THE HIGH COURT

[2012 No. 586 COS]

IN THE MATTER OF

TAILORED HOMES (NAVAN) LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF SECTIONS 683 AND 819 OF THE COMPANIES ACT 2014

BETWEEN:

BRENDAN O'DONOGHUE

APPLICANT

– AND –

MICHAEL TAGGART AND JOHN TAGGART

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 15th February, 2017.

I. Application Made

1. This judgment concerns an application under s.819 of the Companies Act 2014 for a declaration that each of Mr Michael Taggart and Mr John Taggart, being persons to whom Chapter 3, Part 14 of the Act of 2014 applies shall not, for a period of five years, be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned or take part in the formation or promotion of a company, unless the company meets the requirements set out in s.819(3) of the Act of 2014.

II. Section 819

(i) Text of S.819.

2. Section 819 of the Act of 2014 provides as follows:

> *"819. (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).*
>
> *(3) The requirements referred to in subsection (1) are-*
>
> *(a) the company shall have an allotted share capital of nominal value not less than-*
>
> *(i) €500,000 in the case of a public limited company (other than an investment company) or a public unlimited company, or*
>
> *(ii) €100,000 in the case of any other company,*
>
> *(b) each allotted share shall be paid up to an aggregate amount not less than the amount referred to in paragraph (a), including the whole of any premium on that share, and*
>
> *(c) each allotted share and the whole of any premium on each allotted share shall be paid for in cash.*
>
> *(4) In the application of subsection (3) to a company limited by guarantee, paragraphs (a) to (c) of it shall be disregarded and, instead, that subsection shall be read as if it set out both of the following requirements:*
>
> *(a) that the company's memorandum of association specifies that the amount of the contribution on the part of the member of it, or at least one member of it, being the contribution undertaken to be made by the member as mentioned in section 1176 (2)(d), is not less than €100,000;*
>
> *(b) that the member whose foregoing contribution is to be not less than that amount is an individual, as distinct from a body corporate.*
>
> *(5) In the application of subsection (3) to an investment company, paragraphs (a) to (c) of it shall be disregarded and, instead, that subsection shall be read as if it set out both of the following requirements-*
>
> *(a) that the value of the issued share capital of the company is not less than €100,000,*
>
> *(b) that an amount of not less than €100,000 in cash has been paid in consideration for the allotment of shares in the company.*

(6) Where subsection (1) refers to being appointed or acting as a director or secretary of a company, or taking part in the formation or promotion of a company, "company" means any of the following:

(a) a private company limited by shares;

(b) a designated activity company;

(c) a public limited company;

(d) a company limited by guarantee;

(e) an unlimited company;

(f) an unregistered company.

(7) A prescribed officer of the court shall ensure that the prescribed particulars of a declaration under this section are provided to the Registrar in the prescribed form and manner (if any).”

3. A number of preliminary points might usefully be noted:

(1) the persons referred to in s.820(1) are the Director of Corporate Enforcement, the liquidator of the relevant insolvent company and a receiver of the property of the relevant company;

(2) the combined effect of s.819(1) and (2) is that a declaration of the type contemplated under s.819(1) must issue unless the court is satisfied as to each and all of the matters referred to in s.819(2);

(3) s.819 applies to all company types;

(4) s.819 is concerned with a person who was a director of an insolvent company. The term “insolvent company” is defined in s.818(1) of the Act of 2014 as “a company that is unable to pay its debts”; s.818(2) then provides that “For the purposes of the definition of ‘insolvent company’ in subsection (1), a company is unable to pay its debts if – (a) at the date of the commencement of its winding up it is proved to the court that it is unable to pay its debts (within the meaning of section 570), or (b) at any time during the course of its winding up the liquidator certifies, or it is proved to the court, that it is unable to pay its debts (within the meaning of section 570).”[1] In the within application the liquidator has furnished a certificate of the type referred to in s.818(2)(b), being a certificate of 26th February, 2016, that “Tailored Homes (Navan) Limited has at all times from the date of the commencement of the winding up of the said company, been and continues to be, unable to pay its debts within the meaning of…section 570 of the Companies Act 2014”; it was common case between the parties that this continued to be the position as of the date of hearing.

[1] Under s.570 of the Act of 2014 a company is deemed to be unable to pay its debts for the purposes of the Act of 2014 “(a) if – (i) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €10,000 then due, has served on the company (by leaving it at the registered office of the company) a demand in writing requiring the company to pay the sum so due, and (ii) the company has, for 21 days after the date of the service of that demand, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, or (b) if – (i) 2 or more creditors, by assignment or otherwise, to whom, in aggregate, the company is indebted in a sum exceeding €20,000 then due, have served on the company (by leaving it at the registered office of the company) a demand in writing requiring the company to pay the sum so due, and (ii) the company has, for 21 days after the date of the service of that demand, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of each of the creditors, or (c) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or (d) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company”.

4. If a director does not defend a s.819 application then an order will almost certainly issue under s.819(1), save in the extremely unlikely circumstance that the party bringing the application makes averments in her grounding affidavit that would lead the court to reach the conclusion that it was satisfied as to the matters referred to in s.819(2). So the burden of proof in these applications, specifically the burden of establishing such matters as would enable the court, on the balance of probabilities, to be satisfied in the manner contemplated by s.819(2), rests with a respondent former director.

5. The fundamental fairness and constitutionality of the effective imposition of the burden of proof on a director in this regard was doubted, without any definitive finding being reached, by Hardiman J. (with whom Finnegan and Macken JJ concurred) in *Re Tralee Beef and Lamb Ltd* [2008] 3 IR 347, 355. Yet the Oireachtas clearly remains sufficiently satisfied of the constitutionality of this arrangement that no attempt was made to amend it in the Act of 2014. And perhaps with good reason: one can see the inclusion of a court-administered dimension in the restriction process, an inclusion that does not appear to be mandated by constitutional law, as a generous attempt by the Oireachtas to calibrate carefully the restriction process in such a manner as to ensure that directors of insolvent companies are not subject to automatic restriction, but are given a ‘last chance’ in the form of a hearing at the High Court at which they may seek to prove such matters as will enable them to escape what would otherwise be an automatic restriction. In including the courts as it has, the Oireachtas may well have calculated that fundamental fairness is better served by having a court dimension to the restriction process, even if at the relevant court hearings the burden of proof is effectively reversed.

6. Notwithstanding the foregoing, the judgment of Hardiman J. continues to be of significance. For he, if the court may respectfully so observe, properly draws the attention of all succeeding courts to the importance of fundamental fairness as an aspect of the restriction process. This is of very great importance given the social stigma that can attach to directors who are subject to restriction, the financial consequences that can result so far as their future employability as directors is concerned, and the blemish that such a restriction may even bring in terms of the potential for a company that is operated by a onetime restricted director to obtain borrowed finance at reasonable rates. That stigma, those consequences, that blemish seem unlikely to be obviated easily if ever once a restriction order is imposed, notwithstanding the ostensible ‘out’ for onetime restricted directors that is contemplated by s.819(1) and (3).

7. In the within application, counsel for the Taggart brothers has urged on the court that the stigma that would attach to his clients is a factor that the court ought to bear in mind in its deliberations, and he is certainly right to do so insofar as encouraging the court

to bring great carefulness to how it approaches the within application (not that such encouragement is required). However, the court, with respect, considers that he goes too far in suggesting that any possible causes for restriction which are put forward by the liquidator must be weighed against the practical effects of such an order. That, is a consideration that might be relevant to an assessment under s.819(2)(c); otherwise the court's task is to gauge whether or not such reasons for restriction as are offered by a liquidator are accepted by the court, on the balance of probabilities, as true; if they are true, if there was a want of honesty, if there was a want of responsibility, or if there was a want of cooperation with the liquidator, then the court cannot be satisfied in the manner contemplated by s.819(2) and a declaration must issue under s.819(1).

(ii) Defences Available under S.819.
(a) Overview.

8. The effect of s.819(2) of the Act of 2014 is that it is a defence to an application to restrict, 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)*."

(b) Honest and Responsible.

9. Professor Hutchinson in the current (fifth) edition of Keane on Company Law provides, at paras. 27.199–27.224, a most helpful analysis of the "The *defence of acting honestly and responsibly*". It seems to the court that the key principles arising in this regard are as follows:

> (1) There are three types of situation which the court is typically required to consider in s.819 applications, viz. (i) issues involving compliance by a company with its formal obligations under the Companies Acts, (ii) the commercial management of the company, especially at the period when the company was insolvent or heading in that direction, and (iii) compliance by the directors with their *Frederick Inns* obligations, *i.e.* ensuring that once a company is facing insolvency its assets are dealt with in a manner designed to ensure the proper distribution of those assets in accordance in insolvency law.[1]
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> (2) In assessing director behaviour under this category, a court should have regard to (i) the extent to which the director has or has not complied with any obligations imposed on her by the Companies Acts, (ii) the extent to which her conduct could be regarded as so incompetent as to amount to irresponsibility, (iii) the extent of the director's responsibility for the insolvency of the company, (iv) 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, (v) the extent to which the director, in the conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards. [2]
>
> (3) The just-mentioned criteria should not be read as precluding the court from also taking into account a failure by a director to comply with her duties in equity and at common law.[3]
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> (4) It is important in a restriction application to have regard to the entire tenure of an individual as director of a company in determining whether they have acted honestly and responsibly.[4]
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> (5) Since restriction provisions do not apply to a person who has ceased to be a director more than 12 months, their primary aim is to deal with directors who acted dishonestly or irresponsibly in the last 12 months of the company's existence.[5]
>
> (6) A standardised or formulaic approach cannot be adopted by the courts: each s.819 application should be viewed in the light of the issues that are important in that particular case.[6]
>
> (7) The maintenance of proper books and accounts and the employment of appropriate experts will go a long way to discharging the onus of showing that a director behaved responsibly; the converse, i.e. that failure to keep accounting records always constitutes a failure to act responsibly, is not necessarily true; however, failure to make annual returns and keep proper accounting records are often found to constitute evidence of not acting responsibly.[7]
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> (8) A failure to comply with tax law may be found to involve dishonest or irresponsible behaviour. However, (a) a distinction tends to be drawn between where the breach of tax law is temporary or done with intent to rectify the situation at some future point, (b) failure to make tax returns for a relatively limited period of time will not, of itself, indicate that the directors of a company have acted either dishonestly or irresponsibly; (c) cooperation with the Revenue Commissioners where there has been a want of tax compliance is often viewed as positive, provided there was no intent to trade on monies due to the Revenue Commissioners in the shadow of an inevitable winding-up.[8]
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> (9) Mere errors of judgment on the part of directors of an insolvent company may not be enough to warrant the making of a restriction order on the basis that they have not acted responsibly.[9]
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> (10) Hindsight must be applied with caution.[10]
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> (11) Quite when trading through difficulties crosses the line from commercially sensible to legally reprehensible may be difficult to pinpoint; however, hindsight must not be allowed to dictate the answer; a failure to take steps to improve the financial circumstances, and a failure to commence winding-up proceedings within a reasonable time of ceasing to trade may be relevant.[11]
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> (12) There will usually be a real difference between the duties of executive and non-executive directors. The latter will usually be dependent on the former for information about the affairs and of the finances of the company, a fact which will impose correspondingly larger duties on the former. However, even non-executive directors must be increasingly conscious that they cannot be mere ciphers or purveyors of votes at the whim of management.[12]
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> [Court Note: When it comes to non-executive directors, the court would respectfully endorse the learned view offered by Professor Hutchinson at para. 27.214 of Keane on Company Law (5th ed.) that many of the decided cases in this area "*have been concerned with non-executive directors who were 'passive' or 'nominal' directors (i.e. persons who were*

formally appointed as directors but who were not expected to play any role, or only a very limited role, in the management of the affairs of the company) and there has been little examination of the extent of what is expected of what might be considered 'professional' non-executive directors, i.e. the kind required to be found on the boards and board committees of listed PLCs. It seems safe to suggest that more will be expected of them than of passive or nominal non-executive directors." Also of note in this regard, of course, are non-executive directors in the financial services sector; with much now being expected of such directors by the Central Bank as a check on the actions of financial services providers, it seems almost inevitable that the more their role is seen as critical to a healthy financial services sector, the more will be expected of them in the event that their actions ever fall to be reviewed in a s.819 application in the, hopefully unlikely, prospect of a regulated financial services provider ever again becoming insolvent.]

(13) As regards 'nominal' or 'passive' directors, to the extent that real moral blame is relevant, a lack of same does not oblige the court to excuse such a director who has not made a reasonable effort to keep abreast of the affairs of a company.[13]

[Court Note: When it comes to 'nominal' and 'passive' directors, it is worth noting that many of these cases involved individuals, often family members, who agreed to serve on a company operated by another family member so as to satisfy the requirement under the previous company law regime that a private limited company have a minimum of two directors. Again, in this regard the court would respectfully endorse the learned view offered by Professor Hutchinson at para. 27.217 of *Keane on Company Law* (5th ed.) that "*Any distinction that may have been made for 'passive' or 'nominal' directors may…prove unwarranted under the Companies Act 2014 since, as we have seen, it is now possible for an LTD to have only one director. Moreover, the position of such directors must now be viewed in the context of s.223(3) [of the Act of 2014] which requires them to provide a written acknowledgement of their duties as directors. There is no longer any need for passive or nominal directors in an LTD, and those who remain on in such a capacity on conversion to an LTD after the coming into force of the Act would be well advised to resign*."

(14) That a director is a director of a wholly owned subsidiary in a group of companies does not relieve her of the responsibility of considering whether specific transactions are in the interests of a company, even though the margin of discretion s/he enjoys in the making of such decisions is factually very limited.[14]

[Court Note: Though the issue does not arise for adjudication in the within application, it appears to the court that this particular principle may need to be applied with some caution. Many international financial service providers have a presence in Ireland. Provided that no aspect of a proposed cross-border financial services transaction is unlawful, and given that no rational international financial services group is going to sanction a group-level, cross-border transaction that is not expected to yield a group-level benefit, it could perhaps be contended to be excessively cautious as a matter of Irish corporate law that the Irish limb (which may be a purely tax-driven limb) of a transaction should be required to be in the particular interest of the particular Irish corporate entity involved (especially where that entity is a special purpose vehicle) even though there is a clear(er) benefit to be derived group-wide from the transaction. A 'rising boats' logic which would allow the Irish entity to have regard to the group-wide benefit as being in its interest as a group member might perhaps be more commercially realistic. However, this question has not been argued before the court and the court emphasises that its observations in this regard are entirely *obiter*.]

(15) Where conduct is not dishonest, in the sense that a director derives nothing personally from an action, it may nonetheless be irresponsible for the purposes of s.819.[15]

(16) While the conduct of a director subsequent to a winding-up is not relevant in determining whether s/he has acted honestly and responsibly, it may be relevant in considering whether there is any reason why it would be just and equitable to subject her to a restriction order.[16]

[1] *Re Swanpool Ltd, McLaughlin v. Lannen* [2006] 2 ILRM 217; [2] *Re La Moselle Clothing Ltd and Rosegem Ltd* [1998] 2 ILRM 401; [3*] Re Tralee Beef and Lamb Ltd, Kavanagh v. Delaney* [2004] IEHC 139; *Re Mitek Holdings Ltd, Grace v. Kachkar and Ors* [2010] IESC 31; [4] *Re Squash (Ireland) Ltd* [2001] 3 IR 35; [5] *Re Gasco Ltd* [2001] IEHC 20;[6] *Re Mitek Holdings Ltd, Grace v. Kachkar and Ors* [2010] IESC 31; [7] *Re Costello Doors Ltd* (Unreported, High Court, Murphy J., 21st July, 1995);, *Re Greenmount Holdings Ltd, Stafford v. O'Connor* [2007] IEHC 246, *Re Walfab Ltd, Director of Corporate Enforcement v. Walsh* [2016] IECA 2; [8] *Re Noxtad Limited, Van Dessel v. Esmonde* [2014] IEHC 278, *Re Digital Channel Partners Ltd, Kavanagh v. Cummins and ors* [2004] 2 ILRM 35, *Re Shellware Limited, Taite v. Breslin* [2014] IEHC 184; [9] *Re Squash (Ireland) Ltd* [2001] 3 IR 35; [10] *Re Noxtad Limited, Van Dessel v. Esmonde* [2014] IEHC 278, *Re Gerdando* Ltd [2014] IEHC 187, *Re Shellware Ltd* [2014] IEHC 184; [11] *Re Pierse Contracting, Coyle v. O'Nolan* [2015] IEHC 74; *Re Careca Investments Limited* [2005] IEHC 62; [12] *Re Mitek Holdings Ltd, Grace v. Kachkar and Ors* [2010] IESC 31; [13*] Re Walfab Ltd, Director of Corporate Enforcement v. Walsh* [2016] IECA 2; [14] *Re 360 Atlantic (Ireland) Ltd, O'Ferrall v. Coughlan and Anor* [2004] IEHC 412; [15*] Re Swanpool Ltd, McLaughlin v. Lannen* [2006] 2 ILRM 217; [16] *Re CMC (Ireland) Ltd, Fennell v. Carolan* [2005] IEHC 340.

(c) Reasonable Co-operation.

10. Because s.819 is drafted in such a way that an order under s.819(1) must issue unless the court is satisfied as to the matters referenced in s.819(2)(a)–(c), any respondent former director who is the subject of s.819 proceedings is now effectively required, as part of her or his defence to such proceedings, to establish that s/he did 'cooperate as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company'. However, though not required, it will obviously assist the more efficient administration of justice if the party bringing such proceedings indicates in the pleadings if it is satisfied that such cooperation was provided; that will relieve the respondent and court from having to address this aspect of matters in detail.

(d) Just and Equitable.

11. This aspect of what is now s.819(2) is a little-explored provision, even though it perhaps offers the court the widest latitude as regards impugning director behaviour. In *Re La Moselle Clothing Ltd and Rosegem Ltd* [1998] 2 ILRM 345, 353 Shanley J. opined that because what is now s.819(2)(a) refers to a respondent former director having "*acted honestly and responsibly in relation to the conduct of the affairs of the company in question*" (emphasis added) and because the underlined constraint does not appear in what is now s.819(2)(c), this latter provision falls to be read as wider in ambit, extending to "*any relevant conduct of the director after the commencement of the winding-up or the receivership (for example, any failure to co-operate with the liquidator or receiver)*". This seems undoubtedly correct, but two ancillary points might perhaps be made in this regard. First, the inclusion of s.819(2), a provision new to Irish company law, might be contended to narrow the ambit of s.819(2)(c) to the extent that alleged want of

cooperation with a liquidator should now be treated with, at least in the first instance, under s.819(2)(b), albeit that behaviour that does not quite satisfy s.819(2)(b) may perhaps offer "*other reason*" for the purposes of s.819(2)(c). Second, it is notable (and, in this Court's respectful opinion, correct) that Shanley J. confined his example of behaviour relevant to what is now s.819(2)(c) to egregious behaviour in the corporate context. It does not appear to the court that the provision is intended by the Oireachtas to offer a roaming jurisdiction to the court whereby it may draw on an aspect of a respondent former director's life in the non-corporate context, for example (and this does not arise in the within application) that s/he has committed a road traffic offence, as offering "*other reason*" for the purposes of s.819(2)(c).

III. Background

12. Turning then to the facts of the within application, Mr Michael Taggart and Mr John Taggart, two brothers, are well-known in the building trade. They built their first house together in 1986. Between that date and 2008, they built and sold somewhere in excess of 4,000 homes in Ireland and the United Kingdom. They employed hundreds of employees and, in the process, generated extensive tax revenues for, amongst others, the Irish Exchequer. In addition to building houses, they also developed commercial properties in Ireland, the United Kingdom and even further afield in the United States and New Zealand. Over the course of their more than two decades of generally successful trading, the two brothers became the directors of in excess of 100 companies. So, generally speaking, the two brothers have long experience of operating companies and, up to 2008, operating them without landing in legal difficulty.

13. So far as the company that is the focus of the within proceedings is concerned – Tailored Homes (Navan) Limited (in liquidation) – it was established on 1st June, 2008, to develop the land on a site in Johnstown, County Meath (hereafter 'the Site'). It ceased to trade at end-2010. In November, 2012, Mr O'Donoghue was appointed as liquidator. During the relatively short lifespan of the company, Mr Michael Taggart was its managing director and Mr John Taggart its construction director. In these respective capacities, Mr Michael Taggart oversaw some construction work but was primarily concerned with design, quality and sales. By contrast, Mr John Tagggart primarily oversaw the construction work.

14. The Site itself was owned by Tailored Homes. It is suggested that Mr Michael Taggart may also have had some interest in it; from the evidence it is not clear that this was so. It was purchased with funding from Anglo Irish Bank (hereafter the 'bank'), with the bank holding security over the land in respect of both this loan and other loans extended by it to one or other or both of the Taggart brothers and/or various corporate entities in which one or other or both of them held an interest. The bank, as secured lender, required Tailored Homes to deliver all of the sale proceeds to it. And it confirmed to Tailored Homes that, in doing so, it would pay all VAT due to the Revenue Commissioners but, for reasons unclear, it may even be inadvertence, it failed to do so (save, it seems, as regards the first house sold). This failure landed Tailored Homes in significant difficulties with the Revenue Commissioners, through no fault of Tailored Homes.

15. In passing, the court notes that Mr Michael Taggart initially swore each of his affidavits on his behalf and that of his fellow director and brother, Mr John Taggart. Given that the two men have not only worked together for thirty years but are brothers, it is entirely understandable that they proceeded to swear their evidence so. However, it is appropriate in proceedings such as these that if one director is to swear what might be styled a 'principal' affidavit, there would also be an ancillary affidavit sworn by the other director adopting the averments of the first with any (if any) qualifications it is desired to make. Such an ancillary and unqualified affidavit has latterly been sworn by Mr John Taggart.

IV. Alleged Sales of Properties at 'Significant Loss'

16. In his grounding affidavit, the liquidator avers that "*[T]he Company's failure primarily relates to the sale of houses at a significant loss which led to Revenue liabilities in the sum of €586,021*". The Taggart brothers would be rather exceptional builder-developers, if they did not suffer some loss on house sales made post-2008, but an examination of the appraised prices of the properties relevant to the within application and the price at which they were sold indicates that the loss incurred in this regard was in fact marginal. The below table is a redacted version of a table that was furnished in evidence to the court which compares the gross price obtained on property sales at the Site with the appraised values of those properties:

House Gross Price

(€k) Appraised Value (€k) Difference

(€k)

1 199 199 –

2 169 169 –

3 169 169 –

4 295 299 +4

5 199 199 –

6 199 199 –

7 219 219 –

8 219 219 –

9 199 199 –

10 209 209 –

11 224 219 -5

12 219 219 –

13 219 219 –

17. As can be seen from the foregoing, the overall differential between the gross prices obtained and the appraised prices on the houses at the Site over a total circa. €3m-worth of sales is a comparatively trivial €1k. The houses that were sold were not, therefore, sold at a significant loss. And the company's failure does not therefore primarily relate to the sale of the houses at such a loss. To the extent that property was not sold, the Taggart brothers are not responsible for the collapse of the property market that occurred post-2008. The issue of Revenue liabilities is considered later below.

V. Alleged Prejudice to Trade Creditors

18. The liquidator also avers in his grounding affidavit that "*The Statement of Affairs furnished by the Directors includes a further amount owing to creditors in the sum of €169,375.15…owing to 17 creditors who appear to be predominantly subcontractors and building trade suppliers*". In fact, this €169,375.15 was later negotiated down to €135,104.21 and this amount was then paid out by the bank to those creditors. So it is very difficult to see that trade creditors have been adversely impacted by the liquidation (save, perhaps, in the mutually agreed downward renegotiation of amounts owing…and these were mutually agreed amounts, so the court hesitates to find that anything adverse occurred in this regard, at least on the evidence before it). Whether the trade creditors were unfairly preferred over the Revenue Commissioners is a separate matter; on the evidence before it, and separate from the issue of timing, the court does not in any event see, contemporaneous with the settlement agreed with the creditors, that dominant intention to prefer which would be a pre-requisite to such a finding.

VI. Trading Through Losses

19. The liquidator criticises the Taggart brothers for allowing Tailored Homes (Navan) Limited to trade continuously at a loss when, the liquidator avers "*there was no reasonable prospect of discharging same*". A closer examination suggests this to be a somewhat unreasonable analysis of matters. It is of the nature of the property development business that debts are incurred at the site development stage. The initial works on the Site included the construction of a so-called 'show village' encompassing eight houses and a marketing suite. In addition, other ancillary costs were incurred, including the development of a website to promote the development and associated marketing materials. As the Site comprised 354 units, it was anticipated, and reasonably so, that the additional cost for a show village would have been recovered from revenue accumulated from the sale of the show houses which would not in ordinary circumstances have been sold until the development was complete. As is clear from the above-mentioned table, the houses that were sold were not generally sold at a loss and overall yielded a €1k loss which is not of an amount to be notable in an application such as that now presenting. While Tailored Homes was undoubtedly a leveraged entity, there is nothing remarkable or unusual in this in the context of property development; and there is nothing to suggest that the Taggart brothers behaved dishonestly or irresponsibly as directors in this regard, even with that special carefulness that directors ought naturally bring to the operation of a company that is leveraged so. The worst that might perhaps be alleged of the Taggart brothers, and the court does not cast this stone, is that the two brothers may not have anticipated, it seems apparent from their actions that they did not in fact anticipate, when establishing Tailored Homes in June, 2008, that the national economy would collapse three or four months later; but they were not alone in that, nor is any (if any) failure in this regard on their part suggestive of dishonesty or irresponsibility. As regards Tailored Homes' continuing to trade after the property market collapsed post-2008, this was done not out of some vain hope that the property market would somehow reverse itself and all would be well but because the development in which Tailored Homes was engaged was not 'just' a 400-home development; it was a greatly diversified development that included a healthcare facility and a nursing home, which Tailored Homes and, for a time, its financiers considered might well succeed, and for which, for quite some time, enjoyed a very real prospect that it would be the subject of a comprehensive re-financing. However, notwithstanding the continuing prospects of such a re-financing, as will be seen under the next heading below, the court considers that the Taggart brothers did allow Tailored Homes to continue in existence even after it had passed markers which would have clearly flagged contemporaneously with their occurrence (and thus whose significance is not now merely recognised with the benefit of hindsight) that the time for placing the company into liquidation had come.

