THE COURT OF APPEAL

[185CJA/2019]

Birmingham P.
McGovern J.
McCarthy J.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

GARRET HEVEY

RESPONDENT

JUDGMENT of the Court delivered on the 3rd day of February 2020 by Mr. Justice Patrick McCarthy

1. This is an appeal pursuant to s.2 of the Criminal Justice Act, 1993, on the basis that the sentence imposed on the respondent herein was unduly lenient. On the 29th of July, 2019, the respondent, after entering a plea of guilty, was sentenced as follows: five years imprisonment with one suspended for a count of fraudulent trading, contrary to s.722 of the Companies Act, 2014, three years imprisonment for a count of deception, contrary to s.6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, three years imprisonment for another count of deception, and three years imprisonment for a final count of deception. The sentences are to run concurrently.

Background

2. The background to the offence is as follows. The accused and his co-accused pleaded guilty to offences of fraudulent trading and deception relating to their respective roles in the management of a company known as 'Arden Forestry Management Limited' in the period between January 2014 and June 2016. Mr Hevey pleaded guilty on a pre-trial hearing date and his co-accused pleaded guilty one week prior to the trial date which was fixed for the 21st of January 2019.

3. Evidence was given by Detective Inspector Catriona Gunne on the 19th of March 2019 in relation to the activities of Arden Forestry Management. The company purported to be an investment company offering investment opportunity in the Irish forestry sector. Potential investors were attracted on the basis of three income generating schemes, namely grant schemes, income from thinning of trees and the resale value of the particular forest. A fourth income stream was identified by counsel for the defence as the sale of the timber itself.

4. Arden Forestry Management was incorporated by Mr Hevey in November 2013 and its principal bank account was held at Dún Laoghaire in the AIB bank and was opened in January 2014. On the 13th of June 2016, a freezing order was placed on the account and it has remained frozen since that date. Over the course of the period between January

2014 and the 13th of June 2016, €5.5 million passed through the company's account. This sum represented the investment of 143 investors, the minimum permissible investment was for £10,400 which afforded the investor two acres of forested land, the largest investment was €491,381.81.

5. In reality, the company purchased a mere 30.2 acres of forest and if the monies invested had been used for the purpose for which they were intended, 858 acres of forestry should have been acquired. Payments slightly in excess of €270,000 were paid out to investors in the form of purported government grants and thinning payments. The payments to investors were funded by the investment monies of later investors because the 30.2 acres which had been purchased were not eligible for government grants. It was the use of subsequent investors' monies to make the payments to earlier investments which caused Detective Inspector Gunne to liken the activities of the company to a Ponzi scheme.

6. The company attracted investors through the placement of advertisements on Google Ads and their marketing campaign targeted overseas investors who would have had limited knowledge of the Irish forestry sector. Following their investment, investors were provided with an impressive looking investor pack. The notable features of the investment pack were the use by Mr Hevey of a pseudonym, James Baker, the use of a virtual office with an address at 629 Trinity Street, Dublin 2 and an associated telephone number and the investment pack also included a brochure which contained unauthorised endorsements from AIB, Confor, FBD and Forest Sale Ireland. The company also issued fraudulent timber certificates from a non-existent forestry company, Forest Sales Limited, which purported to be based in Athlone. The same two forests, located in Frenchpark, Co. Roscommon, were being sold over and over again by Arden Forestry Management and the investors were given a false folio which stated the company to be the full owners of the land and the investor to hold a tenancy in common. It appeared that tenancies in common were not permissible in the forestry sector. The folio numbers used were numbers taken from genuine purchases of land, but the same numbers were used and re-used.

7. In addition, a document which was stated to be a forestry management consultant agreement claimed that Veon, formerly FEL Limited, a wholly legitimate company in the forestry management sector, was servicing and managing its forests. FEL, as it was then, had to take legal action and took steps to warn investors and to disassociate itself from Arden's activities. Other management consultant agreements used the name 'John Power', a fictitious person with a fictitious address. Mr Hevey was the principal at Arden Forestry and in conducting that role he used the name 'James Baker'. His co-accused was the second in command and used the name 'David Marshall' in his role with Arden. The company employed a number of other persons whose main function appears to have been attracting new investment. The company also operated a reward scheme which incentivised existing investors to refer new investors for which a reward of £500 was offered.

