[2020] IEHC 194

**THE HIGH COURT**

**Record No. 2019/180 COS**

**IN THE MATTER OF ADALBERT LIMITED (IN LIQUIDATION) AND IN THE MATTER OF SECTION 819 OF THE COMPANIES ACT 2014**

**BETWEEN**

**AIDEN MURPHY**

**APPLICANT**

**- AND –**

**DARAGH HEAGNEY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Quinn delivered on the 23rd day of April 2020.**

1. In these proceedings the applicant seeks a declaration that the respondent, being a person to whom Chapter 3 Part 14 of the Companies Act 2014 applies, shall not for a period of five years be appointed or act in any way, whether directly or indirectly as a director or secretary of a company or be concerned to take part in the formation or promotion of a company unless that company meets the requirements set out in subsection 3 of section 819 of the Companies Act 2014.

2. On 18 June, 2018, the applicant was appointed liquidator of the Company by order of the High Court on foot of a petition presented by the Collector General of the Revenue Commissioners.

3. This application is grounded on an affidavit of the applicant sworn 14 May, 2019. The respondent delivered a replying affidavit on 8 November, 2019, and two further affidavits were exchanged between the parties namely a second affidavit of the applicant on 8 January, 2020, and a second affidavit of the respondent sworn on 17 February, 2020.

4. The trade of the Company was the operation of a coffee shop from a premises known as No. 1 at Howth Market, Harbour Road, Howth, County Dublin. This appears to have been a semi-permanent stall at the meeting point of Harbour Road, Howth and Howth Pier.

5. In the spectrum of gravity of cases to come before this Court pursuant to s.819 of the 2014 Act this case is at the lower end, in terms both of the scale of the Company's trade and its indebtedness, and in terms of the conduct of the sole director. Nonetheless I have come to the conclusion that the respondent has not demonstrated that he acted responsibly in relation to the conduct of the affairs of the Company or that when requested to do so by the liquidator he co-operated as far as could reasonably be expected in relation to the conduct of the winding up of the Company. Therefore, I shall make a declaration pursuant to s.819(1) of the Act.

6. I shall firstly outline the history of the Company and then consider the matters which the applicant has identified as being of concern in his assessment of the respondent's conduct, and consider the responses made by the respondent in respect of these issues.

**Incorporation and directors**

7. The Company was incorporated on 23 April, 2014. There is some dispute as to when the precisely it commenced trading. It ceased trading in May 2017 in the circumstances referred to below.

8. The respondent was at no time a shareholder in the company. He said that the business operated by the Company was owned by his former girlfriend, Olivia Marjoram. Ms. Marjoram was a director of the Company from its incorporation on 23 April, 2014, to 19 December, 2014. The respondent was appointed a director on 23 September, 2016. During the intervening period, two other persons namely a Conor Fogarty and a Tommy Martin were directors. Mr. Martin resigned on 19 November, 2015. Mr. Fogarty resigned on 23 September, 2016, when the respondent was appointed a director.

**Lease of the property**

9. There is significant lack of clarity as to the precise nature of the Company's interest in the premises from which it traded. This is important because the respondent says that the sudden repossession of the property was the cause of the insolvency.

10. The Company occupied the premises pursuant to a lease granted by the landlord, Mr. Gregory Rickard. The applicant has exhibited two versions of the lease, one provided to him by the respondent and one provided to him by Mr. Rickard.

11. The version provided to the applicant by Mr. Rickard shows the tenant to be the respondent, described as "*Darragh Heagney t/a…".* This lease is undated, but expressed to be for a term of three years from "*July 2013*". The rent payable was €15,000 per annum to be paid by monthly standing order. This version of the lease is not signed by Mr. Rickard. It is signed by the respondent as tenant. It also has appended to it an executed form of Guarantee, also signed by the respondent as the guarantor.

12. The second version of the lease, being the one produced by the respondent, is dated 18 October 2013. It shows the tenant to be *"Darragh Heagney, 48, St. Peters Terrace, Howth, Dublin 14"*. On this version of the lease the term is clearly stated to be for a three year period from 1 September, 2013. This version has been signed by Mr. Rickard and by the respondent as tenant. Immediately beside the respondent's signature there has been inserted the word "*promoter*" although apparently not in the handwriting of the respondent.