VII. Delayed Liquidation

20. Tailored Homes was established in June, 2008. It ceased trading at end-2010. It was placed into liquidation on the petition of the Revenue Commissioners in November, 2012. The liquidator's twin contentions in this regard are that "*the failure by the Directors to place the Company into voluntary liquidation at an earlier date did unfairly prejudice creditors, particularly Revenue*" and that it "*continued to incur credit*". As mentioned above, the court does not see that the trade creditors were prejudiced in the manner suggested. The Revenue liabilities are dealt with separately below. As to the delay in placing the company into liquidation, the court accepts that: right the way through 2012, Tailored Homes was engaged in negotiations with its financiers as to how matters would be managed, and payments allocated, going forwards; and a re-financing of the company's affairs was a reasonable prospect and was not done out of some vain hope that the housing market would somehow recover. As against this, however, during this period, as will be seen, the company was entirely unable to discharge PAYE/PRSI liabilities that arose to be paid in three successive years and was so reduced in circumstances that it could not even pay for its annual accounts to be prepared (which in turn led to a failure to file same). It is always difficult to identify the exact moment when a company falls to be placed into liquidation and the court has to be careful not to approach matters with the benefit of hindsight. But the repeated annual failures to pay PAYE/PRSI and the reduction in circumstances to such an extent that annual accounts could not be prepared suggest to the court that there were trigger events a-plenty which ought to have prompted the Taggart brothers to commence the liquidation process long before the Revenue Commissioners saw fit to do so.

21. The court notes in passing a related criticism by the liquidator that Tailored Homes did not open a separate bank account in which to deposit the proceeds of the house sales so that those funds would be available for the general body of creditors. The court is not sure how assiduously this aspect of matters is being pursued. But it seems somewhat far-fetched given that from in or about early-2010, the bank, as secured creditor, had *de facto* control over the allocation of such proceeds as Tailored Homes received. That is not to say the directors were not responsible for how the company continued to operate; they undoubtedly were responsible. It is merely to recognise the practical constraints of the factual matrix within which they and Tailored Homes were operating at this time. Just by way of example of how tightly those constraints were applied, it is perhaps helpful to quote from a letter sent by Matheson Solicitors to the bank on 20th January, 2010, concerning the disposal of proceeds from then pending residential sales closings and the response received by e-mail of 25th January, 2010:

a. Letter on Matheson notepaper

> "*…Date: 20 January 2010…*
>
> *RE: TAILORED HOMES (IRL) LIMITED AND TAILORED HOMES (NAVAN) LIMITED*
>
> *DEDUCTIONS SOUGHT IN RESPECT OF UPCOMING CLOSING OF RESIDENTIAL PROPERTIES….*

I write to advise that our mutual client Tailored Homes (Navan) Limited has indicated that certain residential sales are projected to close in the [Site]…in or about early March 2010.

With this in mind you might please note that I am writing to seek…consent…to the following deductions out of the proceeds of sale of each of the residential units….

1. Part V (Social and Affordable Housing) Payment to Meath County Council….

You might please confirm…consent…to (1) the deduction of the sum of €2,522.19 from each closing of a residential unit (354 units)…and (2) the payment of such deduction by this Firm on behalf of Tailored Homes (Navan) Limited directly to Meath County Council….

2. VAT as due to Revenue Commissioners in respect of sale of Residential Units

Please note that certain funds will fall due to be paid by Tailored Homes (Navan) Limited and/or Tailored Homes (Irl) Limited to the Revenue Commissioners, out of the proceeds of the sale of the residential units sold….

You might please advise the method preferred…in respect of dealing with the issue of VAT on the sale of residential units…It may be preferable to open a separate account to deal with the issue of VAT.

In any case you might note that it is considered practical to allow for a deduction of the necessary amount due to the Revenue Commissioners in respect of VAT, out of the proceeds of the sale of the of the residential units….

Please revert…on this issue.

3. Solicitor's Fees….

You might please confirm…agreement…to the deduction of our fees in the sum of €1,250.00, plus VAT, plus outlays as incurred, out of the proceeds of sale of each residential unit….

4. Auctioneers Fees….

You might please confirm…agreement…to the deduction of the Auctioneer's fee at the rate of 0.75% of the passing consideration for each residential unit, plus VAT thereon, out of the proceeds of each sale of each residential unit….

5. Financial Contributions due to Meath County Council in respect of the Residential Units….

Please confirm…the payment of the financial contributions due to Meath County Council…on the basis of the rolling payment in advance of the amount due to Meath County Council to discharge six residential units….

6. Terms of the Part V Agreement

I would direct you specifically to the proposed terms of the Part V Agreement…whereby Tailored Homes…have agreed to provide ten 'free units' and €1,000,000 in capital contributions to Meath County Council in compliance with the requirements of Part V of the Planning and Development Act 2000 (Social and Affordable Housing)."

b. Reply E-mail from bank lending manager.

"...Sent: 25 January 2010.…

I respond to your letter and the various points raised as follows:

1. I confirm…consent…to (1) the deduction of the sum of €2,522.19 from each closing of a residential unit (354 units) and (2) the payment of such deduction by MOP on behalf of Tailored Homes…directly to Meath County Council.

2. I would like to receive in the full gross sales proceeds and then pay back out the VAT directly to the Revenue as and when it falls due for payment.

3. I confirm…agreement…to the deduction of your fees in the sum of €1,250 plus VAT, plus reasonable outlays as incurred, out of the proceeds of sale of each residential unit….

4. I confirm….agreement…to the deduction of the Auctioneer's fee at the rate of 0.75% of the passing consideration for each residential unit, plus VAT thereon, out of the proceeds of sale of each residential unit contained in the Estate.

5. I am currently not in a position to confirm…the payment of the financial contributions due to Meath County Council…on the basis of the rolling payment in advance of the amount due to Meath County Council to discharge six residential units. I will…revert to you in due course.

6. I confirm…approval…to the proposed Part V Agreement….I also confirm that you may proceed to negotiate same with the solicitors acting on behalf of Meath County Council."

22. It is obvious from the foregoing that when it came to matters financial, Tailored Homes, as early as January, 2010, was having to do a lot of tacking with the bank. The liquidator has sought in his affidavit evidence to parse the above reply message, suggesting that the "*I would like …*" regarding the proposed VAT payment arrangements is stronger than the "*I confirm…*" used in other paragraphs and that the Taggart brothers enjoyed some freedom of action when it came to the VAT proceeds that they have not conceded. Two points might be made in this regard. First, the practical reality, regardless of grammatical niceties, is that if a commercial customer is indebted to a bank to the amount of several million euro and looks like it will not be able to repay that amount in full, an assertion by the bank as to what it 'would like' that commercial customer to do is but a polite way of telling that commercial customer what it must do if it wants to keep the bank 'on-side'. Second, in the context of the above-quoted correspondence the difference of phraseology seems readily explainable. The other points in Matheson's letter effectively state 'Here's what's intended; please confirm that you are satisfied with same' whereas point no. 2 is effectively 'Here's a suggestion, but what would you like to

do?' And the answer to such a question, however exactly it is posed, is, perhaps unsurprisingly, "*I would like…*". A more sensible answer to the bank's "*I would like…*" would have been 'The company is required by law to pay the VAT, the company is responsible if the VAT goes unpaid, and so the company must have its solicitor pay the VAT directly'. There really would be very little that the bank could say in reply to that, but perhaps desirous to placate the bank to the maximum extent possible while they were seeking to negotiate a re-financing, the Taggart brothers proceeded differently. In any event, regardless of the nature of Tailored Homes' relationship with the bank, the Taggart brothers, as directors of Tailored Homes, were responsible for the direction of the company and for the decision as to whether and when to place the company into liquidation. All the evidence points to this as having been done too late and, again, one does not need to rely on hindsight to reach this conclusion: there were clear markers that should have made apparent to the brothers that the commencement of liquidation was due and then overdue.

VIII. Alleged Failure to Cooperate with Liquidator

23. The liquidator complains about an alleged failure to cooperate with him. Two complaints are made in this regard. First, that the statement of affairs was late in coming. Second, that the statement of affairs contained errors. The court turns to consider the second issue (that the statement contained errors) under a separate heading below. This is because it does not seem to the court that a deficiency in the statement of itself points to a failure to cooperate with the liquidator, nor has the liquidator suggested any reason as to why the court should view any such deficiency so. Moreover, the court cannot but note in this regard that (i) the statement of affairs was sworn in May, 2013, (ii) the liquidator, in his second and third interim reports filed with the ODCE, confirms that "*Since May 2013 the directors have co-operated with me in my investigation into the management of the Company*", and (iii) the court does not understand it to be suggested that matters have changed since. So there has been no want of cooperation by the Taggart brothers since the statement was provided and there is no suggestion that the statement was sworn other than honestly. As to the first point (that the statement was late in coming), there is an entirely credible explanation provided by Mr Michael McTaggart in his sworn evidence as to why there was a delay in providing the statement of affairs. To put this evidence in context, the court notes that the liquidator was appointed in November, 2012, the High Court itself allowed various extensions of time in providing the statement from as early as January, 2013, and the statement was finally sworn in May, 2013. Per Mr Michael McTaggart:

> *"[Timing of provision of statement of affairs]*
>
> *38. The backdrop to the provision of the Statement of Affairs is as follows. In early December 2012, I requested accountants PFS and Partners to assist me in preparing responses to questionnaires provided by the Applicant [i.e. the liquidator] and statements by the directors which were confirmed as having been received by the Applicant on 10 December 2012. I had understood at this time that this was all that was required by the Applicant…at that time. On the same day the Applicant sent me a template Statement of Affairs to be completed by the directors which I immediately passed to PFS and Partners. In communicating with the Applicant I explained the difficulties that I had personally in retrieving the information requested within the timelines required by the Applicant. I clearly and regularly explained that I did not have the personal knowledge, personnel resources or finances to employ a person with the requisite skills to carry out this work within the timeframe required by the Applicant.*
>
> *39. In addition, throughout the course of January, February and March 2013 both I and my co-Respondent were working in Benghazi in Libya trying to conclude work contracts, in the UK trying to attract further investment and in the United States where we were involved in a contractual dispute before the Courts. Therefore we were unable practically to deal with the Statement of Affairs. However, I remained in telephone communication with the Applicant and his solicitor in respect of it. As soon as I returned to Ireland in early April 2013 I wrote to the solicitor for the Applicant confirming the steps I was taking in respect of preparing the Statement of Affairs and the ongoing difficulties that we had in doing so. Principally at this time we were trying to obtain the assistance of the Company's former bookkeeper who was engaged in other full time employment. I notified the Applicant's solicitor that I would have difficulty in preparing an entirely accurate Statement of Affairs in the circumstances."*

24. The court respectfully concludes that when it comes to the late provision of the statement of affairs, that had nothing to do with any want of cooperation with the liquidator. One does not even begin to approach the behaviour that was at issue in *Re MK Fuels Ltd* [2014] IEHC 305. In truth, based on the evidence before it, the court sees no evidence of a want of cooperation, beyond the little more than bare assertion of the liquidator which seems entirely answered by the evidence of the respondents.

IX. The Substance of the Statement of Affairs

25. A statement of affairs is sworn to by directors and it is not, therefore, a matter to be approached lightly or glibly. But neither is perfection to be expected; errors may unwittingly creep in to even the best prepared and most honest of statements of affairs. Provided there is cooperation by directors in explaining such innocent deficiencies as may appear in a statement and that there has been no dishonest intention on their part when swearing to the substance of the statement, that should usually be an end of matters. Dishonesty, by contrast, cannot be tolerated. But there is no evidence, none at all, before the court of any dishonesty on the part of either Mr Michael Taggart or Mr John Taggart. Moreover, on close examination the court must admit to very considerable doubt that the scale of discrepancy purported by the liquidator to present in the statement of affairs in fact pertains. In his grounding affidavit, the liquidator avers, *inter alia*, as follows:

> *"21. I say and believe that there is a substantial discrepancy between the position of the Company as set out in the Statement of Affairs and the position set out in the last accounts filed by the Company.*
>
> *22. I say that despite the Company filing accounts which included unsold stock to the value of €2.6m as an asset of the company, the sworn Statement of Affairs provided by the Respondents did not include the stock of unsold houses and it would appear that [*the*] value of these assets was entirely attributed to Tailored Homes…and used to discharge its [*liabilities*]…in priority to the Company's liabilities to the Revenue Commissioners and to trade creditors."*

26. In his initial affidavit, Mr Michael Taggart responds to these assertions as follows:

"[Substance of statement]

> *40. I take issue with the allegation that there was a substantial discrepancy between the position of the Company as set out in the Statement of Affairs and the position as set out in the last accounts filed by the Company and any inference that could be drawn therefrom. In this regard I refer to paragraphs 20–23 of the Applicant's Grounding Affidavit. In preparing this Replying Affidavit and as explained above the Statement of Affairs was ultimately prepared by me almost four years after the last filed accounts were prepared which were prepared by a firm of auditors. I did not have access to the books and records of the Company and the task of compiling the Statement of Affairs was made very difficult for*

this reason….

