Neutral Citation: [2014] IEHC 611

THE HIGH COURT

[2013 No. 463 COS]

IN THE MATTER OF AVENTINE RESOURCES PLC AND IN THE MATTER OF S. 160 OF THE COMPANIES ACT 1990 (AS AMENDED)

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

JOHN FRANCIS LIWOSZ AND ANTHONY WILLIAM BROWN

RESPONDENTS

JUDGMENT of Mr. Justice Cregan delivered the 30th day of October 2014

Introduction

1. In this application the Director of Corporate Enforcement seeks a declaration pursuant to s. 160(2)(b) and (f) of the Companies Act 1990, that the two named respondents be disqualified from acting as directors of any company.

2. A significant number of affidavits and exhibits have been filed in these proceedings including four affidavits on behalf of the respondents. The respondents were also represented at the hearing of the application.

3. The company, Aventine Resources plc was incorporated on the 11th February, 1988 as Feltrim Mining plc. On 21st April, 1993, the company changed its name to Minmet plc and on 14th April, 2010, the company changed its name to Aventine Resources plc. The company is principally involved in the exploration, processing and sale of gold, metals, ores and minerals. Its registered office is at 18 Fitzwilliam place, Dublin 2. The company was incorporated in Ireland and is governed by Irish law.

4. The first named respondent has been a director of the company from 18th July, 2008, until 21st June, 2011, and from 22nd December, 2011, to date.

5. The second named respondent has been a director since 22nd December, 2011, to date.

6. At no time during these proceedings did either of the respondents seek to contest their positions as directors of the company.

Background to this application

7. Peter Durnin, an officer with the office of the Director of Corporate Enforcement (ODCE) swore the grounding affidavit in this application. In this affidavit he states that the Director of the ODCE has brought this application against the respondents because they are company directors who have exhibited a long history of poor company law compliance and who have failed, despite repeated demands and requests, to meet certain company law obligations. In addition, the respondents are in breach of two High Court orders and thereby in breach of their duties as directors.

8. Mr. Durnin states that from February 2008, the ODCE received numerous complaints from shareholders in the company about the conduct of the company. The allegations centred on certain transactions involving millions of Euros. These complaints were put up on a website set up by shareholders of the company.

9. In addition the company was admitted to trading on the Alternative Investment Market (AIM) on the London Stock Exchange in December 2005. However it was delisted on 4th December, 2008 and trading in the company's shares ceased on that day. The company was also publicly censured by AIM that month for breaches of a number of AIM rules.

10. The respondents have objected to any evidence being admitted in relation to either the website of the shareholders or in relation to the public censure by AIM of the company on the grounds that this evidence constitutes hearsay. These issues were canvassed extensively in many affidavits put before the court. However, for the purposes of my judgment, I do not intend to have any regard to them. They are not germane to the issues which I have to consider.

11. Mr. Durnin in his first affidavit sets out in detail the ODCE's case against the respondents.

12. The first complaint is that the accounts and financial statements for 2008 were filed late - despite persistent correspondence and threats of enforcement action from the Director to the respondents. The annual returns for the financial year December 2008 (and the financial statements attached thereto) were only filed with the Company Registration Office (CRO) late - on 19th April, 2010.

13. Moreover, these financial accounts (for the year ended December 2008), were disclaimed by the company's then auditors DeLoitte and Touche. The auditors stated that they were unable to obtain sufficient audit evidence to enable them to form an opinion as to the appropriateness of the "going concern basis" in preparing the financial statements. The auditors also expressed concern about the "carrying value" of certain intangible assets (to the value of US$23 million), investment in subsidiaries (in the amount of US$10 million) and demands due by group undertakings (in the amount of US$7 million). Thus the auditors said that they were unable to form an opinion as to whether the financial statements gave a true and fair view of the accounts of the company.

14. Subsequently the ODCE wrote to the auditors querying these matters. It received a response from the auditors wherein it was stated that the degree of uncertainty and significance went beyond the level of uncertainty normally encountered in the course of an audit. As a result the auditors stated that they could not form an opinion on the matters set in the audit report.

15. It appears that the first respondent, – in response to correspondence received from the ODCE - expressed regret about the

stance the auditors were taking and maintained that the directors were of the opinion that the company had sufficient resources to justify their "going concern opinion".

16. Subsequently there were difficulties with the 2009 accounts. Again the accounts and financial statements for 2009 were filed late (in April 2011) despite persistent threats of enforcement action by the Director against the respondents.

17. In addition the financial statements for the company for the financial year ended 30th September, 2009, were also disclaimed by the auditors of the company. By this time the company had acquired new auditors (LHM Casey and McGrath). It is significant that these new auditors also disclaimed the accounts and indicated that they were unable to obtain sufficient audit evidence to enable them to form an opinion as to the appropriateness of using the "going concern basis" in preparing the financial statements and also as to the appropriateness of the carrying value of certain assets of the company.

