THE HIGH COURT

Record 2011 No 129 COS

IN THE MATTER OF GILSON MOTORS LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS, 1963-2009

AND IN THE MATTER OF SECTION 160 OF THE COMPANIES ACT, 1990

AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT, 1990

AND IN THE MATTER OF SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT, 2001

Between

GARY LENNON

Applicant

and

DAMIEN GILSON and GLENDA GILSON

Respondent

JUDGMENT of Mr. Justice Gilligan, delivered on the 30th day of July, 2015.

1. In this application, the applicant seeks, inter alia, the following reliefs:

> (a.) as against the first named respondent, Mr. Damien Gilson:
>
> (i.) a declaration pursuant to section 160(2)(d) of the Companies Acts 1990 that he shall not be appointed or act as an auditor, director, or other officer, receiver, liquidator or examiner, or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation, or management, of any company, or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978, for such period as to this Honourable Court should appear appropriate; or in the alternative;
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> (ii.) a declaration that he shall not for a period of five years, be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in section 150(3) of the Companies Act 1990; and
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> (b.) as against the second named respondent, Ms. Glenda Gilson: a declaration that she shall not, for a period of five years, be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in section 150(3) of the Companies Act 1990.

Background facts.

2. Gary Lennon, insolvency practitioner, was appointed official liquidator of Gilson Motor Company Limited by order of this Court (Laffoy J.), dated the 14th day of March, 2011, on foot of a petition presented by the Revenue Commissioners on 16th February, 2011. Mr. Lennon submitted his report pursuant to section 56 of the Company Law Enforcement Act, 2001, on 17th January, 2012. By letter dated the 9th May, 2012, the Office of the Director of Corporate Enforcement wrote to Mr. Lennon advising him that he was not relieved of his obligation pursuant to section 56(2) of the Company Law Enforcement Act, 2001, to make an application for the restriction of the directors of the company. Consequently, Mr. Lennon was obliged to make this application for the restriction of the first and second named respondents.

3. By way of background, Gilson Motor Company Limited was incorporated on 25th November, 2005. The two directors at the time of the incorporation of the company were the first named respondent, Damien Gilson, and his sister, the second named respondent, Glenda Gilson. Both respondents remained as directors of the company as of the date of commencement of the winding up. The company traded in the business of buying and selling second-hand motor vehicles. Additionally, it appears that the company was also engaged in a car parking and valeting service from the premises occupied by it at Sir John Rogerson's Quay.

4. On the 6th August, 2007, the company entered into a temporary convenience letting agreement with Abbono Limited (In Receivership). This permitted the company to operate a motor dealership from a premises at Barrow Street, Dublin 2. The agreement required the company to discharge a rent of €2,500 per month and to pay to Dublin City Council the municipal rates as and when they fell due. The company first defaulted on the rent on the 6th August, 2009, and also failed to pay the rent falling due on the 6th September, 2009. In October, 2009, Abbono Limited terminated the agreement. On the 20th April, 2010, Abbono Limited issued Circuit Court proceedings against the company for the recovery of amounts due on foot of the forfeiture of the letting agreement, totalling €17,410.24. On the 31st January, 2012, Abbono Limited was placed in receivership by the National Asset Management Agency and the receiver chose not to continue the proceedings.

5. In October, 2009, the company sub-let a portion of a premises at 22/27 Sir John Rogerson's Quay. This premises was owned by Trio Investment Trust who had let it to SJR Quay Property Limited (SJR.) In 2010, SJR defaulted on the rent due to Trio Investments and on the 21st February, 2011, Trio Investment Trust granted Gilson Motor Company a temporary licence to occupy the premises which expired on the 31st March, 2011, at which point it was expected that the company would vacate the premises. As the company was placed in liquidation on the 14th March, 2011, the liquidator, Mr. Lennon, became involved with the termination of the company's occupation of the premises which ultimately occurred on the 4th April, 2011. While no rent was outstanding by the company to SJR, Mr. Lennon avers in his affidavit, sworn on the 24th September, 2014, that he was contacted by Ms. Natalie Leonard of Dublin City Council Municipal Rates Department, who confirmed that €29,805.26 in municipal rates had not been paid during the company's occupation of the Sir Rogerson's Quay premises.

6. In order to have the company restored after it had been struck off the Register for failing to file returns on the 3rd October, 2008, the company engaged the services of Rynne Tully Ward, Chartered Accountants, who prepared audited accounts for the financial years ended 31st December, 2006, and 31st December, 2007. The balance sheet for the 2006 accounts illustrates that the company has a deficiency of assets over liabilities of €64,669.00. Both respondents signed these accounts. The balance sheet for the 2007 account shows a deficiency of assets over liabilities of €102,479.00 indicating a further loss for that year of €37,810.00. By July, 2010, the liability of the company to the Revenue was estimated at €87,407.00. According to the statement of affairs sworn by the respondents, Rynne Tully Ward accountants were owed €12,100.00 on the date the company was wound up over two years after their assignment was completed.

