Neutral Citation: [2016] IEHC 122

THE HIGH COURT

Record No. 2013/381COS

IN THE MATTER OF MANVIK IRELAND LIMITED (IN VOLUNTARY LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

CIARAN KIRK

Applicant

AND

MARK KERSHAW, PHILIP KERSHAW, CIARA KERSHAW,

JOHN MEADE AND RYAN CUNNINGHAM

Respondent

JUDGMENT of Mr. Justice Binchy delivered on the 16th day of February, 2016

1. This is an application for a declaration of restriction against each of the respondents under section 150 of the Companies Act, 1990, as amended. That section has been replaced by s.819 of the Companies Act 2014 (hereafter the "Act of 2014"), which came into effect on 1st June, 2015 under Article 3 of the Companies Act 2014 (Commencement) Order 2015 (S.I. 169 of 2015). Section 5(7) of the Act of 2014 provides, that:-"Schedule 6 contains further savings and transitional provisions and shall have effect accordingly." Paragraph 8(1) of schedule 6 to the Act of 2014 states:-

> "Anything commenced under a provision of the prior Companies Acts, before the repeal, by this Act, of that provision, and not completed before that repeal, may be continued and completed under the corresponding provision of this Act."
>
> Accordingly this application now falls to be dealt with under s 819 of the Act of 2014 rather than under s 150 of the Act of 1990.

Background facts:

2. Manvik Ireland Limited (hereinafter "the Company"), was incorporated on 26th September 1996. The Company changed its name from 'Ashley Park International Limited' to 'Manvik Ireland Limited' on 17th December, 2007. The primary activity of the Company was the leasing and sale of waste handling vehicles (primarily to county councils and companies working in conjunction with county councils) from premises on Turnpike Road, Ballymount, Dublin 22.

3. The first directors of the Company were the first named respondent and his father, Alan Kershaw who were directors from 4th December, 1998 until 7th December, 2007. The second and third named respondents were directors from 3rd December, 2007 until 19th October, 2010 when the third named respondent resigned as director and 20th December, 2010 when the second named respondent resigned as director. During this time, Mr. Declan Murray was appointed a director on 11th October, 2007 and Mr. Evan Dolan was appointed as a director on 3rd December, 2007. Both Mr. Murray and Mr. Dolan resigned with effect from 7th September, 2009.

4. According to the first named respondent, during the Company's life there were three distinct management teams; between 1998-2007, the Company was managed by Alan Kershaw, the father of the first, second and third named respondents and during which period he and the first named respondent were directors of the Company; between 2007 and September 2009 the Company was managed by Mr. Wayne Byrne, Mr. Declan Murray and Mr. Evan Dolan who were also shareholders in the Company; and finally in September 2009 upon the fourth named respondent becoming a 50% shareholder, the Company was placed under the management of Mr. Paul Stephens and Mr. Ray Mc Sorley. It is not disputed that neither the second nor third named respondents had any significant role to play in the affairs of the Company. The second named respondent was employed by the Company as a sales representative, but was not involved in the management of the business and says that he did not, as a director, attend monthly meetings although he did sign documents when requested to do so. The second named respondent was born on 18th July, 1982 and was 25 years of age when he was appointed a director of the Company. The third named respondent was born on 4th July, 1987 and trained as a beauty therapist. She was appointed as a director of the Company when she was 20 years of age. Neither the second nor third named respondent had any relevant business experience and clearly became directors to be of assistance to other members of their family, in particular their father Alan Kershaw and the first named respondent. It appears that Mr. Alan Kershaw owned the Company until he sold 50% of the same to the fourth named respondent in 2009. Although only appointed a director of the Company in October, 2010, it appears to be common case as between the fourth named respondent and the first named respondent that the involvement of the fourth named respondent in the affairs of the Company goes back to 2009. According to the fourth named respondent he invested in the Company and gave guarantees on behalf of the Company as a favour to his friend, Mr. Alan Kershaw. The fourth named respondent says that at the time he bought into the Company, he instructed consultants to carry out a "high level due diligence, but that the audited accounts provided by Mr. Alan Kershaw did not make any provision for outstanding tax liabilities." At the time the Company had accumulated a substantial liability to the Revenue Commissioners, to which I refer in more detail below.

5. On 23rd May, 2011 the Company ceased trading. As of that date the Company had 39 employees. On 24th May, 2011 a general meeting of the Company was held. At that meeting, a resolution was passed which resolved that the Company, by reason of its liabilities, could not continue its business and that the Company was insolvent within the meaning of the Companies Acts 1963-2006. On the same date, a resolution was passed by the creditors of the Company, by which the applicant was appointed as official liquidator of the Company. The applicant now brings this application, not having been relieved from doing so by the Director of Corporate Enforcement. The applicant states that as of the date of commencement of winding up, the 24th of May, 2011, the

Company was unable to pay its debts within the meaning of section 214 of the Companies Acts 1963. A statement of affairs was prepared by the respondents and presented to the members and creditors of the Company on 24th May, 2011. From the statement of affairs it appears that there is an estimated overall deficiency of approximately €6million in excess of liabilities over assets. Of that amount, €3.8million is owed to the Revenue Commissioners.

The Liquidator's Affidavit
Position of the first, second and third respondents

6. The first named respondent, Mark Kershaw, was the managing director of the Company between 4th December 1998 and 7th December, 2007, when he resigned as managing director. However, it is the applicant's position that the first respondent was either a de facto or shadow director of the Company for the period between 25th May, 2010 to November 2010 for the following reasons (as set out in his affidavit sworn 25th October, 2013);