18. Thus, given the view of two firms of auditors that there was an absence of sufficient evidence as to the ownership, nature and value of the company's primary assets, the Director was of the view that this disregard for normal corporate governance in respect of a public limited company with approximately 5,500 to 6,500 shareholders was unacceptable given the perilous state of the company's finances.

19. The Director was also of the view (i) that proper books and records were not being maintained, (ii) that the affairs of the company were being conducted in a manner which was unfairly prejudicial to the members, (iii) that there was uncertainty surrounding the value of the main assets thereby prejudicing the entitlement of the company's members, (iv) that there was a persistent failure to register the company's annual returns within the relevant statutory period, (v) that there were persistent delays in the holding of AGMs.

Breach of two High Court Orders
20. In addition to all of these significant breaches of company law, Mr. Durnin also gave evidence on affidavit that the first and second named respondents were in breach of two High Court orders.

21. The first of these arose as follows: In proceedings entitled Re: Aventine Resources plc, Director of Corporate Enforcement v. Re: Aventine Resources plc, John Francis Liwosz and Anthony Brown, (Record No. 2012/424 COS), (the s. 371 proceedings) the Director brought an application pursuant to s. 371 of the Companies Act (as amended) to compel the respondents to remedy their breaches of their obligations under the Companies Acts and in particular to remedy their breach in respect of their failure to submit to the Company's Registration Office an annual return and financial statement for the year ending 2010. Numerous affidavits were filed in these proceedings. The respondents also filed affidavits. The respondents were represented at the hearing of that application in the High Court.

22. On 5th November, 2012, the High Court (Murphy J.) having considered all the affidavits and having heard submissions by the parties made an order as follows:-

> *1. That the company do make good its default under:*
>
> > *(a) Section 159 of the Companies Act 1963 as amended to send copies of its balance sheets and their appendices and the directors' and the auditors' reports for the year ended 31 December 2010 to its members 21 days before the annual general meeting of the Company in accordance with the requirements of that section and*
> >
> > *(b) Sections 127 and 128 of the Companies Act 1963 as amended to submit to the Registrar of Companies the company's annual return and its appendices for the year ended 31 December 2010 in accordance with the requirements of those Sections within eight weeks from the date hereof*
>
> *2. pursuant to Section 371 of the Companies Act 1963 as amended and invoking Section 383(3) of the Companies Act 1963 that the first and second named Respondents do make good their defaults under*
>
> > *(a) Section 150 of the Companies Act 1963 as amended to lay the company's group accounts for the year ended 31 December 2010 before an annual general meeting of the company in accordance with the requirements of that Section and*
> >
> > *(b) Sections 127 and 128 of the Companies Act 1963 as amended and Section 383 (3) of the Companies Act 1963 as amended to submit to the Registrar of Companies the company's annual return and its appendices for the year ended 31 December 2010 in accordance with the requirements of those Sections within eight weeks from the date hereof*
>
> *3. that the Respondents do comply on a continuing basis with their obligations under sections 127 128 150 and 159 of the Companies act 1963 as amended*
>
> *4. that the Applicant do have liberty to re- enter the within proceedings in the event of future non- compliance on the part of the Respondents each or all of them with their obligations under Sections 127 128 150 and 159 of the Companies act as amended*
>
> *5. that the Applicant do recover against the first and second named Respondents jointly and severally the costs of and incidental to these proceedings pursuant to Section 371 (2) of the Companies Act 1963 to be taxed in default of agreement.*

23. Despite this High Court order the first and second respondents failed to submit to the registrar of companies the company's annual return and its appendices for the year ended 31st December, 2010. Moreover the financial accounts of the company (and the directors' and auditors' reports) for the year ended 31st December, 2010 were not sent to its members 21 days prior to the AGM of the company in compliance with the provisions of the Companies Act.

24. Mr. Durnin in his affidavit sets out the fact that significant amounts of correspondence passed between himself and the respondents in respect of these outstanding accounts. Repeated promises were made on the part of the respondents to complete the

audit work for the accounts for the year ended 2010. However despite these repeated promises the accounts were never completed.

25. The High Court order gave the respondents eight weeks within which to comply with its order of 5th November 2012. Thus on 17th January, 2013 Ms. Keating on behalf of the ODCE wrote to the respondents and their solicitors reminding the respondents that they had 8 weeks from the date of the High Court Order within which to comply with the terms of the order.

26. Given the respondents' persistent refusal to comply with the order of the High Court, the Director re-entered a Motion on 22nd May, 2013. The matter was made returnable for 17th June, 2013 and was heard before Laffoy J. on that date. Again affidavits were filed on behalf of the Director. The respondents did not file any affidavits in that application although they were represented at the hearing.

27. By order of the High Court dated 17th June, 2013 (Laffoy J.) the High Court ordered:

1. That the proceedings be re-entered.

2. That the respondents make good their defaults under the relevant sections of the Act and submit to the registrar of companies the company's annual return for the year ended 31st December, 2011 (and related orders.)

