UNAPPROVED
THE COURT OF APPEAL

Neutral Citation: [2022] IECA 160
Record Number: 2020/237

Costello J.
Faherty J.
Haughton J.

IN THE MATTER OF ALVONWAY INVESTMENTS LIMITED (IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF SECTION 819 OF THE COMPANIES ACT 2014

BETWEEN/

KEN FENNELL

APPLICANT/
RESPONDENT

- AND –

JOSEPH O'DONOVAN (OTHERWISE JOE DONOVAN), BRENDAN O'BRIEN AND FERGUS APPELBE

RESPONDENTS/
APPELLANT

JUDGMENT of Ms. Justice Faherty delivered on the 12th day of July 2022

1. By Order dated 9 October 2020, the High Court granted a declaration under s. 819 of the Companies Act 2014 ("the 2004 Act") restricting Mr. Appelbe (hereinafter "the appellant") from acting as a director or secretary of a company for a period of five years unless the said company meets the requirements set out in subsection (3) of s.819.

2. The Order followed the delivery of the judgment of the High Court (Quinn J.) on 29 July 2020. The appellant appeals the said Order.

3. The application for the Order pursuant to s.819 of the 2014 Act was brought by the Mr. Ken Fennell (hereinafter "the Liquidator") who was appointed the liquidator of Alvonway Investments Limited (hereinafter "the Company") on 24 March 2014.

Background and procedural history

4. The Company was incorporated on 31 January 2005. It was one of a number of companies owned and operated by the first named respondent ("Mr. O'Donovan") in the motion before the High Court. The Company's primary asset was Wilton Shopping Centre in Cork.

5. Certain loan facilities made available to Mr. O'Donovan, and partnerships and companies associated with him, were acquired by the National Asset Management Agency ("NAMA") in early 2011. The assets acquired included a guarantee and indemnity provided by the Company dated 1 February 2007 in respect of a related company, Padlake Limited, and a loan facility advanced to the Company by Anglo Irish Bank under a facility letter of 19 March 2010. Following a series of engagements between NAMA and Mr. O' Donovan, on 26 August 2013, the National Asset Loan Management DAC (formerly National Asset Loan Management Limited (NALM") issued letters of demand to the Company calling for payment of a total sum of just under €420m. On 28 August 2013, NAMA appointed a statutory receiver, Eoin Ryan ("the Statutory Receiver") over the assets of the Company.

6. On 18 February 2014, NAMA presented a petition to wind up the Company. The Liquidator was appointed by Order of the High Court dated 24 March 2014.

7. At the time of the Liquidator's appointment, the directors of the Company were Mr. Donovan, Mr. Brendan O'Brien and the appellant. The appellant was appointed a director

of the Company on 25 February 2005 (the same date as Mr. O'Donovan), which was some 25 days after its incorporation. He holds a 3.75% shareholding in the Company.

8. The most recent accounts for the Company available to the Liquidator following his appointment were for the year ending 30 September 2011. A Statement of Affairs prepared by Mr. O'Brien for the Statutory Receiver on 28 August 2013 indicates that as at 28 August 2013, the Company had assets totalling €49,077,234 and liabilities totalling €122,586,082, resulting in a net deficit of approximately €73.5m. This did not include the guaranteed obligations of Padlake Limited. As noted by the High Court judge in his judgment, as of 31 December 2010, the Company's liabilities, including its guaranteed liabilities, exceeded the value of its assets by approximately €300m. It is not disputed that the Company was insolvent at the time the Liquidator was appointed.

9. On 1 April 2014, the solicitors for the Liquidator, Ronan Daly Jermyn ("RDJ") wrote to the appellant advising of the Liquidator's appointment on 24 March 2014 and that pursuant to the Order of the High Court of the same date, the appellant was required to file in court a statement of affairs within 21 days from the date of the Order. They advised that once perfected, a true copy of the Order would be forwarded to him. On 2 April 2014, the Liquidator himself wrote to the appellant requesting that he would forward to the Liquidator "any records, documents or property" he may have in his possession and that if he did not have such documents, records or property, that fact should be communicated to the Liquidator in writing. The appellant was also requested to complete a questionnaire attached by the Liquidator and return it within fourteen days of the date of the letters. On 3 April 2014, RDJ duly forwarded a copy of the High Court Winding Up Order to the appellant and reminded him that he was required to file a statement of affairs within 21 days from the date of the said Order.

10. Similar correspondence to that referred to above was sent to Mr. O'Brien by and on behalf of the Liquidator.

11. On 4 April 2014, the appellant wrote to RDJ advising that he "was not aware that a liquidator had been appointed, not that much turns on that". He further stated:

> "I confirm my complete commitment to fully cooperating with the liquidator.
>
> Unfortunately I have very little knowledge of what happened in this company".

He enquired as to the other directors to whom the Liquidator may have written. By letter of 8 April 2014, RDJ confirmed to the appellant that they had also written to Mr. O'Brien and Mr. O'Donovan as directors of the Company.

12. On 27 May 2014, RDJ wrote to the appellant advising that on 12 May 2014 the High Court had extended the time for him to file a statement of affairs up to and including Monday 30 June 2014. On 20 June 2014, the appellant wrote to RDJ noting the High Court Order of 12 May 2014. He went on to state:

> "We have checked with the receiver Mr. Eoin Ryan and he has furnished me with a statement of affairs prepared on the 28th of August 2013 and completed by [Brendan O'Brien].
>
> Brendan O'Brien was as far as I know the person who had all of these details. I certainly was not and I can confirm on oath if necessary that I accept Brendan O'Brien's statement of affairs as completed on the 28th of August 2013 and I attach it.
>
> Do you require me to do an affidavit in this situation?
>
> What further steps [does] the liquidator require. Please advise when this matter is returnable to as I consider it appropriate for me to be represented to explain my position."

13. As deposed to at para. 31 of the Liquidator's grounding affidavit in the within motion, on 29 June 2014, the High Court acceded to the Liquidator's request to dispense with the need for the Company's directors to file a statement of affairs. This was in light, *inter alia,* of the fact that Mr. O'Brien had furnished a statement of affairs to the Statutory Receiver in August 2013.

14. By letter 26 March 2018, the Office of the Director of Corporate Enforcement ("the ODCE") notified the Liquidator that he had not been relieved of his obligation to make an application under s.819 of the 2014 Act for restriction orders in respect of each of the three directors. The ODCE also advised that it would be appropriate to seek an order for disqualification as against Mr. O'Donovan.

15. By notice of motion dated 13 July 2018, the Liquidator applied for a disqualification order pursuant to s.842 of the 2014 Act in respect of Mr. O'Donovan, or in the alternative a restriction order against him pursuant to s.819. The notice of motion also sought restriction orders pursuant to s.819 against Mr. O'Brien and the appellant. The application was grounded on the Liquidator's affidavit sworn 16 July 2018.

16. It appears that a principal impetus for the orders sought by the Liquidator was the making of two payments totalling €450,032 from the Company's current account on 27 August 2013 ("the August 2013 Payments"), the day prior to NAMA's appointment of the Statutory Receiver. One of those payments (€300,000) was to a firm of accountants, MC2 Accountants Ltd. and the other (€150,000) was to Mr. O'Donovan. The payment to MC2 Accountants Ltd. was the subject of a separate application by the Liquidator under s.286 of the Companies Act 1963 and/or s.604 of the 2014 Act, which was ultimately compromised.