8. At the sentencing hearing on the 5th of July, 2019, Detective Inspector Gunne gave the details of the individual investments made by the investors who are the subject of the deception counts on the indictment. Mr Brian McCord, the injured party in respect of count 2, invested £10,400 on the 19th of November 2015 and made a further investment of £8,320 on the 3rd of March 2016. He received a £10 Marks and Spencer voucher and a payment of £4.93 which were not specified to be either a grant or a thinning payment. When Mr McCord did not receive an investor pack for his second investment, he contacted the company and was asked to return all of the documents he had received in his initial investor's pack. Mr Tony Collier, the injured party in respect of count No. 3, invested £12,720 and received a payment of £475, again without any specification as to its origin.

9. The fraudulent activities of the company came to light as the result of enquiries conducted by Kari Wahlstrom in May of 2016. Mr Wahlstrom is the subject of count No. 4. Prior to May 2016, Mr Wahlstrom had already invested £52,000 in the company. In May 2016, he requested a site visit with a view to making a further investment. He travelled to Ireland and was greeted at the airport by David Peile, the respondent's co-accused, using his pseudonym David Marshall, and he later met Mr Hevey who he understood to be James Baker. Mr.Peile brought Mr Wahlstrom to a forest which was part of the 60 acres of land which had in fact been purchased. Mr Wahlstrom was happy with what he was shown but sought to visit the Land Registry to view the documentation and review the documents. The visit to the Land Registry never came to pass. An analysis of Mr Hevey's computer showed an email sent to him by his co-accused stating: '*shit, he wants to visit the Land Registry department…how do we get over that?*'. They then told Mr Wahlstrom that there was not enough time to do so as he would miss his flight. On his return to Greece, Mr Wahlstrom carried out his own enquiries with the Property Registry Authority and discovered that the land in question was not registered in Arden's name. As a consequence, he reported the matter to the Garda National Economic Crime Bureau and the funds held in the AIB bank account were frozen.

10. The other investors on the indictment were Margaret Coe who invested £12,720 in the middle of 2016 and a further £16,960 later in the same year for which she received a return of £482. Following the order freezing the AIB account, David Peile opened a Barclays bank account and Mrs Coe's second investment was paid into the newly opened account. €817,439 representing an investment by a further 35 investors was channelled into the Barclays account. Whilst this was referred to by the appellant as relevant, it is not so, as this had nothing to do with Mr Hevey.

11. Following the initiation of the investigation, Mrs Coe was in receipt of a number of emails from Arden Management which advised her not to reply to any emails which she did not recognise due to the hacking of the police site in Ireland and requesting her to keep them informed of any further communications. A second email received by Mrs Coe in October 2016 suggested to her that her engagement with the Gardaí would delay her funds being returned to her. Mrs Coe took this to be a threat.

12. Investigations showed that Mr Hevey received payments of €501,332 from the AIB account of which 281,613 went to Google Ads. In addition, €1.5 million was transferred to an account in the United Arab Emirates and the two beneficiaries of the account in Dubai were Mr Hevey and Mr Peile. €290,000 were paid from that account into Mr Hevey's account. David Peile received payments totalling €312,000 from the AIB account and the GTD account (the UAE account) in Dubai. The respondent and his co-accused were the beneficiaries of that account.

13. Both Mr Hevey and Mr Peile were arrested on the 6th of February 2017 and each was interviewed on six occasions. Nothing of evidential value resulted from the respondent's interviews after arrest. This, however, was the second occasion on which the Gardaí spoke to Mr Hevey concerning the activities of Arden Forestry Management. He and the Gardaí previously met by appointment on the 22nd of June 2016, shortly after the order had been made freezing the company's bank account. Mr Hevey gave the Gardaí an account of the business and explained the company's business model and confirmed that the AIB account was the company's bank account and he also confirmed that the company GTD International was the holder of the bank account in Dubai. He maintained that he was confident that ultimately the company would succeed in purchasing forests for the investors and he indicated that a number of forests were under negotiation but that no purchases had in fact come to fruition. He also provided a spreadsheet of properties in which Arden had expressed an interest in purchasing. He also maintained that the business model was such that it would take five years for investors to realise the full potential of their investment.

14. It was accepted that the respondent had offered to return the balance on the UAE account, but that his solicitor was unwilling to hold the funds as it might amount to money laundering and there was no response to his offer to the CSSO.

