THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

[2016 No. 107 COS]

IN THE MATTER OF WOOD PRODUCTS (LONGFORD) LTD (IN LIQUIDATION)

AND

IN THE MATTER OF SECTIONS 819, 842 AND 682 OF THE COMPANIES ACT 2014

BETWEEN

TONY MCBRIDE

APPLICANT

AND

PATRICK MCGOWAN AND VINCENT FOX

RESPONDENTS

Judgment of Mr. Justice Robert Haughton delivered on this 18th day of May, 2017.

1. In these proceedings the applicant as the liquidator of Wood Products (Longford) Ltd ("the Company") seeks orders pursuant to the Companies Act 2014 disqualifying or alternatively restricting the respondents from being directors.

2. The first named respondent attended court but was unrepresented and indicated to the court in writing that he was not opposing the application, that he would be 70 at his next birthday, that he had not worked in the past three years and had no plans to work in the future, and that he was in receipt of the OAP. He confirmed verbally to the court that he was not opposing the application.

3. The second named respondent who is an accountant attended court and was represented by solicitor and counsel, and fully opposed the applications both in respect of disqualification and restriction.

4. In determining these applications I have considered the affidavits of the applicant and two replying affidavits sworn by the second named respondent Mr Fox. I have also had the benefit of written and oral submissions on behalf of the applicant and the second named respondent.

5. By way of general background, the Company commenced trading in 1975 and continued to trade until wound up by order of Moriarty J. made on 1 May, 2014, on foot of a Petition brought by the Revenue Commissioners dated 13 January, 2014. The first named respondent became a director of the company on 23 June, 1975, and is the principal shareholder, together with his wife. He was primarily responsible for the day-to-day running of the Company. The second named respondent became a director of the Company on 27 February, 2004. Both respondents continued to be directors of the Company at the date of, or within 12 months prior to, the commencement of the winding up.

The provisions relevant to the disqualification application

6. The basis upon which the applicant seeks Disqualification Orders is provided for in section 842(d) of the Companies Act 2014 –

> "842. On the application of a person specified in section 844 or of its own motion, the court may make a disqualification order in respect of a person for such period as it sees fit if satisfied –
>
> (d) the conduct of the person as promoter, officer, statutory auditor, receiver, liquidator or examiner of a company makes him or her unfit to be concerned in the management of a company".

In addition the applicant draws the Court's attention to s.842, subparagraphs (f) and (h) –

> "(f) that the person has been persistently in default in relation to the relevant requirements,
>
> (h) that the person was a director of a company when a notice was sent to the company under section 727 and the company, following the taking of the other steps under Chapter 1 of Part 12 consequent on the sending of the notice, was struck off the register under section 733".

It is only of the court's own motion that directors can be struck off under (f) and (h).

The approach of the court

7. In its approach to its task in these cases, the court takes into account the following principles. First, the burden of proof in respect of disqualification rests with the applicant. The applicant must first establish that the conduct of the directors comes within one of the relevant subparagraphs in order to *trigger the court's jurisdiction. This is a matter of "objective forensic enquiry" – see Fennelly J. in Re Wood Products Ltd: Director of Corporate Enforcement v McGowan* [2008] IESC 28, followed and approved in *Director of Corporate Enforcement v Seymour* [2013] 1 IR 82. Once the jurisdiction is established a Disqualification Order may be made unless in the exercise of the court's discretion it decides not to make such an order. The court should look at the respondents past performance as directors of the company because "…past conduct is certainly the best, if not the only, guide to the necessity for disqualification." As to the meaning of "unfit to be concerned in the management of the company", in *Seymour* Macken J. in delivering the judgement of the Supreme Court quoted with approval the judgement of Browne-Wilkinson V.C. in *In Re Lo-Line Ltd* [1988] Ch. 477, at pp 485 to 486: –

> "What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the cases to which I have been referred is broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others. Therefore, the power is not fundamentally penal… Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

It was common case that in the exercise of its discretion the court is entitled to take into account the effect of a disqualification on a director and that the effect may be greater on a professional person such as an accountant – see the judgement of Denham J. in *Director of Corporate Enforcement v Byrne* [2010] 1 I.R. 222 at page 241. Further, as Denham J. noted at page 240: –

> "(iii) the conduct necessary to justify a disqualification order must be manifestly more blameworthy than merely failing to exercise an appropriate degree of responsibility…".