17. At para. 9 of his affidavit, the Liquidator avers that the Company was "grossly insolvent" at the date of his appointment. At paras. 10-19 he addresses the August 2013 Payments and avers, at para. 20, that the chronology of events he set out in his affidavit

"demonstrates beyond doubt that [the August 2013 Payments] were made at a time when both the company and Mr O'Donovan were aware NAMA had demanded certain payments from the Company and that enforcement action was imminent". As he deposed, the Liquidator was satisfied that the payments had been made to MC Accountants Ltd. and Mr. O'Donovan "when the Company was insolvent and when the Respondents must have been aware of the insolvency."

18. Accordingly, the Liquidator sought a disqualification order against Mr. O'Donovan which he had recommended in his third report to the ODCE in September 2017.

19. Paras. 32 – 34 of the Liquidator's grounding affidavit headed "Restriction Application" are in the following terms:

> "32. I wrote to Messrs. Appelbe and O'Brien on 2 April 2014 noting my appointment as Official Liquidator of the Company and I asked that they complete a questionnaire and furnish me with any records, documents and property of the Company in their possession. I say and believe that I never received a response to that correspondence…
>
> 33. My solicitors wrote to Messrs. Appelbe and O'Brien to notify them of my appointment as Official Liquidator and requested that a Statement of Affairs be filed in accordance with the Winding Up Order made on 24 March 2014. I say and believe that no response was ever received from Mr. O'Brien. My solicitors received correspondence from Mr. Appelbe stating that he had "little knowledge of what happened in this company" and that Mr. O'Brien had all of the relevant information and he accepted the statement of affairs filed by Mr. O'Brien in 2013. As I have noted above, ultimately when the matter was returnable before this Honourable Court on 29 June 2014, this Honourable Court acceded to a request by me to dispense with the need for the directors to file a statement of affairs given the

difficulties my solicitors were having in serving, the costs of same and the fact that Mr. O'Brien had furnished a statement of affairs to the statutory receiver in 2013…

34. Although Mr. O'Brien and Mr. Appelbe did not benefit personally from the transactions [described] above, I say and believe that they ought to have been aware of the Company's insolvent position at the time and to have ensured that there were sufficient controls in operation to prevent these transactions from taking place. In all the circumstances, I do not believe that Mr. O'Brien or Mr. Appelbe acted responsibly in their role as directors of the Company."

20. The appellant swore a replying affidavit on 23 November 2018. Therein, he avers, *inter alia,* that it was clear from the Liquidator's affidavit that his primary concern in relation to the Company were the August 2013 Payments to which the appellant was a stranger "as at the time they were made the Company was under the effective control of NAMA/NALM". He averred that it was his understanding that NAMA became involved in 2010 and that an examination of the papers exhibited in the Liquidator's affidavit made it clear that NAMA dealt exclusively with Mr. O'Donovan and had extensive interaction with him from the commencement of their involvement. The appellant went on to depose that NAMA at no time had made any contact with him, he received no correspondence of any kind from NAMA and no request was ever made of him to assist or engage with NAMA in relation to the Company. Similarly, in relation to the Statutory Receiver, the appellant believed that once appointed, the Statutory Receiver engaged exclusively with Mr. O'Donovan. At para. 12, he goes on to aver:

"Neither NAMA nor Mr. McHale, nor indeed anyone else felt that I should be made aware of what was going on. I was not made aware of what was going on."

He further avers that the first time there was mention made of him was the reference in the Liquidator's affidavit to his letter of 4 April 2014 wherein he advised that he had little

knowledge of what had gone on in the Company in the period, and that the Liquidator's affidavit *"*did not set out the exclusion was in recent times as at the date of my letter". He further states:

> *"*I say now that during the period about which the complaint is made, I had little knowledge of what was happening in this company because I was deprived of it by the Applicant, his predecessors and those who he represents and their predecessors."

21. At para. 14 – 15, he states:

> "I say and assert there was no neglect or breach of duty on my part. I would highlight in my letter of the 20th June 2014… I say that it is clear from the correspondence exhibited … that I was at all times cooperative with the liquidator and that I enquired if there was anything further required of me. Interestingly, I received no reply to the said letter so I believed, quite reasonably in my opinion, that there was nothing further required of me by the liquidator. As to the assertion at paragraph 34 [of the liquidator's affidavit] I say that the insolvent position of the company was not evident and when it was evident NAMA chose to engage in relation to the company with [Mr. O'Donovan] and chose to ignore me and deprive me of any input to the matter."

22. Mr. O'Brien swore a replying affidavit on 21 November 2018. Mr. O'Donovan's replying affidavit was sworn on 23 November 2018.

23. The Liquidator's second affidavit, sworn 12 January 2019, addresses the replying affidavits of all three directors. Paras. 20 – 22 respond to the appellant's affidavit. Therein, the Liquidator notes the appellant's averment that he was a stranger to the August 2013 Payments at the time they were made. He goes on to aver:

"Whilst Mr. Appelbe did engage with me to the limited extent of his two letters dated 4 April 2014 and 20 June 2014… he did not supply the questionnaire which I sought from him by letter dated 2 April 2014. I reject Mr. Appelbe's averment at paragraph 12 of his affidavit that I "excluded" him. In the absence of any detailed response from Mr. Appelbe to my request for his assistance, my third report to the ODCE recommended that I not be relieved from the obligation under section 819 of the 2014 Act."

24. The appellant swore a further affidavit on 6 March 2019 (as did Mr. O'Brien). He again avers that the correspondence exhibited in the application "shows my full commitment to assist in relation to this matter, the absence on my part of any worthwhile information in relation to the affairs of the Company and my adoption of the Statement of Affairs as prepared by Mr. O'Brien" (as per his letter of 20 June 2014). The appellant again avers to the fact that he did not receive a reply to that letter. He avers that from June 2014 to September 2017 "no contact of any kind was made with me by anybody on behalf of [the Liquidator], no request for assistance was received by me nor was I informed of what, if any, progress was being made in the matter. As is clear from the correspondence I was willing to provide what assistance I could but I was never requested to do so. In these circumstances I believe that it is singularly unfair of [the Liquidator] to seek to restrict me under the 2014 Act."

The High Court judgment

25. At para. 47 of his judgment, the High Court judge noted that "the principal matter to which the liquidator draws attention in his grounding affidavit is the making of the August 2013 Payments". He noted that the Liquidator's position was that although the appellant and Mr. O'Brien were not aware of those payments they ought to have been aware of the Company's insolvent position at the time of the August 2013 Payments, the Liquidator

averring that they should have "ensured that there were sufficient controls in operation to prevent them from taking place".

26. The judge firstly addressed the Company's filing obligations. He found that "there is no question as [to] the company's compliance with its filing obligation under the Companies Acts. At all times the Company kept proper books and records, complied with its filing obligations in the CRO and discharged its liabilities owed to the Revenue Commissioners." (at para. 49)

27. He noted the Liquidator's pursuit of the directors for them to submit a statement of affairs and rejected the suggestion that the Winding Up order had dispensed with the necessity for a statement of affairs, noting that none of the directors (including the appellant) had ever referred to the High Court order having dispensed with the requirement for a statement of affairs. The judge noted that, ultimately, the Liquidator had concluded that he should recommend to the court that the requirement for a statement of affairs be dispensed with by reason of difficulties regarding service, cost and the fact that Mr. O'Brien had furnished a statement of affairs to the Statutory Receiver.

28. As regards the questionnaire the Liquidator had furnished to the directors for completion, the judge found that while the appellant and Mr. O'Brien could be criticised for their failure to return the questionnaire, he was satisfied that by the time they received the request "neither of them were in possession of the books and records of the Company, which had already been provided to the receiver by Mr. O'Brien."