28. Despite the requirements of the second High Court order the respondents still failed to submit to the registrar of companies the company's annual return (and its appendices) for the year ended 31st December, 2011. The respondents still have not sent the auditors report and financial statements to company members 21 days prior to the AGM as required. (The respondents had until 12th August, 2013 to comply with the order of the High Court made on 17th June, 2013.)

29. Subsequently there was a further voluminous exchange of correspondence between the ODCE and the respondents (or the solicitors for the respondents) in which the respondents made repeated promises that they would comply with the court orders and finalise the accounts.

30. However although the respondents had until 12th August, 2013 to comply with the second order of the High Court they failed, neglected and/or refused to do so.

31. Therefore by letter dated the 27th August, 2013, the Director wrote to the two respondents and indicated that he intended to bring these proceedings against the two respondents.

32. The respondents - through their solicitor - indicated that they were making efforts to comply with the court orders, that they were encountering practical problems, but that the accounts were almost ready.

33. Thus, the position (as at the time this application was brought) is the following:-

1. The financial statements for the company of 2008 were filed late and disclaimed by the company's auditors.

2. The 2009 accounts were filed late and were disclaimed by a different set of company auditors.

3. The 2010 accounts have not been filed.

4. The 2011 accounts have not been filed.

5. Books of account were not being properly kept.

6. The affairs of the company were being conducted in a manner which is unfairly prejudicial to its members in that there have been persistent delays in holding of AGMs.

7. The respondents have failed to comply with many of their statutory obligations despite persistent pressure from the Director.

8. The respondents are in continuing breach of two High Court orders.

Replying affidavits for the Respondents

34. Mr. Liwosz swore two replying affidavits in this matter. In his first affidavit he states that he is a British citizen, that he is currently resident in the United Kingdom and that he is a trained engineer in the auto and aircraft industry. He also says that he is and has been a director of a number of public and private companies advising on commercial and financial strategy. He also states that he has had an otherwise unblemished business career to date and that he had never been the subject of restriction or disqualification proceedings in any jurisdiction. He also set out a brief history of the company, the problems the company encountered in relation to a specific transaction in 2007, the subsequent difficulties the company encountered in raising funds in the aftermath of the financial crisis, the significant shareholder dissension, the suspension of the company's trading shares on the AIM and various related matters. He says that he was first appointed as a non-executive director of the company on 2nd December, 2005, (prior to the company's listing on AIM) and that he resigned as a director on 9th February, 2007, that at the time of his initial resignation the company was in good standing with considerable cash and assets. He says that he was subsequently asked to return to the company as a director in July 2008, following the dispute between the former board of directors and dissenting shareholders over various transactions. He became a director again from 18th July, 2008. On 25th October, 2009, he was appointed as secretary of the company. He also states that he accepts that he has been a director of the company from the 18th July, 2008 to date, (but stated that he had attempted to resign on or about June 2011.)

35. Mr. Liwosz set out an explanation as to why the 2008 accounts were disclaimed by the auditors DeLoitte and Touche. He stated that at the date of the signing of the accounts, the company had limited cash resources giving rise to a concern as to whether the company could continue operations as a going concern. He said the board conducted a review of the company's ability to meet its commitments for the following twelve months and resolved that there was sufficient working capital to meet the board's needs for the ensuing twelve months. He stated that the board remained of the opinion that the company had sufficient liquid resources available to it to justify its view that the company could continue to operate as a going concern.

36. He also purported to give an explanation as to why DeLoitte and Touche disclaimed the company's accounts in relation to the carrying value of the assets by saying that the nature of exploration assets makes them difficult to assess and therefore it is sometimes impossible to form an opinion as to the value of such assets. He also said that the board believed that the assets in question did have significant value and that this was backed up by professional reports.

37. In relation to the 2009 accounts and the disclaimer by the second set of accountants in respect of the 2009 accounts, Mr. Liwosz' explanation was that one of the reasons why the second firm of accountants disclaimed the 2009 accounts was that they were of the view that the professional reports needed to be updated, that as this would have cost a further Stg £60,000 this was impossible to obtain due to the company's lack of funds.

38. Essentially the explanation by the first respondent for the failure to file the 2010 and 2011 accounts and for the respondents' non compliance with the court orders was that the company was in a perilous financial state and that it had limited funds to meet its auditors fees. He said that the company had difficulty in raising funds and was forced to exhaust all avenues of financing in order to get the funds necessary to complete the filings. He also stated that the company sought to find suitable insolvency practitioners to act as examiners, but was unable to do so due to lack of funds.

39. Mr. Liwosz accepted that there had been non-compliance with the court orders but stated that:

> *"Such non compliance is simply because the company does not have the current assets to pay for compliance. However as I have previously explained on many occasions to the applicant being ordered to do the impossible due to lack of funds does not alter the fact that it is impossible. The company has never chosen not to comply with the High Court orders and on both occasions it neither objected nor consented to the High Court orders being made."*

40. However, in my view this explanation does not sit easily with the previous averment that on 31st March, 2010, the board had resolved that there was sufficient working capital to meet the company's needs for the ensuing twelve months. Moreover, it does not sit easily with his averment at para. 35 of his first affidavit that:

> *"At present the audits for the years ended 31st December, 2010 and 2011 are almost complete. It is envisaged that 2012 could follow reasonably quickly."*

41. It appears that in fact the accounts for year ended December 2010 and year ended December 2011, were almost complete as of the date of the swearing of the affidavit (6th December, 2013) and yet despite this, when the matter came on for hearing, the accounts still had not been filed.

42. Mr. Liwosz also stated that:

> *"In order to raise the money to pay for the completion of the audits, the company has been attempting to find a 'deal' with any prospective purchaser who sees value in the company's assets, but a search of this nature may take time. I submit that this Honourable Court should take into account the perilous financial position that the former board of directors left the company in when determining whether I have been in breach of my duty or in persistent default of my obligations. In particular I submit that this Honourable Court should consider the impossibility of the company complying with its ongoing obligations in light of its financial position where it cannot afford to meet those obligations and cannot afford to appoint an insolvency practitioner to rehabilitate or even liquidate the company."*

43. In relation to his salary, Mr. Liwosz stated:-

> *"Finally I have not been paid at all for my role as a director of the company for 2011, 2012 and 2013 and I was paid a total of Stg£6,000 for the 21 months from March 2009 to the end of 2010."*

44. Mr. Brown swore a replying affidavit in very similar terms. However, he says that as he was not appointed as a director of the company until 31st October 2011, the disclaiming of the company accounts for the year ended the 31st December, 2008, could not be relevant in any consideration of him in the current application. He makes a similar point in respect of the company accounts for the year ended the 31st December, 2009. In addition Mr. Brown states at para. 18 that:-

> *"I can now confirm that the company's books of accounts are to be transferred to Mr. Liwosz's offices and he will locate the information necessary to complete the audit."*

45. He also stated that he believed that, with the benefit of hindsight, he was naïve in accepting his appointment as a director of the company and he says that he has never been paid for his role as director of the company.

Response of ODCE

46. Mr. Durnin swore a replying affidavit on behalf of the ODCE. In this affidavit he sets out the extraordinary volume of correspondence between the Director's office and the respondents in trying to insist that the respondents fulfil their statutory obligations. Indeed in respect of the 2008 statements he exhibited no less than 40 pieces of correspondence that passed between the Director, Mr. Liwosz and others associated with the company. He also points to the inherent contradiction in the respondents' position by contending that the assets of the company have a significant value and yet also claiming that the company does not have sufficient funds to pay for an audit. Mr. Durnin also notes that both respondents in their affidavits refer to how the audits for 2010, 2011 and 2012, would be completed reasonably quickly, but notes that the Director had been the recipient of similar repeated promises from the respondents over the years claiming that the outstanding audits would be completed "as soon as possible", that they would be completed "imminently", that there "would be no future incidents of non compliance", that "audit funds were in place" etc. Indeed by way of one example only, on 11th April, 2011, the first respondent sent the Director an email that he was on the brink of finalising the 2010 audit. This was over three years ago and that audit still has not been completed. Other letters offer "sincerest apologies for the lack of compliance in the past" and resolve to "move matters forward" and "to put the past well and truly behind them" and "to ensure that the company would never again be non compliant in any way at all". It is clear however, that such promises were easily made by the respondents and easily broken. Another example of the respondents' behaviour is that the first respondent sent a letter on 13th April, 2012, wherein he confirmed that the auditors were in funds to complete the 2010 audit and that he expected the audit to be finished by May 2012, whereas the auditors some ten days later claimed that they still had not received the audit fees.

47. Again and again it is clear from the affidavits and the correspondence that the Director repeatedly wrote to the respondents to get them to comply with their obligations under the legislation and to comply with the two court orders. Again and again the

respondents promised much, but delivered little. Again and again they sought refuge in the fact that the company was in financial difficulties and yet at the same time seemed to confirm that the accounts would be shortly completed.

48. Moreover Mr. Durnin noted that although Mr. Liwosz said he was not paid at all for his role as a director of the company for 2011, 2012 and 2013, he had in fact received US$77,000 as director's remuneration for 2008. In addition he received US$87,000 as remuneration in 2009. Mr. Liwosz's affidavits stated that he has been paid a total of Stg£6,000 for the 21 months from March 2009 to the end of 2010. There is no reference in this averment to the fact that he had received US$87,000 for 2009. In reply Mr. Liwosz accepted that he received the remuneration set out by Mr. Durnin in respect of the years 2008 and 2009, but confirmed he had not been paid at all for 2011, 2012 and 2013. However, he says his statement that he was paid a total of Stg£6,000 for the 21 months from March 2009 to the end of 2010 is correct. That may be so, but it is entirely misleading to make this averment in circumstances where he had received a sum of US$87,000 for 2009. This averment that he had received the sum of Stg£6,000 for the 21 months from March 2009 to the end of 2010 would leave the court with the impression that he had not been paid any other monies in 2009 when that was clearly not the case.

Legal Principles applicable to this application.
49. This application is brought under s. 160(2)(b) and (f) of the Companies Act 1990, as amended.

50. Section 160(2)(b) and (f) provide as follows:-

> *"Where the court is satisfied in any proceedings or as a result of an application under this section that:*
>
> *(b) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner; or*
>
> *(f) a person has been persistently in default in relation to the relevant requirements;*
>
> *The court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit."*

Other relevant legal sections.
51. Whilst s.160 (2)(b) provides the circumstances under which a director may be disqualified, there are other relevant sections in the company law code which are of relevance in this application. These are as follows:

> 1. Under s.125 of the Companies Act 1963 every company is required to make an annual return to the Registrar of Companies.
>
> 2. Under s.127 of the Companies Act the annual return must be delivered within 28 days of the annual return date (which is 30th September of each year in respect of the company.)
>
> 3. Section 128 of the Companies Act specifies the documents which must be attached to the annual return. These include the balance sheet, the director's report and the auditors report.
>
> 4. These documents must be first laid before an AGM in accordance with s.128 before they are to be submitted to the Registrar of Companies with the annual return.
>
> 5. Under s.150 (1) of the Companies Act, the Directors of the company must prepare company accounts each year.
>
> 6. Under s.148 (7) of the Companies Act the Directors must lay accounts before the AGM of the company within nine months of the balance sheet date. Thus any accounts for this company (which has its year end on 31st December) should be laid before an AGM no later than 30th September of the following year. (see s.150(9); s148 (7)).

52. These obligations have clearly not been complied with in the present case.

53. Moreover there is no evidence that the company's group accounts for the period ended 31st December, 2010 were laid before an AGM by 30th September, 2011; likewise there is no evidence that the company accounts for the period ended 31st December, 2011 were laid before an AGM by 30th September, 2012 and there is no evidence that the accounts of the company for the period ended 31st December, 2012 were laid before an AGM by 30th September, 2013.

54. In addition the annual return and the financial statements for each of these years have not been filed with the Companies Registration Office. Thus in the present case there are numerous statutory sections which the respondents have repeatedly breached in addition to the failure to comply with two court orders.

Case law on disqualification
55. I have been referred to a number of recent Irish and English authorities on the grounds for disqualification and the circumstances in which the court might make a disqualification order. In particular I have been referred to *Re National Irish Bank Ltd; Director of Corporate Enforcement v. D' Arcy* (2006) 2 IR 163; *Re Bovale Developments Ltd; Director of Corporate Enforcement v. Bailey & anor* (2013) IEHC 561; *Re Kentford Securities Ltd; Director of Corporate Enforcement v. McCann* (2010) IESC 59; *Re National Irish Bank Ltd; Director of Corporate Enforcement v. Seymour* (No. 2) (2007) IEHC 102; *Re Wood Products (Longford) Ltd; Director of Corporate Enforcement v. McGowan* (2008) 4 IR 598.

56. In particular I note that in *Re Kentford Securities Ltd* O'Donnell J. in the Supreme Court held that the appropriate test on an application for discretionary disqualification order was twofold and he stated as follows:

> *"That Act requires a two stage inquiry. Firstly the court must consider whether one or more of the sub paragraphs of s.160 (2) have been established. These in the words of Fennelly J. are "jurisdictional triggers" or as counsel in this case put it "gateways" to the second stage of the inquiry which is a consideration of the court's discretion.*

57. The respondents' position is that they do not contest that they have been guilty of a breach of duty under s.160 (2) (b) of the Act. They do however dispute that they have been persistently in breach of the relevant requirements pursuant to s.160 (2) (f).

Thus they concede that the applicant has demonstrated that at least one of the jurisdictional triggers of s.160 (2) has been established and therefore they admitted that the court should move to consider the exercise of the court's discretion.

58. Whilst in my view the respondents correctly concede that they have been guilty of breach of duty – indeed they have no defence in this regard – the fact that they have disputed whether they have been "persistently in default" of the relevant requirements means that this is a matter which has to be considered by the court.

59. In this regard I note that in *Re Wood Products* Fennelly J. stated that the question is:

> *"Whether on the admitted facts there was persistent default on the part of the respondents. The Oxford English Dictionary definition of "persist" is "to continue firmly or obstinately in a state, opinion, purpose, or course of action especially against opposition." To persist is to do more than to continue, although repetition is involved. It implies an element of determination. The dictionary offers: "firmly". It also often suggests opposition to something, whether an idea, a rule, advice or disadvantage. Paragraph (f) uses simple everyday language. Its terms are capable of application directly to the fact of a particular case. No elaborate citation of authority is needed."*

60. Likewise Fennelly J. stated in relation to the filing of annual returns

> *"Limited liability should be regarded as a privilege conferred by the law. It enables business to raise capital and the promoters to limit their liability to the amount subscribed as well as to organise itself efficiently. The corollary is however that the beneficiaries must comply with the law as to companies. Too many companies have failed as a result of inefficiency, bad management, fraud or mere bad luck. The filing of annual returns offers some admittedly limited protection to possible creditors who may be able to ascertain the financial state of the company."*

61. On the fact of this case it is abundantly clear that the respondents have been persistently in default in relation to the relevant requirements. This can be seen from the following:

1. They filed the 2008 accounts late.

2. The 2008 accounts were disclaimed by the company's auditors.

3. They filed the 2009 accounts late and again the 2009 accounts were disclaimed by a separate firm of auditors.

4. The 2010 accounts have not been finalised and have not been laid before an AGM of the company.

5. The 2011 accounts have not been finalised and have not been laid before an AGM of the company.

6. The 2012 accounts have not been finalised and laid before an AGM of the company.

7. The annual return and financial statements for each of these years have not been filed with the CRO.

62. It is clear from this recital of events that the respondents have been in breach of their statutory requirements for five successive years.

63. On the basis of the affidavit evidence before the court I have no doubt that the respondents are also guilty of persistent default in relation to the relevant company law requirements.

64. In addition the respondents have failed to comply with two court orders.

Exercise of the courts discretion

65. Given that the respondents conceded that they were in breach of s.160 (2) (b) and given my finding that the respondents are also in breach of s.160 (2) (f), I move now to consider the issue of the exercise of the court's discretion.

66. The respondents submitted that the court should exercise its discretion within the parameters of previous case law and thus submitted that the court should engage in a comparison with previous decisions when considering whether to make a disqualification order. Thus the respondents sought to rely in *Re: Newcastle Timber Ltd; Maloney v. Smullen* (2001) 4 IR 586 where McCracken J. considered again the distinction between disqualification and restriction. The company in question had failed to make CRO returns, had traded whilst insolvent for a number of years, and after it had ceased to trade, it paid off trade creditors in priority to the Revenue. McCracken J. however held that it was more appropriate to restrict the directors rather than to disqualify them.

67. Likewise the respondents sought to rely on *Re: Wood Products (Longford) Ltd; Director of Corporate Enforcement v. McGowan [2005] IEHC 41* in which the High Court (Laffoy J.) did not make a disqualification order in circumstances where the court held that the respondents had acted irresponsibly in that they had failed to organise the payment of the company's tax liabilities to the Revenue. Laffoy J. was of the view that the conduct of the respondents although wrong did not warrant the lesser penalty of restriction let alone disqualification. The High Court's refusal to make an order was upheld by the Supreme Court on appeal.

68. The respondents also sought to contrast their behaviour with a decision of the High Court and Supreme Court in *Re: CB Readymix Ltd; Cahill v Grimes* (2002) 1 IR 372 where the High Court (Smyth J.) (and the Supreme Court on appeal) disqualified a liquidator who had destroyed the books and records of the company and had failed to act in the interests of creditors and to have engaged in what he called a "battle" with the revenue.

69. I was also referred to other similar decisions (e.g. *Business Communications Ltd v. Baxter* (Unreported High Court Murphy J. 21st July, 1995); *Re Clawhammer Ltd; Director of Corporate Enforcement v. McDonnell & Others* (2005) 1 IR 503.

70. In addition the respondents submitted that a further discretionary matter the court was entitled to take into account was the director's level of remuneration (see *Re Vehicle Imports Ltd* (Unreported High Court, Murphy J. 23rd November, 2000).

71. In summary therefore the respondents submitted that the court should compare the conduct of the respondents to the conduct of other persons who had been disqualified in previous decisions of the High Court and submitted that their conduct, although wrong, should be seen to be at the lower end of the spectrum of culpability and that it would be inappropriate for the court to make a disqualification order. In particular the respondents submitted that there had been no concerted effort to "battle" with the ODCE but

instead there had simply been a lack of funds with which the company could meet its obligations. Finally the respondents submitted that the first respondent had received little remuneration and the second respondent no remuneration from their roles as directors of the company.

72. However, none of the above arguments are sufficiently persuasive in this case and I am of the view that it is appropriate to make a disqualification order against the two respondents for the following reasons:

