

THE HIGH COURT

[no. 2014/333COS; 2014/484COS]

**IN THE MATTER OF KELLY TRUCKS LIMITED (IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012
AND IN THE MATTER OF THE COMPANIES AMENDMENT ACT 1990**

BETWEEN**GERARD MURPHY****APPLICANT**

**AND
JAMES KELLY AND ANNE KELLY**

**AND
THOMAS CLARKE
AND
NEHAAL SINGH**

**AND
KELLY TRUCKS STROKESTOWN LIMITED
AND
KELLY TRUCKS (BALLAGHADEREEN) LIMITED**

RESPONDENTS**JUDGMENT of Ms. Justice Murphy delivered on the 15th day of January, 2019**

1. The applicant is the liquidator of Kelly Trucks Limited. The first and second-named respondents are the sole directors of the company. The third-named respondent is an accountant retained by the company in 2013. The fourth-named respondent was appointed liquidator of the company at a creditors' meeting on 3rd January, 2014. The fifth respondent is a company incorporated in July, 2013 of whom the directors are James Kelly Junior and Patricia Kelly, children of the first two respondents. The sixth respondent, Kelly Trucks (Ballaghaderreen) Limited, is another company incorporated in July, 2013, whose directors were initially the first and second-named respondents, but who have since been replaced by James Kelly Junior and Patricia Kelly.

2. These proceedings were initiated under the Companies Acts 1963-2012 but are now being maintained under the relevant provisions of the Companies Act 2014. The applicant seeks 1) an order that James Kelly and Anne Kelly are personally responsible, without any limitation of liability, for the debts of Kelly Trucks Limited (in Voluntary Liquidation) and that the first and second-named respondents be held liable for fraudulent and reckless trading; 2) an order directing Kelly Trucks Strokestown Limited to deliver to the applicant all property and assets of whatsoever nature of Kelly Trucks Limited and/or pay such sum to the liquidator on such terms or conditions as to the court seems fit and 3) an order for the disqualification of the first and second-named respondents or in the alternative an order for restriction on the grounds that the conduct of the respondents is such as to warrant disqualification as directors or restriction for such period as to the court shall seem meet.

3. The applicant has chosen not to seek relief against either the third or fourth-named respondents and the court notes that in fact he applied to have the application in respect of them struck out in a motion first listed on 20th January, 2015. The status of the sixth respondent is uncertain, as an application to amend its title, also made on the 20th January 2015 has been adjourned generally.

4. In one guise or another this application has come before six different High Court judges and the progress of the application as set out below illustrates the wisdom for case management purposes of having one judge retain seisin of potentially complex and evolving applications.

General background

5. Kelly Trucks Limited ("the company") was incorporated on 20th March, 1989. It is a family company that is in the business of truck sales, servicing, repairs and testing. The company is run by the first-named respondent Mr. James Kelly, an expert mechanic, along with his wife, the second-named respondent Mrs. Anne Kelly, who looks after the administration of the business. Mr. and Mrs. Kelly each hold a 50% shareholding in the company.

6. The current controversy stems from a dispute over a defective truck which came before the courts in 2012. The plaintiff in those proceedings was a company called Costello Transport Limited. Following a fully contested hearing, the company Costello Transport Limited was granted a judgment of €32,000 plus costs by order of McCarthy J. on 5th November, 2012.

7. On 21st January, 2013 Mullins Lynch Byrne, solicitors for Costello Transport Limited, issued Kelly Trucks Limited a twenty-one day demand letter pursuant to s. 214 of the Companies Act 1963 for the judgment sum of €32,000 plus costs of €55,904. The letter advised that in default of payment, Costello Transport Limited intended to present a creditors' petition to have the company wound up. The letter also advised that failure to pay would be taken as evidence that the company was unable to pay its debts as they fell due. A further letter of demand was sent on 22nd March, 2013 which, having noted that the amount was still outstanding, again threatened a petition to wind up the company if the amount due was not paid within a further seven days.

8. On 29th April, 2013 the company, Kelly Trucks Limited issued a notice of motion seeking leave to appeal the order of McCarthy J. made almost six months earlier. The company having failed to take such steps within the prescribed time period, sought an extension of time for service of a notice of appeal pursuant to O. 58, r. 3(4), together with an order staying the proceedings pending the outcome of the appeal. The respondents sought consent from Costello Transport Limited to this course of action. Consent was refused. Before the notice of motion was served a Mr. Edward O'Brien who had replaced Callan Tansey as solicitors for Kelly Trucks Limited informed Mullins Lynch Byrne solicitors for Costello Transport Limited that they had received instructions to proceed with the appeal.

9. On 7th May, 2013 Callan Tansey solicitors who had acted for Kelly Trucks Limited in the proceedings with Costello Transport Limited wrote to the company claiming to be owed a sum of €55,986. They wrote again on 12th August, 2013 saying that they would not tolerate delay in payment and giving the company a further seven days to pay.

10. It appears that on 7th June, 2013 the motion seeking leave to appeal the decision of McCarthy J. was refused by order of the Supreme Court. Costs of the motion were awarded against the defendants. As of that date, the company had a judgment liability of €32,000 and a claim for legal costs of approximately €120,000, made up of the plaintiff's costs of the action and the failed motion seeking an extension of time for appeal together with their own solicitors costs of the main action

11. On 11th June, 2013 the judgment order was sent to the Roscommon County Sheriff's Office for execution. Notice was sent to the debtor requesting payment of the amount due. The sum was not paid.

12. On 26th June, 2013 both the costs of the High Court and Supreme Court proceedings came before the Taxing Master. The untaxed bill for High Court costs was now €52,619.97, and the untaxed bill for the Supreme Court hearing was €8,507.12. Mrs. Kelly appeared on this date and applied for an adjournment on the basis that she had just dismissed Callan Tansey solicitors that morning; wished to represent the company herself and needed to obtain the relevant papers. The Taxing Master facilitated Mrs. Kelly and gave her an opportunity to get the files in order and adjourned the matter until 29th November, 2013.

13. On 9th July, 2013 Mr. John Hurson a court messenger from the Roscommon County Sheriff's Office visited the company's premises and was met with some hostility by the first respondent Mr. James Kelly who, Mr. Hurson avers, shouted at him: *"Put it in writing. Reply by letter. I don't owe that money."* Mr. Hurson avers that when he tried to explain the position as to the debt and the seizure of goods in the event that the amount went unpaid, the first respondent became increasingly aggressive. Mr. Hurson avers that he feared for his life, left the property and told his superior that he was unwilling to re-visit the premises unless he was accompanied by a member of the Gardaí. Several days later the Roscommon County Sheriff's Office received a letter of apology on behalf of Mr. Kelly. Generously, Mr. Hurson has sworn that he accepts the apology.

14. On 19th July, 2013 a letter was sent by Kelly Trucks Limited to the Roscommon County Sheriff and County Registrar indicating that paperwork was being prepared to re-enter the Costello Transport Limited proceedings and advising that the application for re-entry would be ready in or around the 25th or 26th July, 2013.

15. On 24th July a letter was sent by a Mr. Michael McGreal of Barclay & Lloyd, a financial consultancy firm, to the County Registrar Office indicating that Mr. James Kelly director of Kelly Trucks Limited would be in a position to pay the money due by 28th August, 2013.

16. On 26th July, 2013 two new companies were incorporated by the respondents, Kelly Trucks Strokestown Limited ("Strokestown") and Kelly Trucks (Ballaghaderreen) Limited ("Ballaghaderreen"). This was done in the teeth of the threat of the petition to wind up the company by Costello Transport Limited and in circumstances where a judgment against Kelly Trucks Limited had been lodged with the County Sheriff. Mrs. Kelly wrote as a director of Kelly Trucks Limited to the Registrar of Companies consenting to the establishment of these two new companies and permitting them to use the "Kelly Trucks" brand. The letter also indicated that both companies were to have their registered office at Drummod, Strokestown, County Roscommon, which is the same registered office as Kelly Trucks Limited. The directors of Kelly Trucks Strokestown Limited are the children of the first and second-named respondents, James Kelly Junior and Patricia Kelly. On the company's B1 form, the occupation of both James Kelly Junior and Patricia Kelly is listed as "student". The initial directors of Kelly Trucks (Ballaghaderreen) Limited were the respondents, James Kelly and Anne Kelly but they have subsequently been replaced by James Kelly Junior and Patricia Kelly.

17. On 29th July, 2013 Costello Transport Limited served a petition to wind up Kelly Trucks Limited amidst concerns of alleged asset stripping of the company. The petition was served on Mrs. Anne Kelly on 31st July, 2013 with the verifying affidavit sworn by Ms. Eileen Costello on 2nd August, 2013. The petition was made returnable for 22nd August, 2013. The matter came before Laffoy J. and was adjourned at the request of Kelly Trucks Limited to 5th September, 2013.

18. On 5th September, 2013 the matter came before White J. The solicitor for Kelly Trucks Limited informed the court that he had a bank draft in court for the amount of the High Court judgment and requested that the petition be struck out. Counsel for the petitioner drew the court's attention to the matter of the untaxed bill of costs which it was pointed out was substantial. The court was informed of the petitioner's concerns as to potential asset stripping arising from the conduct of the company and its directors following the formation of the two new companies, Kelly Trucks Strokestown Limited and Kelly Trucks (Ballaghaderreen) Limited. According to Patrick Mullins solicitor for Costello Transport Limited, in his affidavit of 14th January, 2014, White J. acknowledged those concerns and opined that Mr. and Mrs. Kelly should make an offer in relation to the costs. White J. indicated that failure to make payment of a sufficient amount towards costs would result in an order being made to wind up the company.

19. In his affidavit of 24th September, 2013, Mr. James Kelly addressed the concerns expressed about the alleged asset stripping of the company for the purpose of defeating creditors. He asserted that such was never the company's intention. Mr. Kelly averred that he had gone to *"enormous lengths"* to raise sufficient funds to discharge the original judgment of the High Court. He asserted that the proceedings had had a *"tumultuous effect"* on the lives of Mr. and Mrs. Kelly as well as the lives of those associated with the company. In his affidavit Mr. Kelly proffered a further €5,000 towards the costs of the action and advised that, if given the opportunity, he could make immediate payments towards the costs of the action at a rate of €500 per week, pending the taxation of the costs in November, 2013. Mr. Kelly averred that, *"in order to collect the debts due to the company however, it is critical that the petition in this case be lifted."*

20. On 25th September, 2013 by consent White J. ordered that the petition be struck out on condition; that the company pay the petitioner, Costello Transport Limited, the sum of €5,000 as part payment of the costs of the substantive action, and that the company continue to pay €500 per week until the conclusion of the taxation of costs or alternatively for a period of one year. The order of McCarthy J. was discharged, and the company was ordered to bear the costs of the petition to be taxed in default of agreement.

21. On 29th November, 2013, the adjourned date for the costs hearing before the Taxing Master, a cost accountant for Kelly Trucks Limited indicated to Costello Transport Limited's cost accountant that they had just been instructed to defend the taxation and that they were not in possession of the relevant papers. Costello Transport Limited's cost accountant agreed to make his files available for inspection and a short adjournment was agreed to 9th January, 2014. As of that date the total untaxed costs stood at €82,520.25 – comprising of €52,619.97 in respect of the High Court proceedings, €8,507.12 for the Supreme Court proceedings, as well as €21,393.16 being the costs of the petition. In addition the company was facing a bill from its own former solicitors Callan Tansey, for a sum of almost €56,000.

22. On 22nd December, 2013 Kelly Trucks Limited by resolution entered a creditors' voluntary liquidation on the grounds of an alleged inability to pay its debts as they fell due.

23. The terms of the order of White J. of 25th September were complied with until 23rd December, 2013, with €11,500 being paid in respect of legal costs at that date. That sum was made up of the initial sum of €5,000 and thirteen subsequent payments of €500 each.

24. A creditor's meeting took place on 3rd January, 2014 at the Mullingar Park Hotel. In his affidavit of 10th December, 2014 Mr.

Murphy, the applicant, averred that among those in attendance at the meeting were Mr. and Mrs. Kelly, Mr. Nehaal Singh who was appointed liquidator at the meeting, Mr. Thomas Clarke the company accountant who had only been retained two months earlier, in November 2013, Ms. Orlagh Sharkey of Callan Tansey solicitors and Mr. Murphy himself who attended the meeting on behalf of Costello Transport Limited. Callan Tansey claimed to have only received notice of the meeting the previous day and contested the validity of the meeting on the ground that the company had not complied with its obligations under s. 266 of the Companies Act 1963 to give at least ten days' notice of such a meeting. On this ground Callan Tansey requested an adjournment. No response to that letter was received.

25. In Mr. Murphy's affidavit, he outlines the events which took place at the meeting. This account is uncontroverted by the respondents. He avers that:

- a) the company directors, Mr. and Mrs. Kelly, failed or refused to provide explanations as to the business and financial position of the company, its assets or its pre-liquidation position;
- b) the company accountant Mr. Thomas Clarke was unable to inform attendees as to the company's turnover for 2012 or 2013, or the preceding six months;
- c) concerns were raised regarding the write-down of company assets; and
- d) the first-named respondent, Mr. James Kelly, appeared to confirm that the company's business had been taken over by Kelly Trucks Strokestown Limited, though he failed to refer to any consideration passing to the company in respect of this alleged transfer of business.

Mr. Murphy avers that this was the first time the apparent takeover of the business had been acknowledged. In her affidavit of 15th January, 2014 Orla Sharkey acting on behalf of Callan Tansey avers that the meeting was mostly conducted and controlled by Mr. Clarke with very limited input from Mr. Nehaal Singh, the purported liquidator. She contends that the respondents gave "*evasive and non-committal answers*" in response to the concerns that were raised by those in attendance at the meeting. Following Mr. Singh's appointment Mr. Murphy requested that a committee of inspection be formed, comprised of Mr. Murphy, Ms. Sharkey and Mr. James Kelly.

26. At the meeting, the directors produced the company's annual return and statement of affairs for 2011 and 2012. The company returns indicated a turnover of €1.598 million in 2012, and a turnover of €1.550 million in 2011. The company's unaudited directors' report and financial statements for 30th April, 2012 showed shareholder's funds of €750,000; recent additions to fixtures and fittings of a little in excess of €401,000; and a loss for that year of €77,000. The company had sixteen employees and was recorded as having reserves of over €800,000. The company's tangible fixed assets stood at €588,000; its debtors just below €480,000; and its creditors were recorded €405,000. The 2012 report also showed a sum of just over €55,000 owing to the directors in respect of an alleged loan agreement and for rent due for the company premises. The company's bank statements showed that a little in excess of €40,000 had been transferred to Kelly Trucks Strokestown Limited by Kelly Trucks Limited between August and November of 2013. At the meeting the company accountant Mr. Thomas Clarke is alleged to have said that the company's lease for its premises had been terminated.