41. The Applicant at paragraph 22 refers to the Company's filed accounts including unsold stock to the value of €2.6 million as an asset of the Company. He correctly states that the sworn Statement of affairs did not include the stock of unsold houses. He appears to use this as the basis for his allegation that the Respondents' Statement of affairs was inaccurate in that there was a discrepancy between the two. This allegation is incorrect. When the accounts were submitted in 2009 it was understood that the business would continue to trade as usual and that the Work in Progress (WIP) would ultimately be recovered by the Company. Almost four years later a Receiver had been appointed over the Site and had effectively controlled all revenue streams from the Site. It is my recollection that as the Company did not own the land on which the houses were constructed the view was taken that no value could be attributed to the WIP in the books of the Company. In addition…the land was under the control of NAMA who effectively had control of the assets and WIP on the land. It was and is my understanding and I am so advised that unless WIP is believed to be recoverable by the Company it should certainly not have been included in the Statement of Affairs. To the best of my knowledge and belief it was on this basis that the WIP was excluded from the Statement of Affairs and accordingly there is no discrepancy between the Statement of Affairs and the filed accounts as alleged."

27. The court: (i) accepts as true the difficulties that present in preparing a statement of affairs when a director is acting at some remove from a company (it is in fact a difficulty that directors not infrequently point to in applications such as that now presenting); (ii) considers that the issue regarding the €2.6m meets with a credible explanation from Mr Taggart; (iii) noting from the liquidator's second and third interim reports to the ODCE that from May, 2013, the month in which the statement of affairs was sworn, both of the Taggart brothers were engaging in a spirit of cooperation with the liquidator, considers that this acknowledged cooperation just does not chime with any suggestion that the Taggart brothers were seeking to be devious in what the statement of affairs stated; if anything, it suggests the contrary.

X. Cause of the Company's Insolvency

28. In his second affidavit, the liquidator elaborates in some detail on an allegation that is touched upon in his previous affidavit and concerning what he perceives to be underhand dealing that made Tailored Homes "completely insolvent". Per the liquidator:

"50…[T]he Company became entirely insolvent by virtue of the admitted transfers by [the] Company of the entirety of its sales proceeds to Tailored Homes Ireland [Limited, a related Taggart company]. Tailored Homes Ireland and [Mr Michael Taggart]…owned the lands which were developed by the Company. Moreover, the Respondent Directors of the Company were also the directors of Tailored Homes Ireland….

51. The Site developed by the Company was financed…with [borrowed] monies…secured by way of, inter alia, what I say and believe was a fixed charge over the Site, and a floating charge over 'all WIP thereon', namely the work product/stock of the Company….

52. Although the basis for this is entirely unclear, the Respondents appear to regard that security situation as justifying their decision to discharge the liabilities of Tailored Homes Ireland….For the avoidance of doubt, Tailored Homes Ireland is not and was not a creditor of the Company…..[T]his is a cause for concern. At no stage have the Respondents been able to indicate any basis in law for these remittances. I say and believe that the explanation…that the Respondents 'deemed [it] unnecessary' to have a form of building agreement between the Company and Tailored Homes Ireland is simply inadequate, as is their suggestion that 'there was an oral agreement and understanding between them'.

53. I say and believe that this is doubly so in circumstances where the liabilities of Tailored Homes Ireland were guaranteed by each of the Respondents, so that each of these transfers had the effect of reducing the Respondents' liability in the sum of many hundreds of thousands of euro.

54. Further, the Respondents continued to accrue liabilities until the time of its liquidation, in circumstances where it is clear that the benefit (if any) which the Company would have derived from the Respondents' purported negotiations would have been transferred directly to Tailored Homes Ireland. While the benefit to Tailored Homes Ireland is clear from this arrangement, it is remarkably difficult to understand how the Respondents can possibly have conceived that they were acting in respect of the Company."

29. Three points might be made regarding the above-quoted averments.

30. First, the court respectfully does not share the surprise of the liquidator as to the absence of certain written agreements in the circumstances presenting. While the court agrees with the liquidator that such written agreements are desirable, it is mindful that both liquidator and court are trained in disciplines that are cautious in outlook and watchful to the desirability of documenting agreements generally. However, one is dealing in this case with, to borrow from Mr Michael Taggart's second replying affidavit, a building enterprise which, however successful, revolved ultimately around the building experience and commercial nous of two entrepreneurs who "*are brothers…have been business partners for 30 years….speak on an almost daily basis and…have done so since either of us could speak.*" In truth, it is almost to be expected that in such a close-run family enterprise, there would not always be that premium placed on documenting matters which would likely present in an enterprise involving business partners and fellow directors who were not also closely bound together by ties of affection and blood. And it is only fair to note that there is no general legal requirement that companies must take care to document every significant commercial transaction, albeit that as a practical matter it would seem generally sensible and in their own best interests that they should.

31. Second, as it happens there is an alternative and credible explanation for the above-mentioned arrangements. It appears that Tailored Homes Ireland owned the Site which it purchased with its borrowings. Tailored Homes, *i.e.* the company that is the focus of the within proceedings, was established to build houses on the Site and it drew down funds from its bank for the purpose of building units on the Site. By contrast, at the behest of the bank, these funds were paid to Tailored Homes' then solicitors for onwards transmission to the bank (subject to the understanding that the applicable VAT would be paid onwards to the Revenue Commissioners). This financial arrangement, the court notes in passing, is one that the liquidator himself has previously stated to the ODCE to have been "*as would have been expected*". Certainly the court can see the commercial logic as to why a bank would want sales proceeds retained by a commercial customer's solicitor and thereafter advanced directly to itself. Once one understands all of the foregoing to have been the arrangement presenting, then one can see why trade creditors fell to be paid out of the borrowings whereas the Revenue Commissioners fell to be paid out of the sales proceeds. Notable too in this regard is the fact that the bank confirmed to the Taggart brothers that its continued financing of Tailored Homes' activities on-site was dependent on the gross proceeds of sale being remitted to it from Tailored Homes Ireland. So there was a commercial rationale for each of Tailored Homes and Tailored Homes Ireland to have acted as they did. Matters could have been better documented, perhaps they should have been

better documented, but in the context of the within application nothing seems to flow from the fact that they were not documented, and certainly that they were not better documented does not prompt the necessary conclusion that what was done was underhand.

32. Third, the true cause of Tailored Homes' insolvency, it seems to the court, is simply that it was engaged in property development at a time when the property market collapsed, with the result that anticipated sale-levels and prices then plummeted, quickly plunging the company into irremediable financial difficulty.

XI. Revenue Liabilities

33. The VAT liabilities have been touched upon already. The gross sales proceeds went to the bank. The expectation and documented understanding was that the VAT portion would thereafter be paid to the Revenue Commissioners. As well as the correspondence referred to above, the court has, for example, seen e-mail correspondence of 9th November, 2010, from the bank to Tailored Homes stating that "*[T]he Bank reiterates its commitment to paying outstanding VAT monies as soon as possible.*" For some reason, the liability was not settled; but, in the circumstances presenting, the fact that it was not settled does not rebound to the detriment of either of the Taggart brothers as directors.