> "(a) The first named respondent held himself out as "Group Managing Director of Manvik Group" in emails;
>
> (b) The first named respondent was responsible for the Company's overall performance and its day to day operations during this period;
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> (c) The first named Respondent arranged the discharge of employee expenses;
>
> (d) I understand that Mr. Ray McSorley (Chief Operations Officer) and Paul Stephens (Group Chief Executive Officer) were suspended by the first named respondent;
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> (e) The first named respondent signed two company account bank mandate forms as a director of the Company on 24th September 2009 and the 2nd November 2010 respectively;
>
> (f) According to the bank mandate dated the 2nd November 2010, a resolution was passed on that date appointing the first named respondent as a designated signatory on the Company's current account;
>
> (g) by email dated 25th August 2010 to the Bank of Scotland, the first named respondent confirmed that the second and third named respondents (directors at that time) and himself were happy for Bank of Scotland to enter into negotiations relating to the sale of the Company's premises on Turnpike Road, Ballymount, Dublin 22 with a financial/property advisor to the Company directly…
>
> (h) By email dated 27th October 2010 [to his father, Alan Kershaw], the first named respondent confirmed that he proposed to remain on as a director of all companies [in the Manvik group] with the second named respondent…
>
> (i) From my investigations into the Company's affairs, and various discussions with stakeholders of the Company, it would appear that the first named respondent largely determined the Company's strategy and was the driving force behind the Company between the 25th May 2010 and November 2010."

However, this status is disputed by the first named respondent, who avers that during that period his family were 50% shareholders and his involvement in, and relationship with the Company was purely as a shareholder. I deal more fully with the response of the first named respondent in this regard below.

7. The second named respondent, Philip Kershaw, is a brother of the first named respondent and was appointed as a director of the Company on 3rd December, 2007 following the resignation of his father as managing director. He remained a director until his own resignation on 20th December, 2010. The second named respondent was also an employee of the Company, having held the position of sales representative. The applicant avers that the second named respondent did not have an active decision making role in running the business of the Company. This accords with the account given by the second respondent himself who avers that he was not involved in the management of the business and did not attend monthly board meetings, although he was occasionally requested to, and did, sign documents. He says that he trusted in the management and the executive directors to run the Company.

8. The third named respondent, Ms. Ciara Kershaw is the sister of the first and second named respondents and the daughter of Mr. Alan Kershaw. She was a Director of the Company between 3rd December 2007 and 19th October, 2010, when she says that she was asked to resign as a director of the Company by her father and the first named respondent. The third named respondent had no involvement in the daily running of the business, and nor did she attend any meetings of the board, and , she avers, she was not invited to do so, although like the second named she says she was asked to sign documents.

Position of the fourth and fifth respondents:
9. Mr. John Meade, the fourth named respondent, was a director of the Company for a seven month period from 19th October 2010, until the appointment of the applicant as liquidator of the Company and accordingly was a director of the Company as of the date of its winding up. He assumed a role in the day to day business of the Company at least from the time of his appointment as a director of the Company, which followed on from his acquisition of a 50% shareholding in the Company the previous year.

10. The fifth named respondent, Mr. Ryan Cunningham was appointed a director of the Company at the same time as, and on the nomination of, the fourth named respondent and was a director of the Company for the seven months immediately preceding the appointment of the applicant as liquidator.

Revenue Debt
11. The principal reason advanced by the applicant for the Company's insolvency and its subsequent liquidation, was a build up of debts to the Revenue Commissioners. In this regard, the applicant avers (and the first named respondent confirms) that the Company suppressed sales for a number of years during a period between 1998 to 2006, prior to the involvement of the second, third, fourth and fifth named respondents in the affairs of the Company. The first named respondent avers that this was done (without his knowledge) deliberately by a former director of the Company, Mr. Alan Kershaw, the father of the first, second and third named respondents. During this period, the first named respondent was a director of the Company, alongside his father, Mr. Alan Kershaw. On 7th December, 2007 both Mr. Alan Kershaw and the first named respondent resigned as directors of the Company.

12. In 2009, the Revenue Commissioners carried out an investigation into the tax affairs of the Company which resulted in an assessment of a tax liability to the Revenue in the amount of €2 million. The principal sum due to the Revenue comprised arrears of VAT, PAYE and PRSI and Corporation Tax. This sum increased to €4.5million upon the imposition of interest and penalties. In October

2010, the Revenue Commissioners issued a demand for payment of this amount to the Company. The Company entered into negotiations with the Revenue Commissioners in an attempt to agree a payment plan. However, agreement was not reached and the Revenue Commissioners served a statutory demand on the Company, pursuant to section 214 of the Companies Acts 1963, in April, 2011. On 11th May 2011, the Company's overdraft facility in the sum of €250,000 was withdrawn by its bankers due to the overdraft limit having been breached. At this point in time the Company was unable to pay its trade debts as they fell due and the respondents convened a meeting of the Company's creditors on 24th May, 2011 and placed the Company in voluntary liquidation. On the date of liquidation, the total amount of liabilities owed to the Revenue Commissioners was €3,800,316, and the sum of €2,575,146 was owing to the remaining creditors of the Company. According to the statement of affairs filed by the fourth and fifth named respondents, there was a shortfall of €6,015,054 in funds available to pay unsecured creditors of the Company (in this they included some €3,566,757 owing to the Revenue Commissioners).

Matters of concern to the Applicant
13. The applicant advances a number of grounds in support of this application as follows:

> (a) the failure of the Company to file statutory returns and audited accounts, as required by section 125 of the Companies Act 1963;
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> (b) the failure of the Company to keep proper books and records; and
>
> (c) the build up of substantial liabilities to the Revenue Commissioners and the under-declaration of the Company's tax liabilities; and
>
> (d) failure on the part of the first to third named respondents to assist the liquidator.

(a) Failure to file statutory returns:
14. The applicant avers that the Company failed to file annual returns in the CRO for the years ending 31st March, 2010 and 31st March, 2011. The applicant also avers that the Company failed to file audited accounts for the years ending 30th June, 2009 and 30th June, 2010. In this regard, the first named respondent says that he has no responsibility for any of these deficiencies because he was not a director of the Company when these accounts and returns were due to have been filed. However, he says that once he became aware of these matters, he acted honestly and responsibly and tried to have the filings brought up to date. The second named respondent avers that he was not a director of the Company at the relevant time when the returns and accounts were to be filed. The third named respondent avers that she and the second named respondent "signed off" on the audited accounts for the year ending 31st June (sic), 2009 and that she was assured (although she does not say by whom) that same would be filed. She further avers that at this time, the first named respondent was not a director. In relation to the audited accounts for the year ending 31st June (sic), 2010 the third named respondent avers that at the time that those accounts were due to be filed, she, along with the first and second named respondents, were no longer directors of the Company.