7. The Company's filing record is unsatisfactory. Following the submission of the first annual return on the 29th June, 2006, the company failed to file its 2007 and 2008 annual returns on time. As a consequence, as mentioned, the Registrar of Companies struck the company off the Register on the 3rd October, 2008. Subsequently, notwithstanding that the company had been struck off the Register for failure to file annual returns, the company failed to file any further annual returns following its restoration. The liquidator, Mr. Gary Lennon, avers that it is likely that the company would again have been struck off for failure to file annual returns had this liquidation not taken place. In each of the abridged financial statements of 2006 and 2007, respectively, in which "material uncertainty" as to the "company's ability to continue as a going concern" was indicated, Rynne Tully Ward advised that the net assets of the company as stated in the balance sheet were not more than half of the amount of its called up share capital and, in their opinion, there existed at the end of 2006 and 2007, a financial situation which, under Section 40(1) of the Companies (Amendment) Act, 1983, may require the convening of an extraordinary meeting of the company. No extraordinary general meeting ever appears to have occurred.

8. The company first became liable for Value Added Tax as and from 1st January, 2006. The company made out, filed and discharged VAT returns from this date to 30th December, 2006. Between 1st January, 2007, and the 30th April, 2008, the company filed VAT returns totalling €49, 749.20 of which it discharged €20,402.20 leaving an unpaid balance of €29,347.00. From 1st May, 2008, to 31st December, 2010, the company did not make any VAT returns and the collector general raised estimates totalling €75,056.00, of which the company discharged €1,896.00 leaving an unpaid balance for this period of €73,160.00. This gave a total liability, principally based on the Revenue's estimates, of €102,507.00. Similarly, the company first became liable for PAYE/PRSI from 1st January, 2006. It would appear that the company had no employees for the first eleven months of that year based on its monthly declared returns. The company declared a liability for December, 2006, in the round sum amount of €6,000.00, which it discharged. From February 2008 to September, 2008, the company declared that it had PAYE/PRSI employees and declared a liability of €6,774.44 which the company discharged when making the declaration. Between October 2008 and December 2008 the collector raised monthly estimates totalling €2,952.00 which the company failed to discharge. Between 1st January, 2009, and 31st December, 2010, the company did not make any PAYE/PRSI returns. The liquidator avers that while the company traded for just over five years it was in continuous default with regard to its obligations to deduct PAYE/PRSI from its employees' salaries and to promptly remit same to the collector general. In particular, in the last two years of its existence, it paid no income tax whatsoever despite operating a car sales business and a car parking operation, both of which continued to trade to the date of the appointment of the liquidator in March, 2011. The liquidator, Mr. Lennon, describes in his affidavit of the 24th September, 2014, his difficulties in obtaining from the respondents full and accurate books and records of the company.

9. Mr. Lennon also avers that, subsequent to the receipt of an attachment order, the company stopped lodging company receipts to the company current account at AIB, Crumlin Road. In July, 2010, the first named respondent opened a current account at AIB, 52 Upper Baggot Street, Dublin 4, in the name of *Damien Gilson – DG Motor Holdings*. Subsequently, Mr Gilson opened a second bank account in the name of *Damien Gilson Parking Solutions*. Mr. Lennon submits that his investigations suggest that the lodgements to these accounts were, in fact, proceedings of company sales. In the case of current account number 22447-056 a total of €351,183.18 has been lodged into the account between the 13th July, 2010, and the 30th March, 2011, and in the case of account number 21313-077 €24,417.02 has been lodged between the 2nd November, 2010, and the 4th April, 2011, giving a total of €375,600.20 in a period of ten months. Had this money been lodged to the company's bank account, the Revenue demands on foot of which they placed an attachment order on the account would have been satisfied. The liquidator contends that it would appear that these accounts were used for the purposes of defrauding the principle creditor of the company and for purposes of the deliberate avoidance of paying the company's taxes.

10. On 20th October, 2010, the Revenue Commissioners wrote to the company claiming the sum of €141,937.00 by way of unpaid taxes and interest and warned that a failure to pay same within 21 days would result in the issue of a petition for the winding up of the company. On 16th February, 2011, a petition was issued by the Revenue Commissioners. On 14th March, 2011, a winding up order was made and Mr. Gary Lennon was appointed as liquidator of the company.

11. In relation to both named respondents, the liquidator, Mr. Lennon, avers that neither has engaged with him in any meaningful way with regard to the winding up. This is particularly significant in light of the deficiencies in the books and records of the company generally and has caused a very considerable delay in determining the affairs of the company in a reliable manner. However, Mr. Lennon further avers that "during the company's life, the first named respondent derived his livelihood from the activities of Gilson Motor Company and was the person in overall charge of the company's operations. Throughout the lifetime of the company, the second named respondent had an entirely separate career and there is little evidence that she derived any significant income from the company." In this regard, the first named respondent has furnished a statement wherein he states, *inter alia*, that:

(a) he was at all times in control of all finances to do with the company;

(b) he managed all sales;

(c) his signature was the only one on all cheques relevant to the company; and

(d) the second named respondent had at no time anything to do with the day to day running of the company.

The liquidator submits that while the statement itself does not absolve the second named respondent of her obligations under the Companies Acts, he "believes that it accurately sets out the delineation between the two respondents as to their involvement in the running of the company."

12. On the 11th July, 2011, the liquidator was granted a costs order jointly and severally against both respondents with regard to a motion for attachment and committal. On the 24th May, 2012, the costs were taxed at €13,274.14. By May, 2013, there had been no response from either respondent of any kind, and a particulars of demand and notice requiring payment against each respondent was issued on the 8th May, 2013. Demands in the amount of €14,033.49 were issued for service. In December, 2013, the second named respondent discharged the costs order in full some eighteen months after it was first demanded.

Submissions of the applicant:
13. Mr. McGuckian, on behalf of the applicant, submitted that the first named respondent was at all times the effective managing director and owner of the company, holding 99 of the 100 shares in the company. The company had an obligation to file annual returns, yet the only annual returns were filed late and were only prepared in order to have the company restored to the register. Annual returns were never filed for the periods up to the 25th May, 2009, and 2010. The company lost its audit exemption and again only commissioned two sets of audited accounts in support of its application to restore the company. The company had an obligation to commission and prepare three further sets of audited accounts for the 30th December, 2008, 2009, and 2010. The company had an obligation to maintain proper books and records which it appears it consistently failed to do. The directors had an obligation to make out and file a statement of affairs on foot of the order to wind up the company in accordance with section 224 of the Companies Act 1963. The respondents only complied with this provision after a motion for attachment and committal had been issued against them. In fact, it was an accountant, Mr. Ronnie Culliton, who was appointed by the second named respondent, who was tasked the job of assembling the financial information. Further, the liquidator avers that the statement of affairs that was sworn and filed in Court on the 16th June, 2011, is deficient. Moreover, section 293(e) of the Companies Act 1963 makes it an offence for an officer of a company within 12 months prior of the commencement of the winding up to conceal any part of the property of the company with a value greater than €12.70. It would appear that in the twelve months prior to the liquidation the first named respondent diverted company cash assets totalling €375,600.20. Due to lack of records it is not possible to determine whether further sums were diverted in prior periods.

14. As a result of the aforementioned, counsel submits that this conduct vis-à-vis the company's obligations under the Companies Acts amounts to irresponsibility on behalf of the first named respondent. Further, the liquidator avers that the first named respondent is responsible for the insolvency of the company and is responsible for the net deficiency in the assets of the company. Moreover, in light of the aforementioned diversion of company funds to alternative bank accounts, with the presumed intention of frustrating the attempts of the Revenue Commissioners to collect outstanding taxes from the company, the liquidator submits that the first named respondent has not acted honestly or responsibly in relation to the conduct of the affairs of the company and is unfit to be concerned in the management of a company.

15. During the hearing of the within proceedings, it was brought to the attention of the Court that the first named respondent, Damien Gilson, who was not legally represented, was not contesting the application being made against him. I accept the evidence of Mr. Lennon as regards the first named respondent, and I, accordingly, accede to the request for the appropriate order as against him.

16. The liquidator, Mr. Lennon, avers that he accepts that the second named respondent, Ms. Glenda Gilson, was not involved in the day to day running of the business of the company. However, as a director, it is submitted on his behalf that she was under an obligation to keep herself informed with regard to the affairs of the company and to take appropriate action in light of that knowledge. Furthermore, as set out above, two audits of the company which were carried out by Rynne Tully Ward accountants, one on the 28th of November, 2008, and the second on the 8th December, 2008, raised the possibility that there existed a financial situation which under section 40(1) of the Companies (Amendment) Act, 1983, may require the convening of an extraordinary meeting of the company, which was never held. Both audits were signed by both respondents. As a result, the liquidator submits that, in failing to take a pro-active role in relation to the affairs of the company subsequent to its restoration, the second named respondent did not act responsibly in relation to the conduct of the affairs of the company.

17. In relation to the alleged diversion of company funds to accounts controlled by the first named respondent, the liquidator concedes that there is no evidence that the second named respondent benefitted from such diversion and equally there is no evidence that she appeared to know about the existence or extent of the diversion of funds. However, while there is no evidence of direct involvement of Ms. Gilson in those actions, counsel for the plaintiff submits that had she made proper inquiry with regards to the operation of the company and ensured that she was fully conversant with the company's affairs, those acts would have been uncovered at an earlier juncture. As such, in failing to so act, Ms. Gilson has acted irresponsibly in relation to the conduct of the affairs of the company.

18. Counsel for the applicant submitted that, under section 149 of the 1990 Act, as amended, the applicant in a "Section 150 application" is required to establish that:

(a) the company is insolvent; and

(b) as of the date of commencement of the winding up of the company or at any time during the 12 months prior to that date, a respondent was a director of the company.

Once the applicant has established these requirements, the onus of proof shifts to the respondent to show that she ought not to be restricted because of the matters listed in section 150(2) of the 1990 Act. In particular section 150(2)(a) provides that a director shall not be restricted where he can establish three criteria:

(a) that he has acted honestly in relation to the conduct of the affairs of the company;

(b) that he has acted responsibly in relation to the conduct of the affairs of the company; and

(c) that there is no other reason why it would be just and equitable that he should be subject to the restrictions sought.

19. In *La Moselle Clothing Limited v Soualhi* [1998] 2 ILRM 345, Shanley J set out a list of factors which the Court will consider in determining whether a director has acted responsibly (at 352):

> "(a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts, 1963-1990;

(b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility;

(c) The extent of the director's responsibility for the insolvency of the company;

(d) The extent of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter;

(e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or a want of proper standards."

20. Shanley J did not, however, intend that these factors be exhaustive and gave examples of other situations in which the Court may restrict a director (at 352):

> "… not all situations of a want of responsibility will result from a breach of obligations imposed by the Companies Acts: for example, a director's inability to see the 'writing on the wall' (e.g. an inability to see from a perusal of the company's management accounts that the company was trading while insolvent) may result from sheer incompetence and justify a restriction… Equally a director who takes excessive sums from the company by way of drawings for salary without regard to the financial state of health of the company may be said to have acted without commercial probity…"

The *La Moselle Factors*, as they have come to be known, were subsequently approved by the Supreme Court in its decision in *Re Squash (Ireland) Limited* [2001] 3 IR 35.

21. In *Re Tralee Beef and Lamb Limited* [2004] IEHC 139, Finlay Geoghegan J expanded on the criteria identified by Shanley J in *La Moselle* as follows (at page 8):

> "At common law, directors owe duties to the company which are normally divided into duties of loyalty based on fiduciary principles, developed initially by the courts of equity, and duties of skill and care developed initially by the common law courts from the principles in the law of negligence. There is no suggestion in the above decisions that the courts should ignore those duties. Accordingly, it appears to me that when considering the matters referred to by Shanley J in *La Moselle Clothing Limited v Soualhi* [1998] 2 ILRM 345 under paragraph (a) a court should have regard not only to the extent to which a director has or has not complied with any obligation imposed on him/her by the Companies Acts but also with duties imposed by common law."

Relying on the proposition as set out in Keane, *Company Law, 3rd Ed.* (Dublin, 2000) that directors "owe a duty to the Company to exercise skill and diligence in the exercise of their functions," Finlay Geoghegan J cited with approval the following propositions formulated by Parker J in *Re Barings plc* (No.5) [1999] 1 BCLC 433:

> "(i) Directors had, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.
>
> (ii) Whilst directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegated functions.
>
> (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, depended on the facts of each particular case, including the director's role in the management of the company."

22. The decision of Finlay Geoghegan J in *Re Tralee Beef and Lamb* was successfully appealed to the Supreme Court. However, it is clear that the Supreme Court did not disagree with the judgment of Finlay Geoghegan J in so far as common law duties ought to be considered in deciding the question of whether a director had acted responsibly. Hardiman J commented (at page 357):

> "I wish to make it clear that I am in agreement with these propositions of law enunciated by the High Court Judge. In particular I would endorse her citation from Keane's *Company Law* (3rd ed., 2000) and the cases cited there."

Subsequently, the Supreme Court in *Re Mitek Holdings Limited; Grave v Kachkar* [2010] 3 IR 374 confirmed that the amplifications introduced by Finlay Geoghegan J in *Re Tralee Beef and Lamb* represent the applicable law.

23. In relation to any claim that the second named respondent was merely a 'passive director,' who acted as a director of the company solely to satisfy the minimum two-director requirement under the Companies Acts and who did little or nothing in relation to the running of the company, counsel for the applicant submitted that in *Re Hunting Lodges Limited (in liquidation)* [1985] ILRM 75, Carroll J. (in the context of an application pursuant to section 297 of the Companies Act, 1963) commented as follows, at page 85:

> "Any person who becomes a director takes on responsibilities and duties, particularly where there are only two… A director who continues as director but abdicates all responsibility is not lightly to be excused. If she had reasonably endeavoured to keep abreast of company affairs and had been deceived … it might be possible to excuse her."

In the same case, Carroll J. stated:

> "In relation to Mrs. Porrit, the case has been made on her behalf that she played no part in the running of the company. The day has long since passed since married women were classified with infants and persons of unsound mind as suffering from a disability so far as responsibility for their acts was concerned, or since a married woman could escape criminal responsibility on the grounds that she acted under the influence of her husband. Mrs. Porrit cannot evade liability by claiming that she was only concerned with minding her house and looking after her children. If that was the limit of the responsibilities she wanted, she should not have become a director of the company, or having become one she should have resigned."

Submissions on behalf of the second named respondent:

24. At the outset, Mr. Hayden submitted that section 56(2) of the Company Law Enforcement Act, 2001, provides that a liquidator of

an insolvent company shall, not earlier than 3 months nor later than 5 months (or such later time as the Court may allow and advises the Director) after the date on which he or she has provided to the Director a report under subsection (1), apply to the court for the restriction under Section 150 of the 1990 Act of each of the directors of the company, unless the Director has relieved the liquidator of the obligations to make such an application. In the instant case, counsel argues that the application sought by the liquidator as against the second named respondent was to be brought by the 19th May, 2012. This motion was not issued until the 24th September, 2014. The liquidator identifies this at paragraph 5 of his grounding affidavit and points to the complexities of the liquidation and the lack of proper records provided by the respondents as the basis for his delay in so doing. Counsel thus submits that this application has been brought two years out of time, with no explanation for this delay. If the Court is satisfied with this submission, then the case against the second named respondent can go no further, counsel submitted. The Court has discretion to grant an extension of time or to allow the delay, it was conceded.

