THE HIGH COURT
COMMERCIAL

[2016 No. 307 COS]

IN THE MATTER OF SHEMBURN LIMITED (IN LIQUIDATION)
AND
IN THE MATTER OF SECTION 682 AND SECTION 819 OF THE COMPANIES ACT 2014 AND SECTION 150 OF THE COMPANIES ACT 1990

BETWEEN

KIERAN WALLACE, LIQUIDATOR

APPLICANT

AND

MICHAEL EDGEWORTH, GEORGE EDGEWORTH AND ANTHONY KEMBER

RESPONDENTS

Judgment of Mr. Justice Robert Haughton delivered on this 19th day of July, 2017.

1. In these proceedings, the applicant as the liquidator of Shemburn Limited ("the Company") seeks orders pursuant to the Companies Act 2014, or in the alternative the Companies Act 1990, restricting the respondents from being directors.
2. The first named respondent filed two affidavits in this matter and in his second affidavit dated 4 April, 2017, he averred that he was not opposing the application for restriction. The court having considered the papers was satisfied that he had not acted responsibly as a director and accordingly made an order that he be restricted with effect from the date of hearing on 3 July, 2017.
3. The third named respondent failed to file any replying affidavits opposing the restriction and was not represented or present in court. The court considered the papers and not being satisfied that he had acted responsibly made an order restricting him from the date of hearing on 3 July, 2017.
4. The second named respondent, who is a commercial airline pilot and is the son of the first named respondent, was represented by solicitor and counsel and fully opposed the application for restriction. This judgment relates solely to this respondent.
5. In determining this application, I have considered the affidavits of the applicant, two replying affidavits sworn by the first named respondent and one affidavit on behalf of the second named respondent. I have also had the benefit of written and oral submissions on behalf of the applicant and the second named respondent.

Background

6. The Company was incorporated on 5 March, 2000, and its primary activity was the leasing of aircraft to associated companies, Skytrace Limited ("Skytrace") and The Pilot Training Centre of Ireland Limited ("PTCI"), for the training of commercial pilots. The Company and PTCI were linked companies which formed the Shemburn group. The Company purchased aircraft and these were leased to PTCI. In essence, the Company was established to act as an asset holding vehicle for PTCI due to the aviation training industry being VAT exempt. Its sole purpose was to allow the group to reclaim VAT on capital expenditure. The first respondent states that such practice was standard in the airline industry.

7. PTCI encountered financial difficulties and was placed into liquidation on the 28th September, 2012. At this time, the Company owed PTCI approximately €1,512,530. It appears that the first named respondent took an active approach in this liquidation and engaged with the liquidator of PTCI, Mr Michael McAteer, in attempts to realise the assets of the Company for the benefit of PTCI. The first named respondent in his affidavit avers that he agreed to the sale of the aircraft of the Company but was unwilling to do so at the time that PTCI was placed into liquidation as the market was in difficulty due to the financial crisis. At paragraph 9 he states, "I knew that if the sale of the aircraft was carried out in a proper managed way over a period of 12 months we could obtain market value for them and therefore, create far more benefit to the creditors."
8. In January 2013, both Mr McAteer and the first named respondent decided to sell the assets of PTCI, over which AIB had a lien. In order to sell the assets in a manner which would benefit the interests of both PTCI and AIB, the first named respondent and Mr McAteer decided that it would be appropriate for all stakeholders, that is AIB, Mr McAteer, the Company and the first named respondent, to enter into a forbearance agreement. Mr McAteer's legal team drafted a forbearance agreement which was signed by the first named respondent in August 2013. Mr McAteer then sought and obtained Court approval for said agreement on 3 September, 2013, however he refused to sign the agreement until he had the approval of major creditors of the Company, which included AIB.