27. Mr. Nehaal Singh was appointed liquidator of the company at the creditors' meeting with the support of the company directors, Mr. and Mrs. Kelly. Costello Transport Limited objected to the appointment of Mr. Singh and brought an application before the court for his removal. The application to remove Mr. Singh arose, *inter alia*, due to concerns as to his independence, competence and experience. Costello Transport Limited proposed that Mr. Singh be replaced as liquidator by Mr. Murphy, the applicant. The application was brought in circumstances where Costello Transport Limited was still a creditor of Kelly Trucks Limited, and its earlier petition to wind up Kelly Trucks Limited had prompted the discharge of the judgment amount owed to Costello Transport Limited.

28. The notice of motion seeking to replace Mr. Singh bearing record number 2014/28COS proceedings was issued on 16th January, 2014. The grounding affidavit for the application was sworn by Mr. Patrick Mullins of Mullins Lynch Byrne, solicitors for Costello Transport Limited on 14th January, 2014. The notice of motion purports to invoke s. 228 of the Companies Act 1963-2006 both for the removal of Mr. Nehaal Singh as liquidator and for the appointment of Mr. Gerard Murphy as liquidator in his stead. Section 228 relates to liquidators who are appointed subsequent to the making of a winding up order by the court and does not relate to liquidators appointed in a voluntary winding up. This error in the notice of motion drafted by the applicant's lawyers gave rise to confusion and delays, as will be seen below. However, the notice of motion sought in the alternative, an order pursuant to s. 277 of the Companies Act 1963-2006, which is the appropriate section to invoke when seeking the removal of a liquidator in a voluntary winding up. While the notice of motion did not invoke the power pursuant to s. 277 to appoint a liquidator it seems to this court that upon removal of a liquidator, the court has a power to appoint another liquidator under s. 277(2). It provides that:-

"the court may, on cause shown, remove a liquidator and appoint another liquidator."

It seems to this court that upon removal the court automatically has a power to appoint.

29. On 12th February, 2014, a letter was issued by the company directors to the applicant Mr. Murphy, the proposed new liquidator of the company, to the effect that a sum of €55,000 was due and owing to them by the company, by virtue of an alleged loan agreement which they claimed to have made in April, 2008.

30. On 17th February, 2014, an application was made to Baker J. for the removal of Mr. Singh as liquidator and for his replacement by Mr. Murphy. The court granted the application and further directed Mr. Singh to hand over all documents in his possession in relation to the voluntary liquidation within seven days. There is no doubt that there are material errors on the perfected order purporting to reflect the order made by Baker J. on 17th February, 2014. The order purports to have been made by the Master and to have been perfected by the Master's registrar. The most serious error in the perfected order is that s. 228 of the Companies Act 1963-2006 is relied on as conferring the power to direct the removal of Mr. Nehaal Singh, and direct the appointment of Mr. Gerard Murphy. As already stated, section 228 does not apply to a company in voluntary liquidation. The order should have recited and relied upon s. 277 of the 1963 Act. These errors were subsequently addressed by Baker J. in a further application on 13th April, 2015 (see below at para. 67).

31. On 18th February, 2014, pursuant to his appointment as liquidator, the applicant Mr. Murphy wrote to the directors requesting information to assist his investigation into the affairs of the company. The applicant requested that a director's questionnaire be completed. He asked that the first and second-named respondents provide him with information on the operation of the Ballaghaderreen Test Centre, post-liquidation. Kelly Trucks Limited is the licensed operator of that test centre. Mr. Murphy also

sought information about the status of the company's relationship with the Renault Truck franchise based on a service agreement with Renault dated 2012. Mr. Murphy wanted to know who was trading with Renault as Kelly Trucks Limited was in liquidation. Mr. Murphy also sought a copy of all bank statements, correspondence, and agreements entered into by or on behalf of the company by the first and second-named respondents. He inquired about documentation relating to the vehicles owned by the company. He sought all employee records and personnel files. On the same date 18th February, 2014, Mr. Murphy wrote to the company accountant Mr. Clarke requesting any documents relating to the company and information on the capacity in which he acted for the company. He also inquired as to whether he was a creditor of the company.

32. On 19th February, 2014 the Road Safety Authority wrote to Mrs. Kelly in response to her application to have the company licence to test vehicles in the Ballaghaderreen Test Centre transferred from Kelly Trucks Limited to Kelly Trucks (Ballaghaderreen) Limited. The Road Safety Authority refused the application, stating that under the relevant legislation such a licence could not be transferred or assigned to another person or entity, and that it was an offence to carry out such testing when unauthorised to do so. The letter directed that immediate steps should be taken to ensure that any purported testing without such a licence should cease.

33. On 27th February, 2014 Mr. Clark the company accountant, wrote to the applicant about the loan agreement which the first and second-named respondents claim to have had in place with the company. In Mr. Murphy's affidavit, he stated that this was the first time he had heard of the existence of such a loan agreement. The letter stated that the directors claim to have transferred €400,000 to the company, but due to an error the accounts generated for year end 30th April, 2012 had "*grossly understated*" the loan and the figure was more likely to be within the region of €560,000, rather than the €55,000 stated in the company accounts. The letter claimed that, by way of security for the loan, the directors had received a floating charge over all of the assets of Kelly Trucks Limited until such time as the loan was repaid in full. By reason of the liquidation, Mr. Clarke asserted that the floating charge had now crystallised.

34. On 28th February, 2014 the applicant received some company files from Mr. Singh, despite earlier assertions by him that he was not in possession of any files. On this date the applicant wrote to Mr. Singh confirming receipt of the files. He asked when the rest of the materials would be delivered. He further asked that in the event that Mr. Singh was not in possession of other materials, that he would notify the applicant as to their whereabouts. The applicant also wrote to Mr. and Mrs. Kelly on this date stating that he had not received any files as requested in his letter of 18th February and requested a reply from them within seven days.

35. On 3rd March, 2014 the applicant wrote again to Mr. Clarke due to his failure to respond to the earlier letter sent to him on 18th February. Mr. Murphy sought a reply within seven days together with the list of documents which had already been itemised and a copy of the minutes from the creditors' meeting which took place on 3rd January, 2014.

36. On 7th March, 2014 a notice of appeal was purportedly issued by Mr. Singh appealing the order of Baker J. of 17th February removing him as liquidator and appointing Mr. Murphy in his stead.

37. It appears that the parties were next before the High Court on 10th March, 2014, though the court has no evidence as to the basis on which the matter came back before the High Court, on that date. The court has been informed that on that occasion, the second-named respondent made a number of accusations relating to the conduct of Baker J. and the lawfulness thereof. Arising from these accusations, Baker J. offered to recuse herself from the proceedings and the second-named respondent accepted that offer.

38. On 11th March, 2014 the applicant issued a further motion bearing record number 2014/28COS. Arising from the respondents' failure to provide relevant files the applicant sought orders requiring the first and second-named respondents together with Mr. Singh and Mr. Clarke, to hand over an itemised list of files relating to the company. He also sought an order directing the examination on oath of both Mr. and Mrs. Kelly, and such further orders as the court saw fit to make. On the hearing of that motion on 14th March, 2014 White J. ordered that the requested documents be delivered to the applicant within five working days and that the directors and other officers of the company comply with their statutory duty to assist and cooperate with the liquidator.

39. On 24th March, 2014 the directors of Kelly Trucks Strokestown Limited, James Kelly Junior and Patricia Kelly, wrote to the applicant concerning his suspicions that the Strokestown and Ballaghaderreen companies were related entities of Kelly Trucks Limited. They stated that they had "*no dealings whatsoever with Kelly Trucks Ltd in any context.*"

40. On 3rd April, 2014 a notice of appeal was issued by the first and second-named respondents. They sought to appeal the order of White J. made on 14th March, 2014 directing the delivery of files and the cooperation of company officers, to the Supreme Court. The respondents also sought an order that the appeal of Mr. Singh to his removal be joined to their appeal of the order of White J.

41. On 7th April, 2014, Mr. Murphy received a letter from Mrs. Anne Kelly to the effect that she did not have documents in her possession that could assist the liquidator and that Mr. Singh was in fact in possession of all documents relevant to the company. The first and second-named respondents also alleged on several occasions that the relevant files had been stolen or had otherwise disappeared from a storage unit owned by the company which had been occupied by Mr. Singh following his appointment as liquidator.

42. On 8th April, 2014, Mr. Murphy received a letter from Mr. Singh enclosing a key to the storage unit which was at his disposal during his time as liquidator of the company. In this letter Mr. Singh claimed that all records under his control were locatable at that address. Mr. Singh also commented that he had not been paid for his role and claimed that his outstanding fee was €3,500.

43. On 17th April, 2014, the first and second-named respondents wrote to Mr. Murphy about their alleged loan agreement with the company. In the letter they assert that it was a private loan and that the documents were prepared privately and confidentially. On this basis the directors insisted that such documents were not the property of the company and accordingly did not need to be handed over to him for inspection.

44. On 18th April, 2014 Mr. Murphy sent a fax to the directors of Kelly Trucks Limited. He maintained that he still had not received company records despite repeated requests. In the fax Mr. Murphy asserts that the failure to provide company records led him to believe that Kelly Trucks Strokestown Limited had the use of the assets of the Kelly Trucks Limited. Mr. Murphy requested details of such arrangement as had been agreed between Kelly Trucks Limited and Kelly Trucks Strokestown Limited, and also requested details of the consideration that passed for this transfer of business and assets from Kelly Trucks Limited to Kelly Trucks Strokestown Limited.

45. On 19th April, 2014 the first and second-named respondents wrote to the applicant. The letter stated as follows:-

"Dear Mr Murphy,

We have arranged to meet with you for over a week now to show you the requested original documentation in relation to the secured loan given by ourselves to KELLY TRUCKS LIMITED. We have already given you the specific time, date and place. No one ever mentioned 23rd April. We made a specific appointment, as it is our wish to resolve this issue, which you do seem to have, over the validity of the Secured Loan we gave to KELLY TRUCKS LIMITED in 2008, of which you have ALL necessary paperwork in your possession validating same. It is you whom requested (sic) to view the Original documentation.

The meeting was proposed for 11:30am in the Ballaghaderreen Premises and we asked you to let us know if this was not suitable. Now for some reason you see no benefit, which we are at a loss to understand owing to the urgency you portray on different days. And according to yours of April 18th 2014 by Fax, wherein you apparently try to dismiss our valid claim and lawful ownership rights to ALL assets of KELLY TRUCKS LIMITED. You wrongly state in yours that 'all assets of whatever nature of the company belong to the company.' This statement from you is quite simply untrue, and we demand you retract same immediately. You are in possession of the loan documentation lawfully entered into and duly signed by all parties wherein the complete opposite of your statement is the case. Furthermore we have First-hand knowledge of the events and facts of this matter, what qualified you to make these untrue and uninformed statements?

You portray an image that you seem to be of God like status in this liquidation, and that it is your decision and yours alone, whether you accept the fact that we loaned our money to KELLY TRUCKS LIMITED and secured same. For the avoidance of All doubt, we will not sit idly by while you do your utmost to deny us our lawful rights over the secured assets which we are lawfully entitled. (sic) You are in possession of the loan documents and the bank statements showing where we transferred our money into the account of KELLY TRUCKS LIMITED. How can you brazenly present your idea that this actually did not happen? When you are in possession of documentation confirming the loan, agreements, and the money transfer. This has all the hallmarks of a witch hunt, for whatever reasons, which are unknown to ourselves.

This letter may be used to fix you with the costs of securing our position in the courts.

Please immediately confirm it is your wish to cancel the meeting on Tuesday 22nd April in Ballaghaderreen at 11:30am."

46. On 23rd April, 2014, the directors of Strokestown, James Kelly Junior and Patricia Kelly, wrote to the applicant again echoing the sentiments of their earlier letter dated 24th March, reinforcing the assertion that they had no dealings with Kelly Trucks Limited.

47. Also on this date 23rd April Mr. and Mrs. Kelly wrote to the applicant a lengthy letter in which they address Mr. Murphy's concerns that the explanations proffered by the respondents and Mr. Singh concerning the location of company files are inconsistent. In that letter the respondents vigorously deny the claim of inconsistency and in the course of a series of allegations against the applicant hint that the applicant and his counsel had stolen the files themselves:-

"The above statement from you Mr. Murphy only serves to compound your unlawful attempts to portray us as being unhelpful and indeed hindering to your attempts to liquidate the Company. You Mr. Murphy are now fully aware of the facts that we have NO idea as to the whereabouts of the missing files, books and records, but you Mr. Murphy do know of the whereabouts of same, and you are trying to pervert these facts, and obscure the truth. The truth Mr. Murphy will set us free in the end. Honesty is the best policy. As when you tell ONE lie you must tell several more to conceal/compound the original lie. You have been caught out Mr. Murphy. You are a disgrace to your profession."

In relation to Mr. Murphy's assertion that Strokestown had seemingly been operating the business of Kelly Trucks Limited, the respondents replied:-

"Do you deny the fact that KELLY TRUCKS STROKESTOWN LIMITED has been trading since August 2013 in stiff competition to KELLY TRUCKS LIMITED where KELLY TRUCKS LIMITED couldn't survive from the pressure of your principle (sic) MULLINS LYNCH BYRNE solicitors, and you, and the aggressive competition from KELLY TRUCKS STROKESTOWN LIMITED?"

48. On 13th May, 2014, James Kelly Junior and Patricia Kelly replaced their parents Mr. and Mrs. Kelly as directors of Kelly Trucks (Ballaghaderreen) Limited.

49. On 15th May, 2014 Mr. Murphy, having obtained a list of vehicles belonging to the company from Roscommon County Council, wrote to the directors requesting the location of vehicles owned by the company. He also requested information in relation to payments made to the company by the directors in their own names. The applicant contends that as of the date of hearing he has had no response to this request.

50. On 19th May, 2014 the completed directors' questionnaires were submitted to the applicant, some three months after they had first been requested. Mrs. Anne Kelly stated that she was in possession of an Audi A4, a vehicle registered to Kelly Trucks Limited. Several days later the applicant wrote to Mrs. Kelly requesting that the Audi A4 be made available for collection. As of the date of hearing Mrs. Kelly was still driving the Audi A4.

51. Having compiled a list of customers and suppliers from such documents as were available to him, the applicant wrote on 21st May, 2014 to each of them requesting copies of invoices and purchases in relation to the company from 1st January, 2012 to date. The purpose of that inquiry was his attempt to ascertain sales and receivables.

52. On 23rd May, 2014 the applicant received a response to the letter from one of the company's customers, STL Logistics. The letter stated that they did not deal with the company Kelly Trucks Limited but were dealing with Kelly Trucks Strokestown Limited. The accounts furnished by STL Logistics dated back to December 2011, some eighteen months prior to the incorporation of Kelly Trucks Strokestown Limited in July, 2013.

53. On 26th May, 2014 the applicant wrote to Ms. Josephine Lynch of STL Logistics inquiring whether she had been advised to change the name on the accounts and, if so, when she was so advised and by whom. Ms. Lynch responded and attached a notice that she had received from Mrs. Kelly in August, 2013. The letter, which this court believes was sent to all customers and suppliers of Kelly Trucks Limited, states as follows:-

"To Whom It May Concern,

Kelly Trucks Strokestown Ltd has upgraded their system and due to this change all outstanding/unpaid invoices had to be re-done again. Our old system prevented us copying onto the new system. We have enclosed a credit note along with the re-issued invoices."

The letter then goes on to provide bank details for Kelly Trucks Strokestown Limited and requests that cheques be made payable to Kelly Trucks Strokestown Limited.

54. On 29th May, 2014 a circular was issued by Kelly Trucks Limited to its creditors but on "Strokestown" letterhead:-

"To Whom it may Concern,

This letter is to provide clarity to the recent correspondence between your company and the known Liquidator of Kelly Trucks Ltd (in Liquidation). We are ensuring (sic) you that you are aware that your company has been dealing with Kelly Trucks Strokestown Ltd since July 2013. All invoices and statements to date have our name clearly stated.

Kelly Trucks Ltd is in Liquidation and you do not have any debt with Kelly Trucks Ltd.

If you have answered the said letters to the Liquidator and handed over any of Kelly Trucks Strokestown Ltd documents you have breached the Data Protection Laws. We do now (sic) wish to bring this matter of yours and your company's negligence to the Data Protection Commissioner but if it is deemed necessary we will."

55. On 17th June, 2014 a Mr. Aidan O'Grady, a director of Ballaghaderreen Test Centre Limited, confirmed to the applicant that an agreement was in place with the first-named respondent, Mr. James Kelly, whereby equipment belonging to Kelly Trucks Limited had been given to him in consideration for money owed to him by Mr. Kelly.

56. On 2nd July, 2014 the applicant, Mr. Murphy, issued an originating notice of motion bearing record number 2014/333COS in which he sought orders against the current respondents James Kelly and Anne Kelly, Thomas Clarke the accountant for Kelly Trucks Limited, Nehaal Singh the former liquidator, Kelly Trucks Strokestown Limited and Kelly Trucks (Ballaghaderreen) Limited, the related companies, as respondents. The reliefs sought in the notice of motion against these respondents were, *inter alia*: an order pursuant to s. 297(a) of the Companies Acts 1963-2012 that James Kelly and Anne Kelly, directors of Kelly Trucks Limited (in Voluntary Liquidation), are personally responsible, without any limitation of liability, for the debts of Kelly Trucks Limited (in Voluntary Liquidation); and an order pursuant to s. 139 of the Companies Act 1990 directing that Kelly Trucks Strokestown Limited deliver to Mr. Murphy all property and assets of that company and/or pay such sum to the liquidator in respect of this on such terms or conditions as the court sees fit. The applicant originally sought several other orders but clarified in the course of this hearing that he would not be pursuing those reliefs. The notice of motion was made returnable for 21st July, 2014.

57. On 6th August, 2014 the applicant received a letter from the Office of the Director of Corporate Enforcement which stated that the applicant was not relieved of his obligation to make a restriction/disqualification application pursuant to s. 150 of the Companies Act 1990.

58. On 30th October, 2014 a notice of motion was issued by the applicant under 2014/484COS proceedings seeking reliefs against the respondents pursuant to s. 160 of the Companies Acts 1963-2012 for the disqualification of Mr. and Mrs Kelly or, in the alternative, an order under s. 150 of the Companies Acts 1963-2012 for their restriction.

59. On 18th November, 2014 a conditional appearance was entered on behalf of all respondents. The conditional appearance runs to six pages and alleges that the court has no jurisdiction to hear the application: firstly on the basis that the case is based on lies, fraud and illegality; secondly on the basis that the court is unable to prove that it acted with integrity in the issuing of the false and illegal documents; thirdly that all orders previously made in the matter are illegal and that it is impossible for the respondents to receive a fair hearing; fourthly that none of the respondents will receive a proper lawful and impartial hearing due to the fact that the applicant has misled the court with lies and that the court has accepted same; and fifthly they demand a guarantee to be undertaken by the court to investigate and seek out the truth of the matter. The conditional appearance is addressed to the Presiding Judge, the Chief Justice, The Minister for Justice, The Head of the Garda Bureau of Fraud Investigation, An Taoiseach, the Tánaiste, Uachtaráin na hÉireann, the President of the European Court of Human Rights, and to the Court of Justice of the European Union.

60. The court is told that the 2014/333COS proceedings were adjourned until 19th November 2014, and further adjourned to 15th December, 2014. The 2014/484COS proceedings were adjourned to 24th November, 2014 and further adjourned to the same date as the proceedings bearing record number 2014/333COS, being 15th December, 2014. On this latter date it was decided that both 2014/333COS and 2014/484COS proceedings would travel together before the court.

61. On 20th January, 2015 a notice of motion was issued whereby the applicant sought to amend his originating notice of motion and further sought an order striking out the proceedings against the third and fourth-named respondents, Mr. Clarke and Mr. Singh. The claimed purpose of the application was to focus the recovery proceedings on the company directors, Mr. and Mrs. Kelly, and the companies with which they are involved, being Kelly Trucks Strokestown Limited and Kelly Trucks (Ballaghaderreen) Limited. The applicant sought 1) an order pursuant to O. 28, r. 1 of the Rules of the Superior Courts to amend his originating notice of motion to seek only two reliefs pursuant to s. 297(a) of the 1963 Act and s. 139 of the 1990 Act but to seek those reliefs against all respondents as opposed to merely Kelly Trucks Strokestown Limited; 2) an order striking out the proceedings insofar as they concern the third and fourth-named respondents, Mr. Clarke and Mr. Singh; 3) an order pursuant to O. 15, r. 13 of the Rules of the Superior Courts amending the title of the sixth respondent from Kelly Trucks Ballaghaderreen Limited of Lung Road, Ballaghaderreen, Co. Roscommon in substitution for (and with the removal of) Kelly Trucks (Ballaghaderreen) Limited; and 4) such further orders as the court sees just and proper to make. The amendment motion came before the court on 2nd February, 2015 and was adjourned to 2nd March to give Mrs. Kelly the second-named respondent an opportunity to deliver a reply to the grounding affidavit.

62. On 2nd March, 2015, a notice of motion was issued by the second-named respondent, Mrs. Kelly. Mrs. Kelly sought various declaratory orders as to deficiencies in the affidavits filed by reason of an alleged failure to comply with the rules of court, and contended that the affidavits by reason of these deficiencies were inadmissible. In addition Mrs. Kelly took issue with the validity of the order of Baker J. made on 17th February, 2014 removing Mr. Singh as liquidator and appointing Mr. Murphy in his stead. As stated earlier there were clear errors on the face of the order.

63. On this date by order of Cregan J. it was ordered that the applicant be at liberty to issue a notice of motion to amend under the "Slip Rule" the order of Baker J. of 17th February, 2014 to be issued and returned to 23rd March, 2015; that the notice dated 20th January, 2015 be adjourned to 13th April, 2015; and that the notice of motion issued by Mrs. Kelly dated 2nd March, 2015 and

returned to 23rd March, 2015 now be listed for 13th April, 2015.

64. On 4th March, 2015 the applicant's solicitors wrote to Mrs. Kelly notifying her that in their view the application under the "Slip Rule" needed to be brought in the original Costello Transport Limited proceedings bearing record number 2014/28COS, under which the order of Baker J. removing Mr. Singh and appointing Mr. Murphy was made. The registrar for Cregan J. had been in contact with the applicant and had sought clarity in this regard. The applicant outlined that he intended to appear before Cregan J. on 5th March to mention the matter and to clarify the need for the application to be brought under the Costello Transport Limited proceedings, 2014/28COS. The applicant also notified Mrs. Kelly of her entitlement to attend and to make any submissions and/or representations to the court as she thought appropriate.

65. In response the second-named respondent Mrs. Kelly on 5th March issued a memorandum questioning *inter alia* the entitlement of the applicant to appear before Cregan J. without notice to her and challenging the entitlement of Costello Transport Limited to make any application to court in circumstances where it was hopelessly insolvent.

66. The within dual applications for recovery of assets and disqualification of directors had been listed for hearing in the Chancery List on 10th March, 2015. It was clear by reason of the necessity to amend the order appointing Mr. Murphy and the extant amendment application that the matters would not be ready to proceed on that date. The applicant attended before Gilligan J. on 5th March, 2015 to notify the court of these developments. The case was adjourned to a date to be fixed with liberty to apply for a date. This order of Gilligan J. is expressed to be on consent and the DAR appears to confirm that that is what the court was told. Mrs. Kelly, the second-named respondent, has averred that she did not consent to the application and the court accepts her evidence in that regard.

67. On 9th March, 2015 Cregan J. clarified that the application under the "Slip Rule" should be brought in under the Costello Transport Limited proceedings. Mrs. Kelly was present for that clarification.

68. On 12th March, 2015 a motion was issued by the applicant for an order under the "Slip Rule" amending the errors in the perfected order of Baker J. made on 17th February 2014.

69. On 13th April, 2015 an order was made by Baker J. under the "Slip Rule" correcting the two errors contained in the order dated 17th February, 2014. As had been directed by Cregan J. the application was made in the Costello Transport Limited proceedings. The court corrected the errors and also ordered Kelly Trucks Limited to pay the applicant the costs of the motion and for such costs to be taxed in default of agreement. It appears from the *ex tempore* judgment delivered by Baker J. that Mrs. Kelly again questioned the validity and admissibility of affidavits on the grounds that they failed to comply with the requirements of the Rules of the Superior Courts, and again she alleged that her constitutional rights were being infringed. The *ex tempore* judgment of Baker J. stated as follows:-

"The motion before me is a motion dated the 11th March, 2015 returnable before me today the 13th April, 2015 by which an order pursuant to the so called 'Slip Rule', and/or pursuant to the inherent jurisdiction of the High Court is sought correcting two errors which it is said were contained in an order made by me on the 17th February, 2014. The motion is grounded on an affidavit of Cormac O'Regan sworn on the 11th March, 2015 and there is an earlier affidavit of the 11th February, 2015 which is partly in response to affidavits sworn by Mrs. Kelly.

Mrs. Anne Kelly is one of the named notice parties to this motion and she tells me that she appears on her own behalf and on behalf of her husband James Kelly both of whom lived at Strokestown, Co. Roscommon. The motion comes before me following an order made by Cregan J. that the applicant company, Costello Transport Limited, bring an application to me having regard to the fact that the order which is sought to be corrected is an order made by me. Cregan J. directed that the motion be brought before me and directed service on a long list of persons including Mr. Singh, the liquidator who was replaced, Thomas Clarke, Kelly Trucks Strokestown Limited and Kelly Trucks Ballaghaderreen Limited, two companies who are named as notice parties in the motion. I have seen the affidavit of service and I am satisfied that the relevant persons directed to be served by Cregan J. have been served and I am satisfied that Mrs. Kelly appears on her behalf and on behalf of her husband.

The documents before me consist of the motion, two affidavits of Cormac O'Regan of the 11th March, 2015 and the 11th February, 2015 and two affidavits of Mrs. Kelly sworn on the 2nd March, 2015 and the 9th March, 2015. It would be fair to say that those affidavits were sworn for perhaps a slightly different purpose from the one that is now before me because Mrs. Kelly was swearing her affidavit for the purpose of the application before Cregan J. and the first affidavit of Mr. O'Regan was sworn in proceedings bearing record number 2014/333COS which are the subsequent proceedings brought by the liquidator against Mr. and Mrs. Kelly and the named respondents. I am satisfied however that all of the various issues are fully before me and the affidavits of Mrs. Kelly in particular are fulsome with regard to her complaints.

The first complaint that Mrs. Kelly makes in her objection to the making of the order sought by the motion is that the grounding affidavit of Mr. O'Regan is not in compliance with the Rules of the Superior Courts. She refers me to Order 40 of those Rules and in particular Rules 6 and 9 of that Order. In particular she states on affidavit, and she has made arguments before me, that as a matter of law an affidavit should express the time when and the place where the Commissioner to administer oaths has taken the affidavit (the requirement in O.40, r.6), and the requirement in O.40, r.9 that every affidavit shall state the description and true place of abode of the deponent. She says to me in the circumstances that the affidavit grounding this motion is defective in two ways. It is defective because it does not state the time when it was sworn and it does not state the place of abode of Mr. O'Regan. She makes the point to me that her right to constitutional protection and her rights under the European Convention on Human Rights and as a citizen of Ireland have been breached by virtue of the fact that the Rules have been broken. She also makes the point that the Rules are binding on me and that I am obliged to comply with and observe the Rules in the making of any order.

Counsel for the applicant has referred me to a recent judgment of Kelly J. in the Court of Appeal in the case of Kearney v Bank of Scotland plc & Patrick Horkan [2015] IECA 32 where Kelly J. referred to an argument made by the litigant before him, Mr. Kearney, in substantially similar terms. Mr. Kearney had made the point in the Court of Appeal that the affidavit which was sworn grounding the application before the Court did not state the place of abode of the relevant deponent. I have asked Mrs. Kelly if she wishes to address me on the contents of that judgment and the fact that it is a recent judgment of a court which is superior in the structure to me, but Mrs. Kelly makes the point that she is, as she put it, 'not a judge' and she is not in a position to argue the law to me. She also said with regard to my question as to whether I ought to take account not merely of the two express requirements in r.6 and r.9 of O.40 but also of what might be a discretion granted by the court by virtue of r.15 of that Order, namely that the court has a discretion to

receive an affidavit notwithstanding any defect by mis-description of parties or otherwise in the title or in the jurat or any other irregularity in the form of the affidavit. Again in response to my question Mrs. Kelly said she was 'not a judge' and was not in a position to make legal argument with regard to r.15 but she stressed in her lengthy and expressive affidavit before me that 'the Rules are the Rules', they must be interpreted by me and I am bound by those Rules as the law of the land.

Turning now to the first objection of Mrs. Kelly that the affidavit grounding this motion, being the affidavit of Cormac O'Regan does not state the place of abode of Mr. O'Regan. Mrs. Kelly is correct. Mr. O'Regan gives his address as being 89-90 South Mall, Cork which seems to be the address of the firm of James Riordan & Co. in which he is a solicitor. In that regard I find myself bound by the judgment of *Kearney v Bank of Scotland*, namely that, taking a purposive approach to the question of what O.40, r.6 means, that the requirement is not that a person state their abode, or as he puts it where they sleep or lay their head, but where they can be found. Kelly J. took a purposive approach to the requirement that the address of the person be stated, and that the purpose of the stating of an address is that it be possible for the person receiving an affidavit to find out from the affidavit where the person is to be found. Accordingly, and following Kelly J.'s judgment delivered on the 23rd February, 2015, I reject the argument that the Rules require that the place of abode of the deponent be stated and I accept that the law, as a matter of recently pronounced law and as a matter of law going back to the 19th century, is that as long as the place where a person can be found is clear from the affidavit then the affidavit is adequate for the purpose of the Rule. Even if I am wrong in this, it seems to me I have a discretion under r.15, which I exercise to accept that the affidavit is properly before me.

The second objection of Mrs. Kelly is that the affidavit does not state the time when it was sworn and O.40, r.6 states:-

'Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit'.

The affidavit of Mr. O'Regan does indeed state the place where the affidavit was sworn and it states the date. It does not state the exact time of the day. It simply states that the affidavit was sworn on the 11th March, 2015.

Counsel urges upon me the interpretation of the Rule that requires that the date be given rather than the time in minutes or seconds when the affidavit is taken and I accept that he is correct. I accept indeed that that is correct in nearly all legal documents, and it is correct for example in a deed where the date of the deed is given and not the time when it is executed. It is equally the case, it seems to me, in an affidavit that it is the time or the day or the date when the affidavit is taken that is the relevant test. Again looking at the matter from a purposive point of view, the reason why the time is relevant to the question of the efficacy or authenticity or admissibility of an affidavit be in a position to first of all identify the affidavit by reference to its date, secondly identify the evidence contained in the affidavit by reference to the date when the knowledge of the deponent is to be tested and thirdly, if there is a sequence of affidavits, so that it is possible for any person, either a judge reading an affidavit and coming to conclusions on affidavits on evidence, or a person replying to an affidavit, be in a position to understand the precise sequence of evidence before that person for the purposes of properly testing the evidence.

Accordingly, I am of the view that when the Rules require, as they do, in O.40, r.6 that the time when an affidavit is sworn be stated, by 'time' is meant the date of the affidavit. Accordingly, I hold that Mr. O'Regan's affidavit is not defective. I further am of the view that if I am wrong in this that r.15 gives me a discretion to admit the affidavit and I exercise that discretion in the event that I am wrong with regard to the date, and I have to say I exercise that discretion partly for precisely the reason that Mrs. Kelly has identified to me, namely that I have not in my many years of practice at the Bar and subsequently on the Bench as a High Court judge, until I saw the affidavits of Mrs. Kelly, seen an affidavit which identifies the precise second when the affidavit was sworn. It is indeed difficult to imagine that a commissioner for oaths would have to have a stopwatch with him or her to take an affidavit. Accordingly, I reject the argument by Mrs. Kelly that the affidavits are not properly before me.

Having found against her on that point I now come to consider the other matter which is the substantive application before me. The application before me is under the 'Slip Rule' and under the inherent jurisdiction of the court to correct the order made on 17th February, 2014 in two respects. The first correction is the correction of the identity of the judicial officer who dealt with the matter. The order itself states that it was made by the Master of the Court. I am asked to correct that and to identify that the order was made by me. I do make that order and it seems to me that the explanation for why that error is contained is adequately given in the grounding affidavit of Mr. O'Regan, namely that Marianne White, the registrar who dealt with the matter, and who sat as my registrar on that date, used a template and she frequently sits as a registrar with the Master and her template contained the reference to the Master.

The second reason is that somewhat unusually I do remember hearing this matter, and I remember hearing it because there were very voluminous papers before me and I was required to read them over lunch and to read indeed at some speed because of the extent of the objections made by Mrs. Kelly. I remember the matter quite well. I remember hearing it and I have no difficulty in accepting that I was the judge who heard it. Accordingly, I will make the order correcting the perfected order made on the 17th February, 2014 to reflect that the order was made by me.

The second application made is to correct an error in the body of the document. The order recites that I made an order pursuant to s. 228 of the Companies Act 1963-2006. Counsel suggests to me, and it is stated in the grounding affidavit of Mr. O'Regan, that I could not have made an order under s. 228 of the Companies Act 1963 as such an order would have been relevant and possible only were this to be a court appointed liquidator i.e. an official liquidator appointed pursuant to an order where the court wound up this company. Again I accept what counsel says, and I accept the contents of the affidavit of Mr. O'Regan. This is not a court liquidation. This is a creditors' voluntary winding up and Mr. Singh was appointed by the creditors at the creditors' meeting. I could not have made an order under s. 228 of the Act of 1963. I accept that the order as drawn up suggests that I did but I could not have made that order. I had no jurisdiction to make that order and the only jurisdiction I could have had was jurisdiction under s. 277 of the Act of 1963. I note further that the order reflects precisely the terms of the motion paper which was before me dated 16th January, 2014 and that explains why Ms. White when she came to draw up the order on the 18th February, 2014, when she would have been drawing up a number of orders, how she would have understandably and perfectly properly rely on the motion paper itself. The motion paper contained an error and that error was carried into the order itself and I accept that this is the explanation for the error. I also accept that the order as drawn up did not reflect the order that I intended to make. I intended to make an order under s. 277 of the Act. That was the order that was sought. That was

the order in respect of which I heard arguments and that is the order I made.

Accordingly, I make an order in terms of the notice of motion relying also on the old judgment of McCaughey v. Stringer [1914] 1 I.R. 73, where exactly the same set of circumstances arose, namely where the error was an error induced by the form of the notice of motion which got carried on when the registrar came to draw up the order. I note in this particular case the error was also induced by the form of the motion and I also rely on the statement of the Supreme Court in the leading judgment on the 'Slip Rule' and on the inherent jurisdiction of the court, which is the case of McMullen v. Clancy [2002] IESC 61, a judgment of the Supreme Court on 31st July, 2002, that not only do I have jurisdiction under the 'Slip Rule', but I also have a requirement when called upon to do so to correct an order when it does not correctly state what I actually decided and what I actually intended. It seems to me that fairness and justice dictates that I would make this order. It seems to me that the matter has been properly brought before me by notice of motion and that Mrs. Kelly was given ample opportunity to address me on the legal position. Again I say I remember making this order and I remember that the application was in the context of a voluntary and not official liquidation.

Accordingly, I make an order in terms of the notice of motion, firstly correcting the identity of the judicial officer who made the order and secondly deleting reference to s.228 and substituting s. 277 of the Act of 1963."

70. On 8th May, 2015 a notice of appeal was issued by the second-named respondent Mrs. Kelly against the order of Baker J. of 13th April, 2015.

71. Regrettably on 19th May, 2015, a further order was required to be made by Baker J. to amend her order of 13th April, 2015 to change "Ann" to "Anne" and to change the name "Cormac O'Riordan" to "Cormac O'Regan". It was further ordered that para. 3 of the order of 13th April be amended to delete the costs order made against Kelly Trucks Limited and to substitute that the second-named respondent Mrs. Anne Kelly pay the applicant the costs of the motion to be taxed in default of the agreement.

72. On Monday 22nd June, 2015, the applicant's amendment motion of 20th January, 2015 and the motion of Mrs. Kelly dated 2nd March, 2015 seeking declaratory orders as to deficiencies in affidavits came before White J. There was no appearance by Mrs. Kelly. The applicant's motion to amend the proceedings was adjourned generally with liberty to re-enter and Mrs. Kelly's motion of 2nd March was struck out with no order. Thus the application to alter the title of the sixth respondent remains unresolved.

73. At this juncture the hearing of the recovery applications and disqualification application stood adjourned to a date to be fixed and the only live issue in relation to the proceedings was Mrs. Kelly's appeal of the order of Baker J. of 13th April, 2015.

74. On 10th September, 2015 the applicant issued a notice of motion in the Court of Appeal seeking an order striking out the respondent's appeal against the order of Baker J. of 13th April, 2015, pursuant to O. 86, r. 3(1) of the Rules of the Superior Courts, which provides that the Court of Appeal may give such directions and make such orders for the conduct of proceedings before the Court of Appeal as appear convenient for the determination of proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings. This motion was brought on the basis that in the applicant's view, Mrs. Kelly lacked requisite standing to appeal the order of Baker J., in circumstances where the appeal was brought in the name of Mr. Nehaal Singh.

75. On 19th October, 2015 the Court of Appeal granted the applicant's motion to strike out the respondent's appeal of the order of Baker J. of 13th April, 2015.

76. The respondents then brought an application for leave to appeal the order of the Court of Appeal to the Supreme Court. On 8th March, 2016 the Supreme Court refused leave. This court has been informed that in the course of the application before the Supreme Court it became apparent that Mr. Singh had written directly to the Supreme Court to say that the application brought in his name was not being maintained by him. This court has been told that the Supreme Court expressed its dissatisfaction that an application for leave to appeal could reach its office with a doubt over its authenticity, and in which the purported appellant subsequently denied knowledge of the appeal. The court has been told that the file was referred to the Commissioner of An Garda Síochána.

77. On 2nd June, 2016 a notice of intention to proceed with the 2014/484COS, the disqualification proceedings, was served. On 1st July, 2016 a notice of re-entry of the recovery and personal liability proceedings 2014/333COS was issued and later served on the respondents.

78. The motion for re-entry appeared before White J. on 25th July, 2016. Mrs. Kelly objected to re-entry on the grounds that the order of Gilligan J. made 5th March, 2015, adjourning the application to a date to be fixed, expressed to be on consent, was not in fact a consent order. The application was adjourned until 17th October, 2016. It appears to the court to have been adjourned on the application of Mrs. Kelly because she filed an additional affidavit on 17th October, 2016. On that date Mrs. Kelly renewed her objection on the above grounds. Despite her objection White J. ordered the re-entry of both 2014/333COS and 2014/484COS proceedings on foot of the notice of re-entry dated 1st July. White J. ordered that the originating notice of motion and the application for disqualification be made returnable to the Chancery List on 17th November, 2016 for the purpose of fixing a date for hearing. When the two matters appeared in the Chancery List for the purpose of fixing a date on 17th November, 2016 Mrs. Kelly again renewed her objection to the re-entry of the proceedings on the grounds that the adjournment of the case which had occurred on 5th March, 2015 was wrongly stated to have been made on consent.

79. The case was adjourned to 30th November, 2016 when Gilligan J. vacated his order of 5th March, 2015 and fixed both motions for hearing in the Chancery List on 2nd March, 2017, that date being fixed by consent of the parties. Notwithstanding her consent to the date for hearing, the second-named respondent maintained her objection to the re-entry of the proceedings based on the non-consensual nature of the order of Gilligan J. of 5th March. The court gave liberty to the respondents to file replying affidavits within eight weeks, and directed that a copy of the transcript of the DAR be made available on the usual terms to the respondents.

80. This ruling of Gilligan J. was appealed to the Court of Appeal, and the respondent applied for a stay on the proceedings pending the outcome of the appeal. This stay was refused the following day 3rd March, 2017. It seems by virtue of the pending appeal the hearing did not proceed on 2nd March.

81. The matter came before the court on 26th April, 2017 and the court noted that, despite being afforded an opportunity to do so, the respondents had failed to deliver substantive replying affidavits. The court extended the time for filing replying affidavits to 17th May but none were delivered. The case was then fixed for hearing for 15th June, 2017 when the matter first came before this court.

Respondent's application to dismiss these proceedings

82. At the commencement of the hearing the second-named respondent Mrs. Kelly sought to enter a special case pursuant to O. 34,

r. 5 of the Rules of the Superior Courts. The respondent argues that issues as to the legality of the proceedings should be addressed before the hearing of the substantive matters before the court. On being informed that the court would rule on her application in due course, and that in the meantime the court intended to proceed with the hearing of the applicant's two applications, the respondent declined to take further part in the proceedings alleging that this was essentially an unfair trial. On the opening day she removed herself from the proceedings. She did however arrange for a stenographer to be present throughout the application.

83. Mrs. Kelly objected to the proceedings on the basis that the case not being properly before the court, the court has no jurisdiction to entertain the applications that have been brought before it by the applicant Mr. Murphy. The respondent submits that both 2014/333COS and 2014/484COS proceedings are "*impossible at law*" as the notices/motions of re-entry were "*defective*", being based on the orders of Gilligan J. of 5th March, 2015, the validity of which is contested by the respondent. The respondent submits that, where an application for re-entry is made, grounded upon and solely reliant on a contested order, in this case being the order of 5th March, 2015, the effect of vacating the said order of 5th March, 2015 rendered the application for re-entry "*void*". She contends that the order of White J. on 17th October, 2016 re-entering the proceedings relied on the liberty to re-enter granted by Gilligan J. on 5th March, 2015. Since the said orders made on 5th March, 2015 were wrongly expressed to have been made on consent, she submits that the order of the 5th March, 2015 and the subsequent order of White J. on 17th October, 2016 are "*invalid*".

84. The second-named respondent contends that she has been subject to "*glaringly obvious breaches of law*" due to the "*failure, refusal or negligence*" of the High Court to follow and adhere to what she regards as "standard procedural requirements as defined and set out in law". The respondent is of the opinion that the various judges who have been involved in hearing these proceedings erred in law having "*failed, refused and/or neglected to bring the full facts of these matters*" to the court's attention. The respondent claims to have been "*grossly prejudiced*" as a result and further contends that this court has demonstrated "*unacceptable bias*" by continuing to hear the applications of Mr. Murphy when, according to the respondent, the court is "*legally barred*" from doing so.

85. The second-named respondent also submits that she has been "*discriminated against*" by all of the judges mentioned herein, because she contends the applicant's submissions have been taken on board and anything put forward by the respondent has been dismissed as "*vexatious*". On this ground the respondent submits that she cannot receive a fair hearing and/or due process in the course of these proceedings, and that such cannot be "*permitted to stand in a properly constituted court of law*". The respondent opines that serious injustices are being perpetrated against lay litigants, as the law "*cannot be bent and twisted to suit particular litigants*", and that the courts herein are being used in order to facilitate the "*unlawful practices*" of the applicant.

86. The respondent submits that these proceedings cannot be heard due to breaches of O. 40, rr. 4, 6 and 9 of the Rules of the Superior Courts. She reiterates the complaints made to Baker J., Cregan J., and White J. that the affidavits are deficient in that they do not contain the address of the deponent, nor the time of the swearing of the affidavit. She contends that the applicant's affidavits contain statements which are untrue and therefore "*perjurious*", however she did not identify any particular averment by the applicant to be untrue. Despite repeated opportunity to do so the respondent has filed no substantive reply and has not controverted any of the factual details contained in the applicant's affidavits.

87. Furthermore the respondent submits that the applicant does not have requisite standing to bring these proceedings because of the errors contained in the order of Baker J. on 17th February, 2014. The respondent submits that this order was never perfected and that the applicant is seemingly operating on foot of a "*spurious order*" of the Masters Court which purportedly appoints the applicant as liquidator. She submits that the purported order grants reliefs that were not available under the Companies Acts, and that the reliefs were wrongly sought in proceedings which were brought by Costello Transport Limited. As a result, according to the respondent, the applicant was never in possession of a lawful and perfected order appointing him as liquidator and as such there is no legal basis for the applicant to be acting as liquidator and/or for issuing proceedings as liquidator or otherwise on behalf of the company.

88. The respondents submit that the application under the "Slip Rule" should have been brought in the name of the applicant, or in the name of Kelly Trucks Limited, and not in the name of Costello Transport Limited because the applicant was not entitled as the liquidator to go back in to court as Costello Transport Limited. She contends that as the liquidator, he could only go in the name of Kelly Trucks Limited or in his own name. On this basis the respondents suggest that the applicant sought reliefs which were only "*legally available*" to the applicant in his capacity as the alleged newly appointed liquidator and were not available to Costello Transport Limited. The respondent contends that it is "*outrageous*" that the applicant can seek various reliefs under the Companies Acts while being in breach of same himself, and submits that the applicant has not come to court with "*clean hands*". The respondent contends that the liquidator is bound under s. 231(1)(a) of the Companies Act 1963-2012 "to bring or defend any action or other legal proceeding in the name and on behalf of the company", or in his own name. The court observes that s. 231(1) deals with a liquidator in a winding up by the court and not with a voluntary liquidation.

89. The respondent contends that the applicant, along with Costello Transport Limited and their respective solicitors have all acted "*in concert*" in furtherance of their own "*financial interests and to the detriment of the actual creditors*" of the company. She states that the first and second-named respondents are the greatest and only secured creditors because of their claimed loan and crystallised charge. The respondent further asserts that the manner of conduct of these proceedings shows the "*lengths*" that the applicant and his counsel "*are prepared to go...so as to achieve their goals*".

90. The respondent submits that the notice of motion on behalf of the applicant to amend the recovery and personal liability proceedings was unlawfully before the court because the liquidator did not have requisite standing to bring it. She objected that Cregan J. adjourned the matter to allow his status to be corrected when he should in fact have dismissed the application.

91. The respondent contends that the motion returnable for 25th July, 2016 to re-enter the recovery and personal liability proceedings and the notice of intention to proceed in respect of the disqualification proceedings were both "*maliciously*" done and are "*void of all legal process*" because they were not made on consent.

92. The respondents also vigorously contest the allegations that they have been involved in stripping the company of its assets, a matter which they characterise as both "*legally impossible*" and "*nonsense*".

93. The respondent submits that this court is preparing to give judgment in full knowledge that the application to narrow the proceedings is "*live*" before Cregan J., which to date has not been back before him (the motion of 20th January, 2015 was adjourned generally with liberty to re-enter by White J. on 22nd June, 2015), nor has an application been brought to withdraw these proceedings. The respondent submits one cannot "*simply abandon*" proceedings. On this ground, the respondent submits that this court cannot legally take seisin of the case.

94. The respondent submits that, rather than calling for these proceedings to be re-issued, that the court must dismiss the entirety of the proceedings. The respondent also seeks the removal of Mr. Murphy as liquidator of Kelly Trucks Limited owing to his "*outrageous incompetence*" and also seeks an order forbidding him from ever holding the position of liquidator again in the future. The respondent also seeks for the original liquidator, Mr. Singh, to be reinstated as liquidator of the company.

Applicant's reply to the respondents' submissions

95. The applicant submits that every objection by the respondent relates to the making of court orders. He submits that the respondent's reading of the Rules of the Superior Courts is misconceived. He submits that the rules are to be interpreted purposively, and that the affidavits on which the applicant relies are in fact valid. The purpose of the requirement for a deponent to provide an address is simply to indicate where that deponent may be found. The requirement for a date is to fix the date of knowledge of a deponent at the time the affidavit is sworn. Alternatively the applicant contends that the affidavits should be upheld notwithstanding any defect based on the court's discretion contained in O. 40, r. 15 of the Rules of the Superior Courts.

96. The applicant admits that there were errors in the order of Baker J. dated 17th February, 2014 but that such were corrected on 13th April, 2015. The applicant points out that all attempted appeals against the corrective order have been fully disposed of and that there is therefore no basis on which to question the order appointing the applicant or his standing. The applicant also contends that an objection as to the standing of Mr. Murphy is *res judicata*, having been litigated through the "Slip Rule" application, and was unsuccessfully appealed to the Court of Appeal and Supreme Court.

97. In response to Mrs. Kelly's claim that the order dated 5th March, 2015 was not made by consent, the applicant submits that the order was made in the context of proceedings that were not ready to be heard on the assigned hearing date of 10th March, 2015 because of pending motions of both parties. The applicant maintains that these proceedings have been stymied by procedural interruptions by the respondent as to the applicant's standing, which have been the substantial cause of the delays which have undoubtedly occurred in these proceedings.

98. In the circumstances the applicant submits that Mrs. Kelly has failed to identify any prejudice to her in the conduct of these proceedings and that her objection is without merit. The applicant states that the respondent is attempting to litigate something which has already been heard before the court and therefore that this is an abuse of process.

99. The applicant submits that the question of jurisdiction must be a matter in the first instance for this court to determine due to the court's authority to manage its own processes, and it cannot be for a litigant to come to court, accuse it of bias and thereby rob it of its jurisdiction. The applicant further submits that the allegations of bias are only brought against this court as it has chosen to not immediately agree with the respondent's position.

Applicant's submissions on the substantive applications

100. The applicant submits that the origin of the respondents' present difficulties lies in their dissatisfaction with the outcome of the proceedings brought by Costello Transport Limited, which led to judgment in the sum of €32,000 being awarded against Kelly Trucks Limited. Having paid the amount of the judgment in September, 2013 the second-named respondent determined that the company would not pay the substantial costs both of her own lawyers and of the plaintiff's lawyers arising from those proceedings. In an effort to avoid paying those costs, two new companies were set up.

101. It is the submission of the applicant that the second-named respondent, Mrs. Anne Kelly, is the conductor of an orchestrated scheme to transfer the business of Kelly Trucks Limited into these two new companies, Kelly Trucks Strokestown Limited and Kelly Trucks (Ballaghaderreen) Limited. The applicant contends that the companies were established in order to carry on the business formerly carried out by Kelly Trucks Limited. The applicant asserts that the first-named respondent, Mr. James Kelly, confirmed at the creditors' meeting that the company had been taken over by Kelly Trucks Strokestown Limited. There is no evidence of any consideration passing to the company in respect of this transfer of business.

102. The applicant submits that it is plain that substantial assets have been disposed of, the effect of which has been to perpetrate a fraud on the company's creditors. The applicant is seeking the recovery of these assets or, in the alternative, the applicant is seeking payment *in lieu* of an amount equal to his own calculations of the realisable value of assets, being €838,908. The applicant has calculated the value of assets that he alleges have been misappropriated by Kelly Trucks Strokestown Limited by reference to the company's books for the year end 31st December, 2012, which he claims to have completed without the assistance of either Mr. or Mrs. Kelly. The applicant has itemised a list of some of the company's assets with an assessment of their respective values, and an estimate of what he thinks they would realise in a liquidation. The liquidator obtained a list of some twenty vehicles owned by the company from Roscommon County Council which he includes on his list as being collectively valued at €148,500. The company's stock is valued at €175,440. Company equipment is valued at €160,000 but is only expected to realise €20,000 in liquidation. The liquidator has been unable to attribute value to some of the intangible items on the list such as the Renault Franchise licence.

103. The applicant maintains that the first and second-named respondents have refused to offer explanations in relation to company affairs and that, when they have done so, the explanations do not add up. The applicant further comments that the respondents have been repeatedly given the opportunity to deliver affidavits dealing with the substantive proceedings and the factual averments made by him, and have failed to controvert any of the evidence. The applicant points out that in effect his testimony is uncontroverted.

104. The applicant submits that these two companies, Kelly Trucks Strokestown Limited and Kelly Trucks (Ballaghaderreen) Limited are trading with the company's equipment, and with its employees and customers in a seamless continuance of the business of Kelly Trucks Limited in liquidation, meanwhile Kelly Trucks Limited in liquidation now has no assets. The applicant submits that the balance sheet as of 30th April, 2012 shows a solid company, and that balance sheet should be regarded as the starting point for an examination of the company. According to the applicant there has been a "*radical disimprovement*" in the company's financial accounts since January, 2014. According to the applicant, it is clear from the nature of the company's business and from its most recent financial statements that the company had substantial equipment and assets, yet all seemingly have vanished without plausible explanation and, simultaneously, two companies, Kelly Trucks Strokestown Limited and Kelly Trucks (Ballaghaderreen) Limited "*rise from the ashes*".

105. The applicant submits that the absence of employee claims in the liquidation is telling. The company had sixteen employees and the directors' statement of affairs includes a liability of €36,000 for redundancies. The applicant asserts that no claims relating to unpaid wages, holidays, accruals or redundancy have been made in the course of the liquidation and the directors have refused to furnish the applicant with details relating to their employees. This, according to the applicant, is inexplicable and is a breach of the directors' duty to cooperate with the liquidator. On this basis, the applicant believes that if the company business has gone to Kelly Trucks Strokestown Limited, the company's employees have also gone to work for Kelly Trucks Strokestown Limited.

106. The applicant submits that he has not been able to identify with certainty the creditors of the company. The only established creditor at this point are two firms of solicitors, Mullins Lynch Byrne and Callan Tansey, who each are claiming costs arising out of the High Court proceedings between Kelly Trucks Limited and Costello Transport Limited. As of the date of liquidation the solicitors for Costello Transport Limited and the company's own solicitors Callan Tansey were both claiming costs in excess of €55,000. The applicant notes the paucity of creditors for a company with a turnover of over €1.5 million. He notes that a number of creditors appearing in the company's statement of affairs have in fact made no claim in the liquidation. The applicant draws the court's attention to the fact that there are several trade creditors listed in the company's statement of affairs that have not made a claim in the liquidation. The applicant specifically refers to Boreman Limited and DES Services who appear from the statement to be owed over €20,000 and €11,000 respectively though neither has lodged a claim. The applicant also draws the court's attention to the accounts of Corrib Oil which show that trade continued after the company went into liquidation in early 2014, with payments being issued up until October, 2014. The applicant submits that the account uses the same customer number as Kelly Trucks Limited though it is described as "Strokestown". Kelly Trucks Strokestown Limited also seemingly uses the same contact information as Kelly Trucks Limited, namely its landline, fax number and email address. This, the applicant submits, is evidence to show that payment could not have come from Kelly Trucks Limited, and had to have been coming from somewhere else. The applicant also states that the list of creditors is shorter than his experience as a liquidator would lead him to expect in the circumstances. This prompts the applicant to the conclusion that such debts are likely to have been satisfied elsewhere, or otherwise these parties have not made a claim because they are continuing business in association with the two new companies.

107. The applicant submits that the respondents' claim of entitlement to the entirety of the company's assets on foot of a supposed loan has only come to light post-liquidation. The respondents vacillate in relation to the origin and amount of the alleged loan. The respondents currently allege that they are now owed an amount in excess of €600,000 which as the applicant points out is at variance with the company's signed accounts dated 30th April, 2012, which show a maximum of €11,000 owing to the directors (down from €790,000 in 2011), if anything at all. This figure is also at variance with the respondents' own statement of affairs which listed the directors as being owed €560,000 and is also at variance with the sum of €55,000 which was claimed at the time of the liquidation.

108. The applicant points out that the claimed charge, whatever sum it may be, was never registered as is required under s. 99 of the Companies Act 1963 (now s. 409 of the Companies Act 2014), and accordingly is void against the liquidator. The applicant also submits that the auditors were unaware of the alleged charge. It is the applicant's submission that the issue with the charge is a "*clumsy eruption*" in an attempt by the directors to explain how they have taken possession of the company's assets.

109. The applicant submits that the only assets that were made available in the liquidation were a bank account containing €700 that was never recovered and an Irish Life savings bond of a little in excess of €23,000 which has since been expended on the liquidation. The applicant submits that this process has given rise to substantial costs for which the respondents are responsible, and has been greatly increased by their lack of cooperation in the liquidation. In the applicant's submission this liquidation never would have happened but for the conduct of the respondents and the liquidation's costs have been grotesquely increased as a result. Given the limited assets available, the applicant asserts that they will not remotely cover the costs of the liquidation and that, absent relief, there is no prospect of recovery for the creditors of the company.

110. The applicant is of the opinion that the circular issued by Mrs. Kelly on behalf of Kelly Trucks Strokestown Limited to the creditors of Kelly Trucks Limited in August, 2013 is evidence of her intent to continue the company's business under a new guise, insofar as it identifies that customer dealings took place with Kelly Trucks Limited until July, 2013, and thereafter with Kelly Trucks Strokestown Limited. According to the applicant, there was clear instruction from the second-named respondent to STL Logistics to transfer receivables from the company over to Kelly Trucks Strokestown Limited. The accounts dated back to 2011 which was eighteen months prior to the incorporation of Kelly Trucks Strokestown Limited. The applicant believes that this information was circulated generally to other creditors/debtors of the company, which prompted a general diversion of receivables away from the company. The applicant submits that in Mr. Kelly's affidavit from September, 2013 in the hearing of the petition to wind up Kelly Trucks Limited, Mr. Kelly avers that they had no intention to wind up the company and/or to defraud creditors. This averment was made at a time when his wife a month earlier had issued a circular to their customers for the purpose of transferring the customer's accounts to the new company, Kelly Trucks Strokestown Limited. The applicant submits that the outright denial by the first-named respondent on oath of the transfer of assets is demonstrably inconsistent with the transfer of receivables signed by the second-named respondent, and also with the transfer of cash during the period in which Mr. Kelly swore this affidavit.

111. The applicant submits that the company's vehicle test centre is the same as that from which Kelly Trucks (Ballaghaderreen) Limited is now trading. He claims that the business of Kelly Trucks Limited in liquidation has been absorbed post-liquidation by Kelly Trucks (Ballaghaderreen) Limited, and that such is being carried on in direct succession. The applicant asserts that the physical location of the companies demonstrates a continuity of business. They are trading from the same premises. The vehicle testing is being conducted under the Road Safety Authority licence granted to Kelly Trucks Limited, and the applicant alleges that testing certificates are being issued in the name of Kelly Trucks Limited. The applicant maintains that the correspondence dated 19th February, 2014 illustrates an attempt by the respondent to have the licence transferred to the new company but the attempt was unsuccessful for the reasons stated in the letter.

112. According to the applicant, the Renault Franchise continues with Kelly Trucks Strokestown Limited. A screenshot taken in December, 2014 lists the company Kelly Trucks Limited at its former Strokestown premises as an authorised Renault truck repairer, notwithstanding the fact that it had ceased to trade for almost one year at that time. As evidence of this, the applicant relies on a letter that was issued by the company in August, 2014 which shows a Renault Franchise badge, yet it appears that Renault were not informed as to the status of the company at this time.

113. The applicant submits that the involvement of the respondents' children in the establishment of the two new companies and the contention by the respondent that they are independent entities operating in "*stiff competition*" with the company is not credible. He instances Mrs. Kelly's consent to the Registrar of Companies to the use by the two new companies of the "Kelly Trucks" brand.

114. It is the applicant's submission that the present case involves gross misconduct by both respondents in their stewardship of the company, in the manner and circumstances of its winding up, and also in their dealings with the applicant in respect of the liquidation. The applicant states that the directors have actively engaged in the obstruction of the liquidation process. The applicant is of the opinion that fraudulent conduct has been demonstrated and that it is difficult to imagine how there could be a more flagrant breach of the directors' fiduciary duties to the company.

115. The applicant submits that Mr. Singh was nominated to the role of liquidator of the company by the respondents despite being unqualified for office by reason of his lack of experience, qualification, and his lack of independence of the respondent directors. In Mr. Singh's affidavit contesting his removal, the applicant notes that Mr. Singh repeats some of the implausible propositions which

have been advanced by the respondents and in very similar language to that used by the respondents. In the applicant's view Mr. Singh does not display the scepticism appropriate for a liquidator who is bound to investigate the affairs of the company.

116. The applicant submits that the misconduct of the respondents renders the respondents wholly unfit to be trusted with the serious responsibilities of a company director and that the court should exercise its discretion to disqualify the applicant's from holding the position. The applicant further submits that, as the respondents have repeatedly declined to address the substance of these proceedings, no mitigating factors have been identified which might lead to a reduction of a period of disqualification.

117. The applicant submits that Mrs. Kelly's positive steps in participating in the fraudulent scheme are obvious and, though Mr. Kelly was not involved in the administration of the company, his participation and concurrence, he submits, is equally plain. The applicant submits that Mr. and Mrs. Kelly must be taken to have intended the natural and probable consequences of their acts so as to render them responsible for the damage that has been done to the company and the losses occasioned to its creditors.

118. The applicant submits that Mr. and Mrs. Kelly should each be declared personally responsible without limitation of liability for all of the liabilities of the company pursuant to s. 610 of the Companies Act 2014. The applicant submits that the directors are conductors of misconduct and that ultimate responsibility for the resultant liabilities arising from that misconduct must rest with them on a personal level.

119. In terms of the application for disqualification, the applicant submits that the four criteria laid out under s. 842(a) to (d) of the Companies Act 2014 have been established, thus engaging the court's discretion to disqualify. The applicant submits that no mitigating factors have been identified and that none exist so as to reduce any period of disqualification that the court may impose, should it think it just and equitable/necessary to do so. The applicant also submits that, failing an order for disqualification, the court could alternatively make an order for restriction.

The Law

120. The applicant initially instituted proceedings under the Companies Acts 1963-2012. During the course of the application the Companies Act 2014 came into force. The applicant submitted that despite proceedings being brought pursuant to the Companies Act 1963-2012, the Companies Act 2014 is now the relevant legislation governing the application. The court is persuaded that this is so by virtue of s. 5(3) of the Companies Act 2014. That section provides:-

"Any document referring to any former enactment relating to companies shall be read as referring to the corresponding enactment of this Act."

Personal liability

121. The applicant invokes s. 610 of the Companies Act 2014 which provides for the imposition of civil liability in respect of fraudulent or reckless trading of a company. It provides:-

"(1) If in the course of the winding up of a company...that –

(a) any person was, while an officer of the company, knowingly a party to the carrying on of any business of the company in a reckless manner, or

(b) any person was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose,

the court, on the application of the liquidator or examiner of the company, a receiver of property of the company or any creditor or contributory of it, has the following power.

(2) That power of the court is to declare, if it thinks it proper to do so, that the person first-mentioned in paragraph (a) or (b) of subsection (1) shall be personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct."

In such circumstances, the intent to defraud need not be the primary objective. The applicant submits that the evidence in the present case overwhelmingly demonstrates a fraudulent scheme to divert the company's business and assets and, on this basis, Mr. and Mrs. Kelly should be each declared personally responsible without limitation of liability for the liabilities of the company, Kelly Trucks Limited.

122. The applicant cites the case of *Re Hunting Lodges* [1985] ILRM 75 where the liquidator of the company applied to have its two directors, Mr. and Mrs. Porrit, declared personally responsible for the debts of the company. The court acceded to the liquidator's application. In 1981 the company owed substantial monies to the Revenue Commissioners. In 1982 an agreement was made to pay the sum in instalments and Revenue threatened to apply for an order to have the company wound up if the payments went unpaid. In April, 1982 at a meeting with Revenue, the company's auditor stated that the company was hopelessly insolvent and in May, 1982 Revenue sent a notice threatening liquidation in default of payment within twenty-one days. During this time when the company was alleging insolvency, negotiations were ongoing for the sale of one of the company's properties, Durt Nelly's, with the contract for sale being concluded in June, 1983. Mr. Porrit lodged part of the money in a building society account under a false name, the mandate documents for which were signed by both himself and his wife, Mrs. Porrit. Mrs. Porrit had also been present during the closing of the sale. The company was wound up in late June and the amounts claimed to be owed to the Revenue at that time was in excess of £750,000.

123. Carroll J. found that a series of transactions was not required in order to meet the terms of s. 297 of Companies Act 1963. She held that one single act would suffice to ground a declaration under the section. She further held that it was not necessary for all of the company's business to be carried out with a common agreed fraudulent intent in order to satisfy the requirements of the section. The court broke down the various actions taken by the company members so as to include every component of the transaction, starting from the initial negotiations up until the completion of sale, and consequently held liable any party who took positive steps to achieve the sale, noting that every person is deemed to intend the natural and probable consequences of his acts. On this basis, the court noted that Mr. Porrit participated in the sale from start to finish and, though Mrs. Porrit only participated in part of the sale, the court nonetheless considered her to have played an active role in the transaction. The court held:-

"Any person who becomes a director takes on the 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."

Relying on the decision of *Re Hunting Lodges*, the applicant submits that Mr. Kelly's participation in the fraudulent scheme is as clear and culpable as that of Mrs. Kelly. He was a director of the company and he, too, actively obstructed the applicant. The applicant submits that on oath Mr. Kelly has denied the diversion of assets at a time when they were actively being transferred to the two new companies incorporated in July, 2013.

124. In the case of *Re Contract Packaging Limited* (Unreported, High Court, Flood J., 16th January, 1992) the liquidator learned of fraudulent trading when he began his investigation into the company's affairs. A number of deposit accounts were revealed by the liquidator which had not been disclosed in the company's audited accounts, books and records. The money contained in these accounts had been siphoned off by company directors in an attempt to prevent the company's creditors from accessing it. One of the beneficiaries of this arrangement was a company director, Mr. W. Mr. W withdrew over €160,000 for his own personal use. The liquidator also uncovered a diversion of company business to Shrinkpak Limited, a company that was under the control of Mr. W. The liquidator also unearthed a VAT fraud in relation to the company. It was held by Flood J. that it was proper to impose personal liability for fraudulent trading under the predecessor of s. 610, being s. 297 of the 1963 Act, on some of the directors involved. It was ordered that Mr. W and his common law wife give up their home to the liquidator. Mr. W was also ordered to give his interest in a vehicle owned by him, as well as two boats and funds held in various financial institutions, to the liquidator.

125. *Mantruck Services Limited (In Liquidation): Mehigan v Duignan* [1997] 1 IR 340 concerned an application for the imposition of personal liability on the directors of the company. Additionally the liquidator sought to impose liability for costs of the liquidation. Ultimately the court decided to impose personal liability in respect of the director/shareholder's failure to keep proper financial books under s. 204 of the Companies Act 1990, as such a failure had resulted in substantial difficulty in ascertaining the company's assets and liabilities, and such had had the consequence of impeding the winding up of the company. The court considered that the losses which flowed from the liquidator's expenditure of time were reasonably foreseeable and that therefore they could not avail of the protection under s. 204(4) where an application will not be made where a person has taken reasonable steps to ensure compliance with their duty under s. 202 to keep proper books of account. In arriving at this determination the court considered that: (1) before liability could be imposed the court must be satisfied that the company had committed a criminal offence under s. 202 of the Companies Act 1990; (2) that the standard of proof required for (1) was the balance of probability; (3) that the discretion conferred by s. 204 must be exercised in a responsible, but also in a constitutional, fashion; and (4) that the company was unable to pay its debts as of the date of the winding up, and that the contraventions of s. 202 were such as to result in substantial uncertainty as to the assets and liabilities of the company and had substantially impeded the orderly winding up of the company. Relying on the decision in *Mantruck*, the applicant contends that the costs of this liquidation were the reasonably foreseeable consequences of the conduct of Mr. and Mrs. Kelly.

Return of assets improperly transferred

126. The applicant relies on s. 608(1) of the Companies Act 2014 which sets out the court's power to order the return of assets which have been improperly transferred:-

"(1) The court has the following power where, on the application of a liquidator, creditor or contributory of a company which is being wound up, it can be shown to the satisfaction of the court that –

(a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and

(b) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members."

(2) That power of the court is to order, if it deems it just and equitable to do so, any person who appears to have –

(a) the use, control or possession of the property concerned, or

(b) the proceeds of the sale or development of that property,

to deliver it or them, or pay a sum in respect thereof, to the liquidator on such terms or conditions as the court thinks fit.

(3) This section shall not apply to any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company to which section 604 applies.

(4) In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have *bona fide* and for value acquired an interest in the property the subject of the application.

(5) This section is in addition to, and not in substitution for, any restitutionary or other relief by way of recovery (including the remedy of tracing) that is available to a liquidator or any other person."

The applicant submits that it is plain that substantial assets have been disposed of, the effect of which has been to perpetrate a fraud on creditors. Under s. 608 the court is empowered to make such an order for the return of assets if it considers it to be just and equitable.

127. The applicant cites the case of *Re La Chatelaine Thudichum* [2010] 1 IR 529 where the liquidator applied for a declaration relating to fraudulent preference under s. 286 of the 1963 Act, or in the alternative a fraudulent disposition under s. 139 of the 1990 Act. The application under s. 286 failed, however the court found that s. 139 "*merely required that the company, its creditors or members be deprived of something to which they are lawfully entitled*", in concluding that the creditors had been deprived of a benefit to which they were entitled. It was held by Murphy J. that:

"I am satisfied that the disposition in favour of the respondent had the effect of perpetrating a fraud on the applicant in depriving it of its assets, and on the creditors in diminishing the pool of assets available for distribution upon liquidation. The creditors were thus denied the possibility of having a portion of the debts owed to them repaid, and were accordingly deprived of a benefit to which they were lawfully entitled."

128. In *Re Citywest Hire; Kirby v Petrolo Limited and Stokes* [2014] IEHC 279, the High Court ordered that the director of an insolvent company pay a sum of over €21,000 to the liquidator, where the effect of the transfer of cash and credit card receipts to another company's bank accounts had been to perpetrate a fraud on a company creditor, and thus came within the scope of s. 139 of the 1990 Act. Finlay Geoghegan J. considered the award to be just and equitable in the circumstances. In reaching its decision the court held that the reason for which the payments were made was not relevant to the question of whether or not to make an order under s. 139 of the 1990 Act, but that it is for the court to consider the use to which the monies were put once paid.

Disqualification

129. Pursuant to s. 842 of the Companies Act 2014, the court may make a disqualification order in respect of a person for such period as it thinks fit. Before a disqualification order is made the following criteria must be satisfied:-

"(a) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors;

(b) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any breach of his or her duty as such promoter, officer, auditor, receiver, liquidator or examiner;

(c) that a declaration has been granted under section 610 in respect of the person; and

(d) that the conduct of the person as promoter, officer, statutory auditor, receiver, liquidator or examiner of a company makes him or her unfit to be concerned in the management of a company."

The applicant submits that the evidence shows that the above criteria have each been established in respect of the first and second-named respondents. The applicant notes that five years is ordinarily the minimum period of an order of disqualification, and submits that the period must reflect the gravity of the misconduct in addition to containing deterrent elements.

130. The applicant cites the case of *Re Bovale Developments* [2013] IEHC 561, where the court affirmed the two-stage test as outlined in *Re Kentford Securities Limited; Director of Corporate Enforcement v McCann* [2010] 1 IR 585 for the making of an order for disqualification:-

"Firstly, whether conduct falling within any of the categories of s.160(2) (now s. 842) has been established as a matter of fact. Secondly, whether the court, in the exercise of its discretion, should proceed to disqualify."

An order of disqualification was made in circumstances where both directors had engaged in falsification of the company's financial accounts and grossly understated remuneration obtained by them from the company between 1998 and 2000. Having found that the conduct of the directors in this case came within the scope of s. 160 of the Companies Act 1990, the court exercised its discretion to make an order to disqualify the directors. In assessing the appropriate period of disqualification the court referenced its previous decision of Finlay Geoghegan J. in *Re Ansbacher* [2006] IEHC 67 which set out the following principles:-

"(1) The primary purpose of an order of disqualification is not to punish the individual but to protect the public against future conduct of companies by persons whose past record has shown them to be a danger to creditors and others.

(2) The period of disqualification should reflect (in relation to an order under s.160(2)(e)) the gravity of the conduct as found by the inspectors which makes the respondent unfit to be concerned in the management of a company.

(3) The period of disqualification should contain deterrent elements.

(4) A period of disqualification in excess of ten years should be reserved for particularly serious cases.

(5) The court should firstly assess the correct period in accordance with the foregoing and then take into account mitigating factors prior to fixing the actual period of disqualification."

While adopting these principles Finlay Geoghegan J. considered it appropriate to update them in the light of subsequent developments:-

"(i) A primary but not the only purpose of an order of disqualification is to protect the public against future conduct of companies by persons whose past record has shown them to be a danger to creditors and others.

(ii) It is also a purpose of an order of disqualification to improve corporate governance (Re Kentford, O'Donnell J. para. 27 and Re Wood Products Limited.: Director of Corporate Enforcement v McGowan [2008] IESC 28, [2008] a I.R. 498 per Fennelly J. at para. 46).

(iii) A further purpose of an order of disqualification is that it act as a deterrent, both in respect of the respondent director and other directors of companies (Re Kentford, O'Donnell J. at para. 27, quoting with approval Lord Woolf M.R. in Re Westmid Packing Limited. [1998] 2 All E.R. 124 at pp. 131 to 132). Hence, the period of disqualification should contain deterrent elements.

(iv) The period of disqualification should reflect the gravity of the conduct or wrongdoing as found by the Court in relation to the relevant sub-paragraphs of s.160(2) in respect of which the order of disqualification is being made;

(v) A period of disqualification in excess of ten years should be reserved for particularly serious cases;

(vi) The Court should firstly assess the correct period in accordance with the foregoing and then take into account mitigating factors prior to fixing the actual period of disqualification."

The court fixed fourteen years as the appropriate period of disqualification but then considered the existence of mitigating factors. It identified the following mitigating factors: that a significant period of time had elapsed since the conduct in question; that the directors had been Revenue compliant since 2001; and that since the time of the infractions the directors had ensured that the company had kept proper books and records. The court in the circumstances considered it appropriate to reduce the headline sentence to a period of seven years. The applicant submits that there are no mitigating factors in the present case which would allow any period of disqualification to be reduced.

131. In *PSK Construction Limited (Kavanagh) v Killeen & Higgins* [2009] IEHC 538 applications were brought for orders imposing personal liability as well as disqualification and/or restriction pursuant to ss. 150 and 160 in respect of Mr. Killeen and Ms. Higgins. Mr. Killeen was the managing director of the company, while Ms. Higgins was an employee and director. The applications were brought in circumstances where the company had under-declared and under-paid its liabilities to the Revenue Commissioners over a period of eight months between February and September, 2005 in respect of PAYE/PRSI, and over a nine-month period between January and September, 2005 in respect of RCT. The total amount owed for both PAYE/PRSI and RCT for 2005 was in the order of €1,659,023, and the total amount of liability owed to the Revenue Commissioners at the commencement of the company's winding up was €2,361,314. The company made no monthly returns for October, November or December, 2005. In January 2006 it then over-stated the amounts due in order to correct the previous under-declarations that had occurred between February and September, 2005. Mr. Killeen averred that Revenue was aware of this situation prior to the end of 2005. Revenue on the other hand, contended that it did not become so aware until January, 2006. Upon a review of the facts Finlay Geoghegan J. was satisfied that Mr. Killeen must have known that the decision to keep the company trading by under-declaring and under-paying Revenue involved an obvious and serious risk of loss or damage to the company's creditors. She also found that he ought to have been aware of the difficulties involved with various business contracts in which he was engaged. She made an order under s. 297A making him personally liable for the debts of the company. The court found that the risks to creditors were ignored in favour of keeping the company alive. In respect of Ms. Higgins the court was not satisfied that she had sufficient knowledge of the company's financial position to attract the same level of culpability as Mr. Killeen. The court accepted the arguments put forward by her that she had had no active role in the matter and was working under the directions of Mr. Killeen, who had told her that the problems would be straightened out. The court while noting that no personal benefit accrued to Mr. Killeen in respect of his wrongdoing, found him personally liable for the debts of the company in the sum of €1,604,526 on the basis that the effect of the wrongdoing was to keep the company alive during a time when it should have been wound up. During that time it had incurred liabilities to third parties.

132. In considering the application for disqualification the court referred to the decision of *Re C.B Readymix Limited (In Liquidation): Cahill v Grimes* [2002] 1 I.R. 372 in which Murphy J. at p. 381 quoted with approval the following statement of Browne-Wilkinson V.C in *Re Lo-Line Limited* [1988] Ch. 477:-

"What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the cases to which I have been referred is broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others. Therefore, the power is not fundamentally penal. But, if the power to disqualify is exercised, disqualification does involve a substantial interference with the freedom of the individual. It follows that the rights of the individual must be fully protected. Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

133. On the basis of her findings of fact Finlay Geoghegan J. considered it appropriate to make a disqualification order against Mr. Killeen for a period of seven years, in addition to the order of personal liability. While the court did not make an order against Ms. Higgins pursuant to s. 297A, Finlay Geoghegan J. stated that her complicity in making under-declarations to Revenue, not once, but over a period of five months rendered Ms. Higgins unfit to be concerned with the management of a company, and disqualified her for a period of five years.

Decision

134. This case was heard over a period of eight months and was adjourned on multiple occasions in order to facilitate the delivery of affidavits. Adjournments were also given so that the DAR could be produced for the multiple hearings which took place during 2015, 2016 and 2017. This court wished to ascertain precisely what took place in the course of these proceedings for the avoidance of further dispute, and in the absence of agreement between the parties as to what had transpired before various judges of this court. The court observes that there were difficulties in this process and the court ended up with the somewhat onerous task of setting out the multiple events that have occurred in multiple courts over the course of these proceedings.

Preliminary application of Mrs. Anne Kelly, the second respondent

135. At the commencement of the hearing on 15th June, 2017 the second-named respondent presented to the court a special case pursuant to O. 34, r. 5 of the Rules of the Superior Courts in which she raised as a preliminary issue the jurisdiction of the court to embark on the hearing. Her special case is set out *in extenso* at para. 80-92 of this judgment. Essentially she argues that this application is still before Cregan J., before whom the applicant's motion to amend his application and Mrs. Kelly's motion seeking declarations as to the deficiencies and admissibility of grounding affidavits, first came on 2nd March, 2015. Mrs. Kelly maintains that since those applications are still extant the orders made by other judges such as Gilligan J. in the interim are null and void. As set out earlier in this judgment the motions which came before Cregan J. on 2nd March, 2015 were ultimately disposed of before White J. on 22nd June, 2015 when the applicant's motion to amend the application was adjourned generally and the respondent's motion seeking declarations of deficiencies and inadmissibility of affidavits was struck out.

136. As can be seen from the history of this application Mrs. Kelly has repeatedly sought to go behind orders made by various judges of the High Court, in order to advance an argument that this court has no jurisdiction. The mechanism provided by our law for questioning the validity of an order made by a court is an appeal that order, to a higher court or, in appropriate circumstances, to seek judicial review. Mrs. Kelly has appealed or sought to appeal multiple orders made by the High Court in the course of this application, including the original order granting judgment to Costello Transport Limited arising from the supply of a defective truck, and the order removing Mr. Nehaal Singh as liquidator, and the order made by Baker J. 13th April, 2015 under the "Slip Rule", all of which have been unsuccessful. Mrs. Kelly has also sought to challenge before me the validity of orders made by Gilligan J. and White J. Mrs. Kelly is simply unwilling to accept the validity of any court order with which she is not in agreement, be that an order of the High Court, the Court of Appeal or the Supreme Court. This court cannot and will not look behind the orders made by other members of this court, or courts of superior jurisdiction to this court, whose rulings I am bound by law to follow. Accordingly the court finds that Mrs. Kelly's arguments are fundamentally misconceived and rejects her preliminary claim on the issue of jurisdiction.

Liquidator's application

137. The applicant Mr. Murphy originally sought relief pursuant to s. 297(a) of the 1963 Act which empowers the court to impose civil liability on persons engaging in fraudulent or reckless trading of a company, and relief pursuant to s. 139 of the 1990 Act which empowers the court to order the return of assets improperly transferred. The applicant also sought to invoke ss. 150 and 160 of the Companies Act 1990 which provides for the disqualification of directors, or in the alternative the restriction of directors in specified circumstances. As previously stated, pursuant to s. 5(3) of the Companies Act 2014, these applications now fall to be determined under the provisions of the 2014 Act. The respective relevant provisions are ss. 610, 608, and 842 of the Companies Act 2014.

138. The applicant has advanced an array of evidence which he submits makes out an overwhelming case that Mr. and Mrs. Kelly have been obstructing the liquidation since his appointment as liquidator of the company by this court, on 17th February, 2014. None of the evidence advanced by the applicant on affidavit has been controverted. The court is satisfied that there is strong evidence that the respondents have failed to cooperate with the liquidation and have attempted to put the assets of the company beyond the control of the liquidator.

139. The difficulties in which the first and second-named respondents have placed themselves stem from a judgment delivered by McCarthy J. on 2nd November, 2012 in which McCarthy J. gave judgment in favour of Costello Transport Limited in the sum of €32,000. The first and second-named respondents were and it appears to the court, still are aggrieved by the fact of the judgment, but they failed to appeal the judgment within the statutory timeframe allowed for an appeal. Their grievance concerning the judgment was undoubtedly heightened by the arrival of the plaintiff's solicitor's bill of costs, in which the plaintiff's solicitors sought a sum in excess of €55,000 by way of costs. This was subsequently added to by the arrival of their own solicitors' bill of costs, being again for a sum in excess of €55,000.

140. Legal costs appear to be the only debts currently owed by the company. In the early months of 2013, the first and second respondents belatedly and unsuccessfully, attempted to appeal the judgment. Having failed in the Supreme Court to obtain an extension of time to appeal they faced a real danger that either the judgment would be executed against the company or alternatively that the company would be wound up.

141. On 11th June, 2013 an execution order was lodged with the Roscommon County Sheriff's Office. Having written to the company seeking satisfaction of the judgment, a court messenger attended at the offices of the company on 9th July, 2013. He was confronted by an aggressive and angry James Kelly, the first respondent, and his reception was such that he was unwilling to return to the premises unless accompanied by the Gardaí. By this time the company was under enormous pressure. As well as the judgment it was facing taxation of the plaintiff's costs which had been initially listed for 26th June, 2013 and had been adjourned at Mrs. Kelly's request to 29th November, 2013.

142. This was the climate in which the two new companies Kelly Trucks Strokestown Limited and Kelly Trucks (Ballaghaderreen) Limited were incorporated. The date of their incorporation is 26th July, 2013. Fearful that these newly incorporated entities would be used to strip the assets of Kelly Trucks Limited, a petition to wind up Kelly Trucks Limited was issued on 29th July, 2013 and served on the second respondent, Anne Kelly, as secretary of Kelly Trucks Limited on 31st July, 2013.

143. The fears of Costello Transport Limited's legal representatives were well-founded because the court is satisfied on the evidence, that in the month of August, 2013 the second-named respondent commenced the process of transferring the business of Kelly Trucks Limited to Kelly Trucks Strokestown Limited. The notice of August, 2013 under the guise of upgrading a billing system, transferred the customers of Kelly Trucks Limited to Kelly Trucks Strokestown Limited. The notice provided bank details for Kelly Trucks Strokestown Limited and requested that cheques be made payable to Kelly Trucks Strokestown Limited.

144. When the petition to wind up Kelly Trucks Limited came before White J. on 25th September, 2013, the first respondent James Kelly swore an affidavit denying that the respondents were attempting to put the assets of Kelly Trucks Limited beyond its creditors. The petition did result in the judgment sum of €32,000 being paid to Costello Transport Limited.

145. Rather than winding up the company, White J. afforded the respondents an opportunity to discharge the outstanding costs by means of a lump sum payment of €5,000 and weekly instalments of €500, until such time as the outcome of the taxation of costs became known. Instead of complying with the order of the court, the respondents used the time granted for the purpose of challenging the costs, to execute their plan to transfer the business of Kelly Trucks Limited to Kelly Trucks Strokestown Limited and Kelly Trucks (Ballaghaderreen) Limited. Once the process of transfer was completed the respondents ceased paying the weekly instalments of €500 in respect of costs and put the company into creditors' voluntary liquidation.

146. Further evidence that the assets and business of Kelly Trucks Limited have been transferred to Kelly Trucks Strokestown Limited and/or Kelly Trucks (Ballaghaderreen) Limited is the absence of creditor claims in the liquidation. In truth the only creditors appear to be the solicitors who acted for and against Kelly Trucks Limited in the proceedings brought by Costello Transport Limited. Kelly Trucks Limited had sixteen employees and there are no employee claims in the liquidation. The fact that the fax, email, contact number and address for Kelly Trucks Strokestown Limited are the same as that for Kelly Trucks Limited also supports the finding that the business and assets of Kelly Trucks Limited have in fact been transferred to Kelly Trucks Strokestown Limited and/or Kelly Trucks (Ballaghaderreen) Limited. Further there is evidence of the dissipation of Kelly Trucks Limited's assets by the first respondent. The letter sent by one Mr. O'Grady to the applicant on 17th June, 2014 indicates that he had received equipment belonging to Kelly Trucks Limited from the first respondent in satisfaction of a debt. Based on the evidence presented to the court, the court is quite satisfied that the first and second-named respondents have engaged in a concerted plan to put the assets of Kelly Trucks Limited outside the reach of their creditors.

Frustration of the liquidation

147. When the company was put into voluntary liquidation the respondents appointed as liquidator, Mr. Nehaal Singh whose primary qualification appears to have been his willingness to do the bidding of the respondents. Since the removal of Mr. Singh and the appointment of the applicant as liquidator on 17th February, 2014 the respondents have frustrated the liquidation process: by failing to make the company records available to the liquidator; by threatening action against creditors who cooperated with the liquidator's request for information as to their dealings with the company; by giving the liquidator the run-around as to the location of company files claiming first of all that they were in the possession of Mr. Singh and subsequently that they were in a storage unit to which Mr. Singh had the key, and thereafter claiming that the files had been stolen by the liquidator, his servants or his agents; by failing to return the Audi A4 admittedly being used by the second respondent and failing to account for nineteen other vehicles registered to Kelly Trucks Limited with Roscommon County Council; and by failing to account for an alleged loan made by the directors to the company. At the time of the creditors' voluntary liquidation that loan was stated to be in the region of €55,000. It subsequently increased ten-fold to €560,000 and in its most recent manifestation was alleged to be in excess of €600,000. The first and second respondents claim that the said loan was a charge on the company which had crystallised so as to entitle the respondents to retain all of the assets of the company. This loan [if any] has not been registered against the company and is therefore void against the liquidator.

148. The court is satisfied that transfer of the business of Kelly Trucks Limited to Kelly Trucks Strokestown Limited and Kelly Trucks (Ballaghaderreen) Limited and the frustration of the liquidation has been brought about by the deliberate actions of the second-named respondent, Mrs. Anne Kelly. Mrs. Kelly has sought to represent herself as an injured party in these proceedings, a fact which is difficult to reconcile with the objective evidence before the court. Throughout these proceedings, Mrs. Kelly has shown herself to be an individual who refuses to accept or abide by court orders. Any order that is made against her is simply taken by her to be evidence

of instances of the court's corruption, and of the grave injustices which continue to be perpetrated against her as a lay litigant. The court is quite satisfied that she has played a pivotal role in the business of Kelly Trucks Limited and that of Kelly Trucks Strokestown Limited and Kelly Trucks (Ballaghaderreen) Limited. While maintaining that Kelly Trucks Strokestown Limited is the company of and controlled by her children, it was she who issued a circular in May, 2014 on Kelly Trucks Strokestown Limited's letterhead threatening customers with legal action in the event that they cooperated with the liquidator. The evidence in this regard, as proof of her centrality in the transfer of assets and frustration of the liquidation process, is irrefutable.

149. Mrs. Kelly has been responsible for the administration of company business for Kelly Trucks Limited since its foundation in 1989, a role which authorised and required her to have access to company files, supplies, assets and contact information for customers and employees. Such a role puts her in an optimal position to assist the liquidator in the orderly winding up of Kelly Trucks Limited. However Mrs. Kelly has repeatedly defaulted on this obligation and has at times out rightly refused to do so. Placing her two children, James Kelly Junior and Patricia Kelly, as directors of Kelly Trucks Strokestown Limited was done in order to facilitate her involvement with that company and to allow her to exercise substantial control over company operations, so as to facilitate the transfer of business that has occurred. The explanation offered to the court that James Kelly Junior and Patricia Kelly were learning the business and acting in "stiff competition" with Kelly Trucks Limited while operating from the same premises, is in the circumstances simply incredible.

150. While Mr. James Kelly's participation in these events is less visible than that of his wife Anne Kelly, it is nonetheless significant. It was he who chased away the court messenger, Mr. Hurson, in July, 2013 claiming "Put it in writing. Reply by letter. I don't owe that money." It was he who swore an affidavit in September, 2013 that he was willing and able to discharge the amounts owing to Costello Transport Limited and swore that there was no plan or scheme to divest Kelly Trucks Limited of its business and assets, so as to deprive creditors. He swore this at a time when he knew or ought to have known that his wife was actively doing just that. It was he who having undertaken to discharge €500 per week to defray costs due on foot of the Costello Transport Limited judgment, unilaterally stopped those payments on 23rd December, 2013, when the business and assets of Kelly Trucks Limited had been successfully transferred to Kelly Trucks Strokestown Limited and/or Kelly Trucks (Ballaghaderreen) Limited. It was he who announced at the creditors' meeting on 3rd January, 2014 that the company business had been taken over by Kelly Trucks Strokestown Limited. It was he who gave Mr. Aidan O'Grady equipment belonging to Kelly Trucks Limited in consideration for money that he was owed by Mr. Kelly.

151. The court considers Mr. Kelly's participation in these events to be analogous to that of Mrs. Porrit in the case of *Re Hunting Lodges*. There, the court found that, although her conduct was not as central as that of Mr. Porrit, the actions of Mrs. Porrit nonetheless amounted to participation in the fraudulent scheme. Mrs. Kelly could not have engaged in the course of action undertaken by her without the assistance, cooperation and consent of her spouse, co-director, and co-shareholder of their company Kelly Trucks Limited.

Application for an order pursuant to s. 610

152. The court is satisfied that both the first and second-named respondents acted fraudulently and recklessly with a view to defrauding their creditors in relation to the business of Kelly Trucks Limited and should therefore be held personally liable without any limitation of liability for all of the creditors' debts of Kelly Trucks Limited. The court therefore considers it proper to exercise its power under s. 610 of the Companies Act 2014 to declare that James Kelly the first respondent and Anne Kelly the second respondent shall be personally responsible without any limitation of liability, for all of the debts of the company.

153. While the court is satisfied that they each have taken steps to frustrate the liquidation the court considers it would be unfair at this point, to visit them personally with the costs of the liquidation. The court was informed at the outset of this application that an order pursuant to s. 204 of the Companies Act 1990 was not being pursued, even though it had been sought in the original notice of motion. All of the evidence necessary to underpin an application pursuant to s.204 was known to the liquidator prior to the commencement of this application, but he elected not to pursue that relief. An individual is entitled to know what is being claimed against them as they come before the court. Where the application is limited to seeking certain specific orders then the court should not go beyond the relief claimed unless satisfied that the other party has had an appropriate opportunity to address the issue. If a liquidator seeks to make directors personally liable for the costs of a liquidation in addition to the debts of the company, then he/she should make a specific application in that regard. Having notified the court at the outset of this application that he was no longer pursuing an application pursuant to s. 204 of the Companies Act 1990 it would be unfair to allow the applicant to revisit that issue subsequently. Having said that, should the first and second respondents persist in their disruptive behaviour and in their refusal to cooperate with the liquidator, then they run the risk of being made personally liable for the costs of the liquidation from the date of this judgment.

Application for an order pursuant to s. 608

154. The court is satisfied that there has been a transfer of business and assets from Kelly Trucks Limited in liquidation to Kelly Trucks Strokestown Limited and/or Kelly Trucks (Ballaghaderreen) Limited. The court proposes to make an order pursuant to s. 608 against Kelly Trucks Strokestown Limited ordering the directors of the company, James Kelly Junior and Patricia Kelly to account for assets that have been transferred from Kelly Trucks Limited to Kelly Trucks Strokestown Limited. It is evident, from a review of the books of Kelly Trucks Limited, that payments totalling €40,820.64 were made from Kelly Trucks Limited to Kelly Trucks Strokestown Limited between 9th August, 2013 and 25th November, 2013. More than €20,000 of this amount was transferred within one month of the incorporation of Kelly Trucks Strokestown Limited. The court on the facts of this case considers it just and equitable to order that Kelly Trucks Strokestown Limited, James Kelly Junior and Patricia Kelly deliver to the liquidator the sum of €40,820.64. At the date of liquidation, Kelly Trucks Limited owned 20 vehicles which the liquidator estimated had a value of approximately €178,000. It appears to the court that James Kelly Junior and Patricia Kelly, in their capacity as directors of Kelly Trucks Strokestown Limited or Kelly Trucks Ballaghaderreen Limited have the use, control or possession of 19 of those vehicles, or the proceeds of sale of same.. The court considers it just and equitable to order them to deliver those vehicles to the liquidator, or alternatively pay to him the book value of those vehicles as of 31st July, 2013. Further the court considers that it is just and equitable to order the second respondent Mrs. Kelly to deliver to the liquidator the Audi A4 currently in her possession which is the property of Kelly Trucks Limited or alternatively the book value of that vehicle as of the date of liquidation.

155. The applicant has estimated the total value of assets transferred to be in the region of €838,908. This was compiled and estimated from such records as he was able to obtain. However since the applicant does not have a precise list of assets transferred to either Kelly Trucks Strokestown Limited and/or Kelly Trucks (Ballaghaderreen) Limited the court cannot be satisfied as to the accuracy of this figure such as would allow the court to make an order directing the return of that amount. The court will hear further from the parties as to the orders it should/can make in light of its finding that the assets and business of Kelly Trucks Limited have in fact been transferred to Kelly Trucks (Strokestown) Limited and/or Kelly Trucks Ballaghaderreen Limited.

The sixth respondent

156. The status of the application in respect of Kelly Trucks (Ballaghaderreen) Limited is unclear. In his motion of 20th January, 2015 the applicant sought an order that Kelly Trucks Ballaghaderreen Limited of Lung Road, Ballaghaderreen, Co. Roscommon be added as a respondent in substitution for (and with the removal of) Kelly Trucks (Ballaghaderreen) Limited. That motion stands adjourned generally and no order has been made on foot thereof. Because of the uncertainty of the status of the sixth-named respondent the court does not propose to make any order on this application in respect of Kelly Trucks (Ballaghaderreen) Limited.

Disqualification

157. In maintaining his application for the disqualification of the first and second-named respondents as company directors, the applicant relies on the evidence adduced in both the 2014/333COS and 2014/484COS proceedings. The applicant contends that all of the criteria under s. 842 of the Companies Act 2014 have been met, namely that:-

- a) the first and second-named respondents have been guilty, while officers of the company of fraud in relation to the company and creditors by stripping the company of its assets and transferring them to two newly incorporated companies;
- b) that the respondents have been guilty, while officers of the company of breaches of their respective duties as officers of the company by failing to cooperate and by actively frustrating the lawfully appointed liquidator of the company;
- c) that a declaration has been granted under s. 610 in respect of the first and second respondents; and
- d) that the conduct of the first and second respondents as officers of the company make them unfit to be concerned in the management of a company.

Having considered making an order for restriction, the court has come to the view that the conduct displayed herein is of such an egregious nature as to warrant disqualification. The court takes a particularly serious view of the fact that this court was deliberately misled during the course of a petition to wind up this company in September, 2013. The first respondent swore an affidavit that he was not engaged in trying to put the assets of Kelly Trucks Limited outside the reach of its creditors, at a time when he and his wife were doing just that. He sought time ostensibly to challenge and pay such costs as might ultimately be found to be due to Costello Transport Limited, but in reality, the time was sought to facilitate the ongoing transfer of assets out of Kelly Trucks Limited to the newly incorporated companies.

Once that objective had been achieved, he unilaterally stopped payments and put the company into a creditors' voluntary liquidation. While the court can appreciate that the first and second-named respondents were shocked to find their company, which they had assiduously grown since 1989, to be liable first for a judgment sum of €32,000 and thereafter legal costs of in excess of €120,000, to the solicitors who acted in that case, both for them and for the plaintiff, their response to that disaster has been wholly inappropriate. It is obvious to the court that the respondents still refuse to accept the validity of various court orders made since 2012. Their continuing refusal to accept or comply with court orders of itself makes them unfit to be concerned in the management of a company, quite apart from the court's finding that they have fraudulently sought to divest the company of its assets, in order to defeat the company's creditors. The two-step test as laid out in the *Kentford* case has been satisfied:-

"Firstly, whether conduct falling within any of the categories of s.160(2) (now s. 842) has been established as a matter of fact. Secondly, whether the court, in the exercise of its discretion, should proceed to disqualify."

On this basis, the court proposes to disqualify both Mr. and Mrs. Kelly for a period of seven and a half years. Having set that period as the appropriate disqualification period the court unfortunately, cannot find any mitigatory factors which might allow it to reduce the period of disqualification, particularly, taking into account the continued intransigence of Mrs. Kelly.

158. The source of the grievance and the unlawful strategy adopted by Mr. and Mrs. Kelly in this case is the high level of legal costs incurred by them in defence of the Costello Transport Limited claim. The court has no insight into the nature or complexity of the claim. However, the court observes that total costs of almost four times the award is always likely to give rise to unhappiness in those required to pay.

159. While the court has found that the Kelly's response to their company's indebtedness was wholly inappropriate and unlawful, the court considers it appropriate that those costs should not simply be accepted by the liquidator without challenge.

160. The court is concerned and raised at the hearing, the fact that it was the high level of legal costs that gave rise to most of the difficulties in this case. The only outstanding creditors appear to be lawyers.

161. Counsel for the applicant suggested that I could make an order directing that the liquidator tax those costs. I am not persuaded that I have the power in the context of a voluntary winding up to direct that the liquidator tax costs accrued prior to the liquidation. However, the court is certainly of the opinion that it is appropriate that he should do so.

162. The applicant's appointment as liquidator in place of Mr. Singh, was at the behest of Costello Transport Limited which has an order for costs in its favour against Kelly Trucks Limited arising from the original proceedings. The amount of that debt was challenged by Kelly Trucks Limited, and taxation invoked by it, prior to liquidation. Before paying any legal costs from the assets of Kelly Trucks Limited, the applicant is under a duty to satisfy himself that such costs are in fact due. The most efficient means of establishing that is through the taxation process that has already commenced.

163. Similarly, the substantial costs claimed by Callan Tansey solicitors, who acted for Kelly Trucks Limited in the original proceedings, are only payable if they were properly and reasonably incurred in defence of the claim. The liquidator presumably has no personal expertise in assessing legal costs and it appears to the court that the easiest way for the liquidator to satisfy himself as to the sum in fact due, is to have those costs taxed.

164. In summary therefore, and for the reasons set out herein, the court will grant a declaration pursuant to s. 610 of the Companies Act 2014 that the first and second respondents, James Kelly and Anne Kelly, be held personally liable for the debts of Kelly Trucks Limited in liquidation. Secondly, the court directs pursuant to s. 608 of the said Act that the directors of Kelly Trucks (Strokestown) Limited, James Kelly Junior and Patricia Kelly, deliver to the applicant the sum of €40,820.64 paid by Kelly Trucks Limited to Kelly Trucks (Strokestown) Limited between 9th August, 2013 and 25th November, 2013. The court further orders that they deliver to the liquidator the nineteen vehicles registered to Kelly Trucks Limited as of July, 2013 or in the alternative pay to the liquidator the book value of those vehicles as of 31st July, 2013. The court considers that it is just and equitable to order the second respondent Mrs. Kelly to deliver to the liquidator the Audi A4 currently in her possession which is the property of Kelly Trucks Limited, or alternatively

the book value of that vehicle as of 31st July, 2013. Finally, the court, pursuant to s. 842 of the Act, disqualifies both James Kelly and Anne Kelly, the first and second respondents respectively, from being appointed or from acting as directors or other officers, or being in any way, whether directly or indirectly, involved in the promotion, formation or management of a company or society within the meaning of the Act, for a period of seven and a half years from the date of perfection of the court's order.