25. In relation to the argument that the second named respondent, Ms. Gilson, was a so-called 'passive director,' counsel argued that she played no hand, role, or part in the day-to-day running of the company. Unlike in the recent decision of Barrett J. in *In the matter of Zuccini Café and Restaurant Limited (In voluntary liquidation) Patrick McCoy v Gerard and Patricia Courtney* [2014] IEHC 369, where the learned judge held that the wife's non-business related purchases on the company credit card illustrated a want of responsibility and directly involved her in the company operations by using a company credit card to make private purchases, thus issuing a s.150 declaration against her, there were no such circumstances in the instant case. The second named respondent became a director of the company in her early twenties, with no commercial experience, she did not sign company cheques, she owned 1 share out of 100, and she was not involved in the trading of the company in any way.

26. In her affidavit of the 5th July, 2011, sworn in connection with a motion for attachment and committal issued as against the respondents for failure to furnish a sworn statement of affairs, Ms. Gilson averred, *inter alia*, as follows:

"(4) I say that I became a director of "The Company" in or about 2005 at the request of my brother Damien Gilson, who was forming this Company through which to run his business. My brother told me at this time that it was a requirement of Irish company law that his Company have two directors and in order to facilitate the minimum number of directors, he asked if he could put my name forward and I agreed on this basis that I was simply facilitating him.

(5) It was clearly understood and agreed that I would be operating as a non-executive director and would have no role in the running of the business whatsoever. This was confirmed to me by Damien Gilson at all stages.

(6) I have since been informed by my solicitors and counsel that this may not have been the most prudent decision to take in the circumstances where I had very little active participation in the management of the Company. It was after all a small family company and I took comfort from the annual review of the financial statements that were scrutinised by the chartered accountants and registered auditors."

27. Mr. Hayden submits that recent caselaw, particularly decisions of Barrett J. of this Court, point to the ultimate question of 'real moral guilt' or 'moral turpitude' or misconduct on the part of the particular passive director against whom restrictions are being sought under section 150 of the Companies Acts. Simply being a non-executive director is not in itself an exoneration, but it reduces the level of responsibility.

28. In a further affidavit of Ms. Gilson, sworn on the 27th February, 2015, she avers that:

> "(4) In 2005, my brother, Damien Gilson, the first named respondent herein, asked me to become a director of a new private company he was in the process of forming in order to carry on his niche motor trade business. At the time, I was in my early twenties and not experienced in matters of commerce or knowledgeable of the requirements of company law. I say that I had no experience or knowledge of the motor trade. The first named respondent explained that he needed two directors to establish a private company. He told me that he was going to be one of the directors and he asked me to be named as the second director. At the time I wrongly understood that being named as the second directors was an administrative step necessary to set up a company. The first named respondent is my brother and, in the context of that relationship, I did not want to disappoint him by refusing his request so I agreed to allow my name be put forward as a director of Gilson Motor Company Limited and to take a single share in the company."

29. Mr. Hayden referred to the decision of this Court (Barrett J.) in *The Director of Corporate Enforcement v Slattery* [2014] IEHC 363, where, in relation to the aforementioned remarks of Carroll J. in *Re Hunting Lodges Limited*, the Court noted, at paragraph 16:

> "16. By way of initial remark, the court notes that Carroll J.'s observations in the above-quoted text were made solely in relation to a married woman who embarks upon a passive company directorship. However, in our contemporary society where (i) there are many couples in which the wife is the principal commercial actor, and (ii) 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 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. It is important also to recognise the limits of what Carroll J. stated in *Re Hunting Lodges*. In effect she said 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 modern age of equality between the sexes. However, Carroll J. did not say that a married female director can never escape liability as a director where she embarks upon a directorship through ties of natural affection and never does anything in relation to the company of which she is director. That 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. Notably, Carroll J. states that '*a director who continues as director but abdicates all responsibility is not lightly to be excused*'. She does not, however, dismiss the possibility that such a passive director may be excused in some circumstances. Indeed she gives one instance, 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. Neither expressly nor impliedly does Carroll J. assert that there are no other instances in which a passive director might be so excused. Carroll J. 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. In *Re Hunting Lodges* , the purportedly passive director, Mrs. Porrit, had been party to fraudulent trading that included the opening of a building society account under a false name, with the mandate documents for that account being signed by herself and her husband under false names. As a consequence of her actions, Mrs. Porrit would likely have struggled to persuade any judge that no moral blame attached to her.

> However, later case-law presents with instances in which, though it is reiterated that non-executive or passive directors cannot simply wash their hands of responsibility, in fact such responsibility is not visited upon them because they are not guilty of specific wrongdoing. In the present case, the court considers that in any event no liability should attach to either of the respondents, whether under s.160 or s.150 of the Act of 1990, and thus the court is not required to render judgment on the contention made in respect of the second-named respondent that she was in effect only a passive director of Chercrest who never played any role in relation to the activities of same. Were it required to do so, however, the court does not see on the evidence before it any "*real moral blame* " on the part of Ms. Caffrey which so taints her behaviour as a director as to place it in one or more of the categories of behaviour in respect of which a s.150 declaration is required or, alternatively, to render it behaviour that merits a disqualification order under s.160."

30. Further, in the decision of Finlay Geoghegan J. in *Re Colm O'Neill Engineering Services Limited* [2004] IEHC 83, at paragraph 3, the learned judge stated:

> "In considering the matters raised by the liquidator in relation to the four respondent directors, I think it is necessary just briefly to consider the legal framework which has been established by s.150 and the authorities on the section. Firstly, it is well established that the purpose of the section is to protect the public against the future supervision and management of companies by persons whose past record as directors of insolvent companies have shown them to be a danger to creditors and others. It is also established that it is not the purpose of the section to punish the individuals concerned."

Counsel for the second named respondent submitted, in the context of the instant case, that if this is the test for 'moral turpitude' then it is not to punish Ms. Gilson for her inexperience, but to ensure that going forward the same actions or inactions would not be repeated by her.

31. The Court was also referred to the decision of this Court (Barrett J.) in *Doherty v Donohoe* [2014] IEHC 187, where the learned judge, at paragraph 7, refers to the decision of Fennelly J. in *Re Mitek Holdings Ltd* [2010] 3 IR 374 at 396, in which he affirmed that:

> "7. … it is important not to adopt a formulaic, standardised, 'tick the box' approach to determining s.150 applications. Thus Fennelly J. emphasised *'the need to identify the issues that are important in the particular case.'"*

Conclusion.

32. In relation to counsel for the second named respondent's argument that the orders being sought in the within proceedings are out of time, I am satisfied that it is clear from the decision of Finlay Geoghegan J in *Re E Host Europe Ltd* [2003] 2 IR 627 that a delay in the bringing of a section 150 application does not, of itself, impact on the validity of that application. The circumstances in which an issue may arise is if the delay is sufficient to give concern as to whether the respondents can have a fair hearing (*Re Verit Hotel and Leisure Ltd* [2001] 4 IR 550.) In *Verit Hotel and Leisure Ltd*, the respondents unsuccessfully sought to prevent restriction application proceedings on the grounds of delay. The alleged delay occurred between the date of issue of the motion (December, 1994) and the date on which the liquidator sought to re-enter that motion (March, 2000). The Supreme Court cited the decision of *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 to the effect that, even where a delay had been both inordinate and inexcusable, the Court must exercise a judgment on whether, in its discretion, on the facts the balance of justice was in favour or against the case proceeding. The Supreme Court referred to the mandatory nature of the restriction proceedings and the public interest underlying such orders. The Court found that, in the context of section 150 applications, the onus was on the respondent to satisfy the court that they had acted honestly and responsibly regarding the affairs of the company. The Court further found that the respondents had not claimed that they were prejudiced in their ability to discharge and that, in such circumstances, the court would not presume prejudice.

33. In *Re Supreme Oil Company Ltd* [2005] 1 IR 571, a period of 12 years between the date of commencement of the winding up and the issuing of the section 150 application was found to be excessive in circumstances where the liquidator offered no explanation for the delay. On the other hand, in Re *Countyglen Plc* [2007] IEHC 346, the liquidator was appointed in December, 1998. In February, 2001, the liquidator sought an order for disqualification. In February, 2003, he sought an order for restriction. In February, 2005, more than 6 years after his appointment, he sought discovery. Murphy J nevertheless refused an application issued by the respondents seeking an order dismissing the liquidator's claim for want of prosecution or inordinate or inexcusable delay.

34. In the circumstances pertaining there is no suggestion of unfairness or any prejudice arising and any delay in itself is not of any significance. In the exercise of my discretion and in the interests of justice between the parties, I decline the application on the second named respondent's behalf that the application not be permitted to proceed because of delay.

35. In terms of the section 150 order being sought against the second named respondent, Ms. Gilson, I am satisfied on the facts that the company, at the relevant time in question, was insolvent, and further, that as of the date of commencement of the winding up of the company and at a time during the 12 months prior to that date, she was a director of the company. The applicant having established these requirements, the onus of proof effectively shifts to the respondent to show that she ought not to be restricted because of the matters listed in section 150(2) of the 1990 Act. As aforementioned, section 150(2)(a) provides that a director shall not be restricted where (s)he can establish three criteria:

(a) that (s)he has acted honestly in relation to the conduct of the affairs of the company;

(b) that (s)he has acted responsibly in relation to the conduct of the affairs of the company;

(c) that there is no other reason why it would be just and equitable that (s)he should be subject to the restrictions sought.

36. There appears to be a very unsatisfactory situation developing in recent times, largely as a result of the minimum two-director requirement under the Companies Acts, whereby, through family connections, a party consents to being appointed a director without any intention of playing an active role in the day to day running of the company and without any interest in staying abreast of its commercial affairs.