13. The respondent says that in 2012 Ms. Marjoram wanted to open a cake and coffee shop in Howth, having expertise and experience as a pastry chef. The respondent said that he had no direct interest in such a business. He had lived all his life in Howth and he was well placed to know if a suitable premises might become available. At some time during 2013 he became aware of the availability of this premises and in October 2013 he signed the lease, thereby securing one of the units at Howth Pier he says for the benefit of Ms. Marjoram.

14. The Company was not incorporated until 23 April, 2014, so the Company itself was not the contracted tenant. No suggestion has been made that any corporate act was subsequently taken by the Company to formally ratify a tenancy or lease.

15. It is common case that from a time shortly after the incorporation of the Company it conducted the business previously conducted by Ms. Marjoram from the premises, until the landlord re-entered the property in May 2017.

**Re-entry by the landlord**

16. The three-year term of the lease expired on 31 August, 2016. The respondent said that after he was appointed a director on 23 September, 2016, following the resignation of Mr. Fogarty, he, the respondent, then for the first time took over the running of the business. He said that he immediately opened negotiations with the landlord seeking an extension or renewal of the lease. He says that these efforts were ultimately unsuccessful and in May 2017 the landlord effected a re-entry of the premises and thereupon the business and trade of the Company ceased.

17. The respondent says that up to the day when the landlord re-entered the premises, the Company had been trading well. He exhibited an excel sheet which he said recorded the trading receipts and payments for the full year 2016. The excel spreadsheet appears to be an attachment to an e-mail of 10 February, 2017, received by the respondent from a Mr. Gerry Malone, who it is said was an accountant.

18. This spreadsheet showed cash inflows for the full year 2016 of €41,330.16 and outflows of €33,7041, leaving a "*concluding cash balance*" of €7,588.70 as of 31 December, 2016.

19. The respondent says that when the landlord took possession of the property in May he did so abruptly and changed the locks. He describes the entry as having been "*by allegedly peaceful means*". The respondent says that the effect of this event was that overnight the Company went from trading consistently and earning an income to being unable to trade or earn any income.

20. The applicant's evidence is that the landlord had served a notice to terminate in March 2017, arising from the cessation of rental payments in December 2016.

21. The uncertainty in relation to the status of the lease, even on the part of the respondent, is further illustrated by the fact that in the post-liquidation correspondence between the applicant and the respondent, the respondent indicated in an e-mail as late as 7 November, 2018, that he was waiting for certain information from his solicitor, Mr. Denis McSweeney, to enable him to respond to a number of queries. In particular, he indicated that Mr. McSweeney needed to "*get some documents out of storage to prove that Adalbert was the tenant and get the lease*".

22. In fact, the lease produced was the one granted to the respondent and contains no evidence of the Company itself having been a tenant. Ultimately, on 19 December, 2018, Mr. Alan Sheehan, a trainee solicitor at Messrs. Denis McSweeney Solicitors, emailed the applicant enclosing what he described as "*attached personal guarantee of Darragh*

*Heaney together with supporting documentation highlighting the company to be formed"* and stating that in the lease agreement Mr. Heaney is described as "*promoter*". Again, none of this advanced or clarified the question of the status of the Company vis-à-vis the premises.

23. The respondent says that following the re-entry by the landlord he instructed Mr. McSweeney to communicate with the landlord to seek the return of certain items at the premises. On 22 May, 2017, Messrs. McSweeney wrote to the landlord's solicitor, Marcus Lynch, on this subject. In this letter Mr. McSweeney states as follows:

*"Our client: Daragh Heagney*

*Your client: Gregory Rickard*

*Unit1, 3A Howth Road, Co Dublin*

*We are instructed to make an application to court at the earliest opportunity to compel your client to release to our client all items which remain in the unit in question. It would be preferable if this could be done on an agreed basis but if your client is unwilling to allow our client to remove his fixtures, fittings and equipment without a court order he will be left with no choice but to make an application to court and to seek the costs of so doing.*

