Neutral Citation: [2015] IEHC 817

THE HIGH COURT

[2014 No. 252 COS]

IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001 AND ARCHITECTURAL & INDUSTRIAL COATINGS LIMITED (IN LIQUIDATION)

EDMOND P. CAHILL

Applicant

AND

JOHN O'BRIEN AND RAY COSGROVE

Respondents

Judgment of Ms. Justice Murphy delivered the 17th day of December, 2015

1. This is an application for a declaration that the first and second named respondents, being persons to whom Chapter 1 of Part VII of the Companies Act 1990 applies, shall not, for a period of five years, be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company, unless that company meets the requirements set out in section 150(3) of the Companies Act, 1990 (as amended). The applicant also seeks an order, pursuant to section 56(2) of the Company Law Enforcement Act 2001 extending the time for the making of the application along with any further order the Court may think just.

2. The applicant in these proceedings, Mr. Edmond Cahill, is the liquidator of Architectural and Industrial Coatings Limited (In Liquidation) ("the Company"). The first named respondent, Mr. John O'Brien, was a director of that company within twelve months prior to the date of Mr. Cahill's appointment as liquidator, as was the second named respondent, Mr. Ray Cosgrave. Both Mr. Cosgrave and Mr. O'Brien were registered as directors between 1995 and 2006. Mr. Cosgrave was the non-executive nominee of Lafor Establishment, a Liechtenstein entity controlled by a Liechtenstein trust of which a Mr. Lesley Auchincloss is a potential beneficiary. Lafor Establishment was a 36% shareholder in the Company. Mr. Cosgrave is a teacher by profession. He avers that it was clearly understood that he would not be involved in the day-to-day running of the Company and would carry out his duties as non-executive nominee director by attending board meetings to exercise his vote as required. Mr. John O'Brien is a chartered accountant and 27% shareholder of the Company. He acted as Company Secretary and appears to have originally acted as a non-executive director of the Company but assumed the role of General Manager in 2004. Mr. Cahill was appointed as liquidator by a resolution of shareholders dated 20th April, 2010, in the circumstances outlined below. His appointment was confirmed by the creditors of the Company on the same date.

Background

3. The Company was incorporated on 6th July, 1994 and was engaged in the contract painting of aluminium. It also provided a metal treatment service for customers. The Company commenced trading on 1st February, 1996. It traded successfully until 28th May, 2002 when it came to the Board's attention that one of the Company's largest customers was installing its own paint line. The Company incurred a loss in 2002 and attempted to diversify into other areas to compensate for the loss of business. It was unsuccessful in this regard. A number of changes were made to the Board. Mr. Paddy Barry was replaced as Managing Director by Mr. Dermot Monaghan in March 2002. Mr. Barry however continued to be involved in the Company in the position of Sales Director. In addition, reports were commissioned about the future viability of the Company.

4. In and around February 2004 it appears that Mr. Dermot Monaghan, who had been Managing Director since 2002, left the Company. Mr. Paddy Barry, who had been Managing Director of the Company from 1996 to 2002, and thereafter had been Sales Director, resigned as a director on 27th February, 2004 and thereafter stayed on for a short while as General Manager. Thus by early 2004 the Company had lost two directors who, according to Mr. Cosgrave, the second respondent, were technically experienced and qualified persons who had managed the daily operations and manufacturing processes of the Company, leaving the two respondents as the sole directors. On 28th April, 2004 Mr. Barry, then General Manager, wrote to Mr. O'Brien and Mr. Cosgrave. In that correspondence, entitled *"Crisis Update – March 2004 – Management Accounts"*, Mr. Barry noted as follows:

> *"During the month of March we have implemented controls and outlined the development necessary for return to profit. All reports over the past weeks have highlighted the seriousness of the situation and the urgent need for injection of working capital in order for the company to go forward.*
>
> *There will not be funds to pay next week's wages and employees need to be advised rather than bring them in for work that we at present do not have funds to pay wages for.*
>
> *A decision must be made immediately and I do not have the authority to make this decision."*

In or around 4th May, 2004, Mr. Barry absented himself from the position as General Manager due to ill health. It would appear that the first respondent, Mr. O'Brien, took over that role.

5. At this stage Mr. O'Brien and Mr. Cosgrave were the sole remaining directors and were aware that the Company was unable to pay its debts. On 29th April, 2004, according to the affidavit of Mr. Cosgrave, he and Mr. O'Brien met with Ulster Bank to agree terms on which further funding would be provided to the Company. According to the investigation of the liquidator, Mr. Cahill, on 5th May, 2004, Mr. O'Brien, having discussed the matter with Les Auchincloss, sought the appointment of a receiver by Ulster Bank, with whom the Company had an Invoice Discounting Agreement. Both Mr. O'Brien and Mr. Cosgrave aver that Ulster Bank refused their request in this regard and instead requested that the Company continue to trade and seek investment. In his report as liquidator dated 21st November, 2011, Mr. Cahill recorded that it appeared the Bank were unwilling to appoint a receiver on the grounds that they would find it very difficult to recover their money if the Company ceased to trade.

6. At this time, Mr. O'Brien contacted the Company's main suppliers, including a firm called Carbon Chemicals. He explained that as the Company was now losing money it had no option but to cease trading. Preliminary contacts were made with potential investors and purchasers who had been introduced to the Company by Ulster Bank and Carbon Chemicals. Five potential investors were identified in mid-2004. Mr. O'Brien states in his affidavit that he received advice from the Company's solicitor at this point to the effect that the

Company was legally entitled to trade as long as there was a reasonable prospect of obtaining investment or of selling the business in a way that would discharge all creditors. He stated that the directors therefore made a decision to continue to trade while looking for an investor or purchaser for the Company. He further states at paragraph 11:

> *"This was in the best interests of the Company's creditors and employees. At this stage my plan was that the business of the Company would be sold and that all creditors of the Company would be paid in full from the purchase monies. In addition, I hoped that all the Company's employees would be able to retain their employment with the purchaser".*

However none of the potential investors ultimately invested. Mr. Cosgrave avers that he suggested, in early 2004, that consideration be given to placing the Company in liquidation "but the prevailing view was that efforts should be made to secure investment finance and implement measures to have the Company trade out of its difficulties".

7. On 16th August, 2004, Mr. O'Brien and Mr. Cosgrave received a letter from Mr. Frank O'Sullivan, the Company's Management Accountant and Financial Controller. Mr. O'Sullivan indicated that he no longer felt he could offer his services to the Company "as my position has become impossible over the last number of months". He continued:

> *"As you are aware, the company has been trading insolvently for a number of months now & despite various efforts to bring new investment into the company, nothing concrete has yet been achieved. It is nearly 6 months since Dermot Monaghan left his position as managing director, and 3 months since Paddy Barry left. I am now extremely concerned that the situation will be allowed to go on in spite of continued losses. I trust you will take your positions as directors of the company into consideration in your decision to continue to trade. You don't need me to tell you that continuing to trade without honestly believing that the company will be able to pay its debts as they fall due could result in the directors being held personally liable for the debts of the company and subject to penalties and/or restrictions".*

8. Around this time, Mr. O'Brien became unwell. On 17th September, 2004 he wrote to a Mr. Sean P. Kelly requesting that Mr. Kelly undertake a consultancy assignment on his behalf to do the following:

> *"1. Examine the present state of the company and let me have an assessment as to the prospects of restoring possible trade;*
>
> *2. Assist with the day-to-day management until such a time as a permanent appointment can be made;*
>
> *3. Assist with any negotiations or investigations to be carried out with prospective investors or purchasers of the business;*
>
> *4. Supervise the evacuation of premises presently occupied by the company in respect of which we do not have a direct lease or tenancy from the Marina Park Industrial Estate."*

9. Following an assessment of the business, Mr. Sean P. Kelly wrote to Mr. O'Brien, in a letter dated 21st September, 2004, commenting that: *"it would seem to me that everyone are (sic) going around like headless chickens not sure of what they are supposed to be doing and not sure of what the future holds for them. The basic problem is that nobody seems to be in control".* Mr. Kelly advised: *"I feel the best thing to do at this stage is for me to get involved in the day to day activities of the company for a period of three months after which I should be in a position to advise if the business can survive".* Mr. Kelly requested a monthly fee of €10,000. Mr. O'Brien confirmed his acceptance of those terms on 28th September, 2004.

10. In a letter dated 11th October, 2004, solicitors for Ulster Bank Commercial Services wrote to Mr. Gratton Roberts, solicitor to the Company. This letter related to the Invoice Discounting Agreement between the Bank and the Company and noted that the Company was in breach of such agreement since preferential creditors, who were to be maintained up to date on an ongoing basis, had not been so maintained and since annual audited accounts had not been provided to the bank within 90 days of year end as required. The letter also noted the Bank's concern about the *"viability of the business, the lack of management continuity and their reluctance to provide facilities in the absence of a clear plan to take matters forward".* Finally, it provided that in the absence of an undertaking to abide by the terms and conditions of the agreement, concrete evidence of receipt of investment funds and the provision of a business plan by 13th October, the Bank intended to terminate the agreement. In a replying letter dated 13th October, 2004, the Company's solicitors responded as follows:

> *"Our clients have abided by the terms of the agreement in so far as they were able given the conduct of UBCS. The preferential creditors have not been maintained up to date due to the lack of funding. Our clients were encouraged and counselled to do this at all times by officials of UBCS who indicated their continued support for the Company, following a request by the Directors that a receiver be appointed. Your clients, by drastically cutting back on the finance being made available, have made it impossible to maintain payments to the preferential creditors. Meanwhile your clients have systematically reduced their exposure".*

11. On 19th October, 2004, Mr. Brian Power, Account Manager at Ulster Bank, wrote personally to Mr. O'Brien, noting as follows:

> *"From information provided by you, Architectural and Industrial Coatings Limited has recorded significant losses and would appear to be insolvent…*
>
> *The responsibility for the position the company presently finds itself in is the sole responsibility of the directors and shareholders and it is disingenuous to lay the blame on the financial institutions who have provided support to your company in good faith.*
>
> *At our meeting in your company's office on the 20th September you stated that a decision would be taken either to invest in the business or commence wind down by 6th October. We have received no confirmation of either decision.*
>
> *The financial position of the business coupled with your inability to collect debtor accounts in a timely manner now requires address by the directors of the business. Obviously the current situation cannot continue indefinitely and we require your commitment to invest equity in the business by return".*

12. Mr. O'Brien responded to that letter on 20th October, 2004. As well as reiterating the Company's position that its shortage of cash had arisen from the unilateral reduction of facility by UBCS and noting that *"UBCS were fully aware of the fact that sufficient funds were not available to [pay] the Revenue",* Mr. O'Brien also noted:

> *"You will be aware that a meeting is taking place today which will determine the future of the business or its orderly wind-down. Perhaps you would confirm that the bank will assist, as promised in an orderly wind-down should this occur.*
>
> *The implication of the last paragraph is that matters outlined by you have not had the attention of the Directors. As previously expressed to you the attention of the Directors has been applied at great personal inconvenience and cost.*
>
> *It would have been much easier for the Directors to have insisted on the appointment of a receiver when requested and allow the bank to deal with all matters arising thereto. Accordingly, while your letter is noted the purpose thereof is also somewhat disingenuous."*

13. In October 2004, a difference of opinion arose between Les Auchincloss, the beneficiary of the trust on whose behalf Mr. Cosgrave acted as non-executive director, and Mr. O'Brien. This related to the operation of the Company. On 5th October, 2004, Mr. O'Brien wrote to Mr. Auchincloss. He indicated that the Company did not have sufficient working capital to fund materials for production which had instead been funded by Mr. O'Brien personally or by the purchase of materials directly by customers. Mr. O'Brien further indicated that *"all customers have indicated they will restore their business to us if the Company is in a position to satisfy the production requirements"*. He also noted that *"virtually all suppliers have indicated to us that they are willing to enter into an arrangement which would allow the Company to continue, provided current purchases were paid for"*. The tone of the letter suggests a somewhat strained relationship with Mr. O'Brien noting that *"endeavouring to run the business was an extremely difficult exercise without any support from the Directors, both of whom during that period, as far as I can make out were not contactable and abroad"*. He felt that his involvement in the business *"to persevere in the interest of paying all the creditors, preserving employment and ultimately realising some value for the shareholders"* had a detrimental effect on his own business and noted his belief that Mr. Cosgrave had "assumed a somewhat semi-detached position from the exercise". Finally, he expressed his belief that:

> *"It will be with great regret that we have established that a viable business exists in a core area of the Company's trade and the unfortunate part about it from our point of view is the funds that represented the profits earned in the earlier years have not been available to sustain the difficult period in view of payment of a loan which the company discharged to AIB on your behalf".*

14. Mr. Auchincloss replied on the same date indicating his belief that *"this matter will be resolved Friday"* and suggesting voluntary liquidation in the alternative. On 25th October, 2004, Mr. O'Brien received a *"Business Plan for Architectural Industrial Coatings"* which had been prepared by Mr. Kelly. This plan emphasised the need for further investment in the region of €250,000.

15. It is not clear to the Court what transpired in the months of November and December 2004 and January 2005. The Court has no information other than Mr. O'Brien's averment that efforts to sell the business continued in 2004 and 2005.

16. On 9th February, 2005, Mr. Cosgrave sent a letter of resignation to the Company. Mr. Cosgrave avers that his reasons for doing so were as follows:

> *"After I found out the true extent of the financial difficulties of the Company in the course of 2004, I contemporaneously experienced a breakdown in communication with those involved in the management of the Company, and John O'Brien in particular (who I understand to have been unwell at the time). My role as nominee director had become effectively defunct."*

This account is somewhat at variance with that of Mr. O'Brien, as expressed in his letter to Mr. Auchincloss of 5th October, 2004. According to the liquidator's report, dated 21st November, 2011, Mr. O'Brien approached the Company's solicitors, Grattan Roberts, to request that he and Les Auchincloss nominate a new director so as to enable Mr. Cosgrave's resignation to be filed with the CRO. It would appear that a new director could not be found and Mr. Cosgrave's resignation was never formally registered in the CRO given the legal requirement at the time that the Company have a minimum of two director. Therefore, Mr. Cosgrave avers that *"as a result, despite my having formally resigned and concluded my dealings with the Company on a practical level, I remained as a director, against my express wishes".* Mr. Cosgrave later provided assistance in relation to the reinstatement of the Company to the Register of Companies.

17. In June 2005, Mr. O'Brien engaged in correspondence with the Revenue Commissioners in relation to the Company's tax arrears. He outlined that the Company's liabilities had been recognised and *"we are most anxious that it should be repaid in full".* He further noted *"while nothing can be guaranteed with regard to commercial activities, it is my belief that the company has a realistic prospect of trading out of its present difficulties under the guidance of Mr. Kelly and his present management team"*. The Revenue responded to Mr. O'Brien, by letter dated 22nd June, 2005, indicating their willingness to park the Company's arrears up to December 2004 provided that certain conditions were complied with.

18. In a letter dated 6th July, 2005, Mr. O'Brien wrote to the Company's accountants, Noel McCarthy & Co., indicating that the Company had received strike-off notices for failure to file returns. Mr. O'Brien noted that the 2003 accounts had been sent out for signature to Mr. Ray Cosgrave and that material for the 2004 accounts was with the addressee. Mr. O'Brien expressed a concern that the Company should avoid being struck off. On 14th July, 2005, Noel McCarthy & Co. replied that they had prepared accounts for 2003, that the draft accounts sent for signature on 25th March, 2004 had not been returned to them and that they had not signed off on the audit report. The letter further stated:

> *"In light of the financial difficulties that the company has been going through in recent years since the preparation of the financial statements for the year ended 31st January 2003 we are now obliged to check whether the draft accounts should be prepared on the going concern basis or whether they should be prepared on the break up basis".*

It went on to bring Mr. O'Brien's attention to the provisions of s. 297A of the Companies Act 1963 relating to the possibility of reckless trading. Finally, the letter informed Mr. O'Brien that as there were outstanding fees due, the Company's accountants would not be in a position to complete the work required without immediate payment on account.

19. In spite of the circumstances outlined above, Mr. Cosgrave and Mr. O'Brien, as remaining directors, failed to convene a meeting of members pursuant to s. 251(1)(c) of the Companies Act 1963, failed to comply with the requirements of s. 266 of the 1963 Act which provided for the advertisement and convening of a creditors' meeting to place the Company in voluntary liquidation and failed, in the alternative, to apply to have the Company placed into liquidation pursuant to s. 213 of the 1963 Act. The directors advised that this was due to the lack of financial resources to pay for the professional services to make the necessary application to Court to have the Company placed in official liquidation.

20. Instead, on 17th July, 2005, Mr. O'Brien sent an email to the Company's solicitors, copying Mr. Sean Kelly in which he outlined that he felt a lease agreement which had been proposed by Mr. Kelly, was the only option which would give the prospect of all creditors being discharged in the absence of a significant injection of fresh capital.

21. In the summer of 2005, Mr. Sean Kelly, who had been acting as General Manager of the Company on a consultancy basis since September 2004, offered to lease the assets of the Company. The proposed agreement was one in which a company called Keltile Limited, of which Mr. Kelly was a director, would lease the Company's fixed assets for an annual consideration of €60,000 with an enhanced rent in the event of the business being profitable. The ultimate agreement however was for a rent of €60,000. These monies were to be used to discharge Revenue liabilities, rent, all outgoings and any creditors. On 25th August, 2005 a decision was taken to cease trading and to lease the assets of the Company. An agreement in this regard was signed on 28th August, 2005 and Keltile took *de facto* control of the business. The agreement was not formally completed until April, 2006. According to the affidavit of Mr. O'Brien, he made contact with the Company's main creditors once the agreement had been reached including Ulster Bank and the Revenue Commissioners. He stated that each of those creditors was supportive of the agreement and that on that basis he was satisfied that he had acted appropriately. He stated that the Company took legal advice in relation to the agreement and was advised that it was lawful. The Court has seen no evidence, other than the assertion of Mr. O'Brien, of such agreements on the part of the two main creditors. Although the agreement was made on 25th August, 2005, Keltile Limited only formally commenced trading on 13th April, 2006. This was despite the fact that they had been running the business since 25th August, 2005. According to the Directors' Report for the year ending 31st March, 2008 the delay was due to ongoing negotiations with the Revenue Commissioners.

22. On 9th September, 2005 Mr. Kelly wrote to Mr. O'Brien. Despite the fact that Keltile had been in occupation of the Company's premises from August 2005, Mr. Kelly was not prepared to finalise the agreement until he received comfort from the directors that the Revenue Commissioners were supportive of the proposed arrangement. On 23rd September, 2005, Mr. O'Brien wrote to Ms. Claire Quinn of the Collector General's Office to seek the position of the Revenue in relation to the proposal by the Company to cease trading and lease its business to Keltile Limited in order to enable the Company to collect its outstanding debtors and realise its stock in accordance with the lease agreement. The intention was that the Company would generate income from the lease agreement since Mr. O'Brien felt that a liquidation would make it very difficult *"to realise the full book value of the assets in order to discharge the creditors in full"*. According to Mr. Cahill's report of 21st November, 2011, his investigations revealed that a meeting was held with the Revenue Commissioners on 30th March, 2006, during which the Revenue indicated their continued support in connection with the transfer of trade to Keltile Limited, which officially took place in April 2006 but had been operating in practice since August 2005. The Court has seen no written evidence of such agreement.

23. The liquidator's report of 21st November, 2011, further surmised that the main reasons for the late implementation of the agreement with Keltile Limited, appeared to be as follows:

> *"(A) Sean Kelly of Keltile Ltd. wanted assurance that the Revenue Commissioners were supportive of the agreement and that they would not take any summary action against the plant and machinery of Architectural Industrial Coatings Ltd which Keltile Ltd. proposed to lease.*
>
> *(B) The transfer to Keltile Ltd. of the powder supply contract from Carbon Chemicals Ltd in relation to the powder known as interponD which carries with it a 25 year guarantee.*
>
> *(C) Meetings with Ulster Bank Commercial Services to ensure that the Bank were fully appraised of the position and in agreement with the fact that all monies due to Architectural and Industrial Coatings Ltd from its customers as at the date on which Keltile Ltd commenced trading were payable to Architectural and Industrial Coatings Ltd and that all monies due to Keltile Ltd in respect of goods supplied to the same customers post the commencement of trading by Keltile Ltd were to be properly segregated and paid to Keltile Ltd".*

24. The Court notes that ultimately the Company received no income from the arrangement with Keltile Limited. Mr. O'Brien explains that situation as follows at paragraph 22 of his affidavit:

> *"Unfortunately, while Mr. Kelly and his associated companies took over running the business they did not honour the agreement they had entered into with the Company whereby they had agreed to pay the Company a monthly sum which would be sufficient to discharge its creditors. Mr. Kelly made provision for the payment but he would not pay any monies over until his counterclaim for the money he had advanced to the Company before he took it over was resolved. As a result unfortunately no money was paid over. I say that this breach of the agreement may have resulted in litigation were it not for the complete collapse of the construction industry at some point in 2007. Thereafter it became clear that neither Mr. Kelly nor his companies were financially in a position to repay any monies to the Company as their businesses were also struggling financially."*

25. The Company was involuntarily struck off the Companies Registrar on 16th October, 2005, for failure to file returns. At the time of strike off, €349,094 appears to have been owed to unrelated third party trade creditors. The Company had also failed to discharge significant tax liabilities incurred between 2004 and 2005 amounting to VAT liabilities of €246,634 and PAYE/PRSI liabilities of €149,627. Mr. Cosgrave avers that he had no involvement with the Company during that time.

26. The striking off of the Company resulted from its failure to comply with statutory filing obligations in the CRO in 2003 and 2004. The last filed annual return made by the Company was in respect of the period up to 9th October, 2002 with financial statements filed in respect of 31st January, 2002, when the Company was solvent. While draft accounts for 2003 were approved, signed and dated by the directors, they were not filed with the CRO. The explanation offered was that there were insufficient funds. Those draft accounts indicated a trading loss of €168,765. Draft accounts for 2004 were prepared in October 2005 by Mr. O'Brien's firm of accountants indicating a further trading loss of €341,052. Those accounts were not filed with the CRO.

27. The Company continued to trade while struck off. This occurred during the period from 16th October, 2005 to13th April, 2006, the date on which Keltile Limited and an associated company, Architectural Powder Coatings Limited, leased the Company's assets and formally commenced trading pursuant to the agreement of 28th August, 2005. According to the liquidator's report of 21st November, 2011, during this period Mr. O'Brien was endeavouring to have the Company restored to the register. The only evidence the Court has seen in this respect relates to correspondence from Mr. O'Brien to the ODCE and the Registrar of Companies in May 2006 which did not result in any steps being taken by Mr. O'Brien to restore the Company to the Register. The liquidator's report also records that Mr. O'Brien had advanced money to the Company for the purpose of dealing with its creditors. Mr. Cahill, as liquidator, noted that the Company's liabilities decreased during that period.

28. On 20th October, 2005, Mr. O'Brien states that he wrote to the Company's auditors, Noel McCarthy & Co., requesting that they

sign off on the accounts for the year ending 31st January, 2003 and immediately prepare audited accounts for 2004 and 2005. This letter is exhibited by the liquidator as an appendix to his report. In this letter Mr. O'Brien also advised the auditors that the Company had entered into a lease agreement with Keltile Limited for a consideration of €60,000 per annum along with a share of profits and the purchase of the Company's fixed assets. The letter makes no reference to the outstanding fees due to Noel McCarthy & Co. as specified in their letter of July 2004 and in default of payment of which they were not prepared to undertake any further work for the Company. The Court can find no response from Noel McCarthy & Co exhibited.

29. On 27th October, 2005, the Revenue Commissioners responded to Mr. O'Brien's letter of 23rd September, offering an instalment arrangement in respect of outstanding tax liabilities of €375,168 that required a down payment of €20,000 and thirty five monthly direct debit payments of €9,973.28 along with a requirement that current taxes be paid as due. However that agreement could not have been honoured at that time, as the Company had been struck off earlier that month.

30. On 24th May, 2006, Mr. O'Brien wrote to the Registrar of Companies and the ODCE in relation to the striking off of the Company. He advised that *"the strike-off occurred because he was unable to obtain the co-operation of the other director and shareholders to complete the accounts for audit and the CRO returns … and that he wished to have the company reinstated".* No reinstatement of the Company took place at this time.

31. In June 2006, Mr. O'Brien wrote to the Company's solicitor seeking to attempt to have signed returns filed within 31 days so that the Company could be re-registered using a fast track process and seeking to discuss "the prudence of putting the Company into liquidation". Mr. O'Brien averred, at paragraph 24(i) of his affidavit, that he requested funds from Ulster Bank to restore the Company to the Register but that Ulster Bank were only prepared to do so if the liabilities due to it were discharged in full. Mr. O'Brien was advised that this would be inappropriate as it would amount to the Company preferring Ulster Bank.

32. By letter dated 18th January, 2007, the ODCE wrote to Mr. O'Brien in response to his letter of May, 2006. The ODCE advised Mr. O'Brien that *"it was not the mandate of the Director to provide advice or guidance in this matter and would suggest that Mr. O'Brien consult a competent legal advisor".*

33. On 1st February, 2008, Mr. Cosgrave received a letter from the ODCE in relation to his directorship of the Company. This letter outlined that Mr. Cosgrave might be the subject of disqualification proceedings and directed, inter alia, that he confirm that the Company had been restored to the Register of Companies.

34. On 13th February, 2008, having been sent correspondence from the ODCE in relation to his potential disqualification, Mr. O'Brien wrote to Mr. Patrick Houlihan of that office. He referenced previous correspondence to the ODCE dated 24th May, 2006; 28th November, 2006 and15th November, 2007. He outlined that he could not accept that there was any basis for pursuing disqualification proceedings against him and again sought advice as to what steps he might adopt to force his fellow shareholders and directors to comply with their legal requirements.

35. On 26th February, 2008, Mr. Cosgrave responded to his communication from the ODCE expressing his alarm and confirming that he would liaise with Mr. O'Brien to address the matters raised.

36. By letter dated 16th December, 2008, the ODCE sought information from Mr. Cosgrave as to the extent of his role in the Company. The letter noted as follows:

> *"It has been asserted by O'Brien & Co, on your behalf, that you were a passive director of the Company and that efforts are being made seeking to restore the Company to the Register of Companies. The Company has not to date been so restored. Accordingly, please note that nothing has been brought to the Director's attention in correspondence to date to provide a satisfactory defence to the proposed application for a disqualification Order against you and that no material has been provided which would lead the Director to consider it appropriate not to issue disqualification proceedings against you. In that regard, I would observe that the statutory duties placed on Company directors by the Companies Acts, including the keeping of proper books of account and the filing of Annual Returns, fall on all directors of the Company."*

37. Mr. Cosgrave responded by letter dated 12th January, 2009 in which he stated that Mr. O'Brien took a hands-on role in the running of the Company and that "it was clearly understood by all concerned that I would not participate in the daily operations". He went on to state:

> *"To sum up my position, I have been unable to play any role whatsoever in the operation of the Company since 2004, and have received no information re same. My role representing Lafor became defunct. I attempted to resign but was unable to do so. My attempts to take appropriate action have been stymied by a lack of cooperation from Mr. O'Brien".*

38. In the face of the threat of disqualification proceedings by the ODCE, Mr. O'Brien petitioned the Court to seek the restoration of the Company in his capacity as creditor through his business O'Brien & Company. On 18th January, 2010, by order of the High Court, the Company was restored to the register. According to his affidavit, the costs of the proceedings were borne personally by Mr. O'Brien including the costs involved in procuring the updated accounts necessary for restoration, which was conditional on the delivery of returns to the Registrar of Companies within three months. The Company was placed into liquidation on 20th April, 2010 and Mr. Cahill was appointed liquidator on that date.

39. At a hearing on 8th March, 2011, before a Disciplinary Tribunal of the Chartered Accountants Regulatory Board, Mr. O'Brien, as a member of the institute, was reprimanded and fined €1,000 for having failed, as a director of the Company, to advise a creditor that the Company had been struck-off and for having allowed the Company to continue trading after strike-off. According to the liquidator's report of 21st November, 2011, this was as a result of an individual complaint made to the Board by a creditor of the Company, a Ms. Paula O'Donovan, director of Glanmire Precision Limited. An additional complaint was made at the behest of Mr. Paddy Barry but was ultimately withdrawn.

40. On 15th December, 2011 Mr. Cahill, the liquidator of the Company, provided a Final Report to the Office of the Director of Corporate Enforcement pursuant to s. 56(1) of the Company Law Enforcement Act 2001. In that report he noted the co-operation received from both Mr. Cosgrave and Mr. O'Brien during the course of his investigations. He expressed an opinion that the directors had acted honestly and responsibly and requested that he be relieved of his obligation to make an application to the Court pursuant to s. 150 of the 1990 Act for the restriction of those directors. By letter of 12th June, 2013, the ODCE outlined that it was not content to relieve Mr. Cahill of his obligation in that regard and invited him to provide a further report. At this stage Mr. Cahill wrote to Mr. Cosgrave and Mr. O'Brien requesting that they address the perceived issues of responsibility raised in the correspondence of

the ODCE. Mr. Cahill states in his affidavit, that he received correspondence from Mr. O'Brien on 20th August, 2013 and from Mr. Cosgrave on 26th August, 2013, in that regard. Mr. Cahill received a further letter from the ODCE on 16th December, 2013, informing him that he was not relieved of his obligation to bring an application to the Court under s. 150 of the 1990 Act, pursuant to s. 56(2) of the 2001 Act. That letter also outlined the basis on which the ODCE believed that the directors should be pursued under s. 150. The ODCE provided reasons which fell under six headings and were, as follows:

> *"1. Issue of Irresponsibility: On 16th October 2005, the Company was involuntarily struck off the Register of Companies for failing to comply with its statutory filing obligations to the CRO between 2003 and 2005. The Company was not placed in liquidation on a timely basis and was only restored 7 years later on 15th March 2010 following the issuing of High Court proceedings against the company directors by the Director of Corporate Enforcement under section 160(2)(h) of the Companies Act 1990. In effect the directors had allowed the company to "wither on the vine" at a time when the Company had tax liabilities of €396k, trade creditor liabilities of €511k, and assets with a net book value of €536k.*
>
> *2. Issue of irresponsibility: There was a failure to discharge significant tax liabilities incurred between 2004 and 2005. At the time of strike-off, the Revenue Commissioners Statement of Account recorded that the Company had VAT liabilities of €246,634 and PAYE/PRSI liabilities of €149,627.*
>
> *Regarding VAT, the Company paid €60,000 of a declared liability of €157,955 representing 38% of its liabilities between 01/02/03 and 31/01/04. The Company paid €15,000 of a declared liability of €73,385 (20%) between 01/02/04 and 30/06/04. Thereafter, between 01/07/04 and 30/04/06, the Company met its bi-monthly VAT liability on only two occasions and defaulted on nine occasions with an additional outstanding liability of €90,294. VAT liabilities of €246,634 remained un-discharged at the time of strike-off and subsequently at liquidation in June 2010.*
>
> *[3] Issue of irresponsibility: There has been a failure to discharge significant unsecured creditor liabilities to a large number of unsecured creditors. At the time of strike-off, unrelated third party trade creditor liabilities were €349,094 comprising a large volume of unsecured creditors owed between €20k and less than €1k with Carbon Chemicals Limited owed €73,359, The Parkside Group owed €50,000, Celtic Sea Minerals owed €44,470 and Colours and Coatings owed €25,677. These liabilities remained undischarged at the time of strike-off and subsequently at liquidation in June 2010.*
>
> *[4]. Issue of irresponsibility: There has been a failure to ensure that assets of the Company were preserved for the benefit of its creditors at a time of insolvency. In this regard, I note that subsequent to strike-off, the directors allowed the business of the Company to be leased to a company called Keltile Limited. The leasing income does not appear to have been paid with a figure of €260,000 being recorded on the Estimated Statement of Affairs as being receivable and now estimated to realise a 'nil' amount for the benefit of creditors. This arrangement was mentioned in the proposals made to the Revenue Commissioners in a letter dated 23rd September 2005.*
>
> *[5]. Issue of Irresponsibility: The directors failed to join together in the supervision of the affairs of the Company. Mr. John O'Brien and Mr. Ray Cosgrave were recorded as the registered directors of the Company between 1996 and 2005. Mr. Cosgrave was the non-executive nominee of a shareholder, Mr Leslie Auchincloss. As directors, they failed to convene a meeting of creditors pursuant to section 266 of the Companies Act 1963 to consider placing the company in voluntary liquidation or, in the absence of shareholder consensus, they did not apply to have the company placed in Official Liquidation pursuant to section 213 of the Companies Act 1963, having regard to the Company being unable to pay its debts.*
>
> *[…]*
>
> *[6]. Issue of Irresponsibility: There have been breaches of the Companies Acts by the directors in failing to file statutory Annual Returns on time in respect of the years 2003 and 2004, which led to the Company being struck-off the Register of Companies. In this regard, prior to strike-off in 2005, the last filed Annual Return was made up to 09/10/02 with Financial Statements filed in respect of 31/01/02, when the Company was solvent. While the draft Accounts for 2003 were approved, signed and dated by the directors, they were not filed with the CRO. These draft accounts indicated a trading loss of €168,765. Draft Accounts for 2004 were prepared in October 2005 by Mr O'Brien's firm of accountants indicating a further trading loss of €341,052. These Accounts were not filed with the CRO at that time.*
>
> *In a letter dated 6th July 2005, Mr. O'Brien wrote to the Company's former accountants, Noel McCarthy & Co, indicating that the Company had received strike-off notices (and attaching same to his letter). In that letter, he mentioned that the 2003 Accounts had been sent out for signature to Mr. Ray Cosgrave and that material for the 2004 accounts was with Noel McCarthy & Co. Mr O'Brien expressed a concern that the Company should avoid being struck-off. On 14th July 2005, the former accountants advised that they wished to examine whether the draft Accounts should no longer be prepared on a going concern basis, but rather on a break-up basis. They also brought Mr. O'Brien's attention to the provisions of section 297A of the Companies Act 1963 relating to the possibility of reckless trading.*
>
> *Throughout the above and other exchanges of correspondence, there were repeated indications that the Company was insolvent and unable to meet its debts and an acceptance that the Company faced particular consequences if it was not placed in liquidation prior to strike off. Notwithstanding the clear indications to all, the directors eventually allowed the Company to be struck-off, Mr O'Brien entered into a lease arrangement subsequent to strike-off, and both directors failed to fulfil their fiduciary duties to creditors of an insolvent company".*

In respect of point 5, the ODCE noted a number of items of correspondence in the appendices of the liquidator's report including correspondence with Ulster Bank and the Revenue Commissioners and correspondence from Mr. Sean Kelly and the resignation letter of Mr. Frank O'Sullivan, Management Accountant and Financial Controller.

41. Mr. Cahill wrote again to the ODCE on 27th January, 2014 seeking clarification on whether the ODCE had considered his Final Report when deciding not to relieve him of his obligation to bring an application under s. 150. By letter dated 12th February, 2014, the ODCE confirmed that Mr. Cahill's Final Report had been considered and the ODCE had concluded that it was appropriate for an application for restriction, pursuant to s. 150, to be brought before the Court.

Extension of Time Limit

42. Section 56 of the Company Law Enforcement Act 2001 provides as follows:

> *"(2) A liquidator of an insolvent company shall, not earlier than 3 months nor later than 5 months (or such later time as*

the court may allow and advises the Director) after the date on which he or she has provided to the Director a report under subsection (1), apply to the court for the restriction under section 150 of the Act of 1990 of each of the directors of the company, unless the Director has relieved the liquidator of the obligation to make such an application.

(3) A liquidator who fails to comply with subsection (1) or (2) is guilty of an offence."

43. The 2001 Act was repealed in its entirety by s. 4 of the Companies Act 2014 which came into effect on 1st June, 2015. However, schedule 6 of the 2014 Act deals in Part 8 with the "Continuation of acts not completed" and provides as follows:

"(1) Any thing 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".

The Court is satisfied that the 2014 Act grants it a discretion to complete the application commenced under s. 56 of the 2001 Act and to do so on the basis of the law as provided for at the time the acts in question occurred.

44. The Court notes in this regard, the judgment of Finlay Geoghegan J. in the case of *Coyle v. O'Brien* [2003] 2 IR 627 in which she held, at p. 632:

"[T]he only effect of the extension of time, if granted by a court under s. 56(2) of the Act of 2001 is to relieve the liquidator from being considered guilty of an offence under subs. (3). It does not affect the entitlement of the liquidator to pursue the application against the directors. Any entitlement of directors to preclude the application being pursued against them by reason of delay would have to be considered in accordance with the principles referred to by Fennelly J. in Duignan v. Carway [2001] 4 IR 550."

While Finlay Geoghegan J. felt it would be fair and just on the facts of the case before her, inter alia, that the extension being sought was one of three days, she concluded her decision with the following remarks at p. 634:

"In so deciding, I do not wish this to be taken as a signal that the court will extend time where there has simply been inaction on the part of the liquidator or his solicitor. I am heavily influenced in this application by the fact that this was amongst the first batch of reports, decisions and applications pursuant to s. 56 of the Act of 2001. There is a very clear legislative intent that the application should be made within the specified time".

45. The applicant seeks an order, pursuant to section 56(2) of the Company Law Enforcement Act 2001 extending the time for the making of the application. The applicant submitted a report to the ODCE on 15th December, 2011, as required by s. 56(1) of the 2001 Act, in which he recommended to the ODCE that he be relieved of his obligation under s. 150. It appears that by virtue of pressure of business, the ODCE did not manage to consider the s. 56 report until 2013 due to the large volume and complexity of the cases being considered by that office. A detailed letter outlining the views of the ODCE was sent to the applicant on 12th June, 2013 indicating the ODCE's preliminary view as to why the liquidator should not be relieved of his responsibility to bring an application under s. 150 and giving the applicant a further two weeks to submit any further report he deemed appropriate. Notwithstanding the two week time limit, Mr. Cahill's final report does not appear to have been submitted until 30th August, 2013. That final report has not been exhibited in this application but the Court infers that it again recommended that a s. 150 application should not be made against the respondent directors because, on 16th December, 2013, a further letter issued from the ODCE instructing the applicant that he was obliged to make such an application. While the letter of 16th December, 2013 was quite explicit in its terms, Mr. Cahill once again wrote to the ODCE on 27th January, 2014 seeking clarification as to whether it had considered his Final Report in reaching its decision. By letter dated 12th February, 2014, the ODCE confirmed that it had considered that report. That ended the correspondence between the ODCE and Mr. Cahill.

46. On a plain reading of the Act, the position seems to be that, having provided a report to the ODCE under s. 56(1), a liquidator should bring an application to the Court under s. 150 within the following five months, unless he receives instructions to the contrary from the ODCE. However, as matters have evolved, it is first of all very difficult to ascertain with precision when the report is *"provided"* within the meaning of s. 56(1) because, it appears that in some cases, as in this case, where questions are raised by the ODCE, there can be more than one report. It is therefore difficult for the Court to ascertain, on the facts of this case, when in fact the time began to run.

47. Mr. Cahill avers that he submitted his final report to the ODCE, as required by s. 56(1), on 15th December, 2011. On a plain reading of s. 56(2), it would appear that Mr. Cahill, not having been relieved of his obligation to bring an application under s. 150 by the ODCE, ought to have brought this application no later than 15th May, 2012. However, it appears from the affidavit of Mr. Cahill, though the Court has seen no documentation in support of this, that he asserts the application should have been brought within five months of 31st August, 2013, which was the extended time limit granted to him by the ODCE. Mr. Cahill therefore seeks an extension of time in respect of the period between 31st January, 2014 and 20th May, 2014, the date on which the motion was issued, on the basis that he did not conclude his correspondence with the ODCE until 12th February, 2014.

48. In the course of his dealings with the ODCE, Mr. Cahill was issued with what the ODCE refer to as a *"relief at this time letter"* in respect of his obligation to maintain a s. 150 application. Such a letter does not appear to have any statutory basis so as to allow the ODCE to suspend the operation of s. 56. Furthermore, s. 56 does not appear to provide for a liquidator's request to be relieved of his obligation under s. 56(2). A non-statutory process appears to have evolved in the working of the section whereby s. 56(1) reports can be the subject of queries from the ODCE and the provision of further s. 56(1) reports by liquidators. In the instant case, the Court notes that there are numerous possible deadlines ranging from 15th May, 2012, five months after the applicant submitted his report pursuant to s. 56(1), to 16th May, 2014, five months after the confirmation from the ODCE that it did not deem it appropriate to relieve the liquidator of his obligation to make a s. 150 application. In circumstances where the effect of the correspondence on statutory time limits is unclear and where non-statutory procedures appear to have evolved between the ODCE and liquidators it appears to the Court that it would be unfair to penalise a liquidator pursuant to s. 56(2). The Court therefore proposes to extend the time for the bringing of the application to 20th May, 2014, the date on which the application was instituted.

Restriction Application

49. The positions of the first and second named respondents are evident from an examination of the facts of the case however they may be summarised as follows. The first named respondent, Mr. O'Brien avers in his affidavit that he at all times acted honestly and responsibly in relation to the affairs of the Company, that he took legal advice at all stages of his directorship, that he was very open with main creditors in relation to the Company's financial position, that he at all times acted in what he felt were the best interests of the creditors and that the delay in seeking the restoration of the Company, which was ultimately financed at his personal expense,

did not prejudice any of the creditors.

50. The position of the second named respondent, Mr. Cosgrave, is outlined in paragraph 20 of his affidavit:

> *"I say and believe that, in no way did my conduct as a director contribute to the insolvency of the Company or give rise to the net deficiency in the assets of the Company at the time of the striking off or subsequent liquidation of the Company. I say and believe that I did nothing to exacerbate the difficulties experienced by the Company and did all that I could to comply with my responsibilities in the difficult circumstances prevailing at the time. I say and am advised that I went far beyond the requirements of a non-executive nominee director who had formally resigned in 2005".*

51. The applicant's position is that the directors in the case, in his opinion, acted neither dishonestly nor irresponsibly. It is clear that the issue of dishonesty is not in issue in this case. However, in relation to the issue of the responsibility of the directors, the applicant and the ODCE are at odds. In his report submitted to the ODCE on 15th December, 2011 Mr. Cahill noted the co-operation received from both Mr. Cosgrave and Mr. O'Brien during the course of his investigations. He expressed an opinion that the directors had acted honestly and responsibly and requested that he be relieved of his obligation to make an application to the Court pursuant to s. 150 of the 1990 Act for the restriction of those directors. By letter of 12th June, 2013, and further letters of 16th December, 2013 and 12th February, 2014, the ODCE refused to relieve Mr. Cahill of his obligation in that regard. As such, Mr. Cahill is in the unusual position of presenting an application to the Courts which he himself does not support. However, in light of his responsibility as liquidator to put all relevant facts and legal principles before the Court, Mr. Cahill relies on the letter of the ODCE of 16th December, 2013 and his own report, of 21st November, 2011, which was forwarded to the ODCE on 15th December, 2011. The Court notes that this unusual position would appear to have been remedied by s. 820 of the Companies Act 2014 which now allows for the bringing of an application of this nature by the Director of Corporate Enforcement in his own right.

Legal Submissions

52. Section 150 of the Companies Act 1990 provides:

> *"(1) The court shall, unless it is satisfied as to any of the matters specified in subsection (2), declare that a person to whom this Chapter applies shall not, for a period of five years, be appointed to act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in subsection (3)…*
>
> *(2) The matters referred to in subsection (1) are –*
>
> *(a) that the person concerned had acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this section."*

53. Section 150 along with the entirety of the 1990 Act was repealed by s. 4 of the 2014 Act, which came into effect on 1st June, 2015. It was replaced by section 819 of the 2014 Act which provides as follows:

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

54. The Court notes that s. 819 does not differ significantly to s. 150 of the 1990 Act and such differences as exist merely involve giving statutory effect to considerations which were previously considered by courts in practice in applications of this nature. Schedule 6 of the 2014 Act, at Part 8, deals with the "Continuation of acts not completed" and provides as follows:

> *"(1) Any thing 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".*

The Court, is satisfied that the 2014 Act grants it a discretion to complete the application commenced under s. 150 of the 1990 Act and to do so on the basis of the law as provided for at the time of the acts in question occurred.

55. The applicant first drew the Court's attention to a recent decision of Cregan J. in the case of *Coyle v. Nolan & Ors* [2015] IEHC 74. In that case, Cregan J. in dismissing the application for restriction under s. 150, noted as follows in paragraphs 26 and 27 of his judgment:

> *"It is also of considerable importance to emphasise (as the respondents point out in their various affidavits) that in this application to restrict the directors, there are no allegations:*
>
> *1. that the company failed to account properly to the Revenue Commissioners or*
>
> *2. that the company failed to keep adequate books and records or*
>
> *3. that the company failed to deal fairly and honestly with employers and subcontractors or*
>
> *4. that any improper preferential payments were made by the company.*

> *In other words the majority of the allegations appear to be in respect of the commercial judgment of the company's directors. Moreover the allegations of the Applicant in relation to the directors are in relation to a period of time which, as the directors state, "arose towards the end of the company's trading history, mainly in 2008 and 2009 at a time of unprecedented uncertainty in the Irish banking and property market".*

56. The applicant points out that those matters which Cregan J. outlined as being absent in the case of *Coyle v. Nolan & Ors*. are similarly absent in this case and submits that similar considerations therefore apply. He invites the Court in this regard to consider not just the issues of alleged irresponsibility raised by way of complaint in the course of the application, but also the issues which were not.

57. Cregan J. in that case, also outlined the principles applied in this jurisdiction in relation to how a Court should assess the question of whether directors have acted responsibly. He first noted the seminal case of *La Moselle Clothing Ltd and Rosegem Ltd v. Soualhi* [1998] 2 ILRM 345 in which Shanley J. laid down the following criteria at p. 351, which were later adopted by the Supreme Court in Re Squash (Ireland) Ltd [2001] 3 IR 35:

> *"[I]t seems to me that in determining the "responsibility" of a director for the purposes of Section 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.*
>
> *(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.*

58. As outlined by the Supreme Court in Re Squash (Ireland) Ltd the actions of directors are to be judged by an objective standard.

59. Cregan J. also drew attention to the judgment of Finlay Geoghegan J. in the case of *Kavanagh v. Delaney (Tralee Beef & Lamb)* [2005] 1 ILRM 34, in which she agreed with the following propositions outlined by Jonathan Parker J in *Re Barings plc (No. 5)* [1999] 1 BCLC 433, at p. 435:

> *"(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 has been discharged, depended on the facts of each particular case, including the director's role in the management of the company".*

60. Finlay Geoghegan J. considered that directors owed *"a duty to the company to exercise skill and diligence in the discharge of their functions"* and this aspect of her judgment was approved by the Supreme Court in Re Tralee Beef & Lamb Ltd [2008] 3 IR 347.

61. Cregan J. further noted the principle expressed in the decision of *Re USIT World plc* [2005] IEHC 185 in which Peart J. noted that it is not incumbent on a board of directors to immediately place a company in liquidation at the first moment it appears that debts may not be capable of being paid as they fall due such that attempting to trade out of difficulty is not necessarily an irresponsible act. As Cregan J observed, this principle is illuminated by the following statement of McMenamin J in *Re MDN Rochford Construction Ltd* [2009] IEHC 397 at paragraph 50:

> *"While each case must be judged on its facts, there comes a point where optimism becomes hubris, and where belief that a company can trade out of its difficulties is simply wilful self-delusion. Commercial acumen is necessary. Hope must be matched by verification and objectivity. The absence of all of these necessary characteristics constitutes irresponsibility."*

62. The applicant also drew attention to the decision of Finlay Geoghegan J. in *McBride v. O'Reilly & Ors.* [2014] IEHC 463 in which she outlined further considerations to which the Court should have regard in applications of this nature. Finlay Geoghegan J., at paragraph 7 of her judgment, outlined the approach suggested as proper by Fennelly J. to applications of this nature, at paragraph 74 of his decision in *Re Mitek Holdings Ltd* [2010] IESC 31:

> *"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'."*

In this regard Finlay Geoghegan J noted the note of caution sounded by McGuinness J. in *Re Squash (Ireland)* and by Murphy J. in Business Communications v. Baxter & Anor. (unreported, High Court, 21st July, 1995) that one must avoid considering these cases with the benefit of hindsight and that criticisms of directors in relation to the failure of the business of the company must be distinguished from genuine issues giving rise to questions of irresponsibility.

63. Finally, Finlay Geoghegan J noted the decision of Clarke J in the case of *Swanpool Ltd,; McLoughlin v. Lannen* [2006] ILRM 217, in which he noted at p. 8:

"The approach of the court in any case under s. 150 will necessarily differ depending on the types of acts or omissions which are under scrutiny. In broad terms there would seem to me to be three types of situation in 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".

64. The submissions made by counsel for the second named respondent were adopted by the first named respondent, save those applying to the position of nominee and non-executive directors. Thus, the first and second named respondents both submit that the Court can attach significant weight to the fact that the liquidator, after a thorough and scrupulous investigation into the affairs of the Company, has concluded that neither of the directors acted irresponsibly. They submit that while the ODCE fulfils an important oversight role and acts as a safety net in cases where liquidators are less scrupulous, the ODCE is not better placed than the liquidator, who has hands on experience of the books and records of the Company and who has engaged with the creditors and the directors themselves. The respondents note that the liquidator has concluded that they acted responsibly and has placed evidence before the Court in that regard and while the ODCE has reached a contrary opinion, they note that it has not put any evidence before the Court.

65. Furthermore, they contend that none of their averments or evidence have been contested and indeed reiterate that the liquidator has come to the same conclusion they argue for based on his investigation of the Company. In this regard, the respondents note the following uncontested facts:

"(i) The Company traded profitably between 1st February, 1996 and 31st January, 2002.

(ii) The losses sustained by the Company between 31st January, 2002 and 31st January, 2003 were largely due to the decision of its largest customer to undertake on its own behalf, the work for which it had previously engaged the Company.

(iii) The Company endeavoured to diversify – by way of addressing the loss of its largest customer – and this decision was taken following the resignation of Paddy Barry as Managing Director on 22nd February, 2002 and the appointment of Dermot Monaghan in his place.

(iv) Dermot Monaghan's stewardship of the Company was singularly unsuccessful.

(v) Paddy Barry was reappointed as Managing Director of the Company on 1st March, 2004.

(vi) Paddy Barry absented himself from the business of the Company from 4th May, 2004 as a result of ill health.

(vii) The Company was in arrears in respect of its tax liabilities at this time but was keeping its ongoing obligations up-to-date.

(viii) In view of the dire commercial situation facing the Company on 5th May, 2004 the first named respondent invited Ulster Bank Commercial Services Limited (hereinafter "UBCS") to appoint a Receiver to the Company.

(ix) UBCS declined to appoint a Receiver on the basis that its best prospect of recovering the money which was due was if the Company continued to trade. In this regard UBCS indicated that it would extend credit facilities to the Company to enable it to trade out of its difficulties.

(x) The first named respondent brought the facts of the Company's situation to the attention of its main supplier – Carbon Chemicals – which indicated its continued support for the Company and also introduce (sic) the Company to potential purchasers.

(xi) The Company met with five different potential purchasers and investors of substance.

(xii) The Financial Controller of the Company resigned on 16th August, 2004.

(xiii) The first named respondent became ill in August 2004 and was no longer able to run the business of the Company.

(xiv) The Company engaged a General Manager on 28th September, 2004 to run the business pending a sale.

(xv) UBCS ceased to be a co-operative creditor after the appointment of the new General Manager and in response the Company made it clear that it was endeavouring to dispose of its business or obtain a new investor.

(xvi) A detailed Business Plan was prepared by the General Manager on 25th October, 2004 in an effort to map a future path for the Company.

(xvii) Negotiations with prospective purchasers continued but ultimately did not bear fruit as a result of the difficulties experienced by investors in identifying a suitable Chief Executive Office (sic) to take over the running of the Company.

(xviii) The second named respondent resigned on 9th February, 2005.

(xix) Despite the second named respondent holding his position on the Board as a non-Executive Director on the basis of being the nominee of Lafor Establishment; that corporate entity – which had nominated him – could not identify a replacement Director. Consequently the resignation of the second named respondent was never registered in the Companies Registration Office.

(xx) The Company entered into an arrangement with the Revenue Commissioners on 22nd June, 2005 to address its outstanding liabilities for tax.

(xxi) The Directors took steps to prepare and sign the Company Accounts for the Financial Year ended 31st January, 2003 but – despite repeated requests – the Auditors refused to sign or file the account or the (sic) complete the audit of the 2004 and 2005 accounts.

(xxii) The first named respondent entered into an arrangement with Keltile Limited by which that company – which was operated by the General Manager – would take over the business of the Company for an annual payment and a share of the profits together with the purchase of the Company's fixed assets.

(xxiii) The Revenue Commissioners were informed of – and approved of – the arrangement with Keltile Limited.

(xxiv) The Company was struck off the Companies Register on 16th October, 2005 for failure to file its accounts.

(xxv) The agreement with Keltile Limited was not formally implemented until 13th April, 2006 – as a result of various concerns on the part of Sean Kelly – but the agreement was in fact operated from 28th August, 2005.

(xxvi) During the period from 16th October, 2005 to 1st April, 2006 the extent of the Company's liabilities was actually reduced.

(xxvii) The first named respondent made significant efforts to secure the restoration of the Company to the Companies Register and was assisted in this regard by the second named respondent.

66. Counsel for the first named respondent submits that the Court should have regard to the entire tenure of the directors. This was in fact noted by Shanley J in the seminal decision of La Moselle. Counsel noted in this regard that there is no criticism of the directors' conduct between 1994 and 2004. Counsel for the second respondent submitted that the present situation was almost unique in that when the Company was facing insolvency, the respondents, instead of shirking their responsibilities as directors, went to their largest trade creditors and banking creditor to apprise them of the situation. He submits that the respondents informed creditors of the risks before deciding to attempt to trade out of the Company's difficulties thereby allowing creditors to make an informed decision. Counsel further submits that despite the catalogue of personal misfortune attending the management of the Company, in particular Mr. O'Brien's illness, the directors did not let matters slide and instead went into the market to engage a professional to continue to run the day-to-day business of the Company.

67. Insofar as the failure to file accounts is concerned, counsel for the respondents pointed out that the accounts had in fact been prepared but the difficulty was that there were no funds to pay the auditors so that the accounts could be filed. The first named respondent, Mr. O'Brien, ultimately discharged the necessary funds at his own personal expense.

68. Counsel for the second respondent also submitted that the purpose of filing accounts was twofold, the first being that it prevented directors from *"flying blind"* in relation to the affairs of the Company and the second, that it gives creditors a sense of the state of affairs of the Company so that they can make an informed decision as to whether to trade with it. Counsel points out that both of those objectives were achieved here because the accounts, although not filed, were prepared and available to the directors and because the directors themselves went to their main creditors to inform them of the Company's situation. He submitted that this was not a situation, which indeed is a usual badge of s. 150 applications, where there was a failure to keep proper books and records and that the directors at all times kept such records which were available to them when making decisions which they believed to be reasonable.

69. Counsel relied in this regard on the decision of Barrett J in *Hughes v. Caffrey & Anor.* [2014] IEHC 366. In that case, Barrett J considered an application to restrict the respondents on the basis of (i) failure to have the company wound up at an earlier stage, (ii) failure to file returns with the Companies Registration Office and (iii) accumulation of related company debtors. In declining to grant the application for restriction under s. 150, Barrett J noted at paragraph 7:

> *"As mentioned above, the sole question for this Court in the instant proceedings is whether the director behaviour referred to in the above-quoted text was less than responsible. As regards ground (i), there is no information provided by the liquidator as to why such a delay ought necessarily or on the facts of this case to be considered irresponsible. Mr. Caffrey indicated to the court that the reason for the delay was that efforts were being made to save the company throughout the relevant time. This seems a reasonable explanation for the director behaviour. Faced with a dearth of information from the liquidator as information provider and an ostensibly reasonable explanation from Mr. Caffrey, the court cannot but conclude that neither Mr. Caffrey nor Ms. Caffrey acted less than responsibly in this regard. As regards ground (ii), directors must of course exercise their stewardship of companies in such a way that those companies comply with the requirements of the Companies Acts. However, the court was not informed by the liquidator as to why he considered that a failure to file a single annual return for the financial year following that in which Gleneagle ceased trading crossed the line from reproachable behaviour, and it is reproachable, and became less than responsible behaviour. Nor does the court consider that there is any reason why such lapse should necessarily or in this instance be viewed as involving less than responsible behaviour. In this regard it appears to the court that the same comment might be made in respect of the behaviour of Mr. and Ms. Caffrey as was made by McGuinness J in the Supreme Court decision in Re Squash Ireland, at p. 39, namely that:*
>
> > *'[S]ome criticisms of the directors may be made. Commercial errors may have occurred; misjudgements may well have been made; but to categorise conduct as irresponsible I feel that one must go further than this.'"*

Counsel notes that in the instant case, as opposed to being faced with a dearth of information, the Court is instead faced with a situation where the liquidator has conducted a thorough investigation and considers the directors to have acted responsibly. He also points out that *Hughes* dealt with a failure to file one set of accounts whereas in this case, although the accounts were not filed, they were available to the directors at all times.

70. Counsel further points in this regard to the memorandum of 18th May, 2004 in which Mr. O'Brien indicated that the Company had sought a receivership arrangement but that the Bank had advised it to continue to trading. He suggested, in submissions which were adopted by counsel for the second respondent, that this indicates both that the directors were not flying blind and that, despite the criticism of the ODCE that the directors failed to place the Company into liquidation on a timely basis, the directors in fact embraced their fiduciary duties to the creditors by informing them of a the situation and offering a receivership arrangement which was, in fact,

declined. Counsel further points to letters written by Mr. O'Brien to potential investors between June and September 2004 which he suggests demonstrates that the directors were endeavouring to do something practical and indicate that the directors were not seeking to avoid their debts but instead to realise sums so that they could deal with existing and historic creditors.

71. In response to the ODCE's contention that they allowed the Company to *"wither on the vine",* the respondents remarked that it is evident from their correspondence with Ulster Bank dated 13th October, 2004 that the directors were aware that if the business could not be sold on, the Company would have to be wound up. They assert that this is in fact indicated in the letter. The Company's business was ultimately leased to Keltile and the fact that Keltile did not honour their agreement and make the payments under the lease, which if had been so made would have satisfied debts owed by the Company, is not the fault of the respondents, as directors, in their submission. Counsel for the first named respondent submits, as noted by Murphy J in *Business Communications Ltd v. Baxter and Parsons* (unreported, High Court, Murphy J, 21st July 1995) that the Court cannot look at the situation with the benefit of hindsight. He noted that while hindsight makes it clear that Keltile, who are involved in the construction industry, faced difficulties in 2006 and 2007 such that they could not and did not pay lease liabilities and such that any amount secured by way of legal action would have been irrecoverable from a practical point of view, there was no way the directors could have known this at the time of the agreement, which was reasonable and made good commercial sense at that time and did actually improve the position of creditors.

72. Counsel for the second named respondent submitted that the essence of every s. 150 application is that the directors have not done everything right and that the Court must engage in a balancing exercise and ask whether it was more important at the relevant time for the directors to ensure the business was managed and operated so that creditors could recover losses that might otherwise have befallen them or instead to occupy themselves with ensuring the necessary accounts were filed.

73. In this regard, counsel submits that it is of key significance that the Revenue Commissioners were kept apprised of the Company's situation including the lease agreement with Keltile Limited. In response to the ODCE's criticism that they allowed the assets of the Company to be used by another entity to the detriment of creditors, the respondents assert that this was not done secretly and that the creditors most affected were informed of and approved of the arrangement with Keltile Limited. The respondents submit that in view of Murphy J's comment in *Business Communications v. Baxter & Anor* that "one must be careful not to be wise after the event", the Court must be mindful of the fact that the directors' decision to enter into an arrangement with Keltile was one in respect of which objective third parties had indicated approval such that, objectively, it was a reasonable decision for the respondents to take at that time. Counsel further points to a Statement of Assets and Liabilities which is a reconciliation of statements as at 16th October, 2005 and 31st March, 2006 and which shows a reduction in Revenue liabilities of €35,809 a reduction in liabilities to third party creditors of €127,787 and a reduction in liability to Ulster Bank Commercial Services of €49,074. Counsel states that this both demonstrates that the arrangement actually benefitted creditors and served as an objective indicator to the directors that they had made the right decision. The respondents assert that had they thrown in the towel, the losses for their creditors would have been larger. In this regard, counsel for the second named respondent, with reference to the above quoted passage of McMenamin J in Re *MDN Rochford* noted that what occurred in this instance was *"optimism"* and not *"hubris"* since value did come in for the creditors.

74. Counsel for the second named respondent submits that the Court should be mindful, on the basis of previous decisions, of the extent to which the conduct of the directors is a culpable reason for the failure of the Company and the losses incurred. Indeed, counsel submitted that the contribution of the actions of the directors to the demise of the Company is the single most important factor in a s. 150 application. In this regard, he relies on the following passage from the judgment of Peart J in *Re USIT World plc* [2005] IEHC 285 at p. 37:

> *"Mr. Murray has also referred to the helpful observation by Murphy J in Business Communications Ltd v. Baxter and Parsons, High Court, 21st July 1995 where he stated:*
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> *'…it does seem to me that the most important feature of the legislation is that it effectively imposes a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attaches to them as a result of either dishonesty or irresponsibility.' (my emphasis)*
>
> *That is an important observation in s. 150 applications generally, but in the present case especially, I find the link between the conduct of the directors and the collapse of the companies in question to be one which requires the most careful scrutiny. It follows in my view that the burden on a director seeking to satisfy the Court as to his/her behaviour in relation to the conduct of the affairs of the company for the purposes of escaping from an order under the section, includes, if necessary, establishing that where there are matters about which they can be rightly the subject of criticism, there is in reality no causal link between those culpable matters and the insolvency. This would certainly apply in my view in relation to irresponsibility, since irresponsibility is a matter of degree".*

75. The respondents submit, in that regard, that, as is evident from the s. 56 report of the applicant, what happened to the Company was that it lost 30-40% of its business when its biggest customer moved into its business. It then diversified under a previous executive director. This proved unwise and that director, Mr. Monaghan, resigned. He was then replaced by Mr. Paddy Barry who ultimately resigned also. Both Mr. O'Brien and Mr. Cosgrave were non-executive directors at that point. Counsel for the second named respondent submits that in fact the directors who took the bad decisions are not before the Court because they resigned. Once they did so there were only two remaining directors who could not resign because the registration of such resignation with the CRO would not be effective unless two directors remained.

76. Counsel for the first named respondent submitted that there was no causal link between the actions of the directors and the insolvency of the Company since in reality the latter was caused by the collapse of the construction industry which affected the Company but also Keltile. He also drew the Court's attention to the following passage of the judgment of Peart J in Re USIT at p. 41:

> *"Each case will have to be looked at on its own particular facts. In one case a director may have been culpable in respect of a number of factors on the [La Moselle] list, but in the heel of the hunt none of those factors had any direct or meaningful bearing on the failure of the company. In another case, a director may fall foul of one of the factors, yet that one lapse may be of such a degree and have such a direct bearing on the insolvency of the company that it outweighs all the other ways in which the director conducted himself/herself honestly and responsibly as a director, and be such that the public should be protected for the period of restriction from any risk that it might happen again."*

Counsel submits, in that respect, that this is a case where, in the heel of the hunt, the fact that the Company was struck off is not something that had any bearing or impact on its insolvency. He notes that monies received during the period in which the Company was struck off went to creditors, although there is no evidence as to how this was done and that the Company's actual liabilities were reducing during that time. He submits that the first named respondent is not someone from whom the public needs protection.

77. While he acknowledged that his client had been the subject of disciplinary proceedings by the Chartered Accountants Regulatory Board, counsel for the first named respondent noted that the Court does not have evidence before it as to the evidence which was before CARB at the time. He stated that the first named respondent accepted a reprimand from CARB and indeed accepted responsibility for his failure in this regard, but reiterated the statement of counsel for the second named respondent, that the essence of s. 150 proceedings is that the directors have not done everything right. He also noted that the CARB proceedings had occurred post-strike off but prior to the restoration of the Company, which in fact had retrospective effect such that the Company was deemed to have continued in existence from October 2005 until the date of restoration. Counsel noted that the strike off had caused no prejudice to creditors and that the reprimand from CARB was a modest one. As such, he submitted that the finding of CARB would not preclude a finding by this Court in the context of the application before it, that the first named respondent had acted responsibly.

78. The Court has not been furnished with sufficient information to enable it to determine if the assertions of the respondents, that their failure to take steps to prevent the Company from being struck off in October 2005 did not cause prejudice to creditors, are true.

Nominee/non-executive directors
79. Counsel for the second named respondent further submitted that his client, who is a teacher by profession, was appointed as a nominee non-executive director to the Company for the purposes of fulfilling a voting function on behalf of Lafor Establishment. While he accepts that his client assumed a weighty responsibility when agreeing to become a director, he notes that, on the basis of the caselaw, he should not be held to the elevated standards of commercial probity that apply to other directors. In the first instance, counsel relied on the following passage from p. 43 of the decision of Peart J in Re USIT in circumstances which he submitted was *"on all fours"* with the instant case, particularly in relation to the failure to file accounts:

> *"I believe that in a group as large and spread and to which directors with particular expertise had been appointed to various specialist positions, it was not irresponsible for Mr. Olivares to leave matters such as these to the director of corporate governance. He cannot have been expected to have any direct responsibility in that regard as part of his day to day activity with the company, even though as a director he has a shared responsibility for all matters. In any event, I do not believe that even if there was a failure to observe the requirements in these respects, they went in any way towards the demise of the company in the circumstances of this case, and while it is right that the Court would have regard to a matter such as this when making its assessment of responsibility, it is not in any way persuasive".*

80. Counsel also submitted that, while in no way seeking to avoid the shared responsibility for the affairs of the Company which attaches to membership of the Board of Directors, it remains the case that the matters which have prompted such particular criticism from the ODCE did not form part of the second named respondent's day to day activities. He noted that Finlay Geoghegan J observed in the course of her judgment in *Kavanagh v. Delaney & Ors* [2005] 1 ILRM 34 that:

> *"It is a fact of commercial life which the Courts should not ignore that persons are appointed as non-executive directors to act alongside executive directors. It is a matter of common sense that the duties and responsibilities of each may differ".*

81. He noted that the attitude of the Court in this regard is echoed in the judgment of McCracken J in *Re Gasco Limited* (unreported, High Court, McCracken J, 5th February, 1995) in which he observed:

> *"…in considering the application of section 150 to individual directors, regard must be had to the area of management in the company for which that director was personally responsible".*

In *Re RMF (Ireland) Limited* [2004] IEHC 334 Finlay Geoghegan J again noted:

> *"In considering whether a non-executive director has acted responsibly for the purposes of s. 150 of the Act of 1990 it appears to me that the Courts should also recognise that, in general, a non-executive director is entitled both to rely upon information provided by his fellow executive directors and to rely upon the executive directors carrying out what might be considered to be normal executive functions".*

82. Finally, in relation to Mr. Cosgrave's position as a nominee director, his counsel relied on the decision of the Supreme Court in *Re Tralee Beef & Lamb Limited* [2008] 3 IR 347, and in particular the following excerpt from the judgment of Hardiman J at paragraphs 33 to 36:

> *"[33]…[S]ome regard must be had to the position of the fourth respondent. It is true that he was and is a chartered accountant from whom financial expertise might be expected. It is also true, and it is uncontradicted, that he became a director solely because the trusts governing the business expansion scheme funds required that someone representing the investors be on the board of the companies invested in.*
>
> *[34] The relevance of this last point is as follows. Pursuant to s. 150(2), two of the grounds on which one can resist a restriction order are as follows:-*
>
> *'(b) subject to paragraph (a), that the person concerned was a director of the company solely by reason of his nomination as such by a financial institution in connection with the giving of credit facilities to the company by such institution, provided that the institution in question has not obtained from any director of the company a personal or individual guarantee of repayment to it of the loans or other forms of credit advanced in a company, or*
>
> *(c) subject to paragraph (a), that the person concerned was a director of a company solely by reason of his nomination as such by a venture capital company in connection with the purchase of, or subscription for, shares by it in the first-mentioned company.'*
>
> *[35] It is not suggested that the fourth respondent here met those specific criteria. But it is clear from the uncontradicted evidence that he went on the board solely because someone had to represent the interest of the business expansion scheme investors so that he was in a position not unlike that of a director who might have been exempt from restriction under the paragraphs quoted above. I believe this factor at least required proper consideration."*

83. Counsel for the second named respondent argues in this regard that if Mr. Cosgrave had been engaged by a venture capital company rather than a trust fund, then he would be exempt from s. 150 proceedings and that, on the basis of the decision in *Re*

Tralee Beef & Lamb, this is a factor to which the Court should have regard.

Decision of the Court
84. The Court prefers the analysis of events contained in the letter of the ODCE of 16th December, 2013, set out at paragraph 39 above, to that offered by the applicant and the respondents.The Court notes that the facts underpinning that analysis have not been contoverted by the respondents. The letter sets out six headings under which the ODCE allege irresponsibility in the conduct of the insolvent Company's affairs by the respondent directors. On the evidence before the Court, the Court is satisfied that each allegation has been made out.

85. The Company suffered a significant blow in 2002 when it lost its main customer. The Court does not condemn the respondent directors for their efforts to save the business between 2002 and 2004, even though significant liabilities were accruing during that period. The trading loss in 2003 appears to have been €168,765, as indicated by the draft accounts. A further trading loss of €341,052 was incurred in 2004, according to the draft accounts. However, by Autumn 2004, the writing was on the wall. In August of that year, Frank O'Sullivan, Management Accountant and Financial Controller of the Company, warned both respondents of the perilous state of the Company's finances; the fact of its insolvency and the danger that the directors might be held personally liable were the Company to continue to trade. At that point too, the efforts to find fresh investors had failed. UBCS also expressed concern as to the viability of the business and the lack of management continuity. Sean Kelly, who was initially retained by the first named respondent as a consultant, at a cost of €10,000 per month, described the situation within the Company as *"it would seem to me that everyone are (sic) going around like headless chickens not sure of what they are supposed to be doing and not sure of what the future holds for them. The basic problem is that nobody seems to be in control."*

86. While it could be argued that liquidation should have occurred earlier than 2004, it appears to the Court that by Autumn 2004 it was incumbent on the directors to convene a creditors' meeting as a prelude to placing the Company in liquidation. The argument advanced by the respondents that failure to do so was because of lack of financial resources rings hollow when one considers the dire state of the Company's business and finances at that point and also the fact that at that very time the first respondent retained Mr. Sean Kelly as a consultant at a proposed fee of €10,000 per month.

87. Rather than take the patently required step of applying to have the Company liquidated, yet another rescue plan was hatched by the first respondent. This involved retaining the said Mr. Sean Kelly, a director of a tiling company, initially as a consultant at €10,000 per month. At some point thereafter he morphed into the General Manager of the Company and by August 2005 the situation had evolved to a point where an agreement was reached that his company, Keltile, would lease the business of the Company for fifteen years at an annual rent sufficient to discharge the Company's liabilties. At the time of this agreement, the Company had already been served with strike off notices for failure to file returns for 2003 and 2004. The Company had also been notified by its former accountants that they were not prepared to conduct further work on their behalf without payment on account and payment for work previously undertaken. Being fully aware of the consequences, the first respondent failed to ensure that the appropriate returns were filed and as a consequence, the Company was struck off the Register of Companies on 16th October, 2005. This, in the Court's view, on its own, warrants the restriction of the first named respondent. Contrary to his assertions that he embraced his fiduciary duties to his main creditors, this was a conscious and deliberate breach of his fiduciary duties to all creditors.

88. Thereafter, the first respondent continued to negotiate with the main creditors of the Company, being the Revenue and UBCS and the Court has no independent evidence that he disclosed to any creditor, preferential, secured or unsecured, that the Company had been struck off. Notwithstanding that Mr. O'Brien, in his letter to Mr. Cahill of 20th August, 2013 asserted that the Revenue *"were fully aware of the company's status and of our attempts to have it restored"*, the Court is not willing to accept that assertion without clear supporting evidence. None has been adduced. In the meantime, Keltile were running the business of the Company, without having completed the formal agreement. This was not done until April, 2006, after some arrangement had been arrived at with the Revenue. Having transferred the business to Keltile, in May 2006, the first named respondent then wrote to the Registrar of Companies and the ODCE, giving an explanation that he was *"unable to obtain the co-operation of the other director and shareholders to complete the accounts for audit and the CRO returns…and that he wished to have the company reinstated".* This explanation contradicts the sworn evidence in his affidavit that the reason for the failure to file returns was an inability to procure the necessary funds, Ulster Bank having refused to provide such funds unless its liabilities were discharged in full. In any event, he did not take the necessary steps to restore the Company to the Register at that time and one of the many consequences was that the Company was unable to pursue Keltile for rent due and owing to it on foot of the agreement of 28th August, 2005. In fact, no step was taken to restore the Company to the Register, until the ODCE threatened proceedings to disqualify the respondents pursuant to s. 162(2)(h) of the 1990 Act. The Company was eventually restored on 15th March, 2010. Thereafter, following a complaint from an unsecured creditor of the Company, at a hearing on 8th March, 2011, the first named respondent was reprimanded and fined for having failed, as a director of the Company, to advise a creditor that the Company had been struck off and for having allowed the Company to continue trading after strike-off. While all the other events might be considered to be a series of unfortunate events, the failure to file the necessary accounts resulting in the strike-off of the Company, and thereafter knowingly trading while struck off was the essence of irresponsibility. As Peart J. remarked in *Re USIT World plc*:

> *"Each case will have to be looked at on its own particular facts. In one case a director may have been culpable in respect of a number of factors on the [La Moselle] list, but in the heel of the hunt none of those factors had any direct or meaningful bearing on the failure of the company. In another case, a director may fall foul of one of the factors, yet that one lapse may be of such a degree and have such a direct bearing on the insolvency of the company that it outweighs all the other ways in which the director conducted himself/herself honestly and responsibly as a director, and be such that the public should be protected for the period of restriction from any risk that it might happen again."*

89. It appears to the Court in this case that the conduct of the first respondent, who is a chartered accountant, in permitting the company to be struck off and thereafter knowingly continuing to trade is a lapse of such a degree as to warrant the period of restriction. The attitude of the applicant and the first respondent in seeking to minimise the seriousness of such conduct gives rise to a concern that the public might be at risk that similar unwise decisions might be made in the future.

90. On the facts of this case, the Court considers that each of the criticisms made by the ODCE is made out, namely;

> (i) The failure to place the Company into liquidation on a timely basis such that it was essentially allowed to *"wither on the wine"* by the directors at a time when it had tax liabilities of €396,000, trade creditor liabilities of €511,000 and assets with a net book value of €536,000.
>
> (ii) The failure to comply with statutory filing obligations between 2003 and 2005 leading to the involuntary strike off of the Company in October 2005.

(iii) The failure of the Company to discharge significant tax liabilities in 2004 and 2005. At the time of strike-off the Revenue Commissioners statement of account recorded that the Company had VAT liabilities of €246,634 and PAYE/PRSI liabilities of €149,627. These remained undischarged at the time of liquidation in June 2010.

(iv) The failure of the Company to discharge significant unsecured creditor liabilities to a large number of unsecured creditors. At the time of strike-off unrelated third party trade creditor liabilities were €349,094. These remained undischarged at the time of liquidation in June 2010.

(v) The failure of the directors to ensure that the assets of the Company were preserved for the benefit of its creditors at the time of insolvency, in particular by allowing the Company's assets to be leased to Keltile Limited and failing to recover accruing lease debts in that regard for the benefit of creditors.

(vi) The failure of Mr. O'Brien and Mr. Cosgrave as directors to join together in the supervision of the affairs of the Company.

91. In the circumstances of this case the Court has no hesitation in finding that the first respondent, Mr. John O'Brien, a chartered accountant, acted irresponsibly in the conduct of the Company's affairs following its insolvency and that his irresponsibility warrants restriction pursuant to s. 150(1).

92. The Court has some sympathy for the second respondent, Mr. Ray Cosgrave. He is a teacher and was a non-executive director whose role on the board was as nominee of a trust and who was in effect prevented from resigning in 2005 by the statutory requirement that the Company have a minimum of two directors. While acknowledging that Mr. Cosgrave is in a different category to Mr. O'Brien, as a director, he did assume certain responsibilities. He was aware in Autumn 2004 of the dire state of the Company's finances and the risks involved in continuing to trade. Having expressed the view that the Company should be liquidated in early 2004 and knowing the extent to which matters had deteriorated by Autumn 2004, there was a duty upon him to act. Following his unsuccessful attempt to resign as a director in February 2005, he simply withdrew until threatened with proceedings by the ODCE in February, 2008. Knowing what he knew, it was not sufficient for him to wash his hands of the events and insofar as he attempted to do so, he too was irresponsible. Had he acted in 2004 or even in 2005, the involuntary striking off of the Company might have been avoided. Were it the situation that Mr. Cosgrave were not aware of the difficulties faced by the Company, the Court may have taken a different view in line with the decision in *Re Tralee Beef & Lamb*, but having been aware of those difficulties, his failure to act in Autumn 2004 or indeed at any point during 2005 was, in the Court's view, irresponsible. That said, the Court is conscious that in effect Mr. Cosgrave was excluded from the affairs of the Company by the actions of the first respondent who, from Autumn 2004, ran the Company without consultation with anyone. The Court considers that Mr. Cosgrave is unlikely to find himself in a similar position again. The interests of justice, and the protection of the public in Mr. Cosgrave's case, would in the Court's view be met by an undertaking from him, not to accept a directorship of any limited company or to be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company for a period of five years unless it meets the requirements set out in s. 150(3). In the event of his giving such an undertaking, the Court will not grant a declaration of restriction in respect of him.