37. Nevertheless, regarding Ms. Gilson's role as director in the company, she avers in her affidavits, and counsel submits on her behalf, that as far as she understood it, being named as the second director of the company was merely an administrative step necessary to set up a company and in the context of her relationship with her brother and her family, she agreed to allow her name to be put forward as a director. She submits that she was motivated in this regard purely to assist her brother, and admits that, in retrospect, in the light of her youth and her inadequacies as a person of commerce, this may not have been the most prudent decision. While the liquidator, Mr. Lennon, does not explicitly refer to Ms. Gilson in his affidavit as a non-executive director, I note

paragraph 59 of his affidavit, where, in the context of the company's failure to comply with the Companies Acts by failing to make out and file a statement of affairs on foot of the order to wind up the company, the liquidator avers that:

> "While I have concerns over the contents of the sworn statement it was the responsibility of the first named respondent, being the executive director, to assemble the financial information necessary to complete the statements to be sworn by both respondents. In fact it was an accountant, Mr. Ronnie Culliton, who was appointed by the second named respondent who was tasked with the job of assembling the financial information."

I take the view that the liquidator implicitly accepts that the first named respondent was an executive director and the second named respondent had a role akin to a non-executive director.

38. In any event, it is clear from her own averments and in the affidavit of the liquidator, that the second named respondent took no role in the day-to-day running of the company, and therefore could be described as a 'passive' or 'nominal' director. The Court notes the very recent decision of Barrett J. in *Fitzpatrick (as liquidator) v O'Conaill* [2015] IEHC 4, where the Court succinctly set out the evolution of the recent case-law in this area. In *Fitzpatrick*, the second named respondent, Mary O'Conaill, was the first named respondent's mother. In 2000, she agreed to be named as the necessary second director in his company. She never played any part whatsoever in the operation of the company. Nor did she derive a direct benefit from its operation. She was moved, it seems entirely, by her maternal affection for her son into acting as she did. Barrett J. went on to state in his judgment:

> "Looking to the context and features of this case, it does not appear from the facts before the court that Ms O'Conaill played any part in the running of the company. One will search in vain to find that "*real moral blame*" on her part that the decision in *Re Hunting Lodges* effectively posits as the litmus test of personal liability in these instances. The court finds that Ms O'Conaill's behaviour was not wanting in honesty or responsibility and it does not consider that any other reason arises why it would be just and equitable that she should be the subject of a declaration of restriction under s.150 of the Act of 1990. Ms O'Conaill, frankly, did no more and no less than many or most, perhaps even all, mothers placed in her position would do for her son. She agreed to be the required second director in her son's company; thereafter, she played no part in its operation. The court does not consider that the Oireachtas, when it enacted the Act of 1990, intended that a mother should be sanctioned for so acting, without the court having any regard to context or motive. To read the Act otherwise would be to import a policy that goes beyond its intended ambit and to divorce the law from reality. This does not mean that it is "closed season" as regards bringing s.150 applications against mother-and-child 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 does statute or case-law require the imposition of liability on a person regardless of the fact that it may be, the court finds that in this case it is, primarily 'ties of maternal affection' that drove such person to assume what is in practice, albeit not in law, a nominal directorship. Neither in wording nor effect does the Act of 1990 disavow the fundamental precept that the demands of law must ever yield to the supplications of context."

Barrett J. reiterated this view in a contemporaneous s. 150 judgment, *Fitzpatrick v Shiv Kumar Sharma & Or* [2015] IEHC 3.

39. In the context of the present case, if one was to use Barrett J.'s "litmus-test of personal liability" in respect of a director such as the second named respondent, it is difficult to find "real moral blame" attaching to Ms. Gilson. She was in her early twenties when she became a director, a decision she avers she made out of love and assistance for her brother (not wholly dissimilar to the 'ties of maternal affection' as described by Barrett J. in *Fitzpatrick*), she played no role in the day to day running of the company, there is no evidence to suggest that she was aware of the acts of her brother in relation to the diversion of company funds into an alternative bank account, the most egregious of the allegations made against the company, and she does not appear to have derived any direct benefit from her directorship in the company. She is not directly responsible for the insolvency of the company nor was she personally involved or responsible for the net deficiency in the assets of the company. It is also quite clear that Mr. Damien Gilson accepts complete responsibility for his actions, and has clearly indicated that he does not consider that his sister bears any responsibility. I am satisfied, on the balance of probabilities, that the second named defendant has acted *honestly* in relation to the conduct of the affairs of the company.

40. I now turn to the second criterion under section 150(2)(a), where a section 150 restriction order may be avoided where a director has acted *responsibly* in relation to the conduct of the affairs of the company. As set out above, on 3rd October, 2008, the company was struck off for failure to file returns. In order to restore the company to the register, the company engaged Rynne Tully Ward, Accountants, to complete two outstanding audits for the years 2006 and 2007 respectively, the first of which was signed by the second named respondent on 28th November, 2008, and the second on 8th December, 2008. In both audits, Rynne Tully Ward expressed doubts as to the company's ability to continue as a going concern, and, furthermore, raised the possibility that there existed at 31st December, 2006, and 31st December, 2007, a financial situation which under Section 40(1) of the Companies (Amendment) Act, 1983, may require the convening of an extraordinary meeting of the company, of which none was called. Furthermore, the company continued to trade until it was wound up. In the view of this Court, directors, including directors such as the second named respondent, who consider their role as administrative, or indeed nominal, have a duty and a responsibility toward their creditors that they will act responsibly and carry out their duties in accordance with common law and their obligations under the Companies Acts. Ms. Gilson signed the two audits in November and December, 2008, and was on notice of potential financial difficulties ahead. She did not derive any direct benefit from her role as director in the company. This distinguishes her from that of Patricia Courtney in In the matter of *Zuccini Café and Restaurant Limited (In voluntary liquidation) Patrick McCoy v Gerard and Patricia Courtney* [2014] IEHC 369, where the wife's non-business related purchases on the company credit card illustrated a want of responsibility and was evidence of Mrs. Courtney having directly benefitted from her directorship.