*With this in mind we understand that our client spent a considerable amount of money on the fit out of the unit and we again request that you afford our client immediate access to remove the fixtures and fittings and all equipment that was on the premises.*

*We further understand that there was full stock in the fridge and freezer units together with some cash which was on the premises at the time our client was locked out of his premises.*

*We urgently await hearing from you.*

*Yours faithfully"*

24. The applicant draws attention to the fact that in this letter Messrs. McSweeney's client is described as "Darragh Heagney" being the respondent and not the Company. Secondly, he points out that this can only be a reference to assets owned by Mr. Heagney and to expenditure incurred by Mr. Heagney himself.

25. It appears that on 9 June, 2017, the landlord indicated a willingness to provide access to the respondent to retrieve the assets. The respondent says that he obtained a rental van and attended at the premises to find only some equipment there which was badly damaged and no stock, cash or books or records. Instead of taking the damaged goods he adopted the position that the landlord ought to be fixed with liability for the loss of those assets incurred by the Company. Rather than removing the damaged goods he

contacted the landlord with a view to pursuing the landlord for damages. In this regard he exhibits a further letter written by Messrs. McSweeney to the landlord dated 21 June, 2018:

"*Our client: Darragh Heagney* [emphasis added]

*Your client: Gregory Rickard*

*Dear Sirs,*

*We refer to previous correspondence in this matter.*

*You may be aware that our client was unable to procure his belongings including a cash register, till and books and records of the company at the time that your client re-entered the premises.*

*He made a number of attempts to get the goods from a Mr. Mark Dunne to no avail.*

*Our client has now to provide a Statement of Affairs in relation to Adalbert Limited and we would be grateful if you would please arrange for the company records to be made available to our client as a matter of extreme urgency.*

*Our client is under court appointed time pressure in relation to this issue."*

26. No replying correspondence from Messrs. Marcus Lynch was exhibited. A notable feature of the letter of 21 June, 2018, is that it was written three days after the appointment of the applicant, and no evidence is proffered by the respondent as to what action, if any, he took between 9 June, 2017, and the appointment of the applicant on 18 June, 2018 on the petition of the Collector General.

27. The applicant says that the landlord informed him that after he repossessed the premises he wrote on numerous occasions requesting the respondent to collect the relevant assets and books and records. The landlord informed the applicant that no response was received over an extended period of time and that ultimately the landlord disposed of the relevant assets and books and records due to mounting storage costs.

28. None of this correspondence is exhibited and therefore there is a dearth of evidence as to what exactly transpired between May 2017 and the appointment of the applicant in June 2018. The court is left therefore with the respondent's failure to account for what, if any, efforts he made after May and June 2017 to retrieve the assets and books and records of the company.

29. Although the letter from Mr. McSweeney dated 21 June, 2018 refers to "*previous correspondence*", no such correspondence is specified or exhibited. This leads to the conclusion that it was not until after the appointment of the applicant that the respondent took any further steps as against the landlord. Even then his only action was to write to

the landlord seeking information to enable him to comply with his obligation to file a statement of affairs.

30. Nor does the respondent say what measures were considered or even taken by him as the sole director to determine whether the Company should continue its business or whether and how it would implement an orderly winding up. Instead it was left ultimately to the Revenue Commissioners to petition the High Court for an order for the winding up of the Company.

**Preliminary objection**

31. The respondent objects to the contents of the applicant's certificate pursuant to section 570 of the Companies Act 2014 which states as follows;

*"From an examination of the books and records of Adalbert Limited, I am satisfied that the Company was unable to pay its debts within the meaning of section 570 of the Companies Act 2014 as of November 2016."*

The respondent says that the Company was not unable to pay its debts as of November 2016 and therefore, does not fall within the category of Companies set out in section 570 and not a Company to which the provisions of Part 14 Chapter 3 of the Act apply.