15. Mr Delacey, a liquidator, was appointed to Arden and he gave evidence to the court on the 5th July, 2019 that:-

    i) €100,000 was transferred from the UAE account during the provisional liquidation.

    ii) A further €700,000 was received in July 2018 and €250,00 in respect of a bank draft that had been drawn on the UAE account to a personal account held by the respondent.

    iii) His efforts to take possession of the funds in the UAE account were frustrated by efforts to have the company dissolved. This resulted in him having to issue proceedings prohibiting the respondent and his co-accused from taking any steps to dissolve this company. That process was delayed by adjournment applications made by the respondent.

    iv) By the time the respondent consented to the process, the company had been dissolved for non-filing of its annual return.

v) Proceedings had to be issued in the UAE to prevent the funds from being removed from the UAE account.

vi) The liquidator had to apply to have the company restored. This required the respondent signing documents, but the first set of documents were not accepted in the UAE as the respondent's signature did not correspond to the signature provided previously in the UAE.

vii) Even after the liquidator had been appointed as a sole director so that he could access the funds, the bank would not co-operate as they had been informed by person unidentified that the money actually belonged to the respondent and the co-accused. This resulted in a further set of proceedings having to be issued in the UAE.

viii) Accessing the €250,000 on the draft had not been a straightforward matter.

ix) Legal fees in Dubai were in excess of €100,000 and significant fees were incurred in this jurisdiction – he estimated that half of the money was spent on legal fees.

x) He was still trying to establish the location of funds that had been dissipated, but that also involved a cost.

xi) He anticipated that 'a relatively small fraction' of the amounts due to creditors would be paid at the end of the liquidation.

16. Mr Delacey said that he recovered €100,000 from the GTD account in Dubai during a provisional liquidation and that transfer was arranged by Mr Hevey. Subsequently, in July 2018, after some considerable difficulty, he received €700,000 from the GTD account and in addition he received €250,000 which were the proceeds of a bank draft which had been payable to Mr Hevey.

17. At the time of sentencing, Mr Hevey was a 43-year-old married man with three children. He has no relevant previous convictions. Victim impact statements were submitted from Margaret Coe, Ms Kiteri Ma, and Mr Wahlstrom. Each has described their experience as being extremely stressful and upsetting and in each case, the investment was being made for the benefit of the victim's children and grandchildren, and they could ill afford to sustain the loss of their respective investments.

18. In her sentencing remarks, the trial judge had regard to the content of the victim impact reports, the large number of letters and testimonials in respect of Mr Hevey which were read into the record by his counsel, including letters from family members, former work colleagues and friends. The judge said it was evident from the testimonials that Mr Hevey had a lengthy history of employment in national and international companies and that he enjoyed the respect of his former colleagues. The letters also spoke of his qualities as a husband and father and friend and there was reference to his engagement with charitable concerns and the supportive role adopted by him in relation to his wife, who has a

significant medical condition. All of the testimonials were united in the view that his actions in respect of these charges are entirely out of character.

19. The suggestion that Mr Hevey was operating a Ponzi scheme has been roundly rejected on his behalf by his counsel. Counsel for the defence maintained that Mr Hevey was genuinely seeking to apply the investor's money for their intended purpose and that his failure lay in omitting to explain to investors that the value of their investment would not mature for some years after the forests were harvested.

20. The judge agreed that the scheme could not be characterised as a 'Ponzi scheme', but acknowledged that the number and nature of the fraudulent devices and the documents and fictions used by the respondent to secure investment and to deceive investors as to the substance of their investment were such as to lead to the inescapable conclusion that this was a case of calculated fraud.

21. The judge noted that the respondent did not cooperate with the investigation and, in his view, any engagement by the respondent for the most part, was self-serving and an exercise in damage limitation. The judge stated that Mr Hevey sought to interfere with the garda investigation by casting doubt over the authenticity of communications from the Gardaí to Mrs Coe and in questioning the legitimacy of Detective Inspector Gunne.

22. The judge identified the following aggravating factors: the respondent was the engineer of the fraudulent scheme, the multiple fraudulent devices which were put to use, the large number of investors who were induced to invest in Arden and the very large amount of money involved, the length of time over which the fraud was perpetrated, and the significant financial loss to those affected and the psychological and emotional harm expressed in the victim impact reports submitted. There was, in addition, the potential reputational damage to which innocent third parties were exposed by the unauthorised use of implied endorsements by them and the potential reputational damage to the Irish forestry sector overseas. There was, further, inappropriate interference by Mr Hevey in the dealings of the Gardaí with Mrs Coe; this does not in theory aggravate the offences, but goes to the issue of mitigating.

23. In respect of the fraudulent trading offence, the judge placed the offence in the upper end of the midrange and fixed a headline sentence of seven years. In relation to the deception offences, the degree of deception and dishonesty involved and the loss incurred by the investors, the judge placed the offence in the upper range and set a headline sentence of four and a half years.

24. In mitigation, the judge identified the following factors: the respondent's plea of guilty which was accepted to be a valuable and useful one, notwithstanding the fact that it came at a late stage, the confessions of fact that he made to Gardaí in his dealings with them on the 22nd of June 2016 which would have been assistance to the prosecution had the trial proceeded, his offer to repatriate the monies held in the GTD bank account in Dubai, and his absence of relevant previous convictions. The judge also took into account his family circumstances and his wife's medical condition, his excellent employment history,

the many impressive testimonials submitted on his behalf, and the publicity which the case has attracted and the effect of this conviction on his future employment prospects.

25. The judge determined a final sentence on count No. 1, a sentence of five years' imprisonment with the final year suspended for count No.1, and respect of the remaining counts to which the respondent had pleaded guilty, imposed sentences of three years in respect of each to run concurrently.

Grounds of Appeal

26. The grounds of appeal submitted by the Director can be summarised as follows: that the sentencing judge erred:-

    i) In placing the fraudulent trading offence at the upper end of the midrange, which was too low and consequently the headline sentence identified was too low;

    ii) In attributing too little weight to the attributing factors;

    iii) In attributing excessive weight to the mitigating factors;

    iv) In imposing a sentence which did not sufficiently distinguish the role played by the respondent *vis a vis* his co-accused.

    We will deal with grounds two and three together.

Submissions

Ground One

27. Section 871 of the Companies Act, 2014 provides that when tried on indictment, the maximum sentence is a fine of €500,000 and/or a ten year term of imprisonment. The sentencing judge herein identified a headline sentence of seven years in respect of this offence. The appellant submits that this offence arose out of a prolonged, complex and sophisticated fraud, whereby the respondent was the main protagonist. The appellant further submits that the company never traded in a lawful manner, the company was established with a director (the respondent) using a pseudonym, the company actively sought out foreign investors, using professional documentation to give the operation an air of legitimacy, the company made payments purporting to be returns but were in fact funded by other investors' funds, the fraud was only discovered when an investor travelled to Ireland, sought to see his piece of forest and was misdirected by the respondent causing him to carry out further enquiries of his own, the fraud continued after the AIB account was frozen, substantial funds were transferred off shore, when the AIB bank account was frozen, another bank account was opened which Arden continued to use, funds were released from the AIB account, while frozen, to pay legal and living expenses, when the respondent knew well that such funds did not belong to him, misrepresentations were made to the investors in general and Mr Wahlstrom in particular, funds not in the AIB, Barclays or UAE account have not been found, efforts were made to frustrate the liquidator resulting in very substantial reduction of funds available for creditors, efforts were made to frustrate the garda investigation, including the 'threat' as perceived by Ms Coe, and the period over which the fraud continued.

28. The respondent submits that in her sentencing remarks, the judge outlined the evidence given in the case. She noted that the prosecution contended that the matter was a "Ponzi" scheme but said in her view that it could not be characterised as a "Ponzi" scheme but rather was a simple case of calculated fraud. After identifying the relevant aggravating and mitigating factors, the judge indicated that in respect of the fraudulent trading, the offence fell within the upper end of the mid-range and in the upper range for the deception offences. She fixed a headline sentence of seven years for the fraudulent trading and four and a half years for the deception. It is submitted that the lengthy sentence imposed in this case of five years with one year suspended could never be regarded a substantial departure from the appropriate sentence, indeed it is submitted that the trial judge correctly identified the aggravating features so as to justify the fixing of a headline sentence of seven years and also correctly identified, and gave the appropriate weight to, the significant mitigating factors that applied in this case, particularly the guilty plea, and absence of relevant previous convictions.

Grounds Two and Three

29. The appellant identified as aggravating factors in the Notice of Appeal the following: that the respondent set up the company as a vehicle for fraud, the respondent was a director of the company and was in breach of statutory duties as a director, the respondent was the main protagonist in a complex, sustained and sophisticated fraud, the unsustainable submission that the company was set up as a legitimate business that simply grew too quickly, the amount defrauded, the number of investors and the duration of the fraud, the repayment of amounts to some investors purporting to be grants or proceeds of thinning, but were in fact other investors' funds, the offer of a 'finder's fee' to investors if they introduced other investors, the multiplicity of devices used to perpetrate the fraud, including the use of false names, fraudulent documentation (land folios, timber certificates, forest management consultancy agreement), professional investors' packs, third party companies' names invoked without their knowledge, the re-using of the same two plots of forest and the attempts to frustrate Mr Wahlstrom, the targeting of investors abroad resulting in an extra territorial element to the offences and damage to the reputation of Ireland as a place to invest, the failure to co-operate with the investigation. Any co-operation was self-serving in nature or concerned information already known to the Gardaí, the transfer of monies abroad to Dubai and the dissipation of the funds, the absence of any remorse, the absence of an apology or any acknowledgement of wrong-doing, the attempts to interfere with the garda investigation, in particular the communications with Ms Coe and the representation that Ms O'Byrne worked from home to cover the fact that there was an office, the lack of co-operation with the Liquidator, the interference with the work of the Liquidation by inter alia attempting to dissolve GTD, delaying the transfer of authorities, and necessitating the requirement to get restraint orders in Dubai to prevent further dissipation. As a result, only a small portion of the funds will ever be recovered, the failure to identify where the funds had gone or to assist in their recovery, the submission that the 'personal gain' from the fraud would have been similar to a salary for the period of the fraud, the reliance on testimonials where it was stated that the respondent was remorseful, would not have deliberately set out to defraud or break the law, the reliance of testimonials of persons who had benefit from the fraud,

the manner in which the respondent met the case, efforts to restrict the evidence called by the prosecution at the sentence hearing.

30. The aggravating factors in this case are significant in number and scope and were deliberate acts. Even at the sentencing stage, no efforts have been made to assist the liquidator in finding dissipated funds. The respondent sought to rely heavily on an offer to repatriate funds which did not come to fruition. This flies in the face of the actions of the respondent, by applying for and obtaining a pay-out from the funds frozen in the AIB account to pay legal and living expenses, the efforts made to frustrate the liquidator and the absence of any effort to assist even at this late stage. The lack of remorse and the absence of an apology are stark. Further, the manner in which Arden was established using a false name for the director is telling as to the level of intent and culpability in the offending from the very beginning. This was confirmed by the nature and contents of the investors' packs.

31. The appellant accepts the mitigating factors identified. However, the respondent made submissions that the offer to repatriate funds was not a significant mitigating factor. Had the funds been actually repatriated, that would have been a valid submission. However, when this did not happen, not only did the respondent fail to take any steps (other than his offer to which there was no response) to ensure that the funds were actually repatriated, he actively obstructed the liquidator in his work. The liquidator gave evidence that the lack of co-operation had resulted in substantial additional costs and that while there were other funds not yet recovered, they still had to be identified and a cost benefit analysis would have to be undertaken to see if they were worth pursuing. The court confirmed that it would be giving credit for the fact that the offer had been made, but did not receive the evidence. The court then went on, not only to give the respondent credit for making the offer, but also to observe that a suggested mechanism to effect the repatriation of the funds was not acted upon by the State and that, had it been effected, the loss to the company's creditors would have been significantly reduced. In so concluding, the court went much further than simply giving the respondent credit for "making the offer" and it is submitted that such a conclusion should not have been reached in the absence of evidence.

32. The appellant submits that the respondent's plea was entered shortly before the trial was listed. While it was of some assistance, given its timing it is a limited mitigating factor. Further, the finding by the court that the respondent's engagement with the investigation was '*self-serving and an exercise in damage limitation*' and that he had not co-operated is not reflected in the sentence imposed.

33. The respondent submits that the applicant has made a number of assertions in their submissions as to why the offence should have been regarded as being in the upper-range. It is submitted that nearly all of these are simply a re-iteration of the facts of the case and indeed it is difficult to see how certain matters could be considered to be aggravating factors to the offence (such as "the reliance on testimonials where it was stated that the respondent was remorseful and would not have deliberately set out to

defraud or break the law", "the manner in which the respondent met the case" and "efforts to restrict the evidence called by the prosecution at the sentence hearing". The respondent further say that the applicant also makes a number of assertions, not born out by the evidence in the case. The applicant has also taken issue with the plea in mitigation made by the respondent. Again, in light of the sentencing judge's careful judgment in respect of the evidence of the case, the respondent submits that it is difficult to see how that such a plea, which set out the respondent's position, aggravates the offence.

34. In respect of the mitigation in the case, the applicant appears to take issue with the timing of the guilty plea, despite the evidence that it was entered, as evidence was being served and prior to a number of forensic accountant's reports being served, and entered on the pre-trial date, more than a month prior to the proposed trial date. Notably, the co-accused pleaded on the trial date (the trial date having been vacated the week before). The respondent submits that in circumstances where the trial was listed for six weeks, and involved complex documentary proofs, the plea entered at the pre-trial date was of significant assistance to the prosecution. The applicant also contends that the offer to repatriate funds, made by the solicitor for the respondent after the bank accounts were frozen and prior to the respondent being arrested was not a mitigating factor as the offer was not acted upon. In this respect, the respondent submits that the offer having been made, as was accepted by the applicant, the learned sentencing judge was obliged to consider it a mitigating factor. This was also of significance as the applicant places some reliance on the fact that the liquidation was prolonged and expensive and seeks to lay some blame at the door of the respondent.

Ground Four

35. Effectively, the applicant's position is that the sentence imposed on the co-accused, Mr Peile, was correct, and if correct, a higher sentence should have been imposed on the respondent herein, given his culpability. She effectively seeks to use Mr Peile's sentence as a baseline. We think that Mr Hevey's sentence must be dealt with on its own merits. We cannot see the relevance of the differential. We therefore need not address this point any further.

Discussion and decision

36. It seems to us that on any view these must be characterised as very serious offences of the kind in question here. We do not accept that a number of the factors characterised as aggravating as so on the evidence, or indeed in principle. We think, however, that the following are the principal such aggravating factors, namely: -

    (1) That even though a false name was not used by the appellant in and about setting up the company it cannot be regarded as anything other than one established as an engine of fraud since it is not in debate that when the business of the company commenced he and the other director (Mr Peile) used false names and indeed, Ms. O'Byrne, an employee of the company, said that a number of other persons associated with its business, were similarly using such names.

(2) The misconduct constituting the offences was not of that class with which the Court has had occasion to deal from time to time where a person of otherwise good character, due to human frailty, has perhaps engaged in one wrongful act of deception or perhaps theft of, say, the funds of an employer in a modest amount, and when that was something which could easily be done without any or any significant planning or long considered intent, thereafter perhaps continuing or becoming more serious over even a relatively lengthy period of time when the ease of the early misconduct and the desire for funds draws the individual in, so to speak. Such conduct is often associated with human tragedy, such as a need for funds to feed an addiction (whether, say, gambling or the use of drugs) or to address financial hardship.

(3) The very substantial amounts involved (in or about €5.5M).

(4) The number of investors (143) and the harm done to them.

(5) The fact that many of the investors came from abroad and may properly be inferred to have been targeted for that reason.

(6) The fact that the funds were transferred abroad which, on any view, whether the litigation either here or in the United Arab Emirates was immediately the fault of the respondent constituted an unambiguous decision to appropriate the funds, put them beyond the reach of investors.

37. We do not think, in principle, an offence can, *per se*, be aggravated by a failure to cooperate with the investigation or the recovery of funds to the greatest practicable extent. It is, rather, in a proper case, were such cooperation to exist, a mitigating factor. Neither, in principle, is it an aggravating factor that cooperation or admissions are, as here, to use the trial judge's words "self-serving and an exercise in damage limitation". Such conduct means, by definition, that what might well in a given case be a mitigating factor is absent. Obviously, of course, such conduct is indicative of an absence of remorse. The single most significant factor, here, indicative of a lack of remorse is the fact that even on appeal it was sought to diminish or water down to a very considerable extent the acknowledgment of guilt which on the face of it was constituted by the pleas of guilty. This is directly linked to what was said to the Gardaí in the interview with them immediately after the freezing of funds in June 2016. The burden or thrust of the stance adopted was to limit any question of criminality to the deception constituted by the use of concocted folios when in truth no legitimate business was being carried on or in contemplation contrary to the assertions made that it was sought to buy additional forestry (to the extent which would make provision for investors only to the extent of 40% of the land which might have been necessary).

38. On the evidence, the mitigating factors which are present in this case are those identified by the trial judge and our view is that the most substantial features thereof are as follows: -

(i) The plea of guilty (though not associated with any remorse as is often the case).

(ii) Notwithstanding the fact that it was in part self-serving and sought to advance an innocent explanation for the crimes, in the course of the interview on the 22nd June 2016 admissions were made which would have been of significance in any trial.

(iii) A degree of cooperation and assistance with repayment from the United Arab Emirates; we feel justified in saying that even if fault of is to be attributed to the respondent for the difficulties encountered there, exemplified by the fact that though it was his responsibility as director, the company was struck off the register because of a failure to make returns, some steps were taken by him, both in the provision of information, and return of funds.

(iv) The fact that he had no previous convictions.

(v) The fact that he was a person of previous good character with a record of hard work and commitment to his family.

(vi) The fact that he will have difficulty, especially given his area of expertise, in obtaining employment in the future.

(vii) The reputational damage from which he suffered.

39. The judge gave credit to the respondent as a mitigating factor to the fact that he had apparently caused his solicitors to write on two occasions to the Chief State Solicitor before the appointment of a provisional liquidator (in the interim period between June, when the funds in AIB Dún Laoghaire were frozen, and the appointment of such liquidator). A precise date does not appear from the evidence but such letters it seems were written in or about September 2016. Ignoring for a moment any contention that the company was trading lawfully and regardless of whether or not it was solvent, the letters are proof that at that time the respondent had sufficient control over funds abroad in the United Arab Emirates to return them to Ireland. In effect, it is said that the offer to return of funds ought to be regarded as a mitigating factor, and the fact that they were not returned was due to the inaction of the third party. We do not think that this can be so. We cannot see why the funds could simply not have been returned to this jurisdiction by, say, bank draft payable to the company whether that could be lodged to the frozen account or not. We mention this aspect of the matter because considerable debate arose on the appeal about it and counsel for the respondent stoutly defended the proposition that it was a significant mitigating factor. On the facts this is simply not so. We should add, however, that we do not think that the fact it was taken into account, even if an error by the judge, could have had, or can now have, any significant bearing on the sentence.

40. We think that without details as to what was said by the respondent to the provisional liquidator when he was interviewed by him under the Companies Act immediately after his appointment and before his appointment as liquidator proper, would have assisted the

trial court in any major way, we cannot say. Equally, however, we cannot draw any adverse inference against the respondent in terms of want of cooperation on the evidence in such an interview.

41. We must approach the matter, first, by deciding on an appropriate headline sentence and then having regard to the mitigating factors. The maximum penalty in respect of the Companies Act offence is one of ten years' imprisonment. When one asks oneself where on the scale a given offence falls, one does not cast about so to speak, for what might be theoretically the most serious offence of the class in question but one draws upon the experience of the courts and common sense, it seems to us that in the Irish context, fraudulent conduct of the present kind must fall into the most serious category of this type of offence, that is to say that the headline sentence should be fixed at between seven and ten years. A judgment must be made by a court on a case by case basis as to where on that scale of seriousness an offence falls and in this case we think that the appropriate headline sentence should have been in or about nine years' imprisonment; the trial judge felling into error in this regard.

42. We turn then to the mitigating factors. We think that the trial judge fell into error also by attaching too much weight to them. We think that the appropriate discount or reduction on that headline sentence by virtue of the plea of guilty should be one year. In the nature of the case it was a relatively late plea.

43. We think that the remaining mitigating factors would warrant a reduction of one year and, finally, we think that having regard to the fact that the respondent is being here re-sentenced in circumstances where he may, to a limited extent having regard to the appeal, have hoped for and been working towards a release after four years in prison (subject, presumably, to the usual remission) a further reduction should be afforded. In those circumstances, we will limit our intervention to quashing the sentence imposed in the Circuit Court on the offences under the Companies Acts imposing a sentence of six years. We do not think that a suspension of any portion of that sentence is appropriate. It might well be that in a given case, analogous to the present, a significantly higher sentence than six years might be appropriate at first instance.