(b) Failure to Keep Proper Books and Records:
15. The applicant avers that he found no evidence that the Company prepared accurate and timely management accounts, or that the Company operated a method of accounting that would have allowed management to determine the financial position of the Company as required by s.202(1)(b) of the Companies Act 1990. The applicant is not satisfied that he received all of the Company's books and records, and in particular states that he has not received the management accounts for the Company. This, in the view of the applicant, has hindered him in completing an investigation into the Company and has created difficulties in the completion of his report to the Director of Corporate Enforcement.

16. Having reviewed the books and records provided, the applicant is of the view that it would be difficult to prepare a set of management accounts therefrom in order to ascertain accurately the financial position of the Company. The applicant attributes this to the failure of the first, second and third named respondents to ensure that basic records were properly maintained. It is the belief of the applicant that this failure has resulted in substantial uncertainty as to the assets and liabilities of the Company, and it is the view of the applicant that this has impeded the orderly winding up of the Company. In particular, the applicant points to a number of vehicles, listed as assets in the records of the Company, which he avers that he has been unable to locate.

17. For these reasons the applicant is of the view that the respondents are in breach of sections 202-204 of the Companies Act 1990.

(c) Accumulation of Revenue Liabilities
18. While the applicant believes that the Company was compliant with the filing and payment of its taxes from 2006, the applicant expresses serious concerns regarding the filing and payment of the Company's taxes during the de jure period of directorship of the first named respondent. The applicant points to the statement of affairs filed by the fourth and fifth named respondents on 24th May, 2011 which demonstrates a liability to the Revenue Commissioners in the amount of just over €3.8million and avers that this amount is not in keeping with the returns of the Company, which were actually filed with the Revenue Commissioners. In this regard, and from the applicant's investigations, it is stated that during the directorship of the first named respondent, the Company failed to declare very substantial amounts of VAT and PAYE/PRSI to the Revenue Commissioners.

19. The applicant expresses the belief that the liabilities in respect of VAT and PAYE/PRSI as declared by the Company, were deliberately and substantially understated, leading the Revenue Commissioners to believe that no further liabilities were owing. The applicant also states that it was clear that the Company failed to make payments due to the Revenue Commissioners for an ongoing period prior to its liquidation; it was only following the undertaking of a Revenue audit in 2009, that the true extent of the Company's liabilities to the Revenue Commissioners became apparent. The applicant expresses concern that the first named respondent knew, or ought to have known about the under-declaration of the Company's liabilities to the Revenue Commissioners.

(d) Failure to Assist the Liquidator
20. The applicant expresses dissatisfaction with the cooperation of the first, second, and third named respondents. In particular in relation to a number of unanswered queries, which the applicant avers, has hampered his investigations.

Affidavit of the First Named Respondent
21. Mr. Mark Kershaw avers that he, along with the second and third named respondents, became suspicious of the management team appointed by the fourth and fifth named respondents (i.e. Mr. Paul Stephens and Mr. Ray McSorley). In his affidavit sworn on 12th February, 2014, the first named respondent avers that under this management team, year end accounts were filed late;

statutory returns were not made; management accounts of the Company were not made available to the board, in particular, the first named respondent avers that no management accounts were made available to the board from September 2009, when he says that Mr. Meade became a shareholder and director (although the applicant says that the fourth named respondent did not become a director until 19th October 2010, which is the date recorded in the CRO); and board meetings were not being held. The first named respondent also avers that following upon his own investigations, he found that the fourth named respondent was using Company money to make monthly repayments on his and his wife's cars.

22. In 2010, the first named respondent purported to have himself appointed as Group Managing Director. He avers that this was in circumstances where he and the second named respondent attended a board meeting, where a resolution was passed to suspend Mr. Stephens and Mr. McSorley from the Company. The first named respondent avers that the purpose of his appointment to the role of Group Managing Director was:

> "to conduct an investigation into the running of the Company and to resolve various issues we suspected including the lack of filing and management accounts."

The first named respondent avers that the fourth named respondent intervened and had him removed as Group Managing Director. He states that at no time did he formally take up the position, and he never received remuneration for same.

23. The first named respondent avers that at this time, a dispute arose between him, the first named respondent, the second named respondent, and the third named respondent on the one hand, and the fourth named respondent on the other, which ultimately resulted in a settlement agreement. In correspondence exhibited to the affidavit of the first named respondent and sent on his behalf by his solicitors during these negotiations, on 27th October, 2010, a number of demands are made on behalf of the first named respondent which the first named respondent submits demonstrates his concerns and those of the second and third named respondents as regards the management of the Company by the fourth named respondent. Amongst other things, the following is demanded:

> "...14. Meetings of the board of directors of the Manvik Group Companies shall be held monthly in accordance with good corporate governance.
>
> 15. All unapproved payments for personal car leasing and loans shall stop immediately. All Shareholders benefits shall be paid to the Shareholders on an equal basis.
>
> 16. All monies taken out of the business over the last 12 months by John Meade which were not authorised by the directors shall be repaid or offset against any outstanding monies owed by Manvik Group…
>
> 17. All unapproved expense payments to employees and/or directors shall stop immediately…"
>
> The first named respondent avers that from this correspondence it is apparent that the management of the Company was under the control of the fourth named respondent, who the first named respondent says was not running the Company with due care and diligence.

24. The first named respondent says that he was not responsible for the Company's overall performance during the period of 25th May, 2010 to November 2010; he states he was not a director or employee of the Company (apart from his attempt to take up the position of Group Managing Director). He admits that between October and December, 2010 he held himself out as managing director, but states that this had no effect on the running of the Company, as he was not permitted to exert any influence thereon. The first named respondent also denies that he was responsible for the discharge of employee expenses.

