Neutral Citation: [2015] IEHC 2

THE HIGH COURT

Record No. 2014/90/COS

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

Between:-

JOSEPH ARKINS

Applicant

AND

DAVID MURPHY AND IRENE MURPHY

Respondents

Judgment of Mr. Justice Max Barrett delivered on 13th January, 2015

Nature of Application

1. This is an application for a declaration of restriction against each of the respondents brought pursuant to s.150 of the Companies Act, 1990, as amended. In the case of each respondent the allegation made is that he or she, as appropriate, evinced a want of responsibility as a director of Salesprint such as to require the issuance of a declaration of restriction at this time. Alternatively, it is alleged that it is otherwise just and equitable having regard to all the relevant facts that such a restriction should issue at this time. No allegation of dishonesty is made against either director nor, the court finds, does any suggestion of dishonesty arise from the facts.

Key issues arising

2. In respect of each director the key issue arising is whether he or she, as appropriate, took the steps that one would expect of a company director when it became apparent that Salesprint was in financial difficulty. In respect of Ms Murphy, a second issue arises, being whether the purportedly nominal role that she played as a company director has the consequence that she ought not in any event to be exposed to a declaration of restriction under s.150.

Background facts

3. Salesprint was incorporated on 26th July, 1965. It entered voluntary liquidation on 28th August, 2012. Salesprint encountered significant financial difficulties in roughly the last two years of its existence. Mr. David Murphy has averred in his affidavit evidence that Salesprint, throughout its existence, "*provided both a sourcing and logistics handling service to clients*". This line of business apparently included: sourcing advertising and point-of-sale materials for companies within the drinks industry; and providing customers with a logistics service whereby their advertising materials were warehoused, collected and delivered to the end-user. The company had annual contracts with companies such as Beamish & Crawford, Diageo, Bulmers, and Britvic Ireland.

4. In July 2010, following a review by Diageo of its operations, the annual service contract that it previously maintained with Salesprint was not renewed. This resulted in a revenue loss to Salesprint of about €330k. per annum. The loss of this business came as a considerable shock to Salesprint which to that time had anticipated that its business with Diageo would increase. Following this loss of business, Salesprint undertook a review of its business and, unfortunately for the individuals concerned, cut back immediately on its warehouse staff, reducing their number by about 30 per cent. Salesprint also agreed a surrender of the lease on one of three warehouses which it rented.

5. In January 2011, Salesprint undertook a full review of its business in light of the loss of the Diageo contract and put in place a number of measures to reduce its overhead costs. The principal such measures were: (1) all staff, to their credit, agreed to a 10 per cent wage cut and, in October 2011, some staff, regrettably, lost their jobs through redundancy, a combination of events that resulted in a substantial reduction of Salesprint's annual wage bill from €164k. per annum to €70k. per annum; and (2) the company agreed a surrender of the lease on the second of three warehouses which it had rented, as well as a rent reduction of 50 per cent on the remaining warehouse; these measures combined with the earlier surrender of a warehouse reduced Salesprint's annual rent bill from approximately €165k. to €44k. per annum. In addition to implementing these reductions in overheads, Salesprint (3) engaged the services of a chartered accountant to conduct an overall review of its business and assist in the development and implementation of a new strategy to help turn the business around. In its business plan for 2011/2012, Salesprint predicted a turnover of €1.2m. based on the previous year's turnover and allowing for a €330k. reduction given the loss of the Diageo business. Notably, this level of turnover would have returned Salesprint to a profitable trading position.

6. From 1st April, 2011 and into 2012, Salesprint made strenuous efforts to engage with new, existing and previous clients in a bid to grow company turnover. It is worth recounting these efforts in some detail to give a sense of the scale of industry involved:

- in May, 2011, the company pitched a proposal to Diageo regarding its annual purchasing requirement of, it is claimed, some 60 million beermats. The 'pitch' would have involved Salesprint selling advertising on one side of the beermats, giving it a novel means of making additional revenue while reducing the overall cost to Diageo of sourcing the beermats. This was not a 'pie in the sky' proposal. It was based on a similar model that had worked successfully in the United Kingdom. After an initially cool response, Diageo subsequently showed real interest in the proposal but it fell through in early-2012. Had matters gone otherwise, the result would have been an immediate and significant uplift in Salesprint's trading position.

- in June 2011, Salesprint explored the option of merging with an entity called MOD Sales and Promotions. Such a merger, Mr. Murphy avers, "*would have provided both businesses with synergies as the Company would have been able to eliminate 70% of the overheads of MOD Sales and Promotions by absorbing their administration function into the Company*". This reads suspiciously like 'Humphrey Appleby-speak' for making people redundant. Whether or not that is so, the merger proposal was ultimately unsuccessful.

- in July 2011, Quarmby Promotions, the UK subsidiary of Salesprint's main beermat supplier, Katz GmbH & Co., approached Salesprint with a view to acquiring its business. A meeting was held between the parties but no official offer materialised.

- in early-November 2011, the managing director of a company called DPD Ireland met with Mr. Murphy to ascertain whether Salesprint would be willing to sell its business to DPD. There were a number of meetings between the parties and an accountant for DPD conducted a 'due diligence' exercise on Salesprint's business. However, in early-2012, DPD decided not to proceed with the transaction.

- throughout this period, Salesprint also worked on proposals for other potential clients such as Aviva, Oxfam and Barnardos which would have involved the company providing merchandising for fundraising activities and warehouse and logistics support for an on-line store.

- during late-2011, the company sought to put payment agreements in place with overdue creditors based on the information it had to hand at the time; however, as business declined it became progressively more difficult to satisfy the arrangements that had been agreed.

- in January 2012, Mr. Murphy approached Salesprint's main competitor to see if they would be interested in growing its business by "*purchasing [Salesprint's] remaining service contracts*". By this, the court assumes that some sort of novation or assignment arrangement was contemplated. This proposal did bear fruit, though, perhaps inevitably, given Salesprint's declining financial, and hence poor negotiating, position, an initial €300k. figure that had been discussed as the possible consideration for the transaction transmuted in the end into a €150k. payment.

- around this time, an agreement was reached with Katz GmbH whereby Salesprint would invoice beermat sales directly to the end user while paying Katz a commission, an arrangement that involved less upfront cost and so engendered lower working capital requirements.

7. The above significant, serious and commercially sensible efforts to turn around Salesprint's misfortunes took place against the generally grim economic backdrop that followed the crash of our national economy in 2008. Throughout 2011 and thereafter the company's turnover continued to fall as clients cut back on traditional point-of-sale spending and diverted their budgets to digital media.

8. Woe begat woe, with Salesprint's ability to raise working capital via an existing invoice discounting facility with Bank of Ireland quickly diminishing as, thanks to the general contraction in business, a greater number of invoices were now being paid off to the bank than were being issued to customers, a sequence of events that ultimately cannot but be the coup de grâce to any invoice discounting facility. The decrease in working capital available via this facility led almost inevitably to an increasing reliance on Salesprint's, presumably more expensive, overdraft arrangements with the bank.

9. The end of days for Salesprint came in 2012. On 27th April of that year, one of Salesprint's creditors, an English company by the name of BBP Marketing Limited, issued a so-called 's.214 letter' to Salesprint in which it sought payment of GBP£23,107.36. The issuance of such a letter is contemplated by s.214 of the Companies Act, 1963, pursuant to which a company is deemed unable to pay its debts, inter alia:

> *"if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding €1269.74 then due, has served on the company, by leaving at the registered office of the company, a demand in writing requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor".*

10. The significance of being deemed to be a company that is unable to pay its debts is that this is one of the grounds on which, pursuant to s.213(e) of the Act of 1963, a company may be wound up by the courts. Counsel for the liquidator sought at the hearings of the within proceedings to lay some emphasis on the date of issuance/receipt of the s.214 letter. However, it appears to the court that is possible to attach too much significance to a 's.214 letter'. They are typically employed in practice as a means of leveraging payment from a recalcitrant debtor. More of them issue than are ever acted upon and, although the receipt of the letter was treated with seriousness by Salesprint, it is understandable if, to those working at the coalface of capitalism, the fact that non-payment of a debt pursuant to receipt of a 's.214 letter' may acquire a certain significance three weeks from now is not perhaps viewed with unabated awe when viewed in the context of still-continuing efforts to turn around a company's performance such that it is possible for it to continue trading into the longer future. In the present case the three-week period referred to in s.214 ended in late-May. The company went into voluntary liquidation later in the summer. Maybe this was slightly too late, maybe it was not; it is rarely if ever easy to identify the exact moment at which a company ought to place itself into liquidation and it seems to the court that some degree of latitude has to be afforded to directors in this regard; real life cannot be reduced to unreal exactitude. Sometime in the summer of 2012 Salesprint should have placed itself in liquidation, and at the end of the summer vacation it did.