32. The applicant says firstly that the Company was placed in liquidation on foot of a petition presented by the Revenue Commissioners for unpaid taxes. He says that he has been advised that the High Court has therefore already been satisfied that the Company was unable to pay its taxes, and that this point by the respondent is a collateral attack on that order. The applicant also says that there is nothing irregular about the certificate exhibited by him and that the evidence demonstrates that the Company was unable to pay its debts as they fell due by "in or about November 2016". In this regard he cites the facts that the Company had ceased paying rent for the premises it occupied and the fact that the Company was by then already in arrears with payments to the Revenue Commissioners.

33. I shall return later to the question of when the Company had become unable to pay its debts. Although it is unclear to the court why the applicant chose to make his certificate "*as of November 2016*" it seems to me that the fact that the Company is a Company to which s.819 applies is clearly established by the making of the winding up order on foot of the petition for unpaid taxes.

34. I now turn to the aspects of concern which have been identified by the applicant and the responses thereto.

**Failure to file a statement of affairs as directed by Court Order.**

35. The applicant refers to the order for the winding up of the Company made on 18 June, 2018, in which the respondent was directed to file a statement of affairs within 21 days. The applicant says that no statement of affairs has ever been filed in the High Court by the respondent.

36. The applicant exhibits a statement of affairs sworn by the respondent on 14 December, 2018, which was sent to him by the respondent's solicitors, Denis McSweeney solicitors on 20 December, 2018. It appears from the exhibited statement of affairs that the respondent at least attempted to complete a statement of affairs in the prescribed form, although it was never filed in the prescribed form.

37. Apart from the lateness of this document, the applicant identified a number of issues arising from its contents, and wrote to the respondent on 16 January, 2019, raising these queries. Although certain further correspondence ensued between the applicant and Messrs. Denis McSweeney, no reply was received to the substantive questions raised by the applicant as to the contents of the statement of affairs. The issues identified by the applicant and referred to in these proceedings were as follows:

(1) The assets were described as including "*leasehold property*" at an estimated realisable value of €35,000. In circumstances where the Company was never the contracted tenant of the property, and where a lease which had been granted to the respondent expired on 31 August, 2016, it is clear that the landlord was never under any obligation to extend or renew the lease, either to the Company or to the respondent. Therefore there was no basis for attributing a value of €35,000 to the "leasehold property".

(2) The assets were described as including "*furniture, fittings, utensils etc*." at a value of €27,850 "*see list attached".* No such list or inventory was attached.

(3) The statement of affairs identified a quantum of unsecured creditors at a sum of €6,501 "*as per list E*". No list of such creditors was provided.

38. The statement of affairs included a figure of €25,111.44 as the amount due to preferential creditors. No listing of preferential creditors was provided. It is fair to note that in many cases the principle preferential creditor is the Revenue Commissioners, who in this case made a claim in the liquidation in a sum of €22,843.38. Therefore, the amount quoted in the statement of affairs for preferential creditors cannot be described as grossly inaccurate. It merely lacks a breakdown

39. In summary therefore it seems clear that the respondent was six months late in delivering the statement of affairs to the applicant, the contents of the statement of affairs were deficient for the reasons identified above, and the respondent failed to reply to the applicant's queries in relation to the statement of affairs.

**Failure to file statutory returns and accounts.**

40. The applicant says that in breach of the provisions of s.343 of the Companies Act 2014, the Company failed to file annual returns for the years ended 23 April, 2017, and 23 April, 2018.

41. The applicant also complains that the only set of financial statements ever filed by the Company were abridged financial statements to the year ended 31 January, 2015, and that those accounts indicated that the Company had not commenced trading as of that

date, thereby contradicting the averment made by the respondent to the effect that the Company commenced to trade immediately following its incorporation in April 2014.

42. As to the matter of annual returns at the Companies Registration Office (the "CRO"), the respondent says that among the first things he attended to following his appointment as a director on 23 September, 2016, was to arrange the filing of an up to date annual return. This is a valid point, because the evidence is that on 9 November, 2016 the Company, in fact, filed an annual return, together with a request to change the Company's annual return date to 23 April. However, the applicant says that this left the Company still in breach of the requirement to file annual returns for the years ended 23 April, 2017, and 23 April, 2108.