34. In all the circumstances presenting, the court's greatest concern when it came to the Revenue liabilities was when it heard mention of unpaid PAYE/PRSI to the amount of €93,500. Whatever the scale of the amount involved, and the amount involved here is large, such a failure always falls to be considered most seriously because these are, in effect, fiduciary taxes collected on behalf of company employees who are ultimately the parties to suffer from a company's failure to pay them over to the Revenue Commissioners. Of all the assertions made in the course of the within proceedings as to the respondents' behaviour, the court considers this to be among the most serious. However, the court is ever conscious in this regard of the observation of Finlay Geoghegan J. in *Re Digital Channel Partners Limited* [2004] 2 ILRM 35, in which an unpaid tax bill of €1.5m was in issue that "[*I]n relation to tax liabilities there must be something more than a limited failure over a period to indicate that the directors have acted irresponsibly….[I]n so far as there may be evidence that there has either been selective distribution or selective payment of liabilities of a company or indeed a total disregard of obligations to the Revenue or even a decision to effectively seek to use taxation liabilities for the purpose of financing a company, that of itself will normally be indicative of the fact that directors have been acting at least irresponsibly*." (Related observations are also to be found in the decisions of the High Court in *Re Shellware Limited* [2014] IEHC 184, para.8 and *Arkins v. Murphy & Anor* [2015] IEHC 2, para. 34).

35. When looking at the PAYE/PRSI dimension of matters, it appears to the court that there are three significant features to the respondents' actions that fall to be considered:

> – first, Mr Michael Taggart avers that all the PAYE and PRSI liabilities that were incurred by Tailored Homes were incurred while it was trying to secure funding and in the understanding that the financing to be extended would comprise, *inter alia*, funding that would enable these liabilities to be met.
>
> – second, that the directors 'hung on' as they did and considered such a re-financing was a reasonable prospect was not done in some vain hope that the housing market would somehow recover and all would be well. The development in which Tailored Homes was engaged was not 'just' a 400-home development; it was a greatly diversified development that included a healthcare facility and a nursing home and which Tailored Homes and its financiers considered might well succeed notwithstanding the national economic circumstances presenting and in respect of which there was a reasonable prospect that a complete re-financing would yet be forthcoming.
>
> – third, when Tailored Homes received eventual confirmation from NAMA that it would only accept proposals that did not involve its providing continued funding, the directors immediately accepted that there was no future prospect for the development, all work and employment ceased.

36. The difficulty, however, that the Taggart brothers face is that the PAYE/PRSI liabilities arise over a three-year period, being €11,711 during the calendar year 2010 (the last year for which Tailored Homes filed returns), an estimated €37,787 during the calendar year 2011, and an estimated amount just in excess of €44,000 for the calendar year 2012. So these were not PAYE/PRSI liabilities incurred in the dying days of a fully trading company, when fevered efforts were being made to find new business and directors were liaising with the Revenue Commissioners and seeking to do right by all as a company's revenue stream went wrong for good. In fact, there is nothing before the court, no evidence at all, to suggest that the Taggart brothers ever sought to agree with the Revenue Commissioners how they proposed to discharge the unpaid PAYE/PRSI. On the contrary, the evidence before the court suggests that the Revenue Commissioners were throughout this period chasing for all such taxes as were owed to them, though extending every possible latitude within the constraints of their own statutory responsibilities (there is, for example, an e-mail of 14th June, 2011, in which an officer of the Revenue Commissioners states, albeit not in the context of PAYE/PRSI, that "*I cannot hold forever on this – I am giving you 14 days from today's date to get payment sorted. We have not received any payment since June '10 for this Company*") and being stonewalled in response, with no payment of taxes made and no effort to agree how those taxes would be paid. Instead Tailored Homes' entire focus was on securing a comprehensive re-financing, to the detriment of every other responsibility, including the responsibility to pay over PAYE/PRSI or arrive at some form of agreed process with the Revenue Commissioners, if such agreement was possible, as to how, *inter alia*, the undischarged PAYE/PRSI liability would be met. The court does not doubt that the Taggart brothers were seeking to do what they thought best in the very challenging economic circumstances presenting. Even so, it cannot conclude that their actions when it came to a protracted failure to discharge PAYE/PRSI liabilities arising in three successive calendar years were responsible. Had there been meaningful and proper engagement with the Revenue Commissioners during this period concerning how and when those liabilities would be settled, the court might well have concluded differently.

XII. Annual Returns with Appended Accounts

37. All books and records and management accounts were kept up-to-date by Tailored Homes while it was trading. It filed its last annual return in 2009, but appears to have missed 2010 and 2011, with the liquidator coming on board in 2012. It is very important that companies file in a timely manner their complete annual returns, with appended accounts when required, and a failure to do so is not to be treated lightly, though it is only fair to mention as a possible factor of relevance that there is no evidence to suggest that any-one was especially prejudiced by such failing. Be that as it may, Mr Michael Taggart rightly acknowledges the importance of compliance (and it is important to comply) with filing requirements, averring as follows in his affidavit evidence: "*I acknowledge that the failure…was regrettable….Throughout the relevant period the Company had been limited to two staff members who worked tirelessly…to secure continued funding to complete the development and to ensure that all creditors including Revenue were paid. Any such failure must be viewed in that context*." In fact, it appears that during this period the only funds available to Tailored Homes were provided to it by the bank; and these, it seems, enabled the company to pay for everyday needs but were not, Mr Michael Taggart avers, sufficient to meet the cost of preparing annual accounts, though it does not seem that there was a related descent into internal accounting disorder. The fact that the company simply did not have the financial wherewithal to finance the

preparation of annual accounts presents something of a conundrum: is it irresponsible for directors not to arrange the doing of something that the company of which they are directors cannot afford to do? The answer, it seems to the court, is that the directors ought by that point, when a company is so far reduced in funds, to accept that the company is no longer in any way in a tenable position and to proceed accordingly, but not to decide that they will allow the company to continue to break the law in the hope that some future remediation exercise may be undertaken following a potential comprehensive re-financing. No measure of hindsight is required to reach this conclusion. The court therefore concludes that there was also a want of responsibility shown in this regard.

XIII. Conclusion

38. For the various reasons offered above, the court is not satisfied as to each and all of the matters recited in s.819(2) of the Act of 2014. A declaration therefore falls to be made under s.819(1) of that Act. If the court enjoyed a discretion to impose a shorter restriction period than that which automatically arises under s.819(1) it might well have invoked that discretion and applied a shorter restriction period in all the circumstances presenting; however, no such discretion exists at this time.