Further background

8. By way of further background the undisputed evidence was that the Company was twice struck off on two prior occasions by the Register of Companies for failure to file annual returns on 25 June, 1999, (subsequently dissolved on 2 July, 1999) and again on 10 October, 2011 (and subsequently dissolved on 15 October, 2011). The first named respondent was previously a named respondent to an application made by the Office of the Director of Corporate Enforcement who by notice of motion dated 26 November, 2003, sought *inter alia* an order of disqualification arising from the failure of the Company to file annual returns. As appears in the judgement of Laffoy J., in those proceedings the Company was restored to the Register by order of the High Court (O'Neill J.) on 14 May, 2001. It was further ordered that the respondent directors, including the first named respondent in this application (but not the second named respondent) deliver all outstanding returns to the CRO and the Revenue Commissioners. Despite that Order having been made, the respondent directors, including the first named respondent in this application, had not complied with the obligation to file outstanding returns with the CRO as they were directed to do by O'Neill J. and, as recorded in the judgement of Laffoy J., the said returns were ultimately made on 22 April, 2004, following the commencement of the 2003 proceedings. At that time the outstanding returns dated back to 1990.

9. It was in response to the difficulties in 2003/2004 that the second named respondent became a director of the Company on 27 February, 2004. The first named respondent was the second named respondent's wife's brother. The second named respondent averred that he became involved for family reasons and because he was a practising accountant. He had never been a director of any other company. He says that his involvement with the Company arose only when called upon by the first named respondent and was dictated by events where the company needed "experienced financial and/or legal difficulties, and my activities were remedial in nature" (paragraph 6 of his first affidavit sworn on 16 January, 2017).

The grounds upon which disqualification is sought

10. The applicant presents a number of grounds upon which it is asserted that the respondents are unfit to be directors.

11. First, he asserts that the Company continued to trade while insolvent and he suggests that the insolvency arose in 2003. At paragraph 15 of his principal affidavit sworn on 1 April, 2016, the liquidator sets out a table of accumulated liabilities in respect of unpaid taxes from 2003 to 2014 when the accumulated total was €1,161,975.17 and this prompted the Revenue Commissioners to present the petition and to wind up the Company following demand for a total of €2,447,616.76. The table indicates pre-2003 liabilities of €99,352.89 and significant arrears of PAYE/PRSI and VAT accumulating, particularly in the years 2003 to 2010. Moreover, the directors of the Company failed to ensure that audited accounts were prepared since the period ending 31 December, 2004. This is not contested.

12. Mr Fox contests that the company was insolvent as far back as 2003, and indeed he contested that the company was insolvent at the date of presentation of the Petition. He relies on this in the contesting of the revenue debt and asserts that the company had a defence and counterclaim which would have exceeded the revenue debt which was based on estimated amounts. The basis for the counterclaim was that the company was owed money by government departments other than the Revenue Commissioners, and in particular the Department of Finance, in respect of construction work and goods and services provided.

13. However this defence and counterclaim do not appear to have been pursued at the appropriate time. Moreover conceptually it is hard to see how the Revenue Commissioners, an independent body, could have any liability in respect of counterclaims against a government department such as the Department of Finance or the Department of Justice, or other government agencies whom it is said owed the Company money (Aer Rianta, Social Welfare Office, Portlaoise Prison Officers housing), or any duty to provide a set off against taxes due. No specifics are given by Mr Fox in his affidavits as to the steps taken by the Company to engage in legal proceedings or recover on foot of the alleged claims and counterclaims. Nor are these alleged debts set out in the Statement of Affairs prepared by Mr Fox. Mr Fox does exhibit a letter dated 8 April, 2014, from his solicitors Donal Keigher and Co referring to his request to his solicitors to amend 2006 proceedings to include counterclaims, but no specifics are given. Mr Fox also exhibits a letter from his solicitors of the same date to counsel which refers to a special summons in which the Revenue Commissioners sought to recover taxes due of approximately €680,000 which had reached the close of pleadings by early 2009 and resulted in some negotiations in 2010. It appears that this did not include any counterclaim and Mr Fox wanted the pleadings amended to claim sums of money said to be due to the Company. This letter does no more than indicate a desire by Mr Fox on behalf of the company to raise a counterclaim but it expresses no view on whether there is any factual basis for the counterclaim; nor does this correspondence address the prospects of success.