43. The fact that the Company ceased to trade in May 2017 would not justify the failure to make such returns for period ended 23 April, 2017. Equally, the non-trading status of the Company from May 2017 onwards would not justify a failure to make any form of return for the year to 23 April, 2018, albeit that the liquidation of the Company occurred a very short time thereafter. In the circumstances of this case, I do not regard this as an egregious failure on the part of the respondent.

44. The absence of financial statements is a more serious matter. The return filed by the Company under the stewardship of the respondent on 9 November, 2016, did not include financial statements and this meant that the only set of financial statements ever filed by the Company was in respect of the year ended 31 January, 2015, being financial statements which recorded no trading activity whatsoever and clearly the Company was in breach of this requirement and continued to be in breach from the date of the respondent's appointment onwards.

**Liability to Revenue Commissioners**

45. The applicant refers to the claims submitted by the Revenue Commissioners for sums totalling €22,843.38.

46. Clearly the Revenue Commissioners considered this amount to be sufficiently serious to warrant the presentation of a petition for the winding up of the Company and the appointment of the applicant as liquidator. The respondent says very little in response to the applicant's concerns in relation to this matter. However, it is appropriate to note that only a limited proportion of these amounts fell due after the appointment of the respondent as a director.

47. In respect of VAT, the total amount claimed by Revenue was €8,684.44. This is based on VAT returns up to 29 February, 2016, and VAT estimates to 30 April, 2017. Based on the estimates provided, out of the sum of €8,684.44 only €1,720 in respect of VAT appears to be accrued after the date of the respondent's appointment.

48. In respect of PAYE/PRSI, the total amount claimed by Revenue is €14,158.94. Of this an amount of €10,712.83 related to the period ended 31 December 2016 and a sum of €3,446.11 was based on an estimate in respect of the year ended 31 December 2017. If

one were to apportion the 2016 PAYE/PRSI to the period after the appointment of the respondent as a director, then a sum of only €2,678.21 would have been due in respect of that period.

49. In respect of the balance of €3,446.11 for the year 2017, obviously that is an estimate for the full year and does not of itself take account of the cessation of trade in May 2017.

50. The respondent cannot absolve himself from responsibility in respect of the entire arrears of taxes due and there is an absence of any evidence by the respondent as to what efforts he made to resolve matters with Revenue. However, I consider it material that the vast majority of the taxes which were due at the time of the appointment of the applicant were attributable to periods before the appointment of the respondent as a director. In all the circumstances of this case, I would not regard this factor as sufficient in and of itself to justify the making of a restriction order. In this regard I am informed by the judgment of Finlay Geoghegan J. in *Digital Channel Partners Ltd (in voluntary liquidation) and Others v Cummins and Others* [2004] 2 ILRM 35.

**Failure to file Revenue returns**

51. The applicant identifies the following Revenue returns as outstanding and says that despite requests made to the respondent he has not dealt with such returns: -

(1) All VAT returns from 1 March, 2017, (sic) to the date of the appointment of the liquidator. That reference is an error and, in fact, the VAT returns were overdue from 1 March, 2016, onwards;

(2) All P.30's for 2017;

(3) P.35 for 2017 and 2018; and

(4) Corporation Tax Returns for the years ended 2016, 2017 and 2018.

52. The applicant makes the point that since the respondent's appointment as a director only one Revenue return has ever been made namely the Form P.35 for the year 2016, which was filed in January 2017.

53. The respondent in his replying affidavits states that he accepts responsibility for the failure to file the relevant returns after the period of his appointment. The only further point he makes on the subject is that the liquidator has cited the Company's failure to make a number of additional filings relating to dates prior to his appointment as a director.

54. In circumstances where the respondent was a director from 26 September, 2016, to the date of the appointment of the applicant on 18 June, 2018, it is not in my view sufficient for the respondent to simply allocate blame for these failures to his predecessors, where he had more than sufficient time within which to rectify the outstanding returns.

