seems to me however that this was no more than an error on his part and cannot be regarded as evidence of irresponsible conduct in relation to the affairs of the company within the meaning of the section. I find also that it is essentially irrelevant and unrelated to the events which ultimately gave rise to the dire financial straits of the company and which led to its liquidation.

The inclusion of Ms. Cornelia McKeagney, the spouse of the second named respondent on the payroll

106. The situation in relation to the now ex-spouse of the second named respondent is that she received a salary and the use of a pool car from the company. The applicant asserts that Ms. Murphy did not have a job with the company and did not attend the company premises to carry out any duties. It appears that the salary paid to Ms. Murphy was €90,000 per annum and that this salary was in place for in or around three years. In actual fact the position is more nuanced than might at first appear. The second named respondent replies to this assertion by pointing out that his wife's salary from the company was always considered, treated and reported as a portion of his salary. His salary was €208,000 per annum approximately. It appears that a portion of this salary (approx. €90,000) was paid to his now ex-wife with his salary being reduced accordingly and the balance being paid directly to him.

107. The second named respondent says that this was done in order that he and his wife would have the benefit of the increased standard tax rate band. It is worth pointing out that the Baker Tilly letter states that *"given the current marital conflict, it would be very difficult to persuade the Revenue Commissioners that Ms. Murphy is performing sufficient duties to justify the level of salary being paid to her from IQ Content. The Revenue are currently seeking to challenge what they consider to be an abuse of the standard rate band, where one spouse works either for the other spouse or for a company owned by one or either of the spouses".*

108. It also appears, and I accept, that the arrangement was first put in place after the second named respondent's spouse (now ex-wife) had carried out some professional services (she is an architect by profession) for the company. Again, the reality appears to be that the salary subsequently paid cannot be related to or justified by the work which she actually carried out – but it is the position that this work initially brought about the situation. The "standard rate tax band" situation I find gave rise to the division of the salary.

109. Again, in the overall context it does not seem to me that the decision taken to divide his salary in the manner described was anything other than an error, if that at all. It does not show irresponsibility in relation to the conduct of the affairs of the company. I would go further and point out that it is difficult to see what bearing the decision in question had on the ultimate "insolvency" in circumstances where non-payment of a salary to the second named respondent's wife would simply have meant that he would have been paid the full salary.

110. Any loss to the Revenue Commissioners by reason of the benefit of the increased standard rate tax band must have been modest in the overall circumstances. In that regard, I am not told what actual "loss to the Revenue" by reason of the division of the salary (if it was not justified) would have involved. That is not the argument put forward by the applicant. It is his argument that no salary should have been paid to the second named respondent's wife at all. As I say, the factual situation is that the second named respondent's salary was divided thus creating a salary for his wife. If she was not entitled to a salary the company would have a similar outlay.

The company car

111. In this regard the applicant asserts that the second named respondent's spouse had the use of a company car and he states that he understands that the cost to the company of the use by her of the company car was approximately €15,000 per annum (over a three-year period). The evidence in relation to the use and cost of the company car is wholly unsatisfactory.

112. It appears from a close perusal of the papers in evidence that the information in relation to the cost of the company car is taken from an e-mail sent by the Financial Controller to the second named respondent at a time when it is fair to say that tensions were running high and there was considerable hostility between them both. I do not know how many company cars existed. I do not know if the respondents, and in particular the second named respondent, had a company car. I do not know what inquiries, if any, were made into the actual cost to the company of the company car. I do not know what financial arrangements existed in relation to the company car in question.

113. The evidence presented falls well short of what I would require to decide whether or not the provision of this company car

shows any irresponsibility in relation to the conduct of the affairs of the company by the second named respondent. It also falls well short of giving me any guidance in relation to its impact on the ultimate insolvency of the company.

114. In relation to the company car, the applicant responds to the second named respondent's assertion that any member of staff could use this car by pointing to the difficulty "arising here is that Ms. Murphy does not appear to have been a member of staff properly so called". This response in relation to this issue is unhelpful to say the least of it and does serve to illustrate the almost complete lack of investigation/information in relation to the company car in question and the evidence available to me in that regard.