29. At para. 84, under the heading "Relevant Legal Principles", the judge observed that "[i]t is not suggested by the liquidator that either Mr. O'Brien or the appellant acted dishonestly in their conduct of the affairs of the company. The liquidator's complaint relates only to irresponsibility."

30. The judge considered that "the core question on which Mr. O'Brien and the appellant must satisfy the court is that they acted responsibly in relation to the conduct of the affairs of the company, and that they have, *'when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and (c) there is no other reason why it would be just and equitable that he or she should be subject to the restriction imposed by an order under subsection (1)'."* He opined that "[t]he onus is on the second and third named defendants as directors of the Company to demonstrate that the criteria in subsection 819(2) are satisfied". (at para. 85)

31. The judge found the principles governing the application of s.819 well settled in the case law and following his review of the relevant authorities, he stated as follows, at para. 94:

> "In this case, the court is faced with examining whether the regime of control to which the Company was subject after the loans had been acquired by NAMA displaces or modifies in any way the duties of directors, having regard to the principles considered in the judgments referred to above. The key principles relevant to this case may be summarised as follows:
>
> (1) Each individual director owes duties to the company to inform himself/herself about its affairs and to join with his/her co-directors in supervising and controlling them (*Re Vehicle Imports Limited (In Liquidation)* per Murphy J.).
>
> (2) Directors may collectively delegate certain functions but such delegation does not absolve the directors from their obligation of ultimate supervision (*Kavanagh v Reidler*, per Finlay Geoghegan J.).
>
> (3) A non-executive director is entitled both to rely upon information provided by his fellow executive directors and to rely upon the executive directors carrying

out what might be considered to be normal executive or management functions (*Kavanagh v Reidler*).

(4) Passive directors cannot be exonerated from liability or relieved from disqualification or restriction on the basis of the passive nature of their role (*Re Walfab Engineering Limited*, per Kelly J., Court of Appeal).

(5) There is a distinction between "abdication of responsibility" and "delegation of responsibility" (*Re Laragh Civil Limited*, per Keane J.).

(6) Where a company has become insolvent the directors owe a duty to the creditors to preserve the assets for the benefit of its creditors "or at least not to dissipate them" (*Re Frederick Inns Limited,* per Blayney J.).

(7) Compliance with the duty described in Re Frederick Inns Limited is material to the consideration of a restriction application (*Re Mitek Holdings Ltd*, Fennelly J.)." (at para. 94)

32. At para. 95, the judge noted that the Liquidator did not contradict the evidence of Mr. O'Brien and the appellant that they were unaware of the arrangements which led to the August 2013 Payments. Nor was it contradicted that they were excluded from the engagement that occurred between NAMA and the Company after the former became involved. He noted that the Liquidator's "submission" was that neither Mr. O'Brien nor the appellant had sought to demonstrate that they took any steps to apprise themselves of the Company's affairs at the crucial time when it was insolvent. In this regard the Liquidator was relying on the authorities to the effect that it was no defence to a restriction application to claim, without more, to have been a *"passive director".*

33. The judge was not satisfied that the directors of a company whose indebtedness exceeded €419m and where the balance sheet deficit exceeded €300m and whose loans were acquired by NAMA, as occurred in 2011, could, consistently with their duties as

directors, claim that the degree of influence exercised by NAMA was such that a lower standard applied to them as directors. Until a receiver or liquidator was appointed, "the directors retain their responsibilities and duties". He opined that the transfer of the Company's loans to NAMA "would for any such entity heighten the need for directors to make themselves aware of the company's status and proactively engage with each other, both generally as to the affairs of the Company and in particular to ensure it remains compliant with the conditions of NAMA's support on which the company is dependant." (at para. 96) Quoting Murphy J. in *Re Vehicle Imports Limited (in Liquidation)* the judge opined that a director's duty in such circumstances is "to inform himself about its affairs and to join with his co-directors in supervising and controlling them."

The August 2013 Payments

34. With regard to the August 2013 Payments, the judge was not satisfied that any blame attached to either the appellant or Mr. O'Brien for the making of the August 2013 Payments. He found that those payments were effected by Mr. O'Donovan without the knowledge of the appellant or Mr. O'Brien. At para. 120, he stated:

> "The liquidator says that Mr. O'Brien and Mr. Applebe were blameworthy for not ensuring that there were sufficient controls in place to prevent the making of the August 2013 Payments. For two reasons I am not persuaded that such blame can be attached to Mr. O'Brien and Mr. Applebe:
>
> (1) There is no evidence of a wider pattern of payments made outside the NAMA approved system and therefore the control system was functioning in the Company with the exception of these two payments.
>
> (2) Mr. O'Donovan was clearly the driving force in the entire Group, and dominant in decision making about its affairs. In exercising this dominance, the

August 2013 Payments, one in favour of himself, were effected by him without the knowledge of his co-directors."

35. The judge next addressed Mr. O'Brien's and the appellant's submission that they were excluded from the discussions between NAMA and Mr. O'Donovan. He noted that in his affidavit, Mr. Brendan McHale, on behalf of NAMA, confirmed that his engagement was for the most part with Mr. O'Donovan and that "on financial matters" he liaised principally with Mr. Barry Doyle at the request of Mr. O'Donovan.

Whether Mr. O'Brian and the appellant should be restricted?

36. At paras. 99 – 120, the judge appraised Mr. O'Brien's response to the Liquidator's application which Mr. O'Brien set forth in his replying affidavit sworn 21 November 2018 and his later affidavit of 6 March 2019. At para. 121, he summarised his findings in relation to Mr. O'Brien, as follows:

"(1) [Mr. O'Brien] was appointed a director of the Company on 15 October 2010.

(2) At the time of his appointment the Company was already heavily indebted to Anglo Irish Bank and its loans transferred to NAMA two months later.

(3) In his affidavits, Mr. O'Brien describes the status of the Company and its intended strategy to alleviate losses to creditors.

(4) He describes the engagement between the Company and NAMA, albeit asserting that he was excluded from participating in that engagement.

(5) He had no knowledge of the August 2013 Payments.

(6) He co-operated with the statutory receiver including the delivery of the required statement of affairs.

(7) When the liquidator ultimately determined that a statement of affairs should not be required, he did so partly because he had the benefit of the

statement of affairs delivered by Mr. O'Brien to the receiver. Therefore, the only outstanding item required of Mr. O'Brien was to complete the liquidator's questionnaire, which he failed to do."

37. As regards Mr. O'Brien, the judge's conclusions were in the following terms:

"122. Mr. O'Brien has met this application by demonstrating at least that he had knowledge of and an understanding of the Company's business, its strategy and the constraints under which it operated. When NAMA appointed the receiver on 28 August 2013, it did so because it was not satisfied that a significant number of the conditions for its support had been complied with. The relevant conditions identified by NAMA in communicating this decision were principally the failure to deliver on 'milestone' matters particular to certain assets in the portfolio and particular information requirements. Notably, the decision did not appear to be informed by any complaint about expenditure or any failure to adhere to the payment control mechanism through the "Form A" process. The August 2013 Payments only came to NAMA's attention after the receiver was appointed.

123. Taking all these factors into account Mr. O'Brien has persuaded me that he acted honestly and responsibly in relation to the affairs of the Company. I cannot find that the failure to deliver a completed questionnaire is of itself a justification for finding that Mr. O'Brien did not co-operate as far as reasonably could be expected in relation to the conduct of the winding up. There is no other reason why it would be just and equitable that Mr. O'Brien be subject to the restrictions imposed by s.819(1) of the Act."

38. At paras. 124-144, the judge considered the position of the appellant. He noted that he was a director of the Company since 2005 and that he had also been a director of some eleven other companies in Ireland from 1990 to the present and that he was a practicing

solicitor since 1969. After detailing the engagement that took place between the appellant and the Liquidator following the latter's appointment, the judge addressed the contents of the appellant's affidavits by noting, at para. 136 that it was unclear whether the appellant was suggesting that he was unaware of the insolvency of the Company at the time of the August 2013 Payments or from any earlier date. The judge went on to state:

> "136. …His averment that he had little knowledge of what was happening 'during the period about which the complaint is made' reveals a most fundamental misunderstanding of the serious duties of directors. He appears to believe that in order to avoid the making of a restriction order he need only show that he was unaware of the transactions of which the liquidator makes particular mention. The case law clearly establishes that the onus is on a respondent director to demonstrate that he has acted honestly and responsibly in relation to the affairs of the company during his tenure as director. Mr. Applebe simply states that he was not aware of particular transactions and that he had no 'worthwhile information in relation to the affairs of the Company'.
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> 137. Mr. Applebe was a director of the Company from its inception. Of the three respondents he was the only one to have served as a director continually from the inception of the Company in 2005 to the time of its liquidation. He has adduced no evidence as to his contribution to the decisions of the directors at any time in the life of the Company. He does not address at all the response of the directors to the development of the deficiency and the transfer of its loans to NAMA.
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> 138. Mr. Applebe does not demonstrate any active steps that he took as director to keep himself informed of the affairs of the Company. He does not elaborate on the role he had or steps he carried out to keep abreast of the Company's affairs. Instead he states only that he was never 'called upon' by Mr. O'Donovan, NAMA, NALM

or the Statutory Receiver 'to partake in, engage in or otherwise adopt an active role in the management of the Company'".

39. The judge was not prepared to find that the imposition by NAMA of conditions for its support for the Company absolved the appellant as a director from performing his duties "[i]n circumstances where there is an absence of evidence on Mr. Appelbe's part of any attempt to be involved or kept abreast of the company's affairs". Furthermore, while he acknowledged that Mr. O'Donovan as the driving force directed all of his engagement with NAMA, the judge noted that apart from denying knowledge of the insolvency and the August 2013 Payments, the appellant was "totally silent" on his activities as a director. The judge found it remarkable given the scale of the deficit when the loans transferred to NAMA that the appellant provided no information as to whether he took steps to keep himself informed of the Company's financial status at that time or of its strategy and its engagement with NAMA or what actions were taken to mitigate losses to creditors. He stated:

> "In the absence of any evidence of Mr. Applebe's actions at any time during his tenure as a director I cannot find that he acted honestly and responsibly in relation to the affairs of the Company." (at para.141)

40. At para. 144, the judge noted that given the emphasis by the Liquidator in his grounding affidavit on the August 2013 Payments, it was "understandable to a degree" that both Mr. O'Brien and Mr. Applebe had focussed largely on those transactions in their replying affidavits. He went on to state, however:

> "144. …This does not however mean that simply asserting that they were not aware of them demonstrates that they acted responsibly in relation to the affairs of the Company. In the case of Mr. O'Brien, I have found that he has met this application by adducing sufficient evidence to illustrate an awareness of the affairs of the

Company and to demonstrate the role he performed, notwithstanding his exclusion by Mr. O'Donovan from the important business of engaging with NAMA, and it would be unjust to make a restriction order in respect of him. By contrast, Mr. Applebe says only that he was not aware of the payments and that he lacked 'any worthwhile information in relation to the affairs of the Company'. He therefore provides no information which would enable the court to conclude that he acted honestly and responsibly in relation to the affairs of the Company.

…

145. Mr. Applebe has not satisfied the court that he has acted responsibly in relation to his conduct of the affairs of the Company, and I shall make an order pursuant to s.819 that he shall not, for a period of 5 years, be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned in or take part in the formation or promotion of a company, unless the company meets the requirements set out in subsection (3) of that Section."

The appeal

41. The appellant's grounds of appeal can be distilled into essentially one overarching argument, namely that the High Court judge erred in making the restriction order against him in the absence of any case been made out by the Liquidator for the appellant to answer. That absence, the appellant says, explains the relative brevity of the two affidavits he swore in response to the Liquidator's application. Unlike Mr. O'Brien, he chose not to file a fulsome affidavit. His counsel submits that this was because he did not see a case having been made by the Liquidator against him.

42. The appellant contends that, by and large, the contents of the Liquidator's grounding affidavit do not concern him, concentrated as it is on the case advanced by the Liquidator for the disqualification of Mr. O'Donovan on grounds of dishonesty. It is in these

circumstances that the appellant contends that the application for a restriction order against him is misconceived. He says that the Liquidator was required to put some fact or facts before the High Court which he would then be obliged to answer to the court's satisfaction. He also makes the case that the Liquidator's "submissions" to the High Court (recorded at para. 95 of the judgment) to the effect that the appellant had not sought to demonstrate that he took any steps to apprise himself of the Company's affairs at the crucial time when it was insolvent does not equate to a case having been made against him by the Liquidator pursuant to s. 819. This is in circumstances where the matters pertaining to the appellant were limited to the averments made at paras. 32 – 34 of the Liquidator's affidavit: the Liquidator did not make the case on affidavit that the appellant failed to apprise himself of the Company's affairs. Insofar as the Liquidator refers to the appellant at paras. 32 – 34, the appellant says that these paragraphs do not contain any allegation or case that engages the issue of his responsibilities as director of the Company. The matters therein addressed concern only the issue of his cooperation in the Winding Up process.

43. Issue is also taken by the appellant with the fact that, as the judgment of the High Court demonstrates, the judge accepted that Mr. O'Brien was not responsible for the Company's insolvency, yet, the appellant seems not to have been similarly absolved from responsibility for the insolvency by the High Court judge.

44. These and other arguments canvassed by the appellant are addressed below.

The Liquidator's submissions

45. The Liquidator says that the appellant's argument is fundamentally misconceived within the meaning of s.819 of the 2014 Act. Once the Liquidator established that the Company was insolvent, the onus was the on the appellant as a director to show why an order under s.819 should not be made. The High Court has no discretion in the matter. It is submitted that s.819(2) and the manner in which the subsection has been interpreted in the

case law make clear that the onus on a director is not just to respond to what is set out by the Liquidator but rather to set out more broadly the facts that show that he or she did not act irresponsibly or dishonestly. It is not therefore a question as to whether there is a case to answer, rather the requirement on a director is to demonstrate they acted appropriately during the entire tenure of their time as a director**.**

46. It is submitted that the appellant here sought to adopt a minimalist approach to the obligation on him pursuant to s.819 notwithstanding that he was a director of the Company since 2005 and a director of a number of other companies as well as being a qualified solicitor who thus could be taken as knowing what the obligations of a director were.

Discussion

47. Section 819 of the 2014 Act, in relevant part, provides:

> "819. (1) On the application of a [liquidator] and subject to *subsection (2),* the court shall declare that a person who was a director of an insolvent company shall not, for a period of 5 years, be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned in or take part in the formation or promotion of a company, unless the company meets the requirements set out in *subsection (3).*
>
> (2) The court shall make a declaration under *subsection (1)* unless it is satisfied that—
>
> (a) the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,
>
> (b) he or she has, when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and

(c) there is no other reason why it would be just and equitable that he or she should be subject to the restrictions imposed by an order under *subsection (1).”*

48. The provisions of s. 819 are stark. Section 819(2) makes it mandatory that the court restrict a director of an insolvent company, subject only to it being satisfied as to the three matters specified in the subsection. As said by Murphy J. in *Business Communications Ltd. v. Baxter and Parsons* (High Court, 21 July 1995) with reference to s.150 of the Companies Act 1990 (the predecessor to s.819):

> *“…it does seem that the most important feature of the legislation is that it effectively imposes a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attaches to them as a result of either dishonesty or irresponsibility.”*

49. Likewise, in *RMF (Ireland) Limited, Kavanagh v. Riedler* [2004] 3 IR 498, a case also concerning s.150 of the 1990 Act, Finlay-Geoghegan J. observed that *“[t]he onus of establishing that he acted honestly and responsibly was on the third respondent [director]”*. In *Re 360 Atlantic (Ireland) Limited* [2004] 4 IR 266, the same judge described the application brought by a liquidator pursuant to s.150 of the 1990 Act as *“not a normal inter partes adversarial application. The onus of establishing that he/she acted honestly and responsibly rests on the director.”*

50. While it is accepted by the appellant that in an application under s. 819 a director bears the burden of displacing the claim of irresponsible behaviour, that requirement, the appellant contends, is predicated on the necessary factual premise being asserted by the liquidator for the director then to refute to the court’s satisfaction. It is submitted that support for this proposition is found in in *Re Tralee Beef & Lamb Limited* [2008] 3 IR 347

and in particular the *dictum* of Hardiman J. when he stated that *"the moving party must set out in detail and in advance, the grounds of his application"*.

51. The Liquidator asserts that the appellant's reliance on Hardiman J.'s remarks in *Re Tralee Beef and Lamb Ltd.* is misconceived and submits that Hardiman J.'s observations about the onus of proof were *obiter.* More fundamentally, the Liquidator asserts that the Oireachtas when it amended the legislation in 2014 (and which was post the decision in *Re Tralee Beef & Lamb Ltd*.) made no alteration to the earlier statutory premise (as contained in s. 150 of the Companies Act 1990) that the onus of proof lies on a director.

52. It is certainly the case that in *Re Tralee Beef and Lamb Ltd.*, Hardiman J., while noting that in *Re Squash (Ireland) Ltd.* the Supreme Court had confirmed that the import of s. 150 of the 1990 Act was to cast the onus of proof in a restriction application on the respondent director, expressed strong reservations about the *"blanket reversal of proof"* that s. 150 of the 1990 Act had brought about and queried whether it was *"consistent with fundamental fairness and constitutional justice"*. However, as pointed out by the Liquidator, the legislature has seen fit to enact the 2014 Act in which s.819 thereof again casts the onus of proof on the respondent director.

53. Contrary to the appellant's submission, I do not consider Hardiman J.'s statement at para. 44 of the judgment in *Re Tralee Beef and Lamb Ltd.* that *"the moving party must set out in detail and in advance, the grounds of his application"* as necessarily supportive of the argument that no onus arose under s. 819 for the appellant to discharge because the Liquidator (in the words of the appellant) has not set out the case being made against him for a restriction order to be made. Albeit *Re Tralee Beef and Lamb Ltd* concerned s. 150 of the 1990 Act (the predecessor to s. 819), Hardiman J.'s observation was made in an entirely different context to the present case, i.e. in circumstances where the judge was concerned that the fourth respondent director in an application by the applicant liquidator

for a restriction order (which was brought unwillingly by the liquidator because not to do so would have involved the liquidator in the commission of a criminal offence) was being met with *"material fortuitously available from a separate motion against another person"*. Hardiman J. considered this all the more egregious in circumstances where the liquidator himself did not believe that the fourth respondent director should be restricted. Given the different factual matrix and the particular procedural frailty that obtained in *Re Tralee Beef and Lamb Ltd.,* I am not convinced that that case assists the appellant. In any event, as will shortly become apparent, the courts have expressed what is required both of a liquidator and a company director when a restriction application is brought.

54. Accordingly, it seems to me that the appellant's overarching argument that his obligation under s.819 was not triggered in the absence of the Liquidator having put anything before the High Court by way of some fact or matter for him to respond to requires a consideration of the nature and extent of the duties of the Liquidator in moving an application such as the present, the duties of directors in addressing such application, an analysis of the duties generally on directors of a company (whether in an executive or non-executive capacity), together with an analysis of the actual matters the Liquidator put before the court and the appellant's response thereto.

55. Turning firstly to what is required of a liquidator in making an application pursuant to s. 819. High Court Practice Direction HC28 (referable to s. 150 of the Companies Act 1990) provides, at para. 3 thereof:

> "3. The affidavit grounding the application for restriction shall set out all the facts the applicant considers should be brought to the attention of the court for the purpose of determining
>
> i. whether each of the respondents has acted honestly in relation to the conduct of the affairs of the company

ii. whether each of the respondents has acted responsibly in relation to the conduct of the affairs of the company

iii. whether there is any other reason for which it would be just and equitable to restrict any of the respondents

iv. if appropriate whether any of the circumstances set out in s.150(2)(b) apply."

Order 74, r. 93 of the Rules of the Superior Courts 1986, as amended by the Rules of the Superior Courts (Companies Act 2014) 2015, effectively replaced the 2003 Practice Direction HC28. As the within originating motion issued in 2018, the application is governed by Order 74, r.93. Order 74, r.93(2) provides that the affidavit grounding the application for restriction shall set out all the facts the liquidator considers should be brought to the attention of the court for the purpose of determining:

> "(a) whether each of the respondents has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,
>
> (b) whether each of the respondents has, when requested to do so by the liquidator of the insolvent company, cooperated as far as reasonably be expected in relation to the conduct of the winding up of the insolvent company, and
>
> (c) whether there is any other reason for which it would be just and equitable that the respondents, or any of them, should be subject to the restrictions imposed by an order under section 819(1) if the Act."

Albeit Practice Direction HC28 was no longer in force for the purposes of the Liquidator's application here, given the essential similarity between Practice Direction HC28 and Order 74, r.93, it is useful to consider how the courts (with reference to Practice Direction HC28, which ostensibly dealt only with what a liquidator was required to put before the court)

characterised the respective obligation of both liquidators and directors in the context of a restriction application.

56. In *RMF (Ireland) Limited*, Finlay Geoghegan opined, at para.8, that the liquidator was required:

> *"to put before the court those matters which he considers the court should take into account in determining whether the director acted honestly and responsibly and also any matter which he considers might be relevant to a determination as to whether there is any other reason why it would be just and equitable that the director should be subject to the restrictions imposed by s. 150. In practical terms, therefore, a respondent must primarily deal with the matters raised by the liquidator and will also put before the court any other matters which he or she considers relevant to a consideration by the court of the overall conduct of the person during his or her tenure as a director of the company in accordance with the decision of the Supreme Court in Re Squash (Ireland) Ltd. [2001] 3 I.R. 35."*
>
> (emphasis added)

57. The decision of the Supreme Court in *Re Squash (Ireland) Limited* [2001] 3 IR 35 identified the principles applicable in determining an application for restriction. In summary, in order to qualify as irresponsible conduct so as to trigger an application such as the present, one must prove more than mere commercial misjudgement on the part of the company officers concerned. Factors to be considered in this context include the extent to which a director has complied with his statutory obligations, his general competence and commercial probity and the extent to which he was responsible for the insolvency of the company. The court should look at the entire tenure of the director and not simply the few months prior to the liquidation. As put by McGuinness J. at p.39:

"The question before the Court is whether they acted responsibly and this, as was correctly stated by counsel on behalf of the respondent, must be judged by an objective standard. In the case of all companies which have become insolvent it is likely that some criticisms of the directors may be made. Commercial errors may have occurred; misjudgements may well have been made; but to categorise conduct as irresponsible I feel that one must go further than this."

58. McGuinness J. went on to quote from the decision of Shanley J. in *La Moselle Clothing Ltd. v. Soualhi* [1998] 2 ILRM 345. There, Shanley J. held, at p.1:

"…a director broadly complying with his obligations under the provisions of the Companies Acts and acting with a degree of commercial probity during his tenure as a director of the company will not be restricted on the grounds that he acted irresponsibly.

Thus it seems to me that in determining the 'responsibility' of a director for the purposes of s. 150 (2)(a) the court should have regard to:

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

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

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

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

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

In *Re. Mitek Holding Ltd.* [2010] 3 I.R. 374, Fennelly J. opined that the responsible discharge of a director's duties involved informing himself about *"the business of the company and about his own duties as a director".*

59. The appellant's case, essentially, is that for the principles set out in *Re Squash (Ireland) Limited* and *Mitek Holdings Ltd*. to come into play the Liquidator was required to set out the case against him as to alleged irresponsibility. The appellant emphasises the reference at para. 8 of Finlay Geoghegan J's judgment in *RMF (Ireland) Limited* that in an application such as the present a respondent/director *"must primarily deal with the matters raised by the liquidator"*. While that is the case, I note that it is patent from the *dictum* of Finlay Geoghegan J. in that case, and in *In Re. 360 Atlantic (Ireland) Limited*, that the onus on a director is not just to respond to the liquidator but to set out more broadly the facts that show that he or she did not act irresponsibly. It was in that context that Finlay Geoghegan J., in *RMF (Ireland) Limited*, outlined the obligations on a director of a company, including a non-executive director (as the appellant here was), when responding to a restriction application. The circumstances in *RMF (Ireland) Limited* were that the applicant liquidator had set out four matters in his grounding affidavit, two of which related to respondents other than the third respondent director. The matters which related to the issue of whether the third respondent acted responsibly as a director of the company were the net losses sustained by the company over a 23-month period and the directors' failure to ensure that tax returns (P35s) were made by the company. Moreover, the directors had failed to provide the applicant liquidator with the company's books which meant the liquidator was unable to complete the company's returns.

60. Finlay Geoghegan J. noted that no issue arose as to the honesty of the third respondent, nor was there any other reason for which it would be just and equitable to restrict him. As she said at para.10, *"[t]he only issue is whether, notwithstanding the matters referred to above by the applicant, the third respondent in his affidavit has discharged the onus of establishing that he acted responsibly as a director of this company in relation to the conduct of its affairs".* (emphasis added)

61. At para. 11 of her judgment, Finlay Geoghegan J. addressed the third respondent's status as a non-executive director. He was an experienced business man but without specific experience of the type of business carried out by the company. She went on to acknowledge the distinction between executive and non-executive directors stating with regard to the latter, *"[a] person may, from time to time, be appointed as a non-executive director to bring a particular expertise to a board of directors."* Crucially, however, this did not mean that non-executive directors were exempted from their duties to the company. As the learned judge explained:

> *"[E]very person who agrees to become a director of a company, whether executive or non-executive or for the purpose of bring a particular skill to the board of directors, must discharge the general duty of a director which has been summarised by Jonathan Parker J. in Re Barings plc. & Others (No.5)[1999] 1 B.C.L.C. 433 at p. 435 and cited with approval In re Vehicle Imports Ltd. (in liquidation) (Unreported, High Court, Murphy J. 23rd November, 2000), as follows:-*
>
> > *'Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them.'"* (at para.11)

62. Finlay Geoghegan J. went on to state:

"In considering whether a non-executive director has acted responsibly for the purposes of s.150 of the Act of 1990, it appears to me that the courts should also recognise that, in general, a non-executive director is entitled both to rely on information provided by his fellow executive directors and to rely upon the executive directors carrying out what might be considered to be executive or management functions. There may be factual circumstances which will put a non-executive director on notice that he should not continue to rely either upon information provided or upon executive duties being properly performed and require further action from him or her." (at para.11)

63. Ultimately, as far as the third respondent director in *RMF (Ireland) Limited* was concerned, Finlay Geoghegan J. concluded that he had discharged the onus that as a non-executive director he had at all times acted responsibly in relation to the conduct of the affairs of the company. In relation to the first matter raised by the applicant/liquidator (the financial deficit and the general financial supervision of the company), she was satisfied *"from the third respondent's affidavit that he did discharge the first duty identified above of keeping himself informed as to the financial affairs of the company. Further, when in September or October, 2000, he became aware of potential difficulties in relation to the financial affairs, he took significant steps to deal with the matter."* (emphasis added) (at para.12)

64. The distinction between an executive and a non-executive director was also explored in *Re Laragh Civils Limited* [2016] IEHC 533. As said by Keane J.:

"26. Whatever the variation in the level of permissible delegation may be between different sorts of director in various kinds of company, and that point has yet to be definitively considered, it is difficult to see how any director – executive or non-executive - can escape any of the following basic responsibilities: first, to inform

himself or herself about the nature of his or her duties as director; second, to acquaint himself or herself with the affairs generally of the company concerned; and third, to exercise appropriate supervision or oversight at board level in respect of the execution or discharge of whatever tasks or functions have been properly and appropriately delegated to others.

27. More fundamentally, in my view the present case raises the issue of 'abdication of responsibility', rather than that of 'delegation of responsibility'. I did not understand Counsel on behalf of the second named respondent to argue other than that, on the evidence before the Court, the second named respondent was a 'token' or 'passive' director who agreed to assume that position at the behest of her spouse, the first named respondent and did not purport to discharge any responsibility whatsoever thereafter in relation to any aspect of the conduct of the company's affairs or the supervision of that conduct."

65. In *Re Shemburn Limited* [2017] IEHC 475, Haughton J. put the matter in the following terms:

"32. It seems to me that this ignores the second named respondent's general duties as a director, even as a non-Executive Director, to exercise supervision over the affairs of the Company. This is particularly so in the context of the crisis that led to the liquidation of PTCI with the obvious implications for the Company, and its creditors. In his affidavits the second named respondent does not elaborate on what discussions he had with his father in relation to the Company at the time of or immediately after the liquidation of PTCI. He does not appraise the court of the information that he sought or the nature of any debate that he may have had over the future of the Company at that time. In particular there is no evidence to suggest that the second named respondent had any contact with the Company accountant or

auditor, or sought any outside advice as to the appropriate action to be taken by or in respect of the Company."

66. I turn now to the circumstances of the present case. The first thing to be noted is that in reply to questions from the Court, counsel for the appellant acknowledged that the appellant had not signed the Company's accounts prepared for the year end 30 September 2011. He also acknowledged that the draft accounts would have been sent to the appellant and that there would have been a Board meeting about the accounts in respect of which the appellant would have been notified. It was also acknowledged that the appellant had not adverted to these basic facts in his affidavits, counsel accounting for this omission by again asserting that the Liquidator had not made any case for the appellant to answer in this regard. Counsel's position is that the Liquidator's averments on affidavit, save what it said at paras. 32 – 34, had nothing to do with the appellant particularly in circumstances where both NAMA and the Liquidator had accepted that neither Mr. O'Brien nor the appellant knew anything of the August 2013 Payments. It is argued that the entire body of the Liquidator's affidavit, save paras. 32 – 34, was at a remove from the appellant. Counsel emphasises that the appellant did not have management or oversight of the Company, unlike Mr. O'Donovan and Mr. O'Brien who were more involved. He argues that the involvement of NAMA, and the consequent exclusion of the appellant by that body, had further diminished the appellant's responsibility for the Company's insolvency.

67. I cannot accept counsel's arguments.

68. Insofar as the appellant argues that from 2011 onwards NAMA were in control and liaised only with Mr. O'Donovan and never requested that the appellant would join any meetings, that fact did not absolve him of his obligation as a director to keep himself apprised of the affairs of the Company in the sense outlined in *La Moselle, Re. Mitek Holding Ltd.* and *Re Vehicle Imports Limited.*

69. Furthermore, while the appellant contends that the insolvency of the Company was triggered by Mr. O'Donovan's unilateral actions in making the August 2013 Payments to himself and his accountants (unknown to the appellant) following which NAMA withdrew its support for the Company and for which, it is argued, blame for the Company's insolvency cannot rest with the appellant, the fact of the matter is that the appellant provided no information in his affidavits as to the role he played in the Company. He did not adduce any evidence to demonstrate that he informed himself of the affairs of the Company at any time, which might then have enabled the High Court to apply the tests set out in *Re Squash (Ireland) Limited* to determine whether he complied with the obligations imposed on him under the Companies Act. The absence of any detail in these regards was an entirely relevant consideration for the High Court judge, in my view.

70. As its accounts show, prior to NAMA's involvement, the Company was in significant financial difficulty and dependent on the cooperation of its bankers and financiers. The notes prepared by the Statutory Auditors to the abridged financial statements in respect of the Company's accounts for year end 30 September 2011 refer, *inter alia*, to "Long Term Debt". They state:

> "The Company has long term debt totalling €159,919,518 at the year ended 30th September 2011. The ability of the Company to repay this long term debt from operating activities is uncertain. The future prospects of the business is dependent upon the continued support of the Company's bankers and financiers."

71. Here, the appellant has not said on affidavit what his involvement was with the Company in the accounting period leading to 30 September 2011(the last period for which accounts were available to the Liquidator. Nor has the appellant deposed to his involvement for the period up to the filing of the Abridged accounts in June 2013. Indeed, the appellant's affidavits do not say what investigations he made at any stage of his tenure

as a director to inform himself of the company's affairs, particularly in the period prior to the appointment of the Statutory Receiver, a time when, had he sought them, he would have had access to all of the Company's books and records, as was his entitlement in law as a director of the Company. The involvement of NAMA, while it may have side-lined the directors, did not preclude the appellant from exercising his powers and fulfilling his obligations as a director. Albeit that the Company's accounts in respect of the year ending September 2011 were only filed in 2013, the appellant must or should have known, prior to that time, that significant questions arose regarding the Company's ability to continue to operate. Hence, the appellant cannot now assert with any credibility that he did not know or suspect that the Company was in serious financial difficulty from at least 2011. This state of affairs should have led him to be more assiduous in his approach to his duties. The appellant's failure to put any information regarding the Company before the court falls to be contrasted with the position of Mr. O'Brien who, as found by the High Court judge "assisted the court with a description of his understanding of the state of the Company's affairs and of the fact that the company had continued to trade in the anticipation that a favourable outcome could be achieved either by a redevelopment of Wilton Shopping Centre or its sale" (at para. 112). Albeit he was not actively engaged and took no part in the day-to-day running of the Company, the appellant's failure to advert even in the most general terms about the state of the Company prior to and during the currency of NAMA's involvement is remarkable.

72. The appellant asserts on affidavit that the insolvency of the Company was not apparent to him yet the evidence before the High Court was that pre-2010, the Company's liabilities exceeded its assets by some €300m, a state of affairs, as I have said, that could and should have been ascertainable by the appellant. Had he done so, his averments in his affidavits would not have been limited to such statements as "It is my *understanding* that

NAMA became involved… in 2010" (emphasis added), "I have very little knowledge of what happened in this company" and "I was not aware a liquidator had been appointed", the second of which the Liquidator alluded to at para. 33 of his affidavit.

73. There was, in essence, a total failure on the part of the appellant to provide information from which the High Court judge could derive that the appellant had fully informed himself in relation to the affairs of the Company consistent with his obligations as a director. In the circumstances, I agree with the conclusions reached by the High Court judge. He had no choice but to make the Order he made as there was no evidence upon which he could find that the appellant acted responsibly at any time. Given the paucity of the appellant's affidavit evidence in relation to the affairs of the Company, against a background where the Company was grossly insolvent and where by virtue of his profession and his involvement as a director in 11 other companies it can hardly be said that the appellant was unaware of his responsibilities, the High Court judge could not be satisfied that the appellant was *"a director broadly complying with his obligations under the provisions of the Companies Acts"* (per Shanley J. in *La Moselle*) or that he had informed himself about *"the business of the company and his duties as a director"* (per Fennelly J. in *Re. Mitek Ltd*.)

74. Insofar as the appellant asserts that the judge deprived him of the benefits of the favourable findings the High Court made in respect of Mr. O'Brien, I find no merit in the appellant's attempt to equate his circumstances with those of Mr. O'Brien. To my mind, the difference between the appellant and Mr. O'Brien are stark, not least having regard to the fact that the appellant was a director since 2005 whereas Mr. O'Brien was appointed only in October 2010 at a time when the Company was heavily indebted to Anglo Irish Bank.

75. More fundamentally, unlike the appellant, Mr. O'Brien furnished a detailed affidavit to the High Court outlining his knowledge of the Company and the involvement of NAMA. In my view, having regard to the provisions of s.819(2) and the case law, that was the appropriate approach. The appellant however did not approach the matter in the manner in which Mr. O'Brien did. It is in those circumstances that I am satisfied that there were more than ample grounds for the High Court judge to treat the appellant and Mr. O'Brien differently. While I accept, as counsel for the Liquidator acknowledged, that the Liquidator's affidavits could have been more expansive in setting out his concerns regarding the appellant, nevertheless, even taking into account the Liquidator's somewhat minimalist approach in setting out the case against the appellant, it remains the case that there was such a stark absence of information in the appellant's affidavits that the High Court could not but reasonably and properly conclude that he had not discharged the onus on him to show that he acted responsibly during his tenure as a director of the Company, which was for the entire time it traded.

76. The appellant submits that the High Court judge fell into error in failing to afford any overt consideration to the matter of his cooperation with the Liquidator during the winding up of the Company. Specifically, it is said that the High Court judge failed to (a) address the appellant's cooperation with the Liquidator and/or (b) afford the appellant credit for so cooperating. The appellant contends that, conversely, such consideration was afforded to Mr. O'Brien in that he was excused by the High Court for his non-cooperation with the Liquidator in relation to the questionnaire by virtue of his having previously submitted a Statement of Affairs to the Statutory Receiver. The appellant draws attention to the fact that he had confirmed in correspondence with the Liquidator his acceptance of the Statement of Affairs as compiled by Mr. O'Brien in 2013 for the Statutory Receiver but received no credit for this from the High Court. It is further submitted that in the court

below the Liquidator had accepted that the appellant did not have access to the Company's books and records after they were forwarded to the Statutory Receiver.