41. As mentioned herein, Carroll J., at p.85 of her judgment in *Re Hunting Lodges*, stated that "Any person who becomes a director takes on responsibilities and duties, particularly when there are only two… A director who continues as director but abdicates all responsibility is not lightly to be excused." However, Carroll J. exampled certain circumstances where a passive or "nominal" director may be excused liability such as where a passive director "reasonably endeavoured to keep abreast of company affairs and had been deceived."

42. This Court is prepared to accept that the second named respondent played no active role in running the affairs of the company, apart from signing off on the company's accounts for 2006 and 2007, and that she acted in a role akin to that of a non-executive director with her brother, the first named respondent and co-director, taking all of the relevant decisions regarding the company, and as such she can be regarded as a passive director. I am, as I have already indicated, satisfied that the second named respondent did not act dishonestly in relation to the conduct of the affairs of the company.

43. The difficulty that presents itself is that the purpose of section 150 is to protect the public against the future supervision and

management of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others. It is also established that the purpose of the section is not to punish the individuals concerned. The aspect of moral blame appears to be a factor that can be taken into account, and this is described by this Court (Carroll J.) in *Re Hunting Lodges* as "some" real moral blame. This Court is faced with the situation that the second named respondent agreed to act as a director of the company and then appears to have taken no interest in the running of the affairs of the company, and the company did not file its annual company returns as required by law. When this situation was rectified by the signing of the two year accounts in November and December, 2008, firstly the second named respondent was on notice that accounts had to be filed for each year of trading, and secondly, that there was the possibility that there existed a financial situation which under Section 40(1) of the Companies (Amendment) Act 1983 may require the convening of an extraordinary meeting of the company which in fact was never held. Any inquiry by the second named respondent would have shown that subsequent to December, 2008, no further company accounts were filed. Any degree of a proactive role in relation to the affairs of the company subsequent to its restoration would have shown that the company remained in default of its obligations as regards the filing of accounts. The question that arises is, whether or not, in the particular circumstances, a close relation of the director who effectively runs the company is to be exonerated in a situation where she takes, effectively, absolutely no responsibility for the conduct of the affairs of the company.

44. In this situation, considering the position as set out by Shanley J. in *La Moselle Clothing*, the second named respondent has not complied with the obligation imposed on her pursuant to the Companies Acts 1963 – 1990 insofar as annual returns were not filed in the company's office. She was not personally responsible for the net deficiency in the assets of the company disclosed at the date of the winding up. It does appear that she has displayed a want of proper standards in effectively not taking any interest in the affairs of the company. The second named respondent probably never saw the writing on the wall for the company for the simple reason that she did not involve herself in any way in the affairs of the company.

45. The second named respondent owed a duty to the company to exercise skill and diligence in the exercise of her function. In my view she failed in this regard.

46. The second named respondent also individually had a continuing duty at common law to require and maintain a sufficient knowledge and understanding of the company's business to enable her to properly discharge her duties as a director.

47. As set out herein, I take into consideration that the second named respondent was in her early twenties when asked by her brother to become a director of the company and had no experience or knowledge of the motor trade. She accepts that at the time she wrongly understood that being named as a second director was an administrative step necessary to set up the company and that, in the context of her family relationship, she did not want to disappoint her brother by refusing his request and she allowed her name to be put forward as a director of the company and to take a single share.

48. In my view, Carroll J. in *Re Hunting Lodges* deftly sums up the situation wherein she stated that a director who continues as a director but abdicates all responsibility is not lightly to be excused and that, as regards a passive director, consideration can be given for that person to be excused liability where they reasonably endeavoured to keep abreast of the company affairs and had been deceived.

49. I am prepared to accept that the second named respondent was deceived by her brother, the first named respondent, in the improper manner in which he ran the affairs of the company at a time when it was in clear breach of the provisions of the Companies Acts as regards the filing of accounts and with monies being diverted from the company to a separate account.

50. In my view, the situation that arises turns on the fact as to whether or not the second named respondent reasonably endeavoured to keep abreast of the affairs of the company and, in my view, she did not do so and must suffer the consequences as provided for in section 150 of the Companies Act 1990. I take the view that this Court cannot condone or justify the alternative conclusion which would suggest that a family member can be one of the two directors of a company and if he or she fails to reasonably endeavour to keep abreast of the affairs of the company which is insolvent they are not to suffer any restriction despite losses caused to creditors.

51. For the sake of completeness, in my view there is no other reason why it would be just and equitable that the second named respondent should be subject to the restrictions applied for.

52. I will hear the submissions of counsel as to the form of the orders to be drawn up.