25. The first named respondent denies that he was a shadow director of the Company and avers particularly that: he was not responsible for the discharge of employee expenses; he says that his instructions to change the bank mandate on 2nd November, 2010 were given at a time when he believed he stood appointed as group managing director; as to the bank mandate dated 24th September, 2009 which was also signed by him, he avers that at this time he was not a director and he signed this form to assist the then financial controller John Byrne, and that he did so in error. The first named respondent accepts that he entered into negotiations relating to the sale of the Company's premises on Turnpike Road. However, he avers that in this regard, he was acting in his capacity as joint owner of the premises. The first named respondent also denies that he determined the Company's strategy or was the driving force behind the Company and avers that same was in fact dictated by the fourth named respondent.

26. The first named respondent agrees with the applicant that the Company suppressed its sales for a number of years between 1998 and 2006. He avers that the sales were deliberately suppressed by Mr. Alan Kershaw, the former managing director of the Company. The first named respondent avers that the suppression of sales was a deliberate act by the then management of the Company (by which he means his father, Alan Kershaw) and that he was deliberately misled by the Company management and was provided with misleading financial accounts and information.

27. In respect of the failure of the Company to file statutory returns and audited accounts, the first named respondent avers that when it became apparent that the management personnel of the Company (including the fourth named respondent) could not be relied upon to deal with these obligations, the first, second and third named respondents took steps to remove the management of the Company and to conduct an investigation, but were hampered in their efforts by the fourth named respondent.

28. In respect of the second ground advanced by the applicant in support of this application, namely the failure to keep books and records, the first named respondent avers as follows:

> "The second, third named respondent and I requested management accounts and when these were not provided we acted and suspended Mr. Paul Stephens and Mr. Ray McSorley and launched an investigation. We sought monthly meetings to oversee the proper running of the Company." (Emphasis added).

29. The first named respondent avers that he knew nothing about the under-declaration of the Company's tax liabilities and that the liabilities were incurred five years prior to the winding up of the Company. He says that he does not fall into the category of a person who can be restricted as a director as he was not a director during the 12 months prior to the winding up of the Company.

30. It is also averred by the first named respondent that he sought to assist the applicant and no criticisms have been made about him by the applicant in that regard. Furthermore, he avers that he that he was instrumental in appointing the applicant. He says that the applicant has not proved that the he, the first named respondent, has acted irresponsibly within the meaning of s. 150 of the

Companies Act 1990.

Replying Affidavit of the Liquidator
31. The applicant does not accept that the first named respondent co-operated with him in respect of his investigation into the Company, and he exhibits a directors' questionnaire that was sent to the first named respondent and remains unanswered. In addition, the applicant points to a number of conflicting averments made by the first named respondent. In particular he points to the averment that the board were not informed of the Company's tax liabilities and the averments that the board were mislead and that Mr. Alan Kershaw deliberately suppressed sales. The applicant states that during the time that the Company suppressed sales, both the first named respondent and his father were the sole directors of the Company; the applicant expresses the view that the first named respondent knew, or ought to have known about the Company's tax liabilities.

32. In a supplemental affidavit, the first named respondent avers that he never received the directors' questionnaire, as exhibited by the applicant and he further avers that the address to which it was sent is not his address.

Affidavit of the Second Named Respondent
33. The second named respondent, is the brother of the first and third named respondents and the son of Mr. Alan Kershaw, the former managing director of the Company. The second named respondent held the role of sales representative; this role involved travelling around the country to sell the Company's products. This respondent avers that he held no executive or management position and that he did not spend much time in the office. The second named respondent avers that he, and his sister were appointed as directors of the Company in October, 2007 "in order to satisfy the requirements of the Company to have directors." This was because of the resignation of his father, Alan Kershaw, who, the second respondent says simply without explanation "could not be a director." Interestingly he avers that he and the third named respondent:-

> "were appointed alongside my brother, the first named respondent……as my father could not be a director, my siblings and I were appointed in his place…."

However, he later avers that that he and his sister were the only directors of the Company from November, 2009, when his father, Mr. Alan Kershaw sold a 50% share of the Company and the fourth and fifth named respondents joined the Company alongside Mr. Stephens, who did not become a director.

34. The second named respondent avers that during the time of his directorship, his involvement in the Company was minimal and that he did not receive much information about the Company from the executive, and he relied on the "management of the executive directors to run the Company" during this time. He avers that he attended few meetings, but occasionally signed "various" documents. He states that: "the Company was run by at (sic) the executive director level, the fourth and fifth named respondents and Mr. Stephens."

35. In respect of the statutory returns, this respondent avers that while he signed the accounts for the year ended 31st June (sic), 2009 , he relied on the executive for the filing thereof and states that he was led to believe that these accounts would be filed. He says:-

> "The first and third named Defendant (sic) and I relied on the fourth and fifth named Respondents to file these accounts. We were non executive directors and we relied on the executive."

He further states that for the end of year accounts thereafter, he was not a director of the Company at the time that they were to be filed. He does not explain why he resigned as a director of the Company.

36. This respondent states that he was instrumental in having the applicant appointed. He states that it was the intention of the fourth named respondent to appoint another party as liquidator of the Company and he further states that it was the intention of the fourth named respondent to transfer the Company's business to a number of other companies prior to the date of liquidation of the Company in order to defraud the creditors of the Company.

37. In relation to the issue of cooperation with the applicant, and in particular, in response to the averment of the applicant that he sent to the second named respondent a directors' questionnaire which was not responded to, this respondent states that following the liquidation of the Company all correspondence to him, in respect of the Company, was passed to his father, Mr. Alan Kershaw. Furthermore, the respondent avers that he was not a director at the time that the Company's sales were suppressed, between 1998 – 2006.

Affidavit of the Third Named Respondent
38. The third named respondent, swore an affidavit in response to this application dated 2nd January, 2014. Ms. Kershaw is the sister of the first and second named respondents and she was appointed as director in 2007, shortly after the completion of her Leaving Certificate. Ms. Kershaw avers that the had little involvement in the Company and became a director to assist and aid her family in their shareholding in the Company; she avers that she had no corporate or board experience and was provided with no training by the Company in relation to her role or her duties or responsibilities. Ms. Kershaw did not attend many board meetings during her directorship but avers that on occasion she signed various documents. Ms. Kershaw avers that she resigned as director of the Company in 2010, following a request from her father and the first named respondent so to do.