14. I am satisfied that by 2014 the Company was hopelessly insolvent, and that its insolvency probably dates back to at least 2009. I am satisfied that there is strong evidence that the Company was permitted by the respondent directors to continue trading at a time when it was clearly insolvent at least from 2009 onwards when the Revenue Commissioners made substantial claims in relation to arrears of taxes, which claims were and remain effectively uncontested, and no counterclaim mounted or pursued. Moreover there is no evidence that any suggested counterclaim had any, let alone any reasonable, prospect of success. Also no material has been presented to support any counterclaim, or to assist the Court in establishing whether any such claim might be or have become statute barred. Mr Fox also asserts on affidavit that the Company would have been in a position to dispose of its business premises in the mid-2000s for a sum in excess of €2 million, but he presents no information on affidavit in relation to this, nor any valuation evidence.

15. I find that the continued trading of the Company at least post-2009, notwithstanding its substantial and ongoing indebtedness in respect of taxes, displayed a serious lack of commercial probity.

16. Secondly, the liquidator relied on a failure to make annual returns to the CRO between 2006 and 2013. The last annual return was made in respect of the period ending 28 October, 2005. This is particularly significant because the Company was previously struck off for failing to file annual returns which were outstanding for the period 1990 – 2004. While the second named respondent must be given credit for ensuring that all outstanding returns for that period were filed in the CRO on 22 April, 2004, and that the return was filed for the period up to 28 October 2005, it is astonishing that annual returns were not made thereafter notwithstanding that Mr Fox continued to be a director of the Company. In his affidavit he states that he advised the first named respondent to continue to file annual returns, but his duty as a director, particularly in light of the history of not making annual returns, went beyond this. It was incumbent on him as a director to ensure that the company was compliant. In particular as a practising accountant Mr Fox ought to have been fully aware of the obligations of directors to ensure company filings were up to date. In the circumstances this was an egregious omission. I accept that in November 2013 when contacted by the first named respondent Mr Fox assisted in the preparation of annual returns for the years since 2005, and that it was intended to file these "if the company had not been wound up" (paragraph 30(c) of his first affidavit), but this does not explain or justify his failure over several years to fulfil his obligations as a director.

17. Thirdly the liquidator relies upon the fact that the respondents permitted the Company to be struck off the register of companies for a second time in 2011 following notification of strike off dated 14 October, 2011, for failure to make annual returns.

18. Fourthly, the liquidator asserts that the Company continued to trade while dissolved not only after the dissolution of the company in 1999 (as noted by Laffoy J. in her judgement in the 2003 proceedings), but also after the Company was struck off in 2011. Notwithstanding that the Company ceased to exist in law, it is not contested that the respondents continued to operate the Company and trade as if the dissolution never occurred. This is particularly serious in respect of the 2011 strike off.

19. Fifthly, following that dissolution in 2011, an application was made by CPL (Profiles) Ltd, a creditor of the Company, to the Circuit Court to restore the Company to the register. It is noteworthy that no application was made by the Company or the respondent directors for such restoration. By order made on 12 November, 2013, the Circuit Court ordered the restoration of the Company. Despite that order the respondents did not file the necessary returns although I do accept Mr Fox's evidence that he prepared these returns for the period in 2006 to 2014 and that he filed them with the office of the Revenue Commissioners.

20. Sixthly, the applicant relies on the non-payment of taxes to the Revenue Commissioners. The level of indebtedness to the Revenue Commissioners in respect of taxes at the date of liquidation exceeded €1.1 million. The Company's indebtedness was very substantial by any standards, but particularly in the light of the turnover of the company for the years ending 2011, 2012 and 2013:

• €387,725 – year ending 31 December 2011

• €205,834 – year ending 31 December 2012

• €128,809 – year ending 31 December 2013

The second named respondent in his first affidavit at paragraph 35(h) states "The counterclaim, if successful, would exceed the admitted tax liabilities", but for reasons already given that explanation/excuse is not supported by evidence.

21. The seventh matter relied upon by the liquidator relates to an allegation of withdrawal of funds from the Company. At paragraph 38 of his first affidavit, Mr McBride states that on 28 April, 2014, a sum of €10,000 was paid by the Company to the second named respondent from the Company's bank account at Ulster Bank. This transfer was applied to the account on the same day as a lodgement of €10,491.90 was received with the narrative "Holden Development Ltd". This was three days prior to the winding up order and the appointment of the applicant as liquidator. At paragraph 39 he avers –

> "It is also of significance that this transaction was made at a time when the Respondents were aware of the fact that the Company was unable to pay its debts as they fell due (or, at least, were on actual notice of the allegation being made by the Revenue Commissioners in the petition in that connection)."