9. By letter dated 9th September, 2013, the first named respondent authorised the creditors of the Company to engage with Mr McAteer. Negotiations between Mr McAteer, AIB and the first named respondent in relation to the signing of the forbearance agreement appeared to continue into January 2014, however AIB was unwilling to sign the agreement resulting in such negotiations coming to an end. In January 2014, Mr McAteer decided that the best course of action was to put the Company into liquidation. The Company was put into liquidation and the applicant was appointed as liquidator on 26 May, 2014, nearly two years after the winding up of PTCI.

The provisions relevant to the restriction application

10. In the Originating Notice of Motion dated 11 August, 2016, the applicant seeks orders of restriction pursuant to section 819(3) of the Companies Act, 2014, or, in the alternative, pursuant to section 150(3) of the Companies Act, 1990.
11. An issue may arise as to which provision is applicable in the circumstances in the light of the fact that the Company was wound up prior to the enactment and commencement of the Companies Act, 2014. In both written and oral submissions to the court, the applicant submitted that the approach of the court in this regard appeared to be to apply s.819 of the 2014 Act. The court was directed to the decision of Keane J. in *Re BOD Investment (Ireland) Limited* [2016] IEHC 197. In this case, Keane J. analysed the interpretative provisions in schedule 6 of the Companies Act, 2014 alongside sections 26 and 27 of the Interpretation Act, 2005 and concluded that the court has a discretion to apply the provision dictated by the requirements of justice in the circumstances of each individual case. In that case, despite the proceedings being initiated pursuant to the 1990 Act, Keane J. deemed it appropriate in all the circumstances to determine the application under the 2014 Act. Such an approach was also taken by Binchy J. in both *Re MJBCH Limited (in liquidation)* [2016] IEHC 145 and *Re Manvik Ireland Limited (in voluntary liquidation)* [2016] IEHC 122. I currently tend to the view that at least where the application is brought after the commencement of the 2014 Act, that Act should apply. However it is not necessary for the court to determine this issue at this point in time because, as the parties agreed, the principles that apply in relation to the court's determination of whether or not the second named respondent should be restricted in all the circumstances are not materially different whether the application is considered under s.819 or s.150. I will address the relevant principles later.

The grounds upon which restriction is sought

12. The applicant presents a number of grounds upon which it is asserted that the second named respondent ought to be subject to a restriction application.
13. First, he asserts that he failed to wind the Company up in a timely fashion. As the Company's main source of revenue was PTCI, he avers that when PTCI was wound up, the Company "ceased to have any prospect of survival." He states that the Company should have been placed into liquidation as soon after the winding up of PTCI as possible. Instead the directors failed to put the Company into liquidation at all and as a result, assets were devalued and sums owing to the airport storing their aircraft substantially increased. He avers in paragraph 23 of his affidavit that the value of the aircraft owned by the Company depreciated in value from €395,000 on 12 February, 2013 to €225,000 by June 2014. Such depreciation was allegedly caused by the storage of the aircraft outdoors which resulted in weather damage. He further states that the sums now owed to Weston Airport and Waterford Airport are €105,600 and €40,000 respectively.
14. The third ground of complaint of the applicant is that the second named respondent failed to respond to a request for information required by him. In a letter dated 3 June, 2014, the applicant wrote to the second named respondent informing him of his appointment as Official Liquidator and enclosing a questionnaire which was to be filled out by the second named respondent and returned to the applicant as soon as possible. The applicant received no response to this request.
15. The second ground advanced by the applicant relates to the failure of the directors to locate a log book for the third aircraft which allegedly resulted in a depreciation in value of the aircraft by circa. 80%. This ground of complaint was not pursued at any great length during the course of legal submissions and the court does not consider it to be of any substance. Accordingly the court is concerned only with the first and third grounds of complaint as detailed above.

Response to Failure to wind up the Company in a timely fashion

16. In his affidavit sworn on the 15 March, 2017, the second named respondent gives a detailed account of the events leading up to the liquidation of the Company. In response to the allegation of failure to wind-up the Company in a timely fashion, the second named respondent avers that following the financial crisis which occurred in 2008, his father made him aware of the difficulties that the Company and PTCI were experiencing. He states that his father had taken active steps to ensure that PTCI continued to trade even through this difficult period. In 2009, the second named respondent, after consultation with his father, decided that he would train as a commercial airline pilot "while continuing to be briefed on the welfare of the business". It appears that though he was not actively engaged in the day-to-day running of the Company, he was kept up to date with matters by his father.
17. The second named respondent avers that after the financial difficulties experienced by PTCI, his father attempted to procure further investment through the examinership process. He applied to the Court for protection which was initially successful, however after failing to source an investor this protection was lifted and the Company went into liquidation. After this, the second named respondent avers that his father engaged with Mr McAteer in the hope of realising the assets of the Company for the benefit of PTCI. The second named respondent does not go into any great detail in relation to this process and the delay which this caused. To this end he merely states at paragraph 21 of his affidavit that "I am aware that there were competing interests in relation to the assets of the Company and that the process was not straightforward and ultimately was unsuccessful. This led to the liquidation of the Company."
18. In respect of the delay, the second named respondent avers that he agreed with the course of action taken by his father and "I did not and do not believe that the steps that he took at this time were inappropriate". He then avers that in his non-executive role in the Company he was reliant on his father for information and trusted his judgment, "in particular in high level commercial matters." Significantly he states that in spite of this less active role, he would not have interfered with the manner in which his father dealt with the Company at that time. He states "Therefore, quite apart from the nature of my role, I would not have called on him to change a strategy which appeared to be and still appears to me to be, a reasonable

one – namely to engage with Mr McAteer." The second named respondent did not seek any independent advice or engage with the Company auditors to ascertain whether the approach taken by his father was indeed the correct one or whether an alternative course of action would be more appropriate, such as the placing of the Company, which was at this stage hopelessly insolvent, into liquidation.

Response to Failure to respond to a request for information

19. This allegation relates to a questionnaire posted to the second named respondent by the applicant requiring certain information to be furnished. The second named respondent vehemently denies any failure to cooperate and states that his lack of response to the questionnaire was actually as a result of a number of circumstances. The first of these was that the questionnaire was sent to his father's address as opposed to his address in Italy where he was residing at the time, and his father did not send this on to him. He further states that he did not receive any emails or phone calls and there was no attempt to follow-up with the initial letter. He states that as there was no follow-up by the applicant, he did not appreciate the importance of the questionnaire and the importance of his obligation to furnish a completed copy to the applicant. He avers that if there was any such indication of its importance he would have discharged this obligation immediately.
20. The second named respondent further states that he was aware that his father was fully cooperating with the applicant at this time and that he knew his father was providing the applicant with all necessary information. He states that though he was not a "passive director", he was reliant on his father for information as to the goings-on of the Company and so was not in a position to offer any further information to the applicant. On this point he avers "At this time I was a pilot based in Bergamo, Italy. I did not have access to any of the books and records of the Company and was being apprised of its affairs by my father." He essentially avers that had he submitted the questionnaire, this would not have provided the applicant with any additional information with which he had not already been furnished.