11. Returning to the chronology of events, BBP proved determined to recoup the monies owed to it, as was its right. On 12th July 2012, it petitioned for the winding-up of Salesprint. However, an adjournment of this petition was sought of the court and granted on the understanding that the company would place itself into voluntary liquidation. This last event duly transpired just over a month later on 28th August, 2012.

Alleged wrongdoings

12. Much of the director behaviour to which the court has referred in its description of the background facts is, frankly, the type of behaviour that one would expect a prudent director to engage in when a company encounters trading difficulties. So what are the respondents alleged to have done that has led to s.150 proceedings being commenced against them? The allegations made by the liquidator, in his grounding affidavit, are essentially fivefold:

- first, the liquidator alleges that the respondents did not see to it that Salesprint discharged historic and recent debts to the Revenue Commissioners, with the result that the company owed almost €270k. to the Revenue Commissioners by the date of winding up, and that they allowed the issuance of cheques to the Revenue Commissioners that were subsequently dishonoured.

- second, the liquidator alleges that the last filed accounts of Salesprint (for the year ending 31st March, 2010) show a debtor figure of just under €481k. owed by group undertakings. This figure reflects an amount loaned by Salesprint to its parent company to buy shares in Salesprint. The liquidator contends that as the shares of Salesprint were largely if not entirely worthless by 31st March, 2010, the debtor figure should have been written off. In short, the liquidator contends that the last-filed accounts were incorrect.

- third, the liquidator alleges that the respondents should have convened a creditor meeting earlier than they did and that they only eventually did so upon the issuance of petition for winding-up by BBP Marketing Limited.

- fourth, the liquidator alleges that, allegedly in breach of s.31 of the Companies Act, 1990, the respondents received a total loan from Salesprint of just over €60k. between 1st April, 2009 and 31st March, 2010, which loan amount has not been repaid.

- fifth, the liquidator alleges that a misleading statement of affairs was issued by Salesprint to BBP Marketing Limited in the period running up to the latter's presentation of its petition for the winding-up of Salesprint.

13. Read in isolation, these allegations appear damning. But, as Flaubert was wont to observe, 'the good God is in the detail', and the detail is more complex. The court considers hereafter the response made by the respondents to the liquidator's allegations and then undertakes an analysis of the applicable law before arriving at its conclusions.

Director responses to allegations made
14. Mr. Murphy has responded by way of affidavit to the various allegations made by the liquidator. Thus he avers that:

(1) at all times the directors acted diligently to grow, re-position and restructure the business of Salesprint following the loss of the Diageo contract.

(2) the business opportunities that were pursued were each legitimate and credible options that had a strong possibility of returning Salesprint to a profitable position in the short to medium-term.

(3) Salesprint had traded successfully for a long period of time and there was good reason to believe that its essential fundamentals and its business model were strong and capable of returning to profitability.

(4) the respondents at all times ensured that creditors of Salesprint, including the Revenue Commissioners, were kept informed of the position of the company. Moreover they openly engaged with those creditors in an attempt to resolve those liabilities. The fact that the majority of Salesprint's creditors, including the Revenue Commissioners, were willing to afford Salesprint some leniency, is evidence, Mr. Murphy claims, of the goodwill between Salesprint and its creditors.

(5) the respondents have not shirked their liabilities under personal guarantees that they gave of certain company debts and this is to the benefit of the creditors as a whole.

(6) the impugned debtor figure contained in the 2010 accounts was 'signed off' by Salesprint's auditors as part of a set of accounts that represented the true financial position of Salesprint at that time.

(7) the respondents continued to pursue all credible options to avoid loss to the creditors of Salesprint right up to the moment that BBP presented its petition for the winding-up of the company. At that point the decision was taken to convene a creditors' meeting and place the company into voluntary liquidation.

(8) the negotiations done with the company's main competitor and the payment received increased the amount available for creditors of Salesprint.

(9) all information provided to creditors of Salesprint by way of draft statements of affairs was correct as at the date that those statements were compiled; this was consistent with the open and honest way in which the respondents sought to deal with company creditors.

(10) the respondents have cooperated fully with the liquidator to help realise the maximum achievable value for the fixtures and fitting and also to realise the maximum possible return from debtors.

Applicable law
15. Counsel referred to a wealth of relevant precedents during the hearing of this application. In broad terms, the cases to which they referred are concerned with the following aspects of s.150 applications: (i) the general approach to be taken by the court in such applications; (ii) the significance of non-payment of taxation; (iii) the responsibilities of professionals as directors; (iv) the preferment of creditors; (v) the responsibility or otherwise of trading through financial difficulties; (vi) the availability of relief under s.152 of the Act of 1990 as a factor for consideration; and (vii) the issue of whether and when a spouse or other person prompted by ties of affection into acting as a so-called 'nominal' second director can avoid the imposition of liability under s.150.

16. *(i) General approach to be taken*. In its decision in *Re Mitek Holdings* [2010] I.R. 374 the Supreme Court identifies the type of exercise in which the court ought to engage in determining s.150 applications. In *Mitek*, the key complaint concerning the respondents therein was that at a time when various group companies were insolvent they had permitted the transfer of almost €3m from the group and granted security to a related company. This eventually resulted in declarations of restriction against the respondents in respect of whom application under s.150 was made. Those respondents appealed these restrictions unsuccessfully to the Supreme Court, Fennelly J. noting in his judgment, at p.396, that:

> *"I would not be disposed to limit the matters to which regard should be had or to substitute standardised judicial criteria for the general words of the statute. The judgments of Murphy, Shanley, McGuinness and Clarke JJ. [which Fennelly J. considers] show that compliance with statutory requirements may be relevant. On the other hand, whether in that respect or in respect of common law duties, it is not every criticism that enables one, in the words of McGuinness J., 'to categorise conduct as irresponsible'."*

17. The thrust of the last-quoted remark is that it is important not to adopt a formulaic, standardised, 'tick the box' approach to determining s.150 applications. Thus it is not possible to identify a general behaviour which if discerned in a particular case will yield a 'gotcha!' moment as and from which the issuance of a declaration of restriction is in all instances inevitable. Director behaviour may be open to criticism and yet may not, for example, be irresponsible. It is important, as Fennelly J. observes at an earlier point in p.396 to that just quoted, "*to identify the issues that are important in a particular case*". Having done so, the court must then proceed with its analysis of those issues by reference to precedent and through the prism of context. When it comes to the issue of context, this Court has been particularly alive to the following considerations, which it considers in further detail at a later point below, *viz*. the scale of Salesprint as an enterprise, the longevity of Salesprint's existence as a trading company, the length of the respondents' term as directors, and the bleak trading environment that followed the collapse of our national economy in 2008.

18. *(ii). Non-payment of tax.* The court has been referred to a wide array of cases concerning the non-payment of tax. It considers these in detail hereafter. However, its conclusions can broadly be summarised as follows:

- first, non-payment of tax is always a serious matter. In truth, a director who allows a company to stray into non-compliance on the tax front all but invites a later s.150 application if the company of which he or she is director later gets into difficulty.

- second, circumstances can arise in which a company may not discharge its tax liabilities in full, at least in its waning days, yet no declaration of restriction will issue against former directors of that company.

- third, where there is a 'phoenix' dimension to a director's actions, i.e. where a director serves on the board of successive companies that do largely identical business, and each company encounters tax difficulties, that is a combination of facts which in most if not all instances will yield the issuance of a subsequent declaration of restriction upon application being made under s.150.

- fourth, when it comes to alleged 'trading on Revenue liabilities', *i.e.* continuing the operation of a company through non-payment of tax, factors such as whether there was liaison between the company and the Revenue Commissioners and whether directors were seeking to fund and operate the company from legitimate resources will be of significance in determining whether those directors crossed the border from trading through financial difficulties into the realm of behaviour that could or will yield a declaration of restriction under s.150.

19. In *Re Verit Hotel and Leisure (Ireland) Hotel Limited*, (Unreported, High Court, 23.1.2002., (McCracken J.)), the court was confronted with a s.150 application against onetime directors of a company that commenced business in 1990, appears to have gone into liquidation sometime before 1994, and was found by the court to have been trading on monies owed to the Revenue Commissioners. This last fact was something of which McCracken J. was harshly critical, stating, at p.7:

> *"[I]t is clear that at least from the beginning of 1993 this Company was being kept alive by the fact that it was in effect trading on monies due to the Revenue, and allowing huge arrears to build up, together with the attendant interest. Quite astonishingly [counsel for the respondents]…attempted to justify this by arguing that if a company is temporarily short of funds, it may be justified in not paying the Revenue and in effect taking a loan on interest to keep the company going. P.A.Y.E. and P.R.S.I. are monies which a company pays to the Revenue on behalf of its employees, and constitutes its employees tax and its employees social insurance. To try to justify trading by using what is in effect its employees money without their knowledge or consent, is to me a quite bizarre and totally irresponsible attitude…"*

20. It is of course very important that all persons liable to pay tax should in fact do so, not least as their failure to do so is deeply unfair to, and may result ultimately in higher taxation levels for, those who are tax-compliant. That said, in the years since the decision in *Re Verit Hotel*, the courts have taken a more nuanced approach to the link between non-payment of company taxes and the subsequent restriction of company directors. A leading judgment in this regard is that of Finlay Geoghegan J. in *Re Digital Channel Partners Limited* [2004] 2 I.L.R.M. 35. Digital Channel was an e-business that unfortunately failed when it was still in the start-up stage. Thus it commenced trading in July 1999, was in a difficult financial position by April 2001, and ultimately went into liquidation in March 2002. In the s.150 application that followed the liquidator referred, *inter alia*, to the failure by the company to make certain tax returns, and thus to discharge certain tax liabilities, to the Revenue Commissioners. In the course of an *ex tempore* judgment, Finlay Geoghegan J. judgment observed, at p.4, that:

> *"The mere fact that a company is in breach for, as in this case, a relatively limited period will not of itself, it seems to me to indicate that the directors of the company have acted either dishonestly or irresponsibly in such a way as to preclude my concluding that overall they acted responsibly and honestly in relation to the conduct of the affairs of this company. Unfortunately and inevitably where companies are under significant financial pressure this may occur.*
>
> *It appears to me that in 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 either has 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."*

21. Insofar as the application now before the court is concerned, the decisions of the court in *Re Verit Hotel* and *Re Digital Channel* present certain further points of interest:

- first, it is perhaps notable that in *Re Verit Hotel* and also in *Re Digital Channel*, the relevant companies appear to have been quite firmly set on the path to liquidation. By contrast, Salesprint was a company that had weathered a near half-century of doing business and appears to have had a real prospect of trading its way out of the downturn or otherwise generating the income necessary to satisfy its outstanding obligations to the Revenue Commissioners. It was not solely "*being kept alive by the fact that it was in effect trading on monies due to the Revenue"*. It was principally being kept alive because it showed real promise of being able to effect a reversal of its fortunes. An old soldier in the business world, its directors appear to have been determined, and not without reason, that it would not just fade away.

- second, in *Re Digital Channel*, although Digital Channel was able to obtain a tax clearance certificate in January 2001, it appears to have had a chequered history of tax payments for most of its existence. Thus it commenced trading in July 1999 and there were non-payments of various taxes in each of 2000 and 2001, with the company going into examinership in late-2001 and finally into liquidation in early-2002. By contrast, in the case of Salesprint, the only tax issues that were put before the court arose during the last two years or so of its 47-year existence. A company that appears to have paid its taxes throughout 80 per cent of the 10-year period that the respondents were at its helm, and only encountered difficulties as the company commenced down what can now be seen to have been a one-way street to liquidation, is not a company that leaps out to the eye as a company whose directors are wanting in responsibility.

- third, it is perhaps worth noting the sheer scale of taxes that went unpaid by Digital Channel. Thus Finlay Geoghegan J.'s judgment mentions that a tax bill of €1.5m had gone un-paid, and that there were other payments which ought to have been made but were not. Even today, more than a decade later, this represents a colossal amount of unpaid tax and eclipses to some extent the circa. €270k. in taxes that went un-paid by Salesprint. Non-payment of tax is obviously a serious matter, no matter what the scale involved. However, *Re Digital Channel* shows that even when large amounts of tax go unpaid this will not inevitably lead to a subsequent restriction of company directors.

- fourth, in *Re Digital Channel* Finlay Geoghegan J. points to the following characteristics as indicative of behaviour that evinces, at the least, a want of responsibility, viz. selective payment of liabilities, a disregard of Revenue liabilities, or a decision to use Revenue liabilities to finance the company. Although the liquidator sought in the present case to suggest that the payment of monies towards the invoice discounting facility was a selective payment of liabilities, it was established during the course of the hearings that this payment was made in a routine manner pursuant to a standing contractual obligation so to do. Far from disregarding its Revenue liabilities, Salesprint actively liaised with the Revenue Commissioners, even arranging instalment payment plans with the Revenue that it eventually failed to satisfy by virtue of its continuously declining performance. Once again the court notes that Salesprint does not appear to have made a conscious decision to trade on its Revenue liabilities. Salesprint was principally kept alive because almost to the very end it showed real promise of being able to generate new business or income, effect a reversal of its fortunes, and ultimately settle its tax liabilities. Even if its directors were guilty of misplaced optimism as to its prospects, that need not equate to a want of responsibility.

22. Moving on with its consideration of applicable case-law, the court notes that in the more recent decision in *Re James Murphy & Sons Sales (Dundalk) Limited* [2010] IEHC 115, in which she delivered a reserved judgment, Finlay Geoghegan J. noted in relation to

her comments on tax evasion in *Re Digital Channel Partners Limited* that:

> *"I remain broadly of the view expressed. It appears to me a Court should consider in relation to the facts of each case whether the failure to make the tax returns or pay the taxes displays a lack of commercial probity or want of proper standards."*

23. In other words, tax evasion, though a serious matter, need not, per Finlay Geoghegan J. be fatal to a director's bid in any one instance to establish that he or she satisfies the criteria for the non-issuance of a declaration of a restriction against him or her under s. 150.

24. In passing, the court notes that being "*broadly of the view*" previously expressed seems a step down from being 'entirely' of that view. Even so, it is notable that Finlay Geoghegan J. did not, in her reserved judgment, depart from her earlier decision. This despite the fact that, as it was a decision of the High Court *qua* trial court, though the same would apply to the High Court *qua* appellate court, she was ultimately free to do so, given her (then) capacity as a judge of co-ordinate jurisdiction, if she had thought the earlier decision wrong. Matters would have been different, of course, had the earlier judgment emanated from a divisional sitting of the High Court. This is because, by analogy with the five-judge/three-judge principle that typically operates within the Supreme Court, and consistent with the decision of the court in *Wavin Pipes v. Hepworth Iron Co. Ltd* [1982] 8 FSR 32, a divisional judgment of the High Court is considered to be all but binding on later sittings of that court.

25. The decision of the court in *Re Derbar Developments Limited* [2012] IEHC 144 is of especial interest in the context of the within proceedings. Derbar Developments was a property development company. It owned certain lands in Nenagh, Co. Tipperary. In 2006, it sold those lands for a substantial amount of money, generating a Capital Gains Tax (CGT) liability in excess of €800k. This was due for payment by the end of the 2006 tax year. Instead, Derbar used its profits from the sale to acquire various companies. About two years later, in early-2008, it paid almost €391k. towards its outstanding CGT liability. Later that year it paid a further €60k. using loan-monies that were borrowed by Derbar from AIB Bank and personally guaranteed by the respondent former directors. When the property market collapsed, so too, regrettably, did Derbar, going into liquidation in December 2009. Finlay Geoghegan J. found that the proximate cause of Derbar's being wound up was its failure to pay the outstanding balance of its CGT liability on the sale of the Nenagh lands. She had to consider whether the respondents had acted responsibly in relation to the conduct of the affairs of Derbar, notwithstanding this last-mentioned failure. Perhaps surprisingly she concluded that they had acted responsibly, that there was no issue as to their honesty, and no reason why it would otherwise be just and equitable to impose a restriction pursuant to s.150.

26. How did Finlay Geoghegan J. arrive at the last-mentioned conclusions? The court considers her logic to be highly instructive. Thus Finlay Geoghegan J. had regard to the fact that in 2006 the nation was in a property boom, that Derbar had just turned a significant profit, that it sought to increase that profit by means of further legitimate investment, that it had funding arrangements (orally) agreed with AIB Bank whereby it could satisfy its CGT liabilities, and that it was the collapse of the property market that prevented the carrying out of its plan. This Court struggles to see any logical basis why the relentless pursuit of profit that yields an eventual non-payment of tax should be seen to be any more responsible than the relentless pursuit of potential business in a bid to save a company from failure, and its workers from redundancy and, possibly, unemployment. Each involves in essence a scenario where taxes might once have been payable but eventually go unpaid. There may come a point, regrettably, when the reality is that a company cannot be saved from entering into liquidation. Directors of a failing entity must be alive to this possibility even as they seek to resuscitate its fortunes. However, when it comes to deciding the point at which a company's prospects cross the line from redeemable to irredeemable, the courts have long made clear that it does not do to hang a director on hindsight. (See in this regard the decisions of the court in *Business Communications v. Baxter* (Unreported, High Court, 21st July, 1995 (Murphy J.)) and *Re The Computer Learning Centre Limited* (Unreported, High Court, 7th February, 2005 (Finlay Geoghegan J.)).

27. In *Re Noxtad Limited* [2014] IEHC 278, Finlay Geoghegan J. was confronted with respondent directors whom she found "*may have been*" directors of a company called Carlton Athy Limited which had effectively only been able to continue, as a hotel operator, by paying trade creditors from monies due to the Revenue Commissioners. They then became directors of Noxtad Limited, a company that was struck off the register of companies in 2000 for failing to file statutory returns and accounts, restored to the register in 2002, struck off and restored again in 2005, and occasionally guilty of failing to file tax returns and discharge Revenue liabilities until February 2010, its eventual liquidation coming in early-2011. The central issues of concern presenting for the court were the approach taken by the respondents to Revenue liabilities in 2010/2011 and the continued trading of Noxtad in 2011, with a consequent increase in its tax liabilities. In reaching her conclusions in *Re Noxtad*, the phoenix-trading attributes of the case were not wasted on Finlay Geoghegan J., by which the court means that she had regard to the fact that Noxtad rose from the ashes of, and operated the same hotel as, a previous company of which the respondents were possible directors, and which had itself traded on monies that were owed to the Revenue Commissioners. Thus, Finlay Geoghegan J. states, at p.10:

> *"The context in which the Court must view the actions of the respondents includes the fact that the Company took over the trading of the hotel in January 2010, following the review by HBC of the trading of the hotel by Carlton Athy Hotel Ltd., in which as Mr. O'Toole very fairly acknowledges, HBC had clearly set out that '[t]he Revenue are owed €430k and it is the payments to the Revenue that have been sacrificed in order to pay other creditors". Hence the Company was commencing to trade a hotel business where, to the knowledge of the respondents, as directors of the Company, the prior company which traded the hotel had effectively only been able to continue paying trade creditors by using monies due to the Revenue Commissioners.*
>
> *28. It appears an inescapable conclusion from the facts put before the Court that the respondents made a decision to use VAT and PAYE collected or deducted and due to the Revenue Commissioners for the purpose of financing the continued trading of the Company during a significant period prior to the presentation of the petition to wind it up."*

28. In the present case there is no 'phoenix company' dimension to the facts. Moreover, rather than there being a conscious decision, if indeed there was a decision, to use revenue liabilities to finance Salesprint, a remarkable number of realistic initiatives were pursued in a bid to generate new lines of business and income, with the intention of turning a long-time company back to profit and enabling it to meet handsomely all of these payments out that it is the lot of every company of substance to discharge.

29. In *Re Access Cleaning Services Limited* [2014] IEHC 317, the court was presented with respondent onetime directors of a company that in the year before its winding-up had turned around two years' of losses and managed to generate a profit. Moreover, the director who was the prime mover in the company had injected significant monies into the company, was on the verge of raising more money to invest, had engaged of his own volition with the Revenue Commissioners about repaying outstanding tax liabilities, and had a realistic hope of paying those liabilities if the upward trajectory in performance that the company evinced in its last year before liquidation was to continue. Having reviewed relevant precedents and principles, the court concluded, at para. 10, that:

> *"Taxes due should be paid….In the present case, there was not a total disregard of revenue obligations by Access Cleaning: those obligations appear to have been met to around end-2009 and, belatedly but voluntarily, Mr. Martin Gill sought to put an instalment agreement in place with the Revenue Commissioners whereby the company would discharge its accrued revenue liabilities over time at a time when it appears that Access Cleaning was, or was close to being, in a position to pay such instalments. Moreover, rather than there being a conscious decision, if indeed there was a decision, to use revenue liabilities to finance Access Cleaning, Mr. Martin Gill had invested a substantial sum of money into Access Cleaning and was looking to raise another, all of which suggests that there was a deep level of personal commitment to keeping the company in operation from entirely legitimate sources of capital."*

30. In *Re Shellware Limited* [2014] IEHC 184, application was made against the director of a company that designed and manufactured exhibition and presentation stands and also engaged in the interior design and fit-out of public houses. Unfortunately, the company was one of the many victims of the sudden contraction in the Irish economy that occurred in 2008. In fact the swiftness of Shellware's decline was testament to just how quickly the nation's economy declined at that time: the company yielded its best ever financial results in the year-ended June 2007, its sources of business began to dry up in 2008, and by start-2009 an order for its winding-up had issued. There were essentially six grounds on which it was claimed that an order ought to issue against the respondent director in *Re Shellware*, two of which seem of particular relevance to this case, viz. late/non-payment of certain taxes by Shellware and the steps taken by the respondent director when Shellware was in financial difficulty. On these two issues, the court concluded as follows, at p.5:

> *"7. Late/non-payment of taxes. It seems to apply almost without failing in respect of any insolvent company that there will have been late or non-payment of taxes and such is the case here. Is such a failure to be treated as evidence of irresponsibility? [The court then considered the judgment of Finlay Geoghegan J. in Re Digital Channel]…*
>
> *8. There is a history of late-payment and, towards the end of its existence, non-payment of certain revenue liabilities by Shellware. Indeed the eventual petition wind up Shellware was brought by the Revenue Commissioners. There is no evidence to suggest that Shellware or, more particularly, Mr. Breslin [the respondent director] ever avoided making a tax payment in order to keep the business of Shellware afloat. Thus it does not appear from such evidence as has been placed before the court that there are any of the criteria present which would transform the late/non-payment of taxes in this case from reproachable behaviour to irresponsible behaviour…*
>
> *Mr. Breslin took all the steps that one would expect of a company director when it became apparent that Shellware was in financial difficulty. He looked for new business, engaged with trade creditors, sought professional advice and liaised with the Revenue Commissioners. With the benefit of hindsight, it may be possible to view Mr. Breslin as guilty of misplaced optimism regarding Shellware's continuing trading prospects. However, it does not appear to the court that he was guilty of irresponsible behaviour."*

31. The court cannot but agree with counsel for Salesprint that the facts in this case appear to come squarely within the ambit of *Re Access Cleaning* and *Re Shellware*. Again, the court would emphasise in this case, as it did in those cases, that non-payment of tax is a serious matter. As mentioned above, it all but invites a s.150 application and oftentimes will yield a declaration under s.150 of the Act of 1990, though not always, as is clear from successive decisions of the court, from that of Finlay Geoghegan J. *Re Digital Channel* onwards. In the present case there was not a total disregard of revenue obligations on the part of Salesprint. Those obligations appear to have been met for all but the last two years of its existence. The company never 'buried its head in the sand' when it came to tax liabilities. On the contrary, it liaised with the Revenue Commissioners and, trading in part on its deserved reputation for tax compliance, established repayment arrangements with the Revenue Commissioners whereby the company would discharge its accrued revenue liabilities, albeit that these arrangements eventually failed thanks to the continuing decline in Salesprint's trading performance. Rather than there being a conscious decision, if indeed there was a decision, to use revenue liabilities to finance Salesprint, it appears to the court that realistic business prospects were energetically pursued throughout the waning days of Salesprint's existence in a bid to see the company through what cannot have been the first financial storm in its near-half century of existence. If the actions of the respondents in this regard are to be criticised, it seems to the court that, as in *Re Shellware*, the criticism to be made is one of misplaced optimism; it does not appear to the court that there is a want of responsibility or any other deficiency that would require the issuance of a declaration of restriction under s.150 of the Act of 1990.

32. *(iii) Professionals as directors.* Mr. Murphy is an accountant by profession. Counsel for the liquidator suggested during the hearing of the within application that, as a professional-turned-director a higher duty of care fell to be observed by him *qua* director. To this end, counsel referred the court to *Mitek*, most notably to the observations of Fennelly J., at p.397 of his judgment, that directorships are more than sinecures, that even non-executive directors cannot be mere ciphers or purveyors of votes at the whim of management, and that circumstances will inform the nature and extent of a director's duties.

33. The court accepts that directors do not become denuded of their professional and business experience when they seat themselves at the board table and hence that a director who is also an accountant may, for example, find it more difficult to satisfy a court that he or she was unaware of a serious transgression of the rules of accounting that featured openly in the company's books and accounts and was known to him or her. That said, in the present case the court does not consider that the fact that Mr. Murphy is an accountant ought to count against him in any way. The fact that he is an accountant had nothing to do with his becoming a director, though it likely enabled him to act as a better director. The wrongs that are alleged of Mr. Murphy, as a former director of Salesprint, are almost all wrongs that most people, professionally qualified or otherwise, would recognise as involving wrongdoing, viz. non-payment of tax, giving a value to shares that they do not possess, taking improper loans from a company of which one is director, and seeking to deceive the company's creditors. Mr. Murphy has never pretended that he does not consider that these alleged wrongdoings are wrongs. Given that he is an accountant, he would not have been believed had he done so. The only wrongdoing alleged of Mr. Murphy that might not immediately be recognised as a wrong by a non-professionally qualified director is Salesprint's alleged lateness in convening a creditors' meeting. Such lateness is an issue to which an accountant would almost certainly be more attuned than a 'lay-person' and thus an accountant-turned-director could find that she would face a harder job in persuading a court of the responsibility of her actions in the face of such a wrong-doing than would, for example, a non-professionally qualified trader operating her business through a limited liability company. However, the court has already indicated that such lateness as arose, if it arose, in this case is not a significant factor, certainly not of the significance as to require the issuance of a declaration of restriction under s.150 of the Act of 1990.

34. *(iv). Preferment.* Repeated references were made throughout the hearing of this matter to an alleged preferment by Salesprint of Bank of Ireland as creditor and – as a consequence of Salesprint's decision to continue trading through its financial difficulties for a time – a continuing preferment of all creditors, over the Revenue Commissioners. The alleged preferment of Bank of Ireland arises from the fact that, in the course of Salesprint's trading through its difficulties, it received, in June 2010, a 'payment in' that it allocated in part-settlement of its invoice discount facility with the bank, rather than its receipt being mentioned to the Revenue Commissioners

so as to get their input as to what ought to be done with the payment when received, a course of action for which counsel for the liquidator contended. The court can hazard a guess as to the view that the Revenue Commissioners might have volunteered if approached, but the fact that they were not consulted or that the payment went to Bank of Ireland without the Revenue Commissioners being consulted does not strike the court as intrinsically wrong. Notably there was no pressure on Salesprint to make this payment. It simply made the payment as a matter of course as it continued seeking to trade through its difficulties and at a time when there were business prospects still arising that entailed a realistic prospect of Salesprint's continuing as a going concern. Notably too, there was no personal benefit to the respondents in making the payment. The reduction of the invoice discounting facility led directly to increased reliance on the company's overdraft facility and that facility was personally guaranteed by the respondents.

35. Insofar as the alleged preferment of Bank of Ireland is concerned, the liquidator sought to rely upon the decision of the court in *Re Swanpool Limited* [2005] IEHC 341, a decision that the court considers to be largely distinguishable on its facts from the present case. In *Re Swanpool*, certain investors had placed money into Swanpool on foot of a business expansion scheme or 'BES'. There was nothing wrong with that transaction. However, by the time the investors came to be repaid, the company had suffered a serious reversal of fortune in that company premises which it had hoped to sell for about €2m had eventually been sold for a quarter of that price after certain planning difficulties arose. The payment of monies owed to the investors was perceived to involve a preferment of the BES investors over the Revenue Commissioners, albeit a preference that did not benefit any of the directors or any connected person and in fact resulted in an eventual financial loss to one of the directors who was himself a significant, and ultimately disappointed, creditor of Swanpool. In his judgment, Clarke J., at p.7, states that:

> *"One of the most important obligations of any director is to ensure that when a company is facing an insolvency situation, its assets are dealt with in accordance with law….While understanding the pressures which may have been on the directors it does have to be noted that all directors in insolvent circumstances are likely to be subjected to significant pressure. It is their job to resist such pressure and to ensure that the company's assets are properly dealt with. Any significant failure in that regard has to be taken as demonstrating a level of irresponsibility sufficient to warrant making an order under [s.150]….In that respect this case is not like one where, for example, a single (though perhaps significant) commercial misjudgement is made in the dying days of a company which had otherwise been managed in an entirely proper way. In those circumstances unless the misjudgement was of a very serious type indeed it is unlikely that the court would judge the overall commercial management of the company as displaying a sufficient degree of irresponsibility to warrant making the order."*

36. At least three points might be made about the relevance of *Re Swanpool* to the present case. First, the facts do not appear to the court to be 'at fours' with those arising in this case. Swanpool appears clearly to have been in a pre-insolvency stage of its evolution. By contrast, almost to the last, Salesprint appears to have evinced real promise of being able to generate new business or income, effect a reversal of its fortunes, settle its tax liabilities, and trade into the future. Its directors may have 'called' this wrong but that does not necessarily make them guilty of irresponsibility; it means nothing more than that they are human and so capable of error to a degree that does not require subsequent sanction pursuant to, and in accordance with the terms of, s.150 of the Act of 1990. Second, as mentioned above, there is no indication that the respondents were under any commercial pressure to make the payment made to Bank of Ireland; they were simply honouring a contractual obligation as they traded through a downturn in the company's affairs which, it appears with every good reason, they had some confidence or at the least real hope, of surviving. Third, it seems to the court that the liquidator cannot have it every way: if he is correct that the company was on its 'last legs' by the time that the payment to Bank of Ireland was made, then the making of that sole payment seems to the court to be arguably an example of the kind of singular commercial misjudgement which Clarke J. suggested in *Re Swanpool* would not require an order of restriction.

37. Counsel for the liquidator also contended that as a consequence of Salesprint's decision to continue trading through its financial difficulties for, what he contends was an unduly long time, there was a continuing preferment of all creditors, over the Revenue Commissioners. In this regard he referred to the decision of the English Court of Appeal in *Re Sevenoaks Stationers (Retail) Ltd.* [1991] Ch. 164. By way of general note, when it comes to applications under s.150, the court considers that there are two reasons why foreign precedents are of relatively limited assistance. First, the last near quarter-century has, regrettably, yielded a rich harvest of instances in which the Irish courts have been called upon to interpret and apply s.150 of the Act of 1990. So much so that there must now be relatively few, if any, aspects of s.150 that have not been considered comprehensively by our own judges, whose judgments are, of course, always to be preferred as a matter of precedent. Second, the court must admit to considerable scepticism as to whether applications under s.150, being applications that are so peculiarly context-based in terms of the cultural and economic environment in which a director operates, are applications that benefit from regard to the jurisprudence of an alien jurisdiction whose cultural and economic experiences and expectations differ so greatly from our own. Notwithstanding the foregoing, *Re Sevenoaks* does provide an eloquent elucidation as to how the form of continuing preferment of the general body of creditors over the Revenue Commissioners that is contended for by the liquidator in this case can arise, and why it is objectionable. In that case the Court of Appeal considered that the deliberate, discriminatory preferment of trade creditors who were pressing for payment over other creditors, such as the Crown, which had thus far stayed its hand, was a factor that added weight to the case for disqualification, Dillon L.J., stating at p.183 that:

> *"Mr Cruddas made a deliberate decision to pay only those creditors who pressed for payment. The obvious result was that the two companies traded, when in fact insolvent and known to be in difficulties, at the expense of those creditors who, like the Crown, happened not to be pressing for payment. Such conduct on the part of a director can well, in my judgment, be relied on as a ground for saying that he is unfit to be concerned in the management of a company. But what is relevant in the Crown's position is not that the debt was a debt which arose from a compulsory deduction from employees' wages or a compulsory payment of VAT, but that the Crown was not pressing for payment, and the director was taking unfair advantage of that forbearance on the part of the Crown, and, instead of providing adequate working capital, was trading at the Crown's expense while the companies were in jeopardy. It would be equally unfair to trade in that way and in such circumstances at the expense of creditors other than the Crown. The Crown is the more exposed not from the nature of the debts but from the administrative problem it has in pressing for prompt payment as companies get into difficulties." [Emphasis added].*

38. There does not appear to have been any "*deliberate decision*" in this case to pay only those creditors who "*pressed for payment*". In fact, the only creditor that demonstrably pressed for payment in this case – BBP – did not, regrettably, get its debts paid prior to the company being wound up. Thus the court is not convinced that the facts in this case satisfy the criteria for preferment of the mass of creditors over the Revenue that Dillon L.J. appears to delineate in *Re Sevenoaks*. In truth, this entire line of argument seems to the court to be but a 'heaping of Pelion upon Ossa' in a bid to secure a declaration of restriction against the respondents. But just as the Aloadae failed to scale the heavens with their efforts, so too this avenue of attack is in this case fruitless.

39. *(v). Trading through difficulties.* An eternal conundrum of company law is when does trading through financial difficulties cross the line from commercially sensible to legally reprehensible? That is a question the answer to which would fill a lengthy academic monograph. In this section of its judgment the court confines its considerations to two relevant cases to which it has been referred, *viz*. the decisions of the court in *Re Careca Investments Limited* [2005] IEHC 62 and *Re Pineroad Distribution Limited* [2007] IEHC 55.

40. In *Re Careca Investments Limited*, one of the issues arising was a delay on the part of the director to ensure the winding-up of Careca within a reasonable period of it ceasing to trade and in circumstances where he knew or ought to have known that it was insolvent. Giving judgment in that case, Clarke J. states, at para. 3:

> *"[I]n general terms the directors of an insolvent company are under a duty to seek to have same wound up. That duty does, of course, depend on all the circumstances of the case and there may well be appropriate instances where, at least for a period of time, it may be appropriate to postpone winding-up pending attempts to deal with the issues that arise by virtue of the insolvency…Mr Coady was, to a very large extent, prepared to let matters lie until the Revenue Commissioners became active. While he has indicated that he felt at all material times that the revenue debt could be met if [certain]…inappropriate payments made out of the funds of the company were returned, he does not, quite frankly seem to have done very much about it. To this he pleads an absence of funds but no real explanation is given for why he did not take the advice which he concedes he was given by his solicitor to the effect that he should have sought to have the company wound up."*

41. Here the directors of Salesprint clearly considered that there were real and substantial business prospects in the offing. They did everything conceivable to bring them to fruition. Moreover, the accountant who reviewed their business prospects appears never to have advised them that they ought to have the company wound up, albeit that an absence of such professional advice is not, of course, a 'get out' clause as regards director responsibilities in this regard. From end-May 2012, it is undoubtedly the case that Salesprint could have been wound up by the courts, albeit that it appears from the facts that the respondents continued to have valid reason for considering that the company's fortunes might yet be turned around even at that late stage. The company went into voluntary liquidation later in the summer. As mentioned elsewhere above, this may or may not have been slightly too late but, regardless, it seems to the court that some degree of latitude has to be afforded to directors in this regard. The life of the law is not logic, it is experience, and experience teaches that gauging the exact moment that a company becomes insolvent is in practice an inexact science. Sometime in the summer of 2012, Salesprint should have convened a creditors' meeting and gone into liquidation, and this it did. The court does not consider that insofar as the respondents may have erred in the timing of placing the company into voluntary liquidation they are guilty of irresponsibility, or that their actions in this regard make it otherwise just and equitable that a declaration of restriction under s.150 should issue.

42. The case of *Re Pineroad Distribution Limited* [2007] IEHC 55 is another case in which directors sought to trade through their difficulties, in effect utilising unpaid Revenue liabilities to do so. In his judgment, Hanna J. acknowledges the possibility that this may be legitimate behaviour for a short period of time, but not for any protracted period. However, looming large through the facts of that case is a commercial restructuring that Pineroad, a haulage company, entered into in the period before its demise and which, to use a phrase beloved of *sommeliers*, had an 'interesting bouquet' about it. Thus about thirty-two months before Pineroad went into liquidation, it entered into an arrangement with a key employee who had tendered his resignation whereby that employee was given a ten per cent stake in a new company which, without any payment for goodwill being made, was given the use of Pineroad's employees, vehicles and other equipment. This arrangement had two principal effects. First, in reality the entire workforce and about seventy trucks of Pineroad were transferred to the new company which had no set-up costs and effectively carried on the business in which Pineroad had done well for a period of some thirteen years. Second, Pineroad was left with large tax liabilities and, though it received certain payments from the new company, Hanna J. concluded, at p.11 of his judgment, that these were "*dramatically short*" of what was required to meet Pineroad's existing debts. The end-result of the restructuring was that Pineroad was left trading on its Revenue liabilities while the new company was able to trade gaily without this particular millstone hanging around its neck. This is exactly the type of trading history that would weigh heavily on the mind of any judge called upon to consider the actions of former directors, and which clearly weighed heavily with Hanna J. There is no equivalent transaction in the trading history of Salesprint. Consequently, the court considers that *Re Pineroad* can be distinguished on its facts to the extent that it is of no relevance in the present context.

43. *(vi) The decision in Re Frederick Inns.* Counsel for the liquidator sought in the course of argument to rely on the precedent presented by the decision of the Supreme Court in *In re Frederick Inns Ltd.* [1994] 1 ILRM 387. In that case four companies within a group of companies paid a certain sum of money to the Revenue Commissioners. This sum was then applied by the Revenue Commissioners on a pro-rated basis to the tax liabilities of all ten members of the group. So in effect, the few gifted the benefit of monies to the many. Not surprisingly, the liquidator who was later appointed to the four companies challenged the validity of what had been done. He was successful in the High Court and also appealed successfully to the Supreme Court on the question of how much money fell to be repaid to the four. In the course of giving judgment, Blayney J. established or invoked the principle that the directors of a company that can be wound up by any creditor have a duty to the body of creditors of that company to preserve the assets of the company, or at least not to dissipate them, in anticipation of the inevitable winding-up of the company. Per Blayney J., at p.396 of his judgment:

> *"It is clear…that as soon as a winding-up order has been made the company ceases to be the beneficial owner of its assets, with the result that the directors no longer have power to dispose of them. Where, as here, a company's situation was such that any creditor could have caused it to be wound up on the ground of insolvency, I consider that it can equally well be said that the company had ceased to be the beneficial owner of its assets with the result that the directors would have had no power to use the company's assets to discharge the liabilities of other companies. Once the company clearly had to be wound up and its assets applied pro tanto in discharge of its liabilities, the directors had a duty to the creditors to preserve the assets to enable this to be done, or at least not to dissipate them.*
>
> *This conclusion is supported by the decision of the Court of Appeal in New South Wales in Kinsela v. Russell Kinsela Property Ltd (in liquidation) [1986] 4 NSWLR 722. The essential facts of this case were summarised as follows by Street CJ in his judgment…*
>
>> *'This insolvent company, in a state of imminent and foreseen collapse, entered into a transaction which plainly had the effect, and was intended to have the effect, of placing its assets beyond the immediate reach of its creditors…'*
>
> *At p.730 of his judgment he outlined as follows the principle on the basis of which he came to this conclusion:*

'In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholder's assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration.'

I would respectfully adopt and follow this statement of the law…"

44. It is notable that in *Kinsela*, as in *Re Frederick Inns*, the court was presented with an 'offensive' transaction; in *Kinsela* one that "*had the effect, and was intended to have the effect, of placing…[the company's] assets beyond the immediate reach of its creditors*"; in *Re Frederick Inns* an arrangement that could not be lawfully and effectively done and which was *ultra vires* the four companies and hence void. There is no equivalent transaction in issue in the instant proceedings. The only specific transaction that the liquidator in this case has sought to impugn is the payment made to Bank of Ireland in part-settlement of the invoice discounting facility. But the court has already found that this payment was made by Salesprint as a matter of course, not due to creditor pressure, as it continued seeking to trade through its difficulties; it occurred at a time when there were business prospects arising that entailed a realistic prospect of Salesprint's continuing as a going concern; and it did not yield any personal benefit to the respondents. Even if one accepts that the above-quoted segment from the judgment of Blayney J. in *Re Frederick Inns* is applicable to transactions which have no colourable dimension, the court does not consider that *Re Frederick Inns* was intended to preclude *bona fide* efforts by serious-minded directors to trade through a period of trading turbulence. It merely has the effect that when directors do so, they should be careful to have regard to the interests of all creditors, if only for fear that any failure to do so might later be held against them. In this case, the court can find nothing to suggest that the directors did not do so. They sought to liaise with all creditors, be they ordinary trade creditors or the Revenue Commissioners. And they sought to pursue numerous realistic prospective lines of business and income which, if realised, would have enabled them to continue trading and, over time, to pay off their restructured liabilities. Even if the court strays for a moment and views the actions of the respondents in this case with that glorious Technicolor of hindsight which the decisions of the court in *Business Communications* and *Re The Computer Learning Centre* effectively caution against, the court cannot find anything in the facts of this case to sustain the allegation that, in seeking to trade through difficulties, the respondents did not have proper regard to the interests and wants of Salesprint's various creditors.

45. *Section 152 of the Act of 1990*. In the course of argument, counsel for the liquidator referred to the availability of relief to restricted directors under s.152 of the Companies Act 1990 as a relevant factor when it comes to applications under s.150. Under s.152, a person who has been the subject of a restriction order under s.150 may, within not more than one year of the declaration of restriction being made, apply to the court for, *inter alia*, complete or partial relief of any restrictions imposed pursuant to s.150. Reference was made in this regard to the decision of the court in *Re Xnet Information Limited* [2006] IEHC 289, a case in which O'Neill J. granted qualified relief under s.152 to a previously restricted director. This Court, respectfully, does not consider that any weight ought to be attached to the potential availability of relief under s.152 when deciding whether or not the court is required to issue a declaration of restriction under s.150. That would seem akin to having regard to the possibility of a life hereafter when deciding whether or not to guillotine a man. There may or may not be such a possibility but it is not really the issue at hand. In the context of a s.150 application, the issues at hand are whether a former director has shown that his or her behaviour does not evince a want of honesty or responsibility, and the court has determined that it is not otherwise just and equitable that a restriction order should issue against such person. The fact that if such a director is restricted, the restriction may later be lifted, is a secondary concern. Moreover, even if the court considered (and it does not) that the rehabilitative potential of ss.150 and 152, when operated in tandem, is relevant to its deliberations in the context of an application under s.150, at least four significant practical concerns arise in this regard:

- first, most of the respondents who come before the court in s.150 cases appear to this Court to have been financially ruined or close to ruined and the notion that they would generally be in a position to afford the cost of bringing a s.152 application, even if they are aware of the availability of such potential relief, seems a mite unreal.