In paragraph 40 the liquidator also notes that €665 was withdrawn from the account on the day of his appointment as liquidator – but not by him.

22. In response to this Mr Fox states at paragraph 36 of his affidavit: –

> "36. It is accepted that the sum of €10,000.00 was paid by the Company to an account in the name of your Deponent on or about 28 April 2014. The transfer was completed in order to fund the cost of legal assistance in defending the winding up petition being brought against the company and to fund the cost of making the returns required by the Collector General. This disbursement was substantially funded by a contribution to the company made by Mrs Patricia McGowan in the sum of €8000 for that purpose. Information in respect of this payment was furnished to the Liquidator. I acknowledge that €665 was withdrawn from the company account on or about 1 May 2014. I have no knowledge as to what this transaction relates to."

In his second affidavit the liquidator states that, contrary to what Mr Fox asserts, he had never been provided with any explanation for the €10,000 withdrawal. He observes that no supporting material is exhibited and that Mr Fox does not explain why the payment was apparently made in discharge of legal fees of the company in order to meet a petition brought by the Revenue Commissioners and was paid to him personally and not to the lawyers in question. Mr Fox also does not explain why the payment to him occurred on the same day as payment of €10,491.90 is recorded as having been received in the company's bank account with the narrative "Holden Development Ltd".

In his second affidavit Mr Fox explains in that in November 2013 following the order of the Circuit Court that the Company be restored to the register he provided accountancy services through his firm. He says that when the application was made to wind up the company he felt there was a *bona fide* defence and, at paragraph 7 he states: –

> "I felt it was appropriate that the company should defend itself and avail of legal representation and such other advice as may be necessary. I confirm the sum of €10,000 was withdrawn to fund the solicitors, barristers and as a contribution towards the fees that had already been incurred in complying with the previous order of the Court from November 2013. I would wish to point out that my accountancy firm is still owed considerable fees by the Company. This amount outstanding is approximately €16,540.00 which is a very substantial bill for a one man accountancy practice to be owed."

23. This explanation is very unsatisfactory. First, Mr Fox does not exhibit any documentation in support of his evidence – no

documentation relating to Mrs McGowan's alleged contribution of €8000, and not even an invoice from his firm that would have demonstrated a breakdown of the fees which he claims were due. Mr Fox does not address at all the coincidence between the payment into the Company and the payment out on the same day of €10,000. At the very least I am satisfied that this payment by the Company to Mr Fox's firm demonstrates a lack of commercial probity at a time when both directors must have known that the Company was, or probably was, insolvent.

24. Eighthly, the liquidator asserts that a substantial amount of plant and machinery assets of the company were disposed of in March 2014, some weeks before he was appointed liquidator. When he raised this issue he was informed by the first named respondent that these assets were transferred to Mrs Patricia McGowan in discharge of a loan that she made to the Company. A list of these assets was exhibited and runs to one page. It includes various saws and other equipment such as might be expected to be of use in a woodworking business, but includes other items such as compressors, waste extractor systems and a forklift. At paragraph 42 of his first affidavit the liquidator states that despite requests for further information and supporting documentation for the alleged loans by Mrs McGowan to the company, he has not received any satisfactory response or documentation. At paragraph 43 he states: –

> "43. In a most alarming development, I say that it now appears as though these assets are being used by former employees of the company at a [nearby] rented premises, who are engaged in the similar business to that formerly carried on by the company.
>
> 44. I say and am advised that the transfer of assets of the company to a connected person within a matter of weeks of the appointment of your Deponent as Liquidator (and in circumstances where the first return date on the Petition presented by the Revenue Commissioners was 10 February, 2014) is a matter of significant concern. This is particularly so in circumstances where there were significant debts due to non-connected creditors (including the Revenue Commissioners) at this time."

25. As previously stated the first named respondent did not file any replying affidavit of substance and therefore has not denied these contentions. In his first affidavit Mr Fox says he had no involvement in the running of the company, at paragraph 37 he states –

> "I am informed by the first named respondent, that approximately €15,000 was required by the Company to ease difficulties with cash flow and it was necessitated primarily due to the downturn in trade directly attributable to the economic recessionary period that existed in the country at that time. Full particulars of this transaction were included in the documentation which I supplied to the liquidator".