Non-executive Director Defence

21. In his affidavit, the second named respondent describes the nature and scope of his role within the Shemburn group. He states that it was the intention of both him and his father that he complete his studies and learn the aviation business. At the time of his initial appointment as director, the second named respondent was still in attendance at college and his role was minimal. He describes his role during this initial stage as being limited to weekends and summer holidays which entailed "odd jobs", such as washing planes and moving aircraft.
22. In 2006, the second named respondent completed his college studies in IT and took up a more involved role in the business in Waterford. He was responsible for handling the scheduling and rostering but was kept abreast of Company affairs more generally by his father. As the business continued to expand so too did his role and eventually he became involved in the fitting out of new offices with supplies and IT facilities. He also became involved in the acquisition of equipment through negotiation with various schools and businesses. Over time as the business expanded to both the UK and Florida, the second named respondent was despatched to assist with the IT setup. He also became involved in software development which eventually led to a joint venture of software supply to schools worldwide. This occupied his day-to-day work until 2008.
23. During this time, the second named respondent states that his father was focused on bringing in further investment to the Shemburn group companies. He states that though he was made aware of any developments in this regard and took an interest in them, he was "not in a position to second guess or challenge what appeared to me to be reasonable and responsible decisions made by my father on the advice of others with relevant qualifications."
24. In 2008, the companies of the Shemburn group were severely impacted by the economic recession and the second named respondent and his father discussed their concerns relating to this. The upshot of these discussions was a decision that the second named respondent should train to be a commercial airline pilot. From this point on it appears that he ceased to have full-time involvement with the Company. He undertook this course in January 2009 and qualified 18 months later. He then took up a position as a pilot with a major airline and has since progressed to be an airline captain. In paragraph 17 of his affidavit, the second named respondent avers that he and his father discussed the possibility of his resignation from the position of Director but he states he "did not get around to fulfilling this requirement". He also avers that they envisioned him taking up a consultancy role with the Company at some point in the future when he had gained sufficient airline experience.
25. After taking on the position of commercial pilot, the second named respondent kept up-to-date with the Company solely through communications with his father, which took place frequently. At paragraph 27 of his affidavit he states "I discussed with my father the affairs of the Company and the other business in which we had an interest *regularly* and was aware of what was taking place." The second named respondent allowed his father to continue to manage the affairs of both companies uninterrupted and merely asked to be kept informed of steps taken. He avers that as his father was superior in knowledge and qualifications, he was unwilling to question his judgment or to intervene in any way with the approach taken by his father.

Relevant legal principles

26. As already stated whether this application falls to be considered under section 150 of the Companies Act 1990 or section 819 of the Companies Act 2014 does not make any material difference. It is not suggested that the second named

respondent acted dishonestly, and it is important to state this at the outset. Accordingly the core question is whether he has satisfied the court that he acted responsibly in relation to the conduct of the affairs of the company, and whether "there is no other reason why it would be just and equitable that he should be subject to restriction". The third issue raised is whether he failed to cooperate with the liquidator. It is common case that the onus is on the second named respondent to so satisfy the court.

27. The principles established by Shanley J in *La Moselle Clothing Ltd v Soualhi* [1998] 2 I.L.R.M. 345 and enunciated at page 352 are helpful: –

> "Thus it seems to me that in determining the "responsibility" of a director for the purposes of s.150(2)(a) the court should have regard to:
> (a) the extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts 1963 – 1990.
> (b) the extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.
> (c) the extent of the directors responsibility for the insolvency of the company.
> (d) the extent of the directors responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.
> (e) the extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards."
> It is also clear that "simply bad commercial judgement" does not equate with lack of responsibility, that the court should not permit a witch-hunt against directors, and that the court should be careful "not to view the matter with the inevitable benefit of hindsight" – see Ms Justice Finlay Geoghegan in *O'Neill Engineering Services* (ex tempore, 13 February 2004).

28. It is also clear that the court must consider the evidence in context, and must take into account all relevant circumstances. This is emphasised in the judgement of Fennelly J in *Re Mitek Holdings Ltd: Grace v. Kachkar* [2010] 3 I.R. 374, at p.397 where he states: –

> "[80] there will usually be a real difference between the duties of executive and non—executive directors. The latter will usually be dependent on the former for information about the affairs and of the finances of the company, a fact which will impose correspondingly larger duties on the former…"
> However the mere fact that a person is a non—executive director does not exonerate them from responsibility. In *Re Vehicle Imports Ltd* (Unreported, High Court, 23 November 2000), Murphy J. approved a summary of directors' duties given in the judgment of Parker J. in *Re Barings plc. & Others (No.5)* [1999] 1 B.C.L.C. 433, parts of which summary were cited by Finlay Geoghegan J. with approval in *Kavanagh v. Delaney* [2005] ILRM 34, at p.40 in the following terms: …
>
> > "Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them…
> > (i) Directors had, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.
> > (ii) Whilst directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegated functions.
> > (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it had been discharged, depended on the facts of each particular case, including the director's role in the management of the company."