115. I find that the evidence concerning its existence for whatever period it did exist, and at whatever cost, does not show any irresponsibility on the part of the second named respondent. He has persuaded me otherwise. At worst it was an error of judgment on the part of the second named respondent to allow his wife to have the benefit of a company car.

Inappropriate use of personal expenses

116. In this regard the applicant asserts that his review of the company books and records show that there is a history of both directors withdrawing funds for personal use throughout 2008, 2009 and 2010. Both directors had loan balances as at 31/12/2010 which were repaid through personal borrowings. The applicant asserts that it seems to him that the respondents approved an increase in their respective salaries of €60,000 per annum to facility the repayment of their personal borrowings and ultimately their loan accounts with the company. It seems that the amount that was repaid by both respondents in respect of the directors' loan balance due at 31/12/2010 totalled €165,000. The loans in question were repaid by the directors and after the loans were repaid the salaries of the two directors reverted to the salaries prior to the increases. The larger loans relate to the second named respondent and the smaller to the first named respondent.

117. The applicant asserts that the use of company funds to pay directors' loans does not demonstrate that the directors acted responsibly in their conduct of the company affairs particularly given that the company was eventually wound up with considerable Revenue debts. However, these were directors' loans back in 2010. And, they were repaid in full. There is no evidence before me that the company had any revenue difficulties at that time.

118. The second named respondent has satisfied me that these assertions do not show any irresponsibility on his part in relation to the conduct of the affairs of the company. In fact, both directors acted responsibly by repaying the loans in full. In addition, I do not see that the loans in question had any bearing whatsoever on the ultimate "insolvency" of the company.

119. It is true that the second named respondent owed to the company €68,891 and that the first named respondent owed the company €21,219 at the date of the applicant's appointment as liquidator and the applicant says that these loans must have been incurred in the period from 1/1/2011 to the date of the commencement of the liquidation. It is important to point out that both respondents have acknowledged these loans. Again, I am satisfied on the evidence that the second named respondent has shown that the existence of these loans do not show any irresponsibility on his part in relation to the conduct of the affairs of the company. He has satisfied me that he has acted responsibly in relation to all such loans.

Inappropriate use of consultants

120. In this regard the applicant says that the company paid a number of so called "consultants" which were working exclusively for the company. He says that the Baker Tilly letter advised that the Revenue Commissioners would very likely find that these contractors were in fact employees working under a contract of services. They recommended putting these employees on the payroll and including the historic payments to these employees in the submission to the Revenue Commissioners. The applicant asserts that it appears that the individuals who were in fact employees were categorised differently by the respondents for the purposes of avoiding the drain on cash flow which would arise from treating such persons as employees and paying the taxes associated with their employment.

121. I have a fundamental difficulty with this assertion on the part of the applicant. It is a fact that a company can engage consultants. It is the position that consultants properly so called are responsible for their own taxes. It is also the position that the use of consultants and the naming of employees as consultants has in recent years become a hot topic insofar as Revenue obligations are concerned. The second named respondent properly points out that a company can engage consultants. It would be a strange situation if a company could not.

122. There is insufficient evidence before me to persuade me that these consultants referred to by the applicant were not properly and legitimately so called and were not properly and legitimately retained by the company as consultants and in circumstances where they bore entire responsibility for their own income and related taxes. It would be utter speculation on my part to engage with this assertion which is being made by the applicant in the absence of some evidence which would justify a conclusion on my part that the individuals were not true consultants. Furthermore, I can see no evidence which would persuade me to find that these consultants had anything to do with the ultimate "insolvency" of the company or Revenue obligations existing at the time of the appointment of the liquidator. The second named respondent has satisfied me that this assertion does not show any irresponsibility on his part in relation to the conduct of the affairs of the company. He has satisfied me that he acted at all times responsibly in relation to such matters.

123. The factual matrix leading up to the demise of the company is convoluted and complex. The second named respondent has paved a highway through the maze. He has satisfied me that he acted responsibly and indeed with integrity in relation to the conduct of the affairs of the company both before and after it became an insolvent company. I am therefore declining to make the declaration or restriction sought against the second named respondent.