Mr Fox goes on to say he had no involvement or knowledge of this disposal, and that he was informed by the first named respondent that the transfer in fact took place in 2011. However in a letter dated 13 March, 2014, from Mr Fox to the liquidator's solicitors, between the date of presentation of the petition and the making of the winding up order on 1 May, 2014, Mr Fox states –

> "… It is to be noted that activities are arranged as follows, certain assets have been relocated to facilitate the manufacturing process, located in the rented premises that are listed hereunder. All other assets remain on the company property."

The accompanying "schedule of assets under control of the company relocated to rented premises" lists the same assets that are now being used by former employees of the company at a nearby rented premises.

26. While the manner in which Mr Fox has addressed this particular issue is less than satisfactory I do not consider that misconduct on his part is proven to my satisfaction.

27. Ninthly, the liquidator relies on a material error in the Statement of Affairs filed by the second named respondent on 21 July, 2014. This disclosed trade debtors amounting to €165,047. This figure is misleading because it is comprised almost entirely of sums due from entities that the liquidator ascertained were either in liquidation or had already been dissolved. It included some of €59,840 as being due from an entity known as Structural Detailers Ltd, yet this entity was dissolved on 20 July, 2012. Mr Fox seeks to explain this by saying that he had "difficulty in getting access to records in a timely fashion to comply with" the order that he file a statement of affairs. However Mr McBride in his second affidavit says that when he attended the company premises the day after he was appointed liquidator he was informed by the first named respondent that accounting records for the years 2010 – 2014 were with Mr Fox at his offices, and when the liquidator met Mr Fox on 8 May, 2014 he was told that Mr Fox had all current financial records and that he would make these available to the liquidator by 13 May, 2014. Mr Fox does not further respond to this in his second affidavit. The Court infers that the second named respondent did have available to him all necessary and appropriate financial information at the time he prepared his statement of affairs, and that he cannot avoid responsibility for its inaccuracy. This is further evidence of his unfitness to be a director.

28. Finally, the applicant asserts that the respondents failed to cooperate with him. In particular in a letter dated 11 February, 2015, the liquidator raised 11 queries/requests for further information/documentation to which he did not receive any satisfactory response. Mr Fox refutes this and says that he made every reasonable effort to cooperate in providing information and engaging with the liquidator in correspondence and verbally. I am not sufficiently persuaded that such lack of cooperation as there may have been on the part of Mr Fox amounts to misconduct because he did prepare and file a Statement of Affairs and engage with the liquidator.

Non-executive/passive director defence

29. Mr Fox's primary contention is that, although he was a Director from 2004 onwards, he was not involved in the day-to-day running of the company – this was done by the first named respondent – and he, Mr. Fox, was a "non—executive" or "passive" Director. At paragraph 6 of his first affidavit he says that he had –

> "…minimal involvement in [the] business. I never possessed keys to the assets of the company, I was never involved in any trade/contract negotiations and I held no authority over the Company's bank accounts. I say that my involvement with the company arose only when called upon by the first named respondent. My involvement was dictated by events i.e., when the company experienced financial and/or legal difficulties, and my activities were remedial in nature."

At paragraph 7 he says that he has never been a director of any other company, and that he never received any dividends or directors fees from this company.

30. When the liquidator took issue with this in his second affidavit, primarily on the basis that Mr Fox became a Director of the Company precisely so that he would have a role in the financial record-keeping, Mr Fox in his second affidavit took the opportunity to

clarify his role, stating –

> "3. In relation to paragraphs 7 to 12 of the Liquidators Supplemental Affidavit, I say and clarify that I did provide accountancy services via my Accountancy firm of a routine nature to the company. This involved processing of transactions relating to sales, purchases, payroll, banking, production of PAYE, PRSI, VAT and RCT Returns together with annual accounts for the company…The services provided were limited to the above and I was not directly involved with the running of the company on a day-to-day basis. I never handled the company's banking, had no access to the company bank account and was not a signatory on the company's cheque book. My involvement was as set out in my first affidavit."

31. Mr Fox has stated that he has a small accounting practice. Given that he was a Director, and that he or his firm also prepared monthly management accounts, he ought to have been familiar with the company's financial and banking transactions. He was well positioned to ensure that the Company accounts were audited and that all returns were made to the Revenue Commissioners and the CRO. The fact that he informed the liquidator at their meeting on 8 May, 2014, that he had all current financial records and that he would make them available to the liquidator on 13 May, 2014, confirms the level of his involvement in the Company. I am satisfied that as a matter of fact Mr Fox's involvement in the operations and financial running of the company was significantly more than minimal, occasional or "remedial". Moreover Mr Fox was introduced as a director to the Company specifically for the purpose of assisting the Company in its financial record keeping and ensuring that it complied with its Companies Act obligations. Mr Fox cannot now purport to divest himself of his obligations as a director by minimising his involvement in the day-to-day operations of the Company either as a matter of fact or as a matter of law.

32. In legal submissions, counsel for Mr Fox emphasised the point that the effect of the Disqualification Order may be greater on a professional person – which the Court accepts – and that it may affect a person's constitutional right to earn a livelihood and to a good name. There was however no evidence put before the Court to suggest in any concrete way that a Disqualification Order would affect let alone deprive the second named respondent of his right to earn a livelihood. Counsel referred the Court to *Re Tralee Beef and Lamb Ltd (in liquidation): Kavanagh v Delaney* [2008] IESC 1, where the first named respondent was a chartered accountant in a well-known firm. He had been appointed to the board purely in connection with the business expansion scheme investments of the company. Hardiman J. referred to the jurisdiction to restrict/disqualify as "Draconian" and referred to the importance of reputation and professional standing that the Court should take into account. At page 359 he stated: –

> "… I am slightly uneasy that, in this case, there may have been an assimilation in particular of the position of a non-executive director to that of an executive one…"

At page 360 he stated: –

> "I do not consider that this case [*Re Barings Ltd (No. 5)*] or that of *In Re Vehicle Imports Ltd (in liquidation)* mandates the assimilation of the position of a non-executive director to that of an executive in terms of their common law duties. The position of a highly paid executive director of a vast bank may be of limited use in considering the common law duties of a non-executive director, appointed to keep business expansion scheme investors informed, of a small company."

It will be noted that this passage referred specifically to a director's common law duties.

I find more helpful the recent decision *Re Walfab Engineering Ltd* [2016] IECA 2 in which the Court of Appeal addressed the issue of directors who are not involved in the day-to-day running of the company, whether as non-executive directors or "passive" directors. The trial judge had considered matters which he regarded as pertinent to the exercise of his discretion, the first of these was the "scale of enterprise and qualification of directors" and he pointed out that the courts "in applying the law are of course sensitive to the personal circumstances and social background of persons who present before them…" And he had regard to "unprecedentedly turbulent times, when the respondents and the companies of which they were directors were confronted with economic challenges of such a scale and swiftness that customary practices such as the filing of returns may not have had the priority to some, the respondents among them, that legal requirements ought generally to have for all…"

Disagreeing with this analysis of the trial judge, Kelly P. at paragraph 60 of the judgement of the Court of Appeal stated: –

> "60. For my part, I cannot agree that the factors identified by the trial judge can be regarded as relevant to the exercise of his discretion. The whole thrust of the legislative provision is to ensure that all directors of all companies comply with their obligations. It matters not that they be directors of family companies, or be at the helm of large or quoted enterprises. Neither do the qualifications of the directors or the economic challenges that the companies may be facing affect the obligations of directors to act responsibly in respect of an insolvent company."

Kelly P., in response to the trial judge's comments that the directors should have sought to put the companies into liquidation sooner and sought an orderly wind up of the company's affairs, in a comment that has some resonance in the present case, observed –

> "61. He is undoubtedly correct that they ought to have put the companies into liquidation, but it is not a question of doing so "sooner" because, in fact, they never wound up the companies at all."

In the present case the striking off of the Company in 1999 and 2011 emanated from the CRO. The restoration in 2011 occurred not because of the efforts of the respondents, but rather an application by a third party creditor. Ultimately the petition was presented by the Revenue Commissioners.

33. In *Walfab* Kelly P. directly addresses "passive directorships" from paragraph 67 of his judgement and reviewed the case law. At paragraph 71 he concluded: –

> "… These decisions were given in the context of s.150 restrictions, but I am of the opinion that no different test would be appropriate in the context of a s.160 application. All directors whether passive or otherwise are required to undertake all reasonable steps to file annual returns."