39. In her affidavit, the third named respondent responds to the grounds advanced by the applicant in support of this application. In response to the first ground, Ms. Kershaw avers that she and the second named respondent signed off on the audited accounts for the year ending 31st June (sic), 2009 , and she says that the first named respondent was not a director at that time. The respondent avers that thereafter, and following her resignation, she was no longer a director at the relevant times for filing statutory returns in the following years.

40. In response to the second ground advanced by the applicant, Ms. Kershaw avers that she relied on the executive directors, the management of the Company and her father, Mr. Alan Kershaw to keep proper books and records and that all of the information she knew about the Company came from her father. Furthermore, Ms. Kershaw avers that the build up of Revenue liabilities occurred between 1998 – 2006 at a time when she was between the ages of 11 and 19. Finally, Ms. Kershaw avers that she relied on her father in relation to all business matters and to deal with the applicant on her behalf.

Application in respect of the fourth and fifth named respondents
41. The applicant swore a separate affidavit in respect of the fourth and fifth respondents. The applicant avers that the fourth and fifth named respondents were registered as directors of the Company as of the date of the winding up. In respect of these

respondents, the applicant brings the application on substantially the same grounds as outlined above, namely the failure of the Company to file statutory returns and accounts, and the failure to keep proper books and records. The applicant also advances the additional ground of the sale of certain Company assets prior to liquidation, in grounding his application for restriction as against the fourth and fifth named respondents. This last ground presents as a matter of concern for the applicant who avers that the fourth and fifth named respondents sold assets, including a leased asset, in the weeks leading up to the liquidation, for the purpose of funding the liquidation and in order to ensure the Company continued to trade during that period. The applicant avers that while it would seem reasonable for the directors to sell some of the Company's assets to provide funds for the entry of the Company into the liquidation, he takes issue with the fact that these respondents sold a leased asset to a third party.

42. The applicant states that the fourth and fifth named respondents fully cooperated and assisted him in the discharge of his duties as liquidator.

Affidavit of the fourth named respondent
43. Mr. Meade avers that he was not involved in the day to day operation of the Company's business, until the final weeks preceding its winding up. In a letter to the liquidator exhibited to his affidavit, sworn 14th February, 2014, Mr. Meade explains that his involvement in the Company was at the request of Mr. Alan Kershaw, and that his decision to get involved in the Company "was made out of friendship rather than a commercial decision." Mr. Meade avers that he was not in a position to procure the preparation of the management accounts, nor to procure the operation of a method of accounting that would allow him sufficient information to determine the financial position of the Company. He also states that the failure to keep proper books and records arose before he was appointed as a director.

44. In respect of the applicant's averment concerning the sale of Company's assets prior to the liquidation, Mr. Meade states that the Company supplied approximately 80% of all refuse trucks in the greater Dublin area and that when, prior to the liquidation, a number of trucks were sold, approximately €191,000 was raised by the Company. Mr. Meade avers that these monies ensured a number of things including: the payment of all staff; that the fleet was maintained on the road until the date of liquidation; and the maintenance of the fleet on the road in the weeks leading up to the State visits of the Queen of England and the President of the United States of America.

45. Mr. Meade avers as follows:

> "I say that my appointment as a director was made against a backdrop of extreme crisis in the Company. The Company had been assessed for very significant tax liabilities, of which I had no knowledge in advance of my becoming a director, and which liabilities related to events that had occurred quite some time prior to my becoming a director."

Mr. Meade states that the majority of his time and effort as a newly appointed director was spent seeking to reach an agreement with the Revenue Commissioners in relation to the Company's tax liabilities. He states that the reason for his involvement in the day to day business of the Company prior to the liquidation was attributable to the fact that shortly after the board meeting, when it was resolved to wind up the Company, all of the senior management resigned or left the Company. The fourth named respondent avers that at that time, there were a number of issues to be addressed by him, including an armed robbery of cash from the Company's premises following the resolution to wind up the Company.

46. According to the fourth named respondent, the appointment of Mr. Cunningham to the Board of the Company was solely on foot of his (Mr. Meade's) nomination.

47. In response to the applicant's averment concerning the sale of a leased asset to a third party, Mr. Meade states that he was informed that the assets in question were owned outright by the Company and were not subject to any outstanding leasing finance. Furthermore, he states that these assets were included on a list drawn up by the Company's financial controller and chief executive officer, containing assets that could be sold and that it was only following the liquidation, that one of the trucks sold was identified as being the subject of outstanding leasing finance.

Affidavit of Fifth Respondent
48. Mr. Cunningham, the fifth named respondent in these proceedings, swore an affidavit on 14th of February, 2014 in almost identical terms to the affidavit sworn by the fourth named respondent, and there is nothing that can usefully be added to the summary of Mr Meade's affidavit above.

Conclusions
49. The first matter to be determined in this application is whether or not the first named respondent was, as alleged by the applicant, a de facto and/or shadow director of the Company for the period between 25th May 2010 to November 2010. The first named respondent was a de jure director from 4th December 1998 until 7th December 2007. That much is not in dispute.

50. On 7th December 2007, both the first named respondent and his father, Alan Kershaw, resigned as directors of the Company, although it appears (from CRO records exhibited by the applicant) that Mr. Alan Kershaw may have been reappointed as a director on the same date, resigning again on 30th November 2008. On 3rd December 2007, the second and third named respondents were each appointed as directors of the Company. The fourth and fifth named respondents were not appointed as directors until 19th October 2010, on which date the third named respondent resigned as director. A Mr. Evan Dolan was a director from 3rd December 2007 until 7th September 2009, and a Mr. Declan Murray was a director from 11th October 2007 until 7th September 2009. There is therefore a period of a little over thirteen months i.e. between 7th September 2009 and 19th October 2010 when only the second and third named respondents were the de jure directors of the Company.