- second, as O'Neill J. indicated in *Re Xnet*, the stigma attaching to a s.150 order in the commercial community may not be attenuated, or at least may not be attenuated quickly, by virtue of a later order under s.152. Thus, per O'Neill J. at p.23 of his judgment:

"The applicant…has had to live with the declaration under s.150 for the period…since the making of the declaration. This stigma arises from knowledge of the declaration in the business community and in my view the removal of the restriction…will not end the stigma effect of the original declaration. No doubt in time as the applicant is rehabilitated in commercial life the stigma effect will wane."

- third, apart altogether from 'stigma', there are other more practical concerns arising that make a s.150 declaration an extremely serious matter for an affected person, notwithstanding the ostensible availability of possible relief under s.152. For example, it may impact on his or her ability to raise borrowings from a credit institution regardless of whether the restriction is later lifted. Moreover, it will almost certainly have a negative impact on an affected person's prospects of pursuing a career as a non-executive director even if he or she is ever rehabilitated under s.152. In short, to paraphrase Wilde, the notion that s.152 offers a true prospect of a second-start as a director, appears in practice to be but another example of 'the triumph of hope over experience'.

- fourth, even if an individual knows that he can seek relief under s.152, and has the funds to finance the bringing of such an application, or possesses the courage and stamina to bring such an application in person, it is clear from *Re Xnet* that such relief will not lightly be afforded to such an individual and that success is by no means guaranteed; these are factors that may themselves deter individuals from making application. It may be, as O'Neill J. notes at p.19 of his judgment in *Re Xnet*, that "*the Oireachtas was intent on the relatively speedy rehabilitation of directors in respect of whom declarations of restriction were made*." However, the best-laid schemes of mice and men and, Scott might have added, even national parliaments, sometimes go awry; thus it appears to the court that there are grounds for doubt as to whether the laudable intentions that O'Neill J. recognised as underpinning the combined operation of ss. 150 and 152 of the Act of 1990 are recognised in reality. Certainly this Court, if it looks to the past year, has dealt with multiple s.150 applications but has yet to be presented with a single application under s.152.

46. (viii). 'Ties of affection'. The second-named respondent in this company claims to have been a largely uninvolved director of Salesprint and thus that she ought to be able to escape liability on this basis. Thus she avers in her affidavit:

"I say that, as averred to in the Affidavit of the First Named Respondent, I had a limited involvement in the affairs of the

Company. I was a non-executive director of the Company. As such I had no role in the day-to-day running of the Company. However, I did discuss the difficulties facing the Company and the measures taken by the First Named Respondent to attempt to resolve those issues. Those measures have been described in detail by the First Named Respondent in his Affidavit. In particular, I met with Mr Paraic Bergin [the accountant who was engaged to consider how the company might better its fortunes] on two separate occasions with the First Named Respondent. I also discussed the details of the offer with DPD in or about Christmas 2011 and the potential deal with McGann and Associates in early 2012."

47. The court considers that there is sufficient in the foregoing to evidence that Ms Murphy was in fact highly involved in the conduct of Salesprint's affairs. However, as a courtesy, the court proceeds to consider the applicable law arising. In this regard reference was made by counsel for the second-named respondent to the court's decision in *Director of Corporate Enforcement v. Slattery* [2014] IEHC 363. In that case, at paras. 15–16, the court considered at some length the decision in *Re Hunting Lodges Limited (in liquidation)* [1985] I.L.R.M. 75, in which Carroll J. indicated in effect that a married female director cannot escape liability as a director by reference, for example, to some sort of subservience to husbands that may have existed before the modem age of equality between the sexes. In its analysis of that case the court made perhaps four key points:

- first, by way of general remark, the court noted that Carroll J.'s observations were made solely in relation to a married woman who embarks upon a passive company directorship. In this regard the court volunteered the view that in our contemporary society where there are many couples in which the wife is the principal commercial actor, and there are many unmarried and same-sex couples, there seems no reason why Carroll J.'s comments should not be considered to apply by analogy to any spouse or indeed to any romantic partner, male or female, heterosexual or homosexual, or any person who, motivated primarily by virtue of ties of affection, agrees to act as a passive director in a company so as to satisfy the minimum two-director requirement that arises under current company law.

- second, the court noted that Carroll J. did not say that a married female director can never escape liability as a director where she embarks upon a directorship primarily out of ties of affection and never does anything of substance in relation to the company of which she is director. The court considered that such an approach would place so great a premium on legal reality above practical reality as to be almost certain to result in injustice in some instances, an outcome which Carroll J. undoubtedly did not intend.

- third, the court observed that Carroll J. did not dismiss the possibility that a passive or 'nominal' director may be excused liability in some circumstances. Indeed she cited one instance, at p.85 of her judgment, that of where a passive director "*reasonably endeavoured to keep abreast of company affairs and had been deceived",* in which it might be possible to excuse such director from liability.

- fourth, the court noted that Carroll J. does not indicate that there are no other instances in which a nominal director might be so excused. She establishes as the litmus-test of personal liability in respect of such a director that there should, as a matter of necessity, be some "*real moral blame*" attaching to her before personal liability should arise.

48. The decisions in *Re Hunting Lodges* and *Slattery* do not have, and should not be construed as having, the effect that it is 'closed season' as regards bringing s.150 applications against, for example, husband-and-wife directors. All it means is that just as it did not suffice for the female director in *Re Hunting Lodges* to claim that she should be excused from liability as a director because of her status as spouse, neither statute nor case-law requires the imposition of liability on a person regardless of his or her status as a spouse and heedless of the fact that it may be primarily 'ties of affection' that drove a person to assume what is in practice, albeit not in law, a 'nominal' directorship. Looking to the above averments of Ms Murphy, it is clear that she did not have that level of detachment and indirect benefit that would bring her within the ambit of *Slattery*. She was consulted on the difficulties that faced the company and she was involved in critical meetings and transactions concerning the company. In short, she played much the role of any non-executive director. Thus in this case she must, to use a colloquial expression, 'sink or swim' with her fellow director when it comes to whether or not a declaration of restriction should issue under s.150.

Some factors of relevance

49. The court indicates its conclusions in the next section below. Before proceeding to do so, however, the court pauses to mention four factors that it considered of relevance to its deliberations and which it touched upon elsewhere above, viz. the scale of Salesprint as an enterprise, the longevity of its existence, the length of the respondents' tenure as directors of Salesprint, and the 'crash' of 2008.

50. Scale of Salesprint as an enterprise. Business is a human endeavour. It would be easy to lose sight of this human dimension in the clinical ambience of a courtroom. At the peak of its employment, Salesprint had ten employees. That is ten wage-slips, up to ten families being supported, and up to ten home mortgages being paid. That is a tremendous responsibility for the directors to bear and any rational director would be cognisant of this responsibility when it comes to settling on the future fate of the company. Any person placed in the position of the respondents would almost certainly try to see if there was some means of saving the company and saving all those jobs before electing to place the company into liquidation. As can be seen from the above description of facts, the directors of Salesprint went to the 'nth' degree in terms of the reasonable and commercially sensible efforts undertaken to save Salesprint from financial collapse. Such efforts take time, they take energy, and when looking to the detail of this case and determining whether in all their actions the respondents evinced that responsibility which the law demands of all directors, the court must take stock of the extent to which, in particular, Mr. Murphy was occupied with, and the lengths to which he went in, his efforts to save Salesprint. The court must attach weight to all that was done right. Insofar as there was any wrong on the part of the directors, the court must determine whether the gravity of that wrong is such as to swing the scales in favour of a finding that a declaration of restriction is required to issue against them.

51. Longevity of Salesprint's existence as a company. Salesprint was an 'old soldier' in its field of endeavour. In an age when many companies fail within the first few years of their existence, Salesprint had endured for 45 years before the cancellation of the Diageo contract in 2010 and the commencement thereby of the chain of events that led ultimately to its collapse and ultimately to the initiation of the within proceedings. Doubtless in those 45 years, Salesprint met with many business challenges and yet it survived. It seems to the court that the directors of a company that weathers almost five decades in business can be more justified in taking the view that a company might yet weather whatever current trading difficulties confront it, merely by virtue of the fact that it has done so before, than would the directors of a start-up company that has no history of resilience and no established reputation in its field of business. This does not mean that the directors of a longstanding business can continue to trade oblivious to the financial reality of imminent collapse. It means merely that they may be acting reasonably in taking a more sanguine few of its continuing prospects, as informed by their past experiences, than would be the case if they were directors of a company that did not enjoy a similar longevity of existence.

52. Length of respondents' term as directors. The court has had regard to the fact that the respondents were directors of Salesprint from 2001 onwards. In the course of the within proceedings no adverse comments were made regarding their stewardship of the company other than during the period that is the focus of this application, being roughly July 2010 to August 2012. Their near decade-long period of unblemished behaviour is a factor to which, consistent with the decision of the Supreme Court in *Re Squash (Ireland) Ltd.* [2001] 3 I.R. 35 at p.41, the court can have, and has had, regard when determining the within application.