**Failure to maintain proper books and records**

55. The applicant says that he did not receive books and records of the Company. He says that the respondent claimed that the landlord seized these when he took possession of the property.

56. There is a dispute on the evidence as to what efforts were actually made by the respondent to retrieve the books and records. Central to the applicant's complaints in this regard is that the respondent offered no evidence that the Company had in fact prepared management accounts or operated any method of accounting that would allow management to determine the financial position of the Company at any given time, as required pursuant to s.282 of the Companies Act 2014.

57. Apart from insisting that the landlord had seized all relevant books and records, the respondent makes the case that such books and records as existed were more than sufficient to determine the financial position of the Company at any one time. In this regard he attaches importance to the fact that the Company was such a "*small operation*" in support of the position that it was not difficult to determine the financial position of the Company at any point in time.

58. It seems to me that the fact that the Company was small in the scale of its operations is not an answer to the failure to either provide books and records to the applicant or to offer any description as to what books and records actually existed even before the landlord took possession. On the contrary, the respondent's reliance on the fact that the operations of the Company were so small in scale reveals if anything a disregard on his part for the statutory obligation to maintain such books and records.

**Trading whilst insolvent**

59. The Company ceased trading in May 2017 when the landlord repossessed the property. There is no evidence before the Court as to what quantum of liabilities was incurred between that date and the presentation of the petition on 9 May 2018. The amounts incurred in that period were likely to have been small even in the context of the scale of this case.

60. The applicant says that the Company became unable to pay its debts in or about November 2016 at the latest. This appears to be the time when the Company ceased paying rent. The respondent suggested that the non-payment of rent was tactical, in the context of negotiations with the landlord, and therefore not evidence of inability to pay debts. That would not constitute a valid basis for non-payment and clearly there was no evidence of waiver of rent.

61. As regards liabilities to Revenue, the applicant says that the Company had fallen into arrears earlier than November 2016 having made its last payment of VAT in September 2015. As I have identified in the discussion of Revenue liabilities at paragraphs 45 – 50 above, the amounts accrued after the date of the respondent's appointment as a director are limited. This does not relieve the respondent from the obligation to take steps to regularise the Company's position with Revenue.

62. Clearly the applicant did not consider the conduct of the director as regards continuing to trade as so egregious as to warrant proceedings for personal liability for reckless trading within the meaning of section 610 of the Act. However, it is also clear that by November 2016 the Company had accrued arrears of taxes – a fact not controverted by the respondent – and was no longer able to pay rent for the premises it occupied. Notwithstanding these clear indicators of insolvency the respondent caused or permitted the Company to continue trading until the landlord intervened in May 2017. He himself says that once this occurred the Company was deprived of its only revenues, and yet still no steps were taken to regularise the position with Revenue or other creditors until the Collector General petitioned a further year later.

**Previous company failures and previous restriction**

63. The applicant refers to the fact that the respondent has been a director of thirteen companies (including the Company). He says that eight of those companies had been struck off the Register of Companies for failure to file annual returns and financial statements and that three of the companies had been wound up pursuant to petitions by the Revenue Commissioners on foot of unpaid taxes.

64. In respect of one of these companies, namely Balmain Limited, the respondent was the subject of a restriction order for five years, made in January 2011, the term of that restriction expiring in January 2016. The respondent was appointed a director of the Company on 23 September, 2016. The applicant says that a question has been raised by the Director of Corporate Enforcement (the "ODCE") as to whether while still under a restriction order in the Balmain case, the respondent acted as a shadow director of the Company, in breach of that restriction order. The applicant says that in the absence of books and records and bank statements for the Company, he has been unable to investigate this query from the ODCE. He comments that the question arises in the context of the respondent having signed the lease of the property at Howth in 2014. He does not expand on this issue, although he says that the respondent's explanation is unsatisfactory. The respondent explains his involvement in the lease as limited to assisting his girlfriend with finding a property from which to operate her business, based on his knowledge of the locality.