29. The issue of delay in the winding up of a company is one that can give rise to a finding that directors did not act responsibly. It is well established that where a company is insolvent and unable to pay its debts the directors have a duty to wind it up. Addressing this in *Re Careca Investments Limited* [2005] IEHC 62, Clarke J. noted:

> "That duty does, of course, depend on all the circumstances of the case and there may well be appropriate instances where, at least for a period of time, it may be appropriate to postpone winding-up pending attempts to deal with the issues that arise by virtue of insolvency."
> In *Re Swanpool Limited* [2005] IEHC 341 the same judge noted at paragraph 3.7 of his judgment three different types of situation in which the court is typically required to consider restriction applications, the third being –
> "3. Compliance by directors with the obligations identified in *Frederic 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."
> It is evident that directors of a company that is insolvent have a duty to consider all creditors and should not act in a manner that has the effect of preferring, or potentially preferring, one creditor over another or risking loss that would adversely affect all, or all of a class of, creditors.

Decision

30. The liquidator's primary concern is the failure to wind up the Company in a timely fashion, and in particular the delay following the liquidation of PTCI on 26 July, 2012, until the appointment of Mr Wallace on 26 May, 2014, some 22 months later. There is no doubt that this was irresponsible on the part of the first named respondent as executive director. At the date of liquidation PTCI was owed over 1.5 million euro. The Company was plainly insolvent. It was also dependent on the continued existence of PTCI for income from the lease of aircraft, and when PTCI ceased trading it should have been obvious that the Company would have to be liquidated. This is all the more so because – and this has not been contested – following the liquidation of PTCI all of the Company's aircraft were grounded. It should also have been plain to all the directors that the aircraft would have to be stored pending sale, and that this would entail ongoing payments to Waterford Airport and Weston Airport, apart from other ongoing company expenses. While a short delay might be acceptable, to explore an early, orderly and beneficial sale of the Company assets, in the circumstances this might reasonably have been measured in weeks or a few months, but should not have extended into 2013. Only if a forbearance agreement had been reached with all creditors within a short timeframe might that have justified any greater delay in liquidating the Company. Dragging out that process for over 18 months was not responsible conduct.
31. The second named respondent asks the court to excuse him from responsibility on the basis that his role as a director was non—executive, that his role initially was limited to odd jobs and then developing the company's IT systems, that he was "not particularly qualified or experienced on the financial workings of the business", that from January 2009 he trained to be a pilot, qualifying 18 months later and thereafter becoming a captain with a major European airline and being based much of the time in Bergamo. In addition he says he kept abreast of his father's attempts to rescue PTCI through the examinership process, and, after that company went into liquidation, the first named respondent's attempts to achieve a consensual resolution with PTCI's liquidator and the Company creditors over the realisation of the Companies' aircraft. At paragraph 22 of his affidavit he states: –

> "I believe that it is clear when one considers the nature of my role in the Company that I relied on my father (a) to receive information in relation to matters ongoing with the Company and that (b) I trusted his judgement in particular in high-level commercial matters. As a matter of objective judgement, I did not and do not believe that the steps that he took at this time were inappropriate. Therefore, quite apart from the nature of my role, I would not have called on him to change a strategy which appeared to be and still appears to me to be, a reasonable one, namely to engage with Mr McAteer."