53. The 'crash' of 2008 and its aftermath. The decline and fall of Salesprint took place in the bleak trading environment that followed the collapse of our national economy in late-2008 and the protracted economic decline that followed. This is a contextual dimension to the facts of this case that cannot be ignored. All of us who lived through the events of 2008 and the succeeding years remember vividly the speed and depth of the economic contraction that engulfed our nation at that time; even now, we are still living with the consequences. It would ill-become the courts not to remember what none of us who have lived through that period will quickly forget. It would ill-serve justice to interpret laws and apply case-law with an immutable constancy that, subject to the requirements of precedent, they do not themselves demand. Nowhere will one find the assertion that the criteria of reasonableness, justice and equity, as referred to in s.150 of the Act of 1990 and interpreted at one time, fall to be so construed for all time. To paraphrase Justice Oliver Wendell Holmes, words are the skin of living thoughts and may vary in colour and content according to the circumstances in which they are used. Though the directors of Salesprint no doubt appreciated, with a clarity that only the worst of declining sales figures can bring, that they were working through an unprecedented economic and financial maelstrom, they would not have been alone if they did not immediately apprehend just how bad matters were and how much worse they were to become.

Conclusions

54. The court returns now to the five bases offered by the liquidator as requiring the issuance of a declaration of restriction against the respondents and indicates its conclusions as to each ground. It will be recalled that there is no allegation of dishonesty made against the respondents. Nor, having regard to the facts presented before it, does the court consider that any issue of dishonesty arises.

55. **Allegation No. 1. That the respondents did not see to it that Salesprint discharged historic and recent debts to the Revenue Commissioners, with the result that the company owed almost €270k. to the Revenue Commissioners by the date of winding up, and that they allowed the issuance of cheques to the Revenue Commissioners that were subsequently dishonoured.** It appears now to be agreed between the parties that there was no dishonouring of cheques. As regards the debts owing to the Revenue Commissioners, the respondents acknowledge that, from the autumn of 2010, Salesprint's outstanding liabilities to the Revenue Commissioners began to rise. However, because of the company's previous good record of tax compliance the Revenue Commissioners were willing to work with Salesprint and give it time to see if it could trade through its difficulties. This situation prevailed until 17th June, 2012, *i.e.* until a few weeks before Salesprint went into voluntary liquidation and following all the manifold steps that were taken, as outlined above, to avoid such an outcome. On that date, following a proposal to put an instalment tax payment arrangement in place, the Revenue Commissioners requested that Salesprint pay a substantial lump sum upfront which the company was unable to raise. In any event, by this time sales had deteriorated so badly that Salesprint would have been unable to pay the instalments. It is a credit to Salesprint that it had a history of tax compliance sufficient to earn it the forbearance that it was shown by the Revenue Commissioners. As is clear from the consideration of case-law above, the non-payment of tax need not yield the necessary consequence that a declaration of restriction under s.150 of the Act of 1990 must follow. Conscious of, and consistent with, that case-law, the court does not consider that there are the requisite factors in this case that would require the issuance a declaration of restriction against the respondents by reference to the non-payment of taxation. Nor does the court consider that it is otherwise just and equitable that such a restriction should issue.

56. **Allegation No. 2. That the last filed accounts of Salesprint (for the year ending 31st March, 2010) show a debtor figure of just under €481k. owed by group undertakings. This figure reflects an amount loaned by Salesprint to its parent company to buy shares in Salesprint. The liquidator contends that as the shares of Salesprint were largely if not entirely worthless by 31st March, 2010, the debtor figure should have been written off. In short, the liquidator contends that the last-filed accounts were incorrect.** As mentioned above, the €481k figure represents a genuine loan from Salesprint to its parent company in 2001 to buy shares in Salesprint, and was presumably done in accordance with s.60 of the Act of 1963. The loss of the Diageo account did not occur until July 2010. This last event was the trigger for all of Salesprint's financial woes over the next two years and ultimately its eventual liquidation. For the liquidator to contend that audited accounts for the year ending 31st March, 2010, ought to have set the value of Salesprint at nought seems to the court to be a remarkably early date – in the court's respectful opinion it is too early a date – from which to take such a view; notably, it would seem to depart from the view of the independent auditor who audited the accounts and who appears to have been satisfied with the applicable value that was settled upon therein. The court does not find in the actions of the respondents in this regard any want of responsibility that would require the issuance of a declaration of restriction under s.150. Nor does the court consider that it is otherwise just and equitable that such a restriction should issue.

57. **Allegation No. 3. That the respondents should have convened a creditor meeting earlier than they did and only eventually did so upon receipt of a statutory demand from the Revenue Commissioners.** The event that precipitated the eventual voluntary winding-up of the company appears to have been the petition for the winding-up of the company brought by BBP on 12th July, 2012. However, right up to the end there were meaningful business prospects that the company was chasing up and debt restructurings that were being worked on. It is rarely if ever easy to identify the exact moment at which a creditor meeting should be convened and it seems to the court that some degree of latitude has to be afforded to directors in this regard. Real life cannot be reduced to unreal exactitude, and neither law nor precedent demands that this be done. The court finds that, by the summer of 2012, Salesprint was in serious difficulty. However, the court does not find that as a matter of probability the respondents should have convened a creditor meeting at an earlier time than they did. At worst it appears to the court that it fell to be called around the time that it was called, perhaps a little earlier. Again, the court does not find in the actions of the respondents in this regard any want of responsibility that would require the issuance of a declaration of restriction under s.150. Nor does the court consider that it is otherwise just and equitable that such a restriction should issue.

58. **Allegation No. 4. That, allegedly in breach of s.31 of the Companies Act, 1990, the respondent directors received a total loan from Salesprint of just over €60k. between 1st April, 2009 and 31st March, 2010, which loan amount was never repaid.** As this Court previously noted in its decisions in *Re Zuccini Café and Restaurant Limited* [2014] IEHC 369 at para 6, and *Re Mint Restaurant Limited* [2014] IEHC 370 at para. 6, "*A company, however small, is not the private purse of its directors*". The area of company loans to directors, connected persons and holding companies, is rightly and tightly regulated; a prudent director will tread carefully in this area, it being one in which it is easy to tread quickly over the precipice of illegality. The court does not have sufficient evidence before it to conclude whether or not there was a breach of s.31 of the Act of 1990. It is satisfied that no loan monies ever issued to Ms Irene Murphy. Moreover, it has evidence before it which suggests that almost all of the loans arising have effectively been repaid. Thus the court finds that during the period 1st March, 2011 to 31st March, 2012, Mr. Murphy lodged just under €54k. of his own monies to the company to meet wage and other ad hoc business expenses. The monies so lodged were not

intended as a gift and can be treated as, in effect, a repayment of the loan amount, leaving Mr. Murphy with an outstanding liability to the company of just over €6k. Given the scale of the enterprise that was Salesprint, the court cannot see that even if there was an outstanding personal liability of €6k. owed by Mr. Murphy to Salesprint, that this would, for example, evince such a want of responsibility on his part as to require the issuance of a declaration of restriction against him under s.150, particularly as it does not appear that Mr. Murphy has ever refused to repay this sum of money. It will be recalled that no allegation of dishonesty is levelled against either Mr. or Ms Murphy, nor does the court find any dishonesty to arise on their part. That said, the court would note that the loose 'money out, money in' arrangements that pertained within Salesprint during its waning days is worthy of some reproach. Experienced business-people like Mr. and Ms Murphy knew or ought to have known that a more tightly controlled arrangement ought to have been in place, particularly when Salesprint was encountering financial difficulty. Given the scale of the borrowings, the arrangement and operation of such loans as issued from the company to Mr. Murphy ought ideally to have been the subject of independent professional advice. However, for the reasons stated, the court concludes, having regard to the phraseology employed by McGuinness J. in *Re Squash (Ireland) Ltd.* [2001] 3 I.R. 35 at p.42, albeit writing in a different context, that while the actions of Mr. and Ms Murphy in this regard are open to some criticism, their actions do not fall to be categorised as irresponsible or dishonest, nor do they offer a basis on which it would otherwise be just and equitable that they should be restricted as directors.

59. **Allegation No. 5. That the Respondents presented a misleading statement of the affairs of the Company to a creditor a number of months prior to the winding up. The said misleading statement of affairs overstated the financial position of the Company.** The draft document that issued to the affected creditor (BBP) was prepared in good faith on the accounts to hand at the date of preparation and clearly marked 'Draft'. The company's accounts appear generally to have been prepared and maintained to an appropriate standard and thus, the court finds, could reasonably be relied upon in this regard. Consequently the court does not consider that such behaviour as the respondents evinced in this respect was animated by that want of responsibility which would mandate the issuance of a declaration of restriction under s.150. Nor does the court consider that justice and equity require that such a declaration should issue at this time.

60. For the reasons stated above, the court does not consider that any declaration of restriction is required to issue against either Mr. David Murphy or Ms Irene Murphy at this time.