65. It is understandable that a measure of suspicion would arise in connection with the respondent's engagement in securing the lease of the property from which the Company traded, and the position is complicated by the fact that the Company was not a party to the executed lease. However the applicant has fairly stated that there is not before the Court sufficient evidence to reach any conclusion as to whether a breach of the previous restriction order occurred.

**Cooperation with the liquidator**

66. The applicant says that the respondent failed to co-operate with him in the performance of his duties as liquidator. He refers to three particular issues in this regard as follows:

(a) The failure to file a statement of affairs, and that the version ultimately delivered to the applicant in December 2018 was deficient. I have considered this in paragraphs 35 – 39 above and concluded that the statement of affairs delivered was deficient.

(b) The failure to provide books and records of the Company, other than the lease. In paragraphs 55 – 58 above I have considered this issue and it is clear that the respondent has not complied with the statutory obligations concerning books and records. Not only were they not produced to the applicant, but the respondent has not identified what such books and records were ever maintained.

(c) The applicant refers to the extensive correspondence between him and the respondent after the appointment of the applicant and says that the respondent failed to provide the information requested of him concerning the affairs of the Company.

67. The respondent met the applicant on 9 July, 2018, and claims that he provided all the information he then had in his possession. He says that in subsequent numerous exchanges he provided more information. This claim is not borne out by the evidence of the correspondence exchanged.

68. On 22 June, 2018, the applicant wrote to the respondent. He enclosed a copy of the order appointing him and explained the statutory requirements to provide all information concerning the affairs of the Company. He also enclosed a form of questionnaire for completion by the respondent and requested a meeting. The questionnaire was not retuned completed until 19 December, 2018.

69. The requested meeting took place on 9 July, 2018, and on 10 July, 2018, the applicant wrote again to the respondent identifying the further matters requiring attention and further information required. He referred to the requirement to file a statement of affairs, and to the outstanding CRO and Revenue returns. He then identified the following further information required:

(a) Copies of all books and records of the Company,

(b) Listing of employees including contact details,

(c) Listing of all creditors or potential creditors,

(d) Full listing of all assets and their current location,

(e) Contact details for the majority shareholder Olivia Marjoram, and

(f) Any other details relevant.

70. In the letter of 10 July, 2018, the applicant drew to the attention of the respondent his view that the circumstances of non-compliance with Revenue and CRO requirements *"…suggest that this is a situation where a restriction order against the director is a*

*requirement…".* Therefore, the respondent knew the importance of complying with the applicant's requests.

71. The applicant received certain acknowledgments, but when the requested information was not provided he sent reminders on 3 August 2018, 16 August 2018, 3 September 2018, 18 September 2018, 27 September 2018, and 11 October 2018. During this period the respondent made a number of promises of responses. It was not until 22 November, 2018, that there was provided even the most basic of the outstanding information, being the names and addresses of two staff members. At this stage the respondent said it would take a further three months to obtain information from the accountants and he said also that he was awaiting information from his solicitor Denis McSweeney.

72. On 19 December, 2018, Messrs McSweeney sent the completed questionnaire back and a copy of the lease. Further letters were exchanged but the applicant says that this protracted correspondence, and the deficiencies in the statement of affairs and in other information all illustrate a failure of the respondent to co-operate with him as liquidator. I have come to the conclusion that the respondent indeed failed in this regard for the following reasons:

    (a) At the time when the applicant required co operation in relation to the identification and realisation of assets the necessary information required was not provided,

    (b) The statement of affairs was never filed and when it was delivered to the applicant five months late it was deficient in content,

    (c) The liquidator's questionnaire was returned 6 months after it had been requested, and

    (d) Books and records of the Company were never provided to the liquidator, if indeed they had existed.

**Relevant Legal Principles**

73. In Re *Shemburn Limited (in liquidation*) [2017] IEHC 475 Haughton J. considered the relevant legal tests and summarised them by reference to the judgments of Shanley J. in *Re La Moselle Clothing Limited v. Soualhi* [1998] 2 ILRM, Finlay Geoghegan J. in Re *Tralee Beef and Lamb Limited* [2004] IEHC 139 in which she cited with approval the relevant passages from the judgment of Parker J. in *Re Barings plc et al (No 5) Secretary of State for Trade and Industry v Baker et al (No 5)* [1999] 1 BCLC 433, and the judgment of Mr. Justice Clarke in *Re Swanpool Limited* [2005] IEHC 341.