32. It seems to me that this ignores the second named respondent's general duties as a director, even as a non-Executive Director, to exercise supervision over the affairs of the Company. This is particularly so in the context of the crisis that led to the liquidation of PTCI with the obvious implications for the Company, and its creditors. In his affidavits the second named respondent does not elaborate on what discussions he had with his father in relation to the Company at the time of or immediately after the liquidation of PTCI. He does not appraise the court of the information that he sought or the nature of any debate that he may have had over the future of the Company at that time. In particular there is no evidence to suggest that the second named respondent had any contact with the Company accountant or auditor, or sought any outside advice as to the appropriate action to be taken by or in respect of the Company.
33. The question of whether or not to appoint a liquidator to the Company immediately post the liquidation of PTCI was not in the category of routine or even a significant "commercial judgement". It was a question that had to be addressed in the context of the duties owed by all of the directors under the Companies Acts, and the general duties of directors mentioned earlier. The liquidation of the Company became inevitable following the failed examinership of PTCI, and the decision to wind up the Company should have been straightforward.
34. Moreover by 2012 the second named respondent was over 30 years of age, he was an experienced pilot, and he had been involved in the family companies and their businesses since 2001. He cannot have been entirely without business experience and some knowledge of corporate compliance and the responsibilities of directors. He ought to have had occasion to attend many annual general meetings of the Company or PTCI and to have considered annual financial statements/accounts. He clearly had considerable knowledge of the airline industry. Objectively if he had sat down and properly and responsibly considered the position of the Company in the summer of 2012 he should have realised, having regard to the enormous debt due to PTCI, that incurring further debt for storing aircraft pending sale would have implications for new or existing unsecured creditors, who would ultimately be unable to recover their debt. At the very least he should have sought advice rather than accepting his father's decision-making and strategy, apparently without question.
35. His duty was owed individually, as well as collectively. Had he consulted with an independent accountant or the company auditor he would almost certainly have been advised that the Company should immediately be put into liquidation – and if not so advised he might still be held to have acted responsibly by seeking and relying on professional advice. Had the question been canvassed he would probably have been advised that in a liquidation all expenses associated with selling the aircraft, including storage pending sale, could have been discharged in full by the liquidator, and that a liquidator might have welcomed the assistance of the respondents in marketing the aircraft. Instead – admittedly primarily due to the first named respondent's scheme to sell the aircraft without the Company going into liquidation – by the time of the liquidator's First Report Weston airport was owed €105,600 and Waterford Airport was owed an estimated €40,000. As unsecured creditors there will be no funds in the liquidation to discharge this indebtedness. Some indebtedness of this nature – but not as much as accumulated over the 22 months before liquidation – was reasonably foreseeable.

36. The liquidator suggests that the delay in the sale of the aircraft led to inevitable devaluation of these assets, in the order of €170,000 between February 2013 and June 2014. I am not satisfied that this reflects lack of responsibility on the part of the second named respondent as a director. This depreciation was largely due to the fact that the aircraft in Waterford were stored outdoors and damaged by bad weather. There is no evidence that the second named respondent was aware of the outside storage, and weather-caused damage is not something that the second named respondent could necessarily have foreseen. Nonetheless, in the context of the third consideration highlighted by Shanley J. in *La Moselle*, the second named respondent must bear some responsibility for the increases in the unsecured indebtedness of the company to Weston and Waterford airports during the period when it should have been put into liquidation.

37. I do not accept that the second named respondent acted irresponsibly in respect of the liquidator's request for information, and in failing to complete a questionnaire. In this respect I accept his evidence that the questionnaire was not brought to his attention, having been posted to his father's address. While the second named respondent may be criticised for not having updated the CRO on his change of address, I also accept his averment that he was not in possession of any information that could have added to the information already provided to the liquidator by his father who did provide a Statement of Affairs. That this omission was not a matter of great concern to the liquidator is reflected in the fact that no reminder letters or other correspondence were issued by the liquidator.

38. Accordingly, I find that the second named respondent did not act responsibly in failing to take appropriate action to have the company wound up in a timely fashion following the liquidation of PTCI. As previously stated I do not find that he was in any way dishonest. Nor do I find any irresponsibility in his a failure to fill in a questionnaire or provide information to the liquidator in all the circumstances.

39. I will hear counsel further in relation to whether the restriction order should be made pursuant to section 150 or section 819.