34. Even if I accepted that Mr Fox was a passive director, which I do not because of the level of his involvement in this company as outlined above, as an accountant and having regard to the reasons for his involvement in this company at the outset, he cannot sidestep the evidence of misconduct related to the company trading while insolvent, the failure to make annual returns, the continued trading while the company was dissolved, and the evidence related to non-payment of taxes.

35. I am therefore satisfied that the conduct of both respondents as directors has been such as to make them unfit to be concerned in the management of a company.

36. Further and in the alternative, of the Court's own motion I find that both respondents should be disqualified under s.842(f) on the basis that they were both persistently in default in relation to relevant requirements of the Companies Acts.

37. In the circumstances it is not necessary for the Court to decide whether the second named respondent should be the subject of restriction pursuant to s.819. However my earlier findings lead me to the conclusion that the second named respondent did not act responsibly in relation to the conduct of the affairs of the company, and I would have been satisfied that it was just and equitable that the second named respondent should be subject to restrictions.

38. Counsel for Mr. Fox suggested that, if considering a disqualification or restriction order, the court should consider instead accepting his undertaking not to become a company director in the future. The offer of a formal undertaking to this effect was made by Mr. Fox in a letter that his solicitors sent, somewhat belatedly, on 16th January, 2017, to the Director of Corporate Enforcement (DCE). The letter points out that Mr. Fox is now 65 years of age, and suggests that as the primary purpose of the legislation is to safeguard the public and creditors, this would be achieved by such an undertaking. Counsel also referred the court to the decision of Murphy J. in *Architectural & Industrial Coatings Limited: Cahill v. O'Brien and Cosgrove* [2015] IEHC 817, a restriction case brought under the old s.150, where "some sympathy" was shown for the position of one of the directors who appeared to be "excluded from the affairs of the Company by the actions of the first named respondent".

39. The DCE has a power (under s.850) at his discretion to issue an invitation to a director to voluntarily to submit to a period of disqualification by disqualification undertaking, but this was not done in the present case and the DCE is specifically precluded from offering or accepting such undertaking under s.851(6) which provides:

> "(6) The Director shall not exercise his or her power under section 850(2) in relation to a person where –
>
> a) in the Director's opinion, a period of disqualification, in relation to the person, that is longer than 5 years is warranted by the underlying facts and circumstances, or
>
> b) the Director is aware that an application under section 842 has already been made in respect of the person arising from or in connection with the underlying facts and circumstances."

A similar position in relation to restriction applications/undertakings is contained in s.853.

In a reply letter dated 2 March, 2017, the Office of the DCE informed Mr. Fox's solicitors that as the section 842 application had been made the DCE could not accept an undertaking. The letter added:

> "For the sake of completeness, I should also note that when considering whether or not the liquidator should be relieved of such an obligation, the option of inviting your client to submit to a Disqualification Undertaking was considered. However, it was considered that the Director was precluded from offering an undertaking in this instance by virtue of section 851(6)(a), i.e. in circumstances where it was considered that a period of disqualification of longer than 5 years was warranted by the underlying facts and circumstances of the case."

40. Section 851(6)(b) clearly precluded the DCE from accepting an undertaking. The section does not in express terms preclude the court from accepting an undertaking in lieu of disqualification. However reading the section as a whole, and reading it with s.850, the intention of the legislature appears to be that in appropriate circumstances the DCE can deal with the matter of director misconduct or unfitness by undertaking. In the absence of an express provision empowering the court, it would seem to undermine the function of the DCE if the court were to accept undertakings, or certainly if it were to become common practice. Moreover while sections 850 and 851 provide a statutory framework for disqualification undertakings, and their meaning and effect, there is no such provision in relation to an undertaking the court might accept. So for instance the disqualification undertaking to the DCE must be registered by the DCE with the CRO, and certain specific provisions prescribe its effect (and the same applies in respect of restriction); these provisions would not apply to an undertaking accepted by the court. The decision of Murphy J in Cosgrove is noted, but clearly does not set a precedent in respect of disqualification applications, or indeed restriction applications under the Companies Act, 2014. I also share the view of the DCE that a period of disqualification in excess of 5 years is warranted in the present case, which is a further reason for not accepting an undertaking.

41. I propose to hear the parties further in relation to the appropriate period of disqualification. It may however assist if I were to express a preliminary view on this issue. I regard the misconduct in question as serious, but not egregious. The appropriate period of disqualification is in the range of five years to ten years. The first named respondent is more blameworthy and should attract a disqualification nearer the upper end of this range.