51. In support of his assertion that the first named respondent was, within a period of twelve months prior to the winding up of the Company either a de facto or shadow director of the Company (the applicant pleads both, presumably meaning one or the other) the applicant relies upon the fact that in September 2010 the first named respondent sought to have himself appointed as group managing director (at a board meeting which he convened with the second named respondent) and thereafter sought to act on foot of his purported appointment by suspending the then CEO, Mr. Paul Stephens and also a Mr. Ray McSorley from his position of Chief Operations Officer. The applicant also relies on the fact that the first named respondent signed two Company bank account mandate forms as a director of the Company on 24th September 2009 and again on 2nd November 2010 as further evidence of the first named respondent being a director of the Company, and in particular of his being a director within a period of 12 months prior to the date of appointment of the liquidator. The second mandate, completed on 2nd November 2010 records that a resolution was passed on that date appointing the first named respondent as a designated signatory on the Company's current account. In relation to that bank mandate form, the first named respondent said that he completed that at the time believing that he stood appointed as Group Managing Director, but he avers that he was effectively removed from that position by the fourth named respondent after a period of

a few weeks and so he was never able to take up the position of Managing Director. In relation to the bank mandate dated 24th September 2009, he says that he was not a director at that time but that he did sign a bank mandate form at that time in order to be of assistance to the then Financial Controller, Mr. John Byrne, which the first named respondent says was an error on his part.

52. The first named respondent agrees with the applicant and with the second and third named respondents, that the roles of the second and third named respondents as directors were very limited. Furthermore, the first named respondent avers that neither the second named respondent nor the third named respondent had any involvement in the running of the business.

53. The first named respondent avers that during 2010, his family were 50% shareholders in the Company. It appears that the other 50% shareholding in the Company was held by Mr. John Meade, the fourth named respondent. In the last quarter of 2010, there appears to have been something of a power play between the Kershaw and the Meade interests in the Company and most likely it was this that gave rise to the attempt on the part of the first named respondent to have himself appointed as Group Managing Director. In the course of the correspondence exchanged between solicitors for the parties in October 2010 referred to above , Messrs. McEvoy Partners, acting on behalf of the fourth named respondent, stated:

> (i) "Our client denies Mark Kershaw has ever been appointed "Group Managing Director" and does not agree to such appointment or to any directors' fee in this regard."
>
> (ii) "We do not agree to the appointment of Mr. Mark Kershaw as a director of Manvik Ireland Ltd. and Manvik Ltd. This is a matter for Mr. Alan Kershaw who is entitled to nominate two directors to the board of Kerkea Holdings Ltd. and its subsidiaries. Kerkea Holdings Ltd. was the holding company of the Company."

54. The first named respondent gives no reason as to why he and his father, Alan Kershaw, resigned as directors of the Company in December 2007. It was in the same month that the second and third named respondents became directors of the Company and the first named respondent agrees that neither of those parties had any role in the running of the Company and nor is it suggested that they performed their duties as directors of the Company. The directorships of the second and third named respondents overlapped, until 7th September, 2009, with the directorships of Declan Murray and Evan Dolan, but from that date, until the date of their own resignations on 19th October, 2010 and 20th December, 2010, the second and the third named respondents were the only registered directors of the Company.

55. It appears that until some time in late 2009, the Company was owned by the Kershaw family (no evidence was put before the Court as to how the shareholding may have been held, but it seems likely that the entire shareholding in the Company was vested in Mr.Alan Kershaw) and that at that time, 50% of the Company was sold to the fourth named respondent, with Mr. Alan Kershaw retaining the right to nominate two persons to the board of directors of the Company.

56. Against that background, it is clear that the second and third named respondents could only be regarded as having been puppet directors. The question arises as to whether they were the puppets of Mr. Alan Kershaw or the first named respondent or both. On balance, I think it is likely that both Mr. Alan Kershaw and the first named respondent were shadow directors of the Company at all material times, although of course this application is only concerned with the first named respondent. The clear evidence of this is that when he became concerned about the activities of the new shareholders in the Company, the first named respondent caused a board meeting to be convened and to have himself appointed as managing director. In that capacity he then purported to suspend members of the Company management. In addition he had previously signed bank mandate forms on behalf of the Company which could only be signed by a director, and his explanations for doing so are unconvincing. The fact that he did not get his way in trying to have himself appointed as managing director of the Company is immaterial; he saw himself as being entitled to take the actions that he did. In my view, it is quite likely that Mr. Alan Kershaw and the first named respondent resigned as directors of the Company when they did in order to try and distance themselves from the accumulated revenue debt, and they appointed the second and third named respondents as directors in order that the Company would have directors acting under their instruction. Moreover, since the first named respondent acknowledges that neither the second nor third named respondents undertook any meaningful role in the affairs of the Company, it is entirely reasonable to assume that they were acting on the instructions of the first named respondent and Mr Alan Kershaw at all times. To conclude otherwise would mean that there was a period, between October 2009 and November 2010, when there were no directors of the Company, other than in name only; and an even longer period when the substantial interest of the Kershaw family in the Company was not represented at all on the board. Furthermore, the second named respondent in his affidavit made a number of averments (referred to earlier) that suggest very strongly that the first named respondent was a director at all material times. In arriving at this conclusion, I have taken into account the principles applicable to determining whether or not somebody is a shadow director as set out in the decision of McKechnie J. in re: *Hocroft Developments Ltd. (In Liquidation), Dowall v. Cullen & Ors.* [2009] IEHC 580. For all of these reasons I am of the opinion and I hold that the first named respondent was indeed a shadow director of the Company within a period of twelve months prior to its liquidation.

57. The applicant lists four matters of concern in the context of this application:

(i) Failure of the Company to file statutory returns and audited accounts.
The Company failed to file annual returns for the years ending 31st March, 2010 and 31st March, 2011 and also failed to file audited accounts for the years ending 31st June (sic), 2009 and 31st June(sic), 2010. The first named respondent blames these failures on the fourth named respondent. For his part, the fourth named respondent states that following his appointment as a director in October, 2010, he found himself dealing with a Company in crisis, in particular arising out of the very substantial tax liability assessed by the Revenue Commissioners, of which the fourth named respondent says he had no knowledge in advance of his accepting a directorship in the Company. Whatever about that, in so far as there were failings relating to the statutory returns and audited accounts identified by the applicant, these failings, for the most part, related to a period or periods before the involvement of the fourth and fifth named respondent as directors, even though they are open to some criticism for accepting their appointments as directors without having these matters checked and the appropriate action taken. However, in my view the responsibility for the failure of the Company to comply with its statutory filing requirements rests principally with the first to third named respondents.