77. I note that the High Court judge accepted that neither the appellant nor Mr. O'Brien had access to the Company's books and records after the appointment of the Statutory Receiver. Contrary to the appellant's suggestion, however, that factor was not the sole determinant for the judge to find that Mr. O'Brien had discharged the onus on him under s. 819(2). Nor was it just because Mr. O'Brien had provided a Statement of Affairs to the Statutory Receiver. As can be seen from his judgment, there were a number of factors that persuaded him that Mr. O'Brien had not acted irresponsibly, not least Mr. O'Brien's extensive affidavit evidence which demonstrated his knowledge of the affairs of the Company, notwithstanding the fact he had been excluded from the engagements between NAMA and Mr. O'Donovan.

78. It must also be recalled that even if it could have been said (the High Court judge finding to the contrary as reflected in the Order of 9 October 2020) that the appellant had established that he cooperated as far as he could in the conduct of the winding up, it remained the case that he also had to establish the he acted honestly and responsibly in relation to the affairs of the Company during his tenure as a director. Here, it has not been established that the appellant acted responsibly.

79. The appellant takes issue with the failure of the High Court judge to take account of the fact that his letter of 20 June 2014 was not responded to by the Liquidator either by way of requesting further information or suggesting he was not satisfied with the appellant having adopted Mr. O'Brien's Statement of Affairs. The fact of the Liquidator's non-response was accepted in the court below. Moreover, the appellant points to the fact that he had enquired of the Liquidator what further steps were required on his part and that enquiry was not responded to.

80. The appellant contrasts his position with the approach taken in *Re Shemburn Limited* [2017] IEHC 475, where Haughton J. held that no label of irresponsibility could be said to attach to the second respondent in that case in failing to complete a questionnaire requested by the liquidator in circumstances where the questionnaire was not brought to his attention having been posted to his father's address. In that case, Haughton J. also accepted the second respondent's averment that he was not in possession of information that would have added to the information already provided to the liquidator. Haughton J. also noted that no reminder had been sent to the second respondent/director by the liquidator.

81. Here, as in *Shemburn*, the High Court judge did not make any adverse finding against the appellant regarding his failure to respond to the Liquidator's questionnaire. Hence, the appellant can have no cause for complaint in that regard. Insofar as the appellant argues that the Liquidator's failure to follow up with any further correspondence after receipt of his letter of 20 June 2014 should have led the High Court judge to find that he did not act irresponsibly, I do not accept that argument in light of the jurisprudence (see *RMF (Ireland) Limited*) that requires a director facing a restriction application to *"put before the court any other matters which he or she considers relevant to a consideration by the court of the overall conduct of the person during his or her tenure as a director…"* (emphasis added). Moreover, I note while in *Shemburn* the second respondent director got the benefit of a finding that he did not act irresponsibly in failing to respond to the liquidator's request for further information, that was not sufficient to absolve him from his responsibilities under the Companies Act, Haughton J. finding that the second respondent did not act responsibly in failing to take appropriate action to have the company wound up in a timely fashion.

82. Notwithstanding that the appellant's affidavits depose to the responses he made to the Liquidator's request for information, the salient factor, to my mind, is that there is

nothing in his written communications with the Liquidator (which were before the High Court), or indeed in his affidavits, upon which the High Court judge could reasonably have held that the onus the appellant bore as a director of the Company had been discharged. It is against the backdrop of these omissions on the part of the appellant that I am satisfied any perceived frailties that might attach to the Liquidator's affidavits cannot assist the appellant. In my view, in the present case, the test in *Re Squash (Ireland) Limited* as to what constitutes irresponsible conduct so as to trigger an application under s. 819 has been met for the reasons already set out.

83. I would also observe as follows: at para. 34 of his grounding affidavit, the Liquidator avers that the appellant and Mr. O'Brien ought to have been more aware of the Company's insolvent position at the time the August 2013 Payments were made. In my view, the Liquidator's averment spoke to more than the making of these payments (for which neither the appellant nor Mr. O'Brien bore responsibility as found by the High Court judge). To my mind, in broad brush, the Liquidator's averment speaks not just to the fact of these payments but also to the obligation on the appellant and Mr. O'Brien to be familiar with the affairs of the Company for the entirety of their respective tenures. I am satisfied that it is this obligation that is at the heart of the High Court judge's findings at paras. 121-123 of his judgment, wherein he was satisfied from Mr. O'Brien's affidavit evidence regarding his involvement with the Company that he acted honestly and responsibly in relation to the affairs of the Company, and at paras. 136-144, where the judge was constrained to come to the opposite conclusion in relation to the appellant, namely that he "has not satisfied the court that he acted responsibly in relation to his conduct of the affairs of the Company." I perceive no error on the part of the High Court judge in relation to this finding.

84. As said by Peart J. in *Re USIT World Plc* [2005] IEHC 285, *"irresponsibility can be a matter of degree"*. I concur with the view of Peart J. in this regard. However, I find that,

as far as the present case is concerned, the High Court judge was correct to have, effectively, concluded that the appellant by, *inter alia*, his averment that he had "no worthwhile information in relation to the affairs of the Company", in circumstances where he was a director of the Company from its inception to the time of its liquidation, demonstrated the degree of irresponsibility that, effectively, served to copper fasten the mandatory order the judge was required to make pursuant to s.819 (2) of the 2014 Act, absent the requirements of s.819(2)(a), (b) and (c) being met.

85. The appellant says in his submissions to this Court that the High Court judge found him personally responsible for the Company's insolvency. I am satisfied that no reasonable reading of the judgment could lead to such a conclusion. Rather, the judge found that the appellant had failed to satisfy the burden on him of demonstrating that he had acted responsibly throughout his tenure as a director and in particular at a time when the company was seriously in debt.

86. The appellant also submits that the judge erred in fact or in law by determining that the appellant did not act honestly. In this regard he points to para. 141 of the High Court judgment where the judge states that he "cannot find that [the appellant] acted honestly or responsibly in relation to the affairs of the Company" and para. 44, where it is stated that the appellant "provides no information which would enable the court to conclude that he acted honestly and responsibly in relation to the affairs of the Company".

87. Having regard to the judgment overall, I am satisfied that the High Court judge did not find that the appellant acted dishonestly. In the first instance, the position is made clear at para. 84 where the judge states:

> "it is not suggested by the liquidator that either Mr. O'Brien or Mr. Appelbe acted dishonestly in their conduct of the affairs of the company. The liquidator's complaint relates only to irresponsibility".

88. Secondly, I accept the Liquidator's submission that the statements the High Court judge makes at paras. 141 and 144 of the judgment are tantamount only to a recitation of the statutory test the appellant was required to meet pursuant to s.819(2)(a) of the 2014 Act and do not therefore amount to a finding by the judge of dishonesty on the part of the appellant. Even if it could be said that some frailty attaches to the language used in these paragraphs, the issue is more than definitively established at para. 145 of the judgment where the judge states:

> "Mr. Appelbe has not satisfied the court that he has acted responsibly in relation to his conduct of the affairs of the Company…" (emphasis added).

Thus, the appellant's honesty was not in issue in the restriction application, nor was a finding of dishonesty made against him.

Summary

89. For the reasons set out above, I perceive no error in the approach adopted by the High Court judge and accordingly, I would dismiss the appeal.

Costs

90. The appellant has not succeeded in his appeal. It follows that, provisionally, the Liquidator should be entitled to his costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the twenty-one-day period, the Order of the Court, including the proposed costs order, will be drawn and perfected.

91. As this judgment is being delivered electronically, Costello J. and Haughton J. have indicated their agreement therewith and the orders I have proposed.