> 1. The most noteworthy feature of this application is the fact that the respondents are in persistent and continuing breach of not one but two High Court orders. That is an extraordinary omission on their parts. Indeed although no application for attachment and committal has been brought by the Applicant, it is noteworthy that no substantive defence has been put forward by the respondents, which is acceptable to the court, as to why the respondents have failed to comply with two orders of the High Court. Their behaviour in this regard shows a blatant disregard not only for their obligations as directors under company legislation, but also for the express terms of two court orders directing them to comply. In my view on this ground alone it would be both reasonable and appropriate to make a disqualification order.
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> 2. In addition however, the respondents have shown a persistent failure to comply with the requirements of the Company's Acts. Thus the 2008 and 2009 accounts were filed late; both sets of accounts were heavily qualified by two different sets of auditors and yet the respondents have not seen fit to remedy these defects or to engage with the accountants to resolve the accountants' concerns.
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> 3. In addition the accounts for 2010, 2011, 2012 have still not been finalised, put before an AGM or filed with the Companies Registration Office. Thus for the last five years members of this company have been unable to ascertain what is the true financial position of the company. This is an intolerable situation for shareholders in the company or possible investors in the company. The sole responsibility for this state of affairs lies solely and exclusively with the two respondents. They are the directors of the company; they are the persons who are charged with ensuring that the company fulfils its statutory obligations. However they have over a long period of years failed to discharge these obligations in any way which is acceptable to the court.
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> 4. Contrary to the assertions of the respondents, the respondents have indeed done battle with the ODCE. The court has been referred to countless pieces of correspondence from the ODCE to the respondents and the replies to the ODCE; the ODCE has had to bring not one but two court applications to force these directors to comply with their obligations. Despite these court applications and successful court orders the respondents have still failed to comply with their obligations. The fact that the respondents' behaviour necessitated these court applications is sufficient proof that the Director had to "do battle" with the respondents. The respondents simply refused to comply with their statutory obligations; they refused to comply with the various directions of the ODCE; by their refusal they compelled the ODCE to bring a court application against them under s.371 of the Act. Despite the initial court order they again failed to comply with their obligations forcing the ODCE to bring a second court application in respect of these matters. By their actions and omissions they are directly responsible for forcing the ODCE to spend a significant amount of time and resources pursuing them to fulfil their statutory obligations.
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> 5. Moreover the respondents purported explanation that the only reason they failed to comply with their obligations was that the company lacked the resources to pay for the auditors is not a convincing excuse on the facts of this case. The correspondence from the respondents to the Director has contained repeated promises from the respondents over the years stating that the outstanding audits would be completed "quickly" or "as soon as possible" or "imminently" or that "the audit funds were in place" etc. As stated above, it appears that the first respondent indicated to the Applicant that he was on the brink of finalising the 2010 audit late in April 2011 - over three years ago - and that audit still has not been completed. Indeed the chain of correspondence shows a litany of broken promises from the respondents.
>
> 6. It is unacceptable that two separate firms of auditors have qualified the accounts and that the respondents would nevertheless seek to minimise or ignore these issues. If the respondents were of the view that the assets of the company were of a certain value then they should have proved that to the auditors or provided sufficient evidence to the auditors to enable them to form a similar view. This the respondents failed to do. Given that two sets of auditors formed the view that they were unable to obtain sufficient audit evidence to enable them to form an opinion as to the appropriateness of preparing the accounts on a "going concern basis", the respondents should have been able to provide sufficient audit evidence to enable accountants to form such an opinion. The fact that they were unable to provide sufficient audit evidence means either that the evidence was not there or that the respondents failed to provide such evidence.

73. In this regard the court has particular regard to the statement of Nicholls VC in *Re Swift 736 Ltd; Secretary of State for Trade and Industry v. Ettinger* (1993) BCC 312 that

> *"Those who make use of limited liability must do so with a proper sense of responsibility. The director's disqualification procedure is an important sanction introduced by Parliament to raise standards in this regard".*

74. Likewise in *Re National Irish Bank; Director of Corporate Enforcement v. Darcy* Kelly J. referred to the dicta of Henry L.J. in *Re Grayan Building Services Ltd* where he said:

> *"The concept of limited liability and the sophistication of our corporate law offer great privileges and great opportunities for those who wish to trade under that regime. But the corporate environment carries with it the discipline that those who avail themselves of those privileges must accept the standards laid down and abide by the regulatory rules and disciplines in place to protect creditors and shareholders….. the Parliamentary intention to improve managerial standards … is clear. The statutory corporate climate is stricter than it has ever been and those enforcing it should reflect the fact that Parliament has seen the need for higher standards."*

75. In the present case the respondents have sought to obtain the benefit of limited liability and the protection that that confers on them and yet have seen fit to persistently refuse to comply with the obligations which come with such a privilege.

Conclusion
76. In the circumstances therefore I propose to make a disqualification order against the two respondents.

Principles applicable to assessment of appropriate disqualification period.

77. Both the applicant and the respondent filed legal submissions in relation to the period of disqualification. Both parties were in agreement on the general principles which are applicable to this matter.

78. Section 160 (2) of the Companies Act 1990 provides that the court may make a disqualification order against a person for such period as it sees fit. As Finlay Geoghegan J. stated in *Re Clawhammer Ltd; DCE v. McDonnell & Others* 2005 1 IR 503 "there is no direct guidance from the [Companies] Acts as to the appropriate period for a disqualification order".

79. The aims and purposes of a disqualification order were considered by the Supreme Court in *Re National Irish Bank; DCE v. Byrne* 2009 1 IESC 57 where the Supreme Court held that the primary purpose of a disqualification order is not to punish the individual but rather to protect the public against the future running of companies by persons whose past behaviour has shown them to be a danger to creditors and others. However in *Re Kentford Securities Ltd; DCE v. McCann* 2010 IESC 59 O'Donnell J. in the Supreme Court stated that "it is a significant error to characterise [s.160] as having only a single purpose - that of protecting the public from the [director] in the future". O'Donnell J. was of the view that improving the standards of corporate governance was an additional purpose of disqualification. Moreover it appears that the principle of deterrence is also a matter to which the court can have regard (see McGovern J. in *DCE v. Stakelum* 2007 IEHC 486.)

80. In *Re Clawhammer Ltd; DCE v. McDonnell & Others* 2005 1 IR 503 Finlay Geoghegan J. considered that given that the mandatory period of restriction under s.150 is five years and given that the court must have regard to the fact that the Oireachtas intended a disqualification order to be a more serious sanction than a restriction order under s.150, that it would be appropriate to consider that a reasonable period of disqualification should be five years. It would then be a matter for the Court to consider whether the period should be greater than, or less than, five years. However everything depends on the circumstances of each case and it is a matter for judicial discretion on the facts of each case.

81. I have also been referred to the relevant authorities in respect of the appropriate approach to take in relation to considering the length of the disqualification order (see *Re Ansbacher (Cayman) Ltd; DCE v. Collery 2007 1 IR 580; Re Westmid Packing Services Ltd* [1988] 2 All ER 124 *Re Civica Investments Ltd* [1983] BCLC 456).

82. In particular I note that Finlay Geoghegan J. in *Re Ansbacher (Cayman) Ltd; DCE v. Collery* concluded that the principles applicable to considering the appropriate period of disqualification were that

> *1. The primary purpose of an order of disqualification is not to punish the individual but to protect the public against future conduct of companies by persons whose past record has shown them to be a danger to creditors and others.*
>
> *2. The period of disqualification should reflect (in relation to an order under s.160 (2) (e) the gravity of the conduct as found by the Inspectors which makes the respondent unfit to be concerned in the management of a company.*
>
> *3. The period of disqualification should contain deterrent elements.*
>
> *4. A period of disqualification in excess of ten years should be reserved for particularly serious cases.*
>
> *5. The court should firstly assess the correct period in accordance with the foregoing and then take into account mitigating factors prior to fixing the actual period of disqualification.*

83. I have also been referred to and considered the principles set out in UK in *Re Sevenoaks Stationers (Retail) Ltd* (1991) CH 164 which was referred to with approval by Kelly J. in *Re National Irish Bank; DCE v. D' Arcy* 2006 2 IR 163. In Sevenoaks the court divided the potential fifteen year disqualification period into three categories as follows:

> (a) The top bracket of over ten years should be reserved for "particularly serious cases".
>
> (b) A middle bracket of between six and ten years for serious cases not meriting the top bracket.
>
> (c) A minimum bracket of between two and five years to be applied where though disqualification under s.6 is mandatory the case is not relatively speaking very serious.

Application of these principles to the facts

85. When I consider the application of these principles to the facts of this case there are a number of significant features about which I am particularly concerned. These are as follows:

> 1. Both respondents are in continuing breach of two High Court orders.
>
> 2. The financial statements for the company for 2008 were filed late and disclaimed by the company's auditors.
>
> 3. The 2009 accounts were filed late and were disclaimed by a different set of auditors.
>
> 4. The 2010, 2011 and 2012 annual returns with accounts annexed have not yet been filed.
>
> 5. The ODCE has had to do battle with the respondents over many years and has been forced to bring court applications against them on three occasions - including the current application.

86. The court views with particular seriousness the fact that no attempt has been made by the respondents to comply with the relevant court orders. I specifically asked counsel for the applicant whether the applicant was of the view that the company should have been put into liquidation. The applicant's submission was that the company should certainly have been put into liquidation given the circumstances. I enquired of counsel for the respondents why the company had not been put into liquidation and counsel for the respondents stated that he had no instructions in relation to this matter. It is clear therefore that the respondents have made a deliberate calculation to refuse to comply with two court orders for a protracted period of time, rather than putting the company into liquidation. That is clearly a significant aggravating factor in this case.

87. Having regard to the principles and facts set out above, I am of the view that a period of restriction of seven years would be appropriate in this case.

88. I have considered the mitigating factors put before the court by the respondents. The first respondent was a director of the company from the 18th of July, 2008 until June 2011 and from December 2011 to date. He is a trained engineer and he is now in his mid fifties. He has been a director of a number of private and public companies advising on commercial and financial strategy. He is currently a director of one UK incorporated company. He has had an otherwise unblemished career to date. He has not been paid at all for his role as a director of the company for 2011, 2012 and 2013. That may well be so however I do not regard any of these factors to be a mitigating factor in relation to a continuing breach of two High Court orders.

89. In relation to the second respondent the position is slightly different. The second respondent is now in his seventies. In my view that is not a mitigating factor. However the second respondent was only appointed as a director of the company in October 2011 and he has not been paid for his role as a director. Given that the second respondent only became a director in 2011 he was not responsible for the position originally in relation to the 2008 and 2009 accounts. He is however responsible for the failure to file proper accounts since he became a director and he is also fully responsible for the ongoing failure to comply with two High Court orders.

90. In the circumstances therefore I believe that an appropriate order would be to disqualify the first named respondent Mr. Liwosz for a period of seven years and to disqualify the second named respondent Mr. Anthony Brown for a period of six years.