(ii) Failure to keep proper books and records.
The applicant found that the Company failed to keep accurate and timely management accounts that would allow the management to determine the true financial position of the Company at any given time, as required by s.202(1)(b) of the Companies Act 1990. Moreover, the applicant was not satisfied that he was actually given all of the books and records of the Company and he averred that he was unable to carry out a complete investigation into the affairs of the Company or to ascertain the financial position of the Company with accuracy. The applicant blames in particular the first, second and third named respondents for these shortcomings.

Moreover, it appears that the failure to keep proper records went beyond the keeping of accounts, and extended to the keeping of other records that were necessary for the proper functioning of the Company. In this regard I am referring in particular to the failure

to identify that a particular vehicle, which was sold to an innocent third party, was the subject of a lease and as a result was subsequently repossessed by the finance Company, presumably at the expense of the innocent third party. While I accept that this transaction occurred innocently and without any intent on the part of any of the directors, the fact is that even after all proper inquiries had been made prior to the sale, the Company failed to indentify the existence of a lease which in turn resulted in a loss to a third party. I agree with the applicant that the primary responsibility for the failure of the Company to keep adequate books and records rests with the first to third named respondents and I so hold.

(iii) Build up of liabilities to Revenue Commissioners
The Company was assessed in 2009 with a very substantial liability in respect of VAT, PAYE/PRSI and Corporation Tax owing to the Revenue Commissioners amounting to approximately €2 million, which increased to €4.5 million following the addition of interest and penalties. This appears to have arisen out of income received by the Company that was not declared. According to the first named respondent:

> "…sales were deliberately suppressed by Alan Kershaw a former director of the Company."

Again according to the first named respondent, this occurred during the period between 1998 to 2006, during which time it is undisputed that the first named respondent was a director of the Company. The fourth named respondent states that he was unaware of this liability at the time he agreed to become a director, and indeed he avers that as a result, the bulk of his time and effort as a newly appointed director was focused on seeking agreement with the Revenue Commissioners in regard to the repayment of these tax liabilities, and that this led to protracted negotiations with the Revenue Commissioners which ultimately were unsuccessful. The fourth named respondent avers that, when it became apparent that the negotiations with the Revenue Commissioners were not going to succeed, he then had to focus upon preparing the Company for liquidation, preserving as best possible the assets of the Company pending the appointment of a liquidator. What is absolutely clear however, about the liability to the Revenue Commissioners is that of all of the directors, the only person who can bear any responsibility for the same is the first named respondent. Furthermore, it is clear that this was the biggest single factor leading to the insolvency of the Company.

(iv) Failure to assist the liquidator
This is the final matter of concern that the applicant brings to the attention of the Court. He states that he is dissatisfied with the level of cooperation received from the first, second and the third named respondents. The applicant was satisfied that he did receive cooperation from the fourth and fifth named respondents. In his first affidavit he states that despite several requests, he had yet to receive replies from numerous queries that he had raised with the first, second and third named respondents and that this failure had severely hampered his investigations into the collapse of the Company. There was some dispute in the affidavits about whether or not the applicant and the first respondent each received certain correspondence from the other. The applicant was writing to the first named respondent at the address of the second named respondent. The applicant sent a letter on the 25th November, 2011 enclosing a directors' questionnaire to each of the first, second and third named respondents. He sent reminders on 11th August, 29th August and 4th November, 2011, but did not receive any response. He did have some correspondence by email with the first named respondent but denies receiving some of the documents which the first named respondent says were attached to those emails. In their affidavits, the second and third named respondents stated that they relied on their father to deal with the applicant and assist him on their behalf.

(v) Other Factors
Another factor that should be taken into account is that the applicant says that he was unable to locate a number of vehicles which were listed as assets of the Company. This is not explained by any of the respondents, but having regard to the value of the vehicles which formed part of the stock in trade of the Company this is a serious deficiency; it is either another deficiency in the manner in which books and records were kept or alternatively vehicles were sold without the proceeds of sale being remitted to the Company. Since the latter was not suggested by the applicant, I will treat this aspect of the applicant's findings as a further example of the deficiency in the books and records of the Company.

Applicable law
58. The first point to be observed is that a restriction order under s.150 of the 1990 Act, and now under s.819 of the Act of 2014 is mandatory unless a director can satisfy the Court that he/she has acted honestly and responsibly and that there is no other reason why it would be just and equitable that he/she should be subject to the restrictions imposed by an order under the section. In the Act of 2014, the additional requirement of cooperating with the liquidator has been added, i.e. it is now a statutory requirement for a director, on applications such as this, to satisfy the court that he has cooperated, as far as could reasonably be expected with the liquidator. This was of course a factor that the courts have previously held may taken into account when dealing with a s.150 application under the Act of 1990, but for the purpose of this application, which pre-dates the coming into effect of the act of 2014, I will not treat it as having the elevated status of a statutory imperative, as it will have henceforth, for applications made under the Act of 2014.

59. Many authorities were opened to the Court by counsel on behalf of each of the respondents, but the most expedient statement of the law in recent jurisprudence is that of Ms. Finlay Geoghegan in the case of *Re Abington Garage Doors Ltd.(In Voluntary Liquidation), James Clancy v. Con O'Callaghan and Bridie O'Callaghan* [2014] IEHC 227 in which she repeated an earlier summary of the applicable case law that she herself had set out in the case of Derbar Developments Limited (In Liquidation) [2012] IEHC 144 as follows:-

> "13. The case law relating to s. 150 was reviewed in some detail by Fennelly J. in delivering the judgment in Mitek Holdings Ltd. and the Companies Act [2010] IESC 31, with which Hardiman J. and Finnegan J. concurred. In doing so, he cites with approval passages from the well-known judgments of Murphy J., in the High Court in Business Communications v. Baxter and Parsons (Unreported, High Court, 21st July, 1995) and Shanley J. in La Moselle Clothing Ltd. v. Soualhi [1998] 2 I.L.R.M., 345. In the latter, Shanley J. interpreted s. 150 in the following way:
>
> "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 Act 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 director's responsibility for the insolvency of the company.

(d) The extent of the director's 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."

Fennelly J., at para. 74, summarises the proper approach of the Court to an application under s. 150 in the following terms:

"It is always appropriate to keep in the forefront of one's mind the terms of the applicable statutory provision. The question to be considered, in a case such as the present, where no question of honesty arises, is whether the director against whom an application for a restriction order is made "has acted responsibly in relation to the conduct of the affairs of the company ". The context is, of necessity, a company which is unable to pay its debts. The court should, in the words of Shanley J. [in La Moselle] "look at the entire tenure of the director and not simply at the few months in the run up to the liquidation".

14. The above conclusion must be considered in the context of two earlier passages cited by Fennelly J. with approval. The first is from the judgment of McGuinness (sic) in Re Squash Ireland Ltd. [2001] 3 I.R. 31 at p. 40, where she stated:

"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."

And, secondly, the caution expressed by Murphy J. in Baxter that:

"Of course, one must be careful not to be wise after the event. There must be no single "witch hunt" because the business failed as businesses will."

15. Fennelly J. also cited with approval from Clarke J. in the High Court in the matter of *Swanpool Ltd. McLaughlin v. Lannen* [2006] 2 ILRM 217, and in particular, his emphasis on the need for the Court, in each application under s. 150, to take account of the context in which the relevant acts or omissions of the directors need to be considered. In *Swanpool Ltd.*, at issue was a repayment of funds to BES Investors at a time when the directors knew the company was insolvent or facing insolvency. In that decision, Clarke J., at p. 8, having considered certain of the earlier decisions already referred to, stated:

"It does, however, seem to me that the differences in approach identified in those authorities are more apparent than real. The approach of the court in any case under s.150 will necessarily differ depending on the type of acts or omissions which are under scrutiny. In broad terms there would seem to me to be three types of situation which the court is typically required to consider in such applications. They are:

1. Issues involving compliance by the company with its formal obligations under the Companies Acts including keeping books and records, making returns, holding meetings and the like;

2. The commercial management of the company most particularly at the period when the company was insolvent or heading in that direction; and

3. Compliance by the directors with the obligations identified in *Frederick Inns* to ensure that once the company was facing insolvency its assets were dealt with in a manner designed to ensure the proper distribution of those assets in accordance with insolvency law.'

Fennelly J expressed the view that the above is 'a particularly useful classification of the principal settings for consideration of the responsibility of directors in a modern business'."

60. There has been no suggestion of dishonesty on the part of any of the respondents for the purpose of this application. While it has been suggested that Mr. Alan Kershaw, father of the first to third named respondents, suppressed information regarding Company sales in order to reduce liabilities to the Revenue Commissioners, he is not a respondent to this application. It is therefore necessary to consider next whether the directors have been responsible in relation to the conduct of the affairs of the Company. It is clear from my findings above that the first to third named defendants have not complied with obligations imposed on them under the Companies Acts. To the extent that the first named respondent was a de jure director during the period when a very significant liability was incurred to Revenue, which liability was subsequently very substantially increased by interest and penalties, it is clear that he has a significant responsibility for the insolvency of the Company that arises outside the ordinary course of business of the Company. Furthermore, it should not be forgotten that liabilities to creditors other than the Revenue Commissioners come to in excess of €2.5m.

61. Additionally, the books and records of the Company were not maintained well enough for the liquidator to establish to his satisfaction the true state of affairs of the Company. This is an absolute imperative. Making due allowance for the pressures under which a Company and its officers are likely to be labouring in the period leading up to a liquidation, a liquidator should, after some initial discussions with directors and management and having been provided with any information that he has reasonably requested of them, be able to establish with reasonable accuracy the state of the finances of a Company. The liquidator in this case says that he was unable to do so. In his first affidavit grounding this application he said:

"…having reviewed the books and records, I am of the view that it would be difficult to prepare a set of management accounts therefrom to ascertain the financial position of the Company, with any great accuracy, primarily because the Respondents, in particular the first, second and this named Respondents failed to ensure that the basic records were properly kept….."

This must mean that the books and records of the Company were not being maintained to a minimum acceptable standard, which leads to the inevitable conclusion that the directors bearing responsibility for this failure did not behave responsibly.

62. Insofar as the second and third named respondents are concerned, it is well established, for many years, that directors may not abdicate all responsibility in relation to the management of a Company. As Carroll J. said in *re: Hunting Lodges Ltd.* [1985] I.L.R.M 75:

"Any person who becomes a director takes on responsibilities and duties, particularly where there are only two…A director

who continues as a director but abdicates all responsibility is not lightly to be excused."

63. For all of the reasons set out above, it is my opinion that the first to third named respondents did not act responsibly in the conduct of the affairs of the Company and accordingly, I shall make an order in the terms of paragraph 1 of the notice of motion herein, duly amended to refer to s. 819 of the Companies Act, 2014 instead of s. 150 of the Companies Act, 1990.

64. As regards the fourth and fifth named respondents, I am satisfied that from the time of their appointment as directors in the Company, they were dealing with a Company in crisis. Undoubtedly that would have impeded their ability to organise compliance by the Company with its statutory obligations in relation to the filing of annual returns and accounts, and in relation to the preparation of management accounts and related matters. It is clear that the applicant was satisfied that the fourth and fifth named respondents had little responsibility for these matters and that they cooperated fully with him in the liquidation of the Company. Accordingly, I do not believe there is any reason to make a finding that the fourth and fifth named respondents did not act responsibly in relation to the management of the affairs of the Company or that there is any other reason why it would be just and equitable to subject them to restriction orders.