74. The seminal description of the relevant tests by Shanley J. in Re La Moselle is pertinent to this case where he said the following: -

*"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 directors responsibility for the insolvency of the company.(d) the extent of the directors 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."*

75. Haughton J. continued as follows: -

*"It is also clear that 'simply bad commercial judgement' does not equate with lack of responsibility, that the court should not permit a witch-hunt against directors, and that the court should be careful 'not to view the matter with the inevitable benefit of hindsight" (citing Finlay Geoghegan J. in O'Neill Engineering Services (ex tempore, 13 February 2004)*

76. Haughton J. continued: -

*"The issue of delay in the winding up of a company is one that can give rise to a finding that directors did not act responsibly. It is well established that where a company is insolvent and unable to pay its debts the directors have a duty to wind it up. Addressing this in Re Careca Investments Limited [2005] IEHC 62, Clarke J. noted:*

> *"That duty does, of course, depend on all the circumstances of the case and there may well be appropriate instances where, at least for a period of time, it may be appropriate to postpone winding-up pending attempts to deal with the issues that arise by virtue of insolvency."*

77. In the case of *Re Shemburn Limited*, Haughton J noted the delay following the liquidation of a connected company of some twenty-two months and found that this was irresponsible on the part of the respondent in that case as an executive director. The Court also found in that case that a second director who had been a non-executive director did not act responsibly in failing to take appropriate action to have the company wound up in a timely fashion.

78. In this case when the respondent was appointed a director of the Company on 23 September, 2016, the Company was already in arrears with Revenue both as to returns and payments, and as regards filing of statutory returns of the CRO. The lease of the property which the Company had availed of for the purpose of its trading activities had expired and its landlord was under no obligation to extend or renew the lease in favour of any party, whether that be the Company or otherwise.

79. The respondent attaches the principal responsibility for the insolvency and the ultimate liquidation of the Company to the "*overnight*" loss of use of the premises and fixes responsibility for this on the landlord. He has not contradicted the assertion made by the liquidator that, in fact, the landlord gave two months' notice of termination, having

already granted indulgence from 31 August, 2016, and ultimately only re-entering more than eight months later in May 2017.

80. When the respondent's endeavours to persuade the landlord to extend or renew a lease of the property failed and a full eight months had lapsed after the expiry of the lease no evidence has been advanced by the respondent as to what exactly he did in relation to the regularisation of the Company's affairs at a time when on his own account it had become clear that the Company was unable to continue to trade. Nor is a satisfactory explanation given as to why no steps were taken by the respondent to either secure agreement with Revenue and other creditors such as may have avoided insolvent liquidation or warranted delaying the initiation of a liquidation. In fact, no such steps were ever taken by the respondent and it fell to the Revenue to petition as a creditor for the winding up of the Company which it did more than a year after the landlord had re-entered.

**Conclusion**

81. I have determined that the respondent:

(a) Failed to comply with his obligation to make a satisfactory statement of affairs,

(b) Failed to cause financial statements to be completed and returned for any period of the Company's existence,

(c) Failed to file returns to Revenue,

(d) Failed to maintain proper books and records of the affairs of the Company,

(e) Failed to take steps to implement a winding up of the Company for a period of at least a year after it had become insolvent,

(f) Failed to co-operate with the liquidator as far as could reasonably be expected in relation to the conduct of the winding up.

82. Taking all of these matters into account, I am not persuaded that the respondent has acted responsibly in relation to the affairs of the Company or that he has, when requested to do so by the applicant co-operated as far as could reasonably be expected in relation to the conduct of the winding up of the Company. Accordingly, I shall make a declaration pursuant to s.819 of the Companies Act 2014 that the respondent shall not for a period of five years be appointed to 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 that company meet the requirement set out in subsection 3 of s.819.