

**THE HIGH COURT**

[2022] IEHC 10  
[2020 No. 369 COS]

**IN THE MATTER OF EUROSURGICAL LIMITED (IN LIQUIDATION)  
AND IN THE MATTER OF THE COMPANIES ACT 2014  
AND IN THE MATTER OF SECTION 228 OF THE COMPANIES ACT 2014  
AND IN THE MATTER OF SECTION 608 OF THE COMPANIES ACT 2014  
AND IN THE MATTER OF SECTION 609 OF THE COMPANIES ACT 2014  
AND IN THE MATTER OF SECTION 842 OF THE COMPANIES ACT 2014**

**BETWEEN**

**GEORGE MALONEY**

**APPLICANT**

**AND**

**RAY KANE SENIOR, ALAN KANE, GARY KANE AND ALISON KANE**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Allen delivered on the 14th day of January, 2022**

**Introduction**

1. By originating notice of motion issued on 18th November, 2020, and originally returnable for 11th January, 2021, the applicant liquidator applied for a number of reliefs including orders pursuant to s. 842 of the Companies Act, 2014 disqualifying each of the respondents from being appointed or acting as a director or other officer, statutory auditor, receiver, liquidator or examiner or being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of any company, friendly society or industrial and provident society for such period as seemed just and appropriate.
2. The applicant also sought orders imposing personal liability on each of the respondents for losses caused as a consequence of the failure to maintain proper books of account as required by the Companies Act, 2014, and orders for the recovery of company monies pursuant to ss. 228(1)(a), 608(2) and 609(2) of the Act of 2014. I will come to the detail of the claims, which have since been admitted.
3. In November, 2021 a settlement agreement was signed by each of the applicant and the respondents which dealt with the money claims and by which each of the respondents agreed to submit to disqualification orders for minimum periods. This judgment considers whether the minimum periods of disqualification to which the respondents have agreed are sufficient.

**Background**

4. Eurosurgical Limited ("*the company*") was incorporated on 29th January, 1987 to carry on the business of the distribution of surgical and medical equipment to hospitals and doctors in Ireland, both in the public sector and the private sector. The company traded apparently successfully for nearly 30 years until July, 2015 when the Radio Telefís Éireann *Prime Time* programme made various claims concerning the company's business practices. The negative publicity had a significant effect of the company's business. At about the same time it became known that the first respondent had fraudulently misappropriated millions of euros of the company's funds and the company was the subject of a revenue audit.

5. By order of the High Court (Binchy J.) made on 23rd May, 2016, on the petition of the second, third and fourth respondents, which was presented on 19th May, 2016, the applicant was appointed provisional liquidator, and by order made on 13th June, 2016 (White J.) the company was ordered to be wound up and the applicant was appointed to act as liquidator.
6. At the time of presentation of the petition the first, third and fourth respondents were directors of the company. The first respondent had been so appointed on 6th February, 1987; the third respondent on 31st December, 2002, and the fourth respondent on 1st October, 2008. The second respondent had been a director from 1st September, 2000 until 23rd July, 2015.
7. At the time of presentation of the petition the first respondent owned 64.71% of the shares in the company and the second and third respondents each owned 17.65%.
8. In the meantime, on 9th May, 2016, on the eve of the presentation of the winding up petition, the company entered a purported business transfer agreement with a company called Gemini Surgical Innovations Limited ("*Gemini*"). Two days later, on 11th May, 2016, the Revenue raised assessments on the company for €3,490,875.99, excluding interest and penalties.
9. Gemini was incorporated under the laws of Ireland on 13th January, 2016 as a company limited by shares. Its directors were Mr. Robert Dore, who was the company's solicitor, and Mr. Cathal McHugh, who had acted as the company's accountant. The second, third and fourth respondents were employees of Gemini. By the business transfer agreement the company purported to transfer to Gemini virtually all of the company's trading assets at what the applicant thought, but the second, third and fourth respondents for a long time contested, was a significant undervalue. To make a long story short, on 27th October, 2017 the applicant applied to the High Court pursuant to s. 608 of the Act of 2014 for a declaration that the purported transfer was void *ab initio*, and on 29th January, 2018 Gemini consented to an order in those terms.
10. The applicant takes as the starting point of the procedural history of the application now before the court a letter he wrote on 22nd October, 2018 to the solicitors for the second to fourth respondents and what was for all practical purposes an identical letter of 7th November, 2018 to the solicitors for the first respondent. These letters set out in a schedule a series of issues and transactions which had been identified by the applicant in the course of his investigation of the company and its affairs and which – it is now acknowledged – were a cause for serious concern. Over the following two years the solicitors for the respondents asked for time to respond – which they were given – and the solicitors for the first respondent asked for substantial documentation to allow them to address the queries – which they were given. None of the respondents dealt in correspondence with the substance of the applicant's questions and the motion issued on 18th November, 2020.

11. In response to the motion the first respondent swore a short affidavit on 17th February, 2021. The first respondent deposed that that on 19th December, 2016 he had been adjudicated bankrupt on his own petition. That adjudication, he said, would have captured all liabilities he had as at that date including *"any"* liabilities he might ultimately be found liable *"as a result of the applicant's claims"*. If he was correct in that, said the first respondent, the applicant would not be in a position to enforce any judgment he might obtain. And in any event, the first respondent said that he did not have the means to defend the claim.
12. The first respondent's solicitors had previously written to the applicant's solicitors on 7th January, 2021 notifying the applicant of the bankruptcy and what he maintained were the consequences of it. The letter went on to say that the first respondent denied *"all of the claims levelled against him"* by the applicant and asserted that the nature and extent of the claims had been *"carefully analysed and shown to be flawed in many respects"*.
13. On 18th February, 2021 the third respondent filed the first of three affidavits downplaying his role, responsibility and capability to have acted as a director of the company, and heaping blame on his father. The third respondent was critical of the level of detail in the grounding affidavit and suggested that the applicant had misrepresented and distorted the true position. He proclaimed his complete ignorance of anything to do with the books and records of the company. The third respondent challenged the applicant to prove precisely how, and in what amount, each of the second, third and fourth respondents had benefited by the wrongdoing. Without dwelling on the detail, the position taken by the third respondent was that he was entirely innocent of misappropriation of funds and had suffered greatly as a result of the unlawful activity of his father.
14. The third respondent asserted that there was no case to answer that he, his brother, the second respondent, or his sister, the fourth respondent, had breached their fiduciary duties under section 228 of the Act of 2014. He disclaimed all responsibility for fraud. The third respondent acknowledged the failure to keep proper books and records but appealed to the discretion of the court not to declare him or his brother or sister personally responsible for the debts of the company, or to make a disqualification order against any of them.
15. On the same day the fourth respondent swore a short affidavit in which she corroborated what her brother had said. The fourth respondent deposed that her father had appointed her as a director in 2008 without her knowledge and that she had had no hand, act or part in the day to day running of the company, and certainly no executive role. She asserted that she was wholly ill-equipped to perform the responsible functions of a director of a company and asserted that she bore no responsibility for anything to do with the day to day running of the company.
16. On 8th April, 2021 the applicant filed a second affidavit, contesting the position taken by the first respondent, and rebutting the evidence of the third and fourth respondents as to their and the second respondent's involvement in the management of the company's business by reference to the company's bank mandates, statutory filings and minute

books. The applicant exhibited a number of spreadsheets which had been prepared to summarise the contents of such books and records as there were, which spreadsheets and the underlying documents and records were said to show that the position taken by the second, third and fourth respondents was not credible. The applicant's spreadsheets were said to be sub-tended by a virtual wheelbarrow of documents which, if printed, could not be accommodated in twenty large lever-arch folders. The solicitors for each of the respondents were invited to review the supporting documentation if they wished.

17. In a second replying affidavit sworn on 14th April, 2021 the first respondent maintained the position he had taken on his own behalf and emphatically rejected the evidence of his children as to the extent of their involvement in the matters complained of.
18. In a second replying affidavit sworn on 16th April, 2021 the third respondent cavilled with some of the detail of the inferences which the applicant had drawn from some of the documents and records he had found. He suggested, for example, that the documentary evidence gathered by the applicant that he and his brother had collected and signed for bundles of cash in A4 envelopes did not mean that they had received the cash. The affidavit, I think it is fair to say, was long on indignation. The third respondent suggested that the applicant's invitation that he might inspect the documents and records underpinning the spreadsheets amounted to the applicant inviting him to disprove the case made against him. Again without dwelling on the detail, the applicant's evidence was repeatedly characterised as speculation, untenable and untrue.
19. In a second replying affidavit sworn on 16th April, 2021 the fourth respondent deposed that her brother's affidavit of the same date was true and accurate. She made a few points as to the detail of the applicant's claims that she had used a company credit card for personal expenditure and so forth and threw down the gauntlet to the applicant to prove that she received "*off book payments*" amounting to €111,212.57.
20. In a third replying affidavit sworn on 21st April, 2021 the third respondent rejected as untrue the affidavit which had been sworn by his father on 14th April, 2021 and invited the court – in assessing what probative weight, if any, ought to be attached to the first respondent's evidence – to take into account that he – the first respondent – completely unbeknownst to the remaining respondents, had defrauded the company of millions of euros.
21. The originating notice of motion, in the ordinary way, was made returnable for the Monday Chancery 2 list and was managed in that list for six months. At the conclusion of the exchange of affidavits it was evident that there was a conflict of evidence that could only be resolved by a plenary hearing and the court directed the exchange of points of claim and points of defence. On 25th May, 2021 points of claim were delivered and thereafter points of defence were delivered on behalf of the third and fourth defendants.
22. When the application was ready for hearing it was transferred into the chancery list to fix dates, where it first appeared on 29th July, 2021. The court was then advised that the

parties had agreed to go to mediation and the case was adjourned to the list to fix dates on 28th October, 2021 and from then to the list to fix dates on 2nd December, 2021.

### **The settlement agreement**

23. By the settlement agreement made in November, 2021 the parties agreed to settle all issues between them on the terms there set out, including that the parties would apply to the High Court, by consent, for disqualification orders against each of the respondents. It was agreed that the appropriate period of disqualification should be not less than fifteen years or such longer period as the court might determine in the case of the first respondent, not less than twelve years or such longer period as the court might determine in the case of the second and third respondents, and not less than seven years or such longer period as the court might determine in the case of the fourth respondent. The parties agreed that the facts on which the application for disqualification should be determined were the facts as pleaded in the points of claim, which were admitted by all parties.
24. As far as the money claims were concerned, each of the respondents agreed to submit to judgment in the sum of €18,000,000 (eighteen million euro), subject to a stay, in the case of the first respondent upon terms that he would pay a total of €15,000 (fifteen thousand euro) by instalments over three years, and in the case of the second, third and fourth respondents until 1st March, 2022.
25. While there is no evidence as to the extent of the assets of the second, third and fourth respondents, neither is there any evidence that there is any prospect that the respondents will ever be able to satisfy the judgment against them. As I will come to, the third and fourth respondents have made an open offer to pay €125,000, between them, which the applicant has rejected. The stay of execution against the first respondent is conditional on the accuracy of a sworn statement of affairs and the provision of an updated statement of affairs for the next three years. The expectation is that the second respondent will be adjudicated a bankrupt on his own petition and that the judgment against him will be dealt with in the bankruptcy. The settlement contemplates that the stay of execution against the third and fourth respondents may be extended if they can satisfy the applicant (which they have not to date) of the true extent of their assets.
26. By the originating notice of motion the applicant sought orders pursuant to s. 608(2) of the Act of 2014 directing the respondents to pay €27,610,161.55. The sum claimed by the points of claim – the make-up of which is now admitted by the respondents – is €27,516,181.62. It is clear that the settlement has been driven, on the applicant's side, by pragmatism. I can see why the applicant would not have spent money pursuing a liability which he had no hope of recovering but I do not immediately see what the respondents might have hoped to achieve by confessing to a judgment for less than their admitted liability. Left to my own devices I might have been inclined to the view that a debtor who – however belatedly – acknowledges his indebtedness ought to submit to judgment for the full amount and pay what he can but I am not asked to, and therefore do not, attach any significance to the difference between the two.

### **The admitted facts**

27. The applicant undertook an investigation of the company's affairs from 1st January, 2005 until 13th June, 2016 when the company was ordered to be wound up. In that time a little more than €13 million was plundered from the company, with the result that its tax liabilities were underdeclared by about €5 million, which in turn gave rise to a liability for interest and penalties of €7 million. The unlawful conduct of the company's business and the respondents' actions in hollowing out the company's assets and business on the eve of the liquidation gave rise to consequential losses and costs of about €2.4 million.
28. The applicant established, and it is now admitted, that there was a deliberate failure on the part of the respondents to maintain accurate books and records and to account properly for significant tax liabilities.
29. The applicant established, and it is now admitted, that the respondents caused and permitted a client account operated by the former solicitors of the company to be used to extract substantial sums of money from the company. A sum of €3,256,166.17 of company funds was paid into the solicitors' client account linked to the first respondent.
30. The applicant identified, and the respondents now admit, that sixteen cheques, amounting in total to €1,576,266.00, which were received from the company's customers in payment for supplies by the company were not recorded in the company's books but were paid into the solicitors' client account. The company was at the loss of this money and its sales and tax liabilities were pro tanto under recorded.
31. The respondents caused and permitted the company to record large cash withdrawals and payments for the benefit of directors and connected parties as payments to its bank for foreign exchange drafts payable to suppliers. The applicant was able to trace to that account, and the solicitors' client account, a total of €4,770,000 which he linked to "off book" payments to the directors, including the respondents. Of that total, he identified €1,503,160 as having been paid to the directors, including the second, third and fourth respondents.
32. Over the ten year period of the review the remuneration paid to directors and employees exceeded by €1.35 million the amount returned to the Revenue Commissioners.
33. The applicant identified, and the respondents now admit, that five persons connected with the directors were on the company's payroll despite not being employed by the company or working in the business. These were the former spouse of the first respondent; the spouse of the second respondent; the spouse of the third respondent; the current spouse of the first respondent; and the stepson of the first respondent.
34. The applicant estimated, and the respondents now admit, that the respondents used company credit cards for personal expenditure amounting to €942,078.32 and used a Musgrave's Cash and Carry account for personal expenditure to the tune of €234,450.00. A total of €236,304.00 was paid by the company to the company's contract cleaning company for the cleaning of the homes of the directors. The company paid substantial

sums to a UK based travel agency owned by the family of the third respondent's wife in respect of the cost of directors' personal travel and gifts to customer procurement personnel.

35. The applicant traced a payment of €130,950 of company money to the second respondent to assist in his purchase of a house in Enniskerry, Co. Wicklow – where he apparently still lives – and a payment of €144,363.19 of company money to the third respondent towards the purchase of a house in Delgany, Co. Wicklow – where he still lives.
36. On 4th February, 2009 a Northern Ireland subsidiary of the company, Endosurgical (NI) Limited, made a payment of GBP£110,000 which it recorded as a payment to the company for purchases from the company. The payment, however, was not made to the company and was not recorded in the books of the company as having been received. Rather the money was paid into a bank account in the name of the second respondent. Later, between July, 2013 and September, 2013 several sums amounting in total to GBP£334,895.00 were paid by Endosurgical towards the acquisition on a public house in Manchester, in the name of the second respondent.
37. In 2011 a total of US\$57,500.00 (€41,029.00) which was recorded as having been paid by the company for supplies, was in fact paid for medical treatment in the United States of America for a member for the second respondent's family.
38. And so on.
39. On 9th May, 2016 the respondents caused and permitted the company to enter a business transfer agreement with a company called Gemini Surgical Innovations Limited ("Gemini"). The directors of Gemini were Mr. Robert Dore, the company's solicitor, and Mr. Cathal McHugh, who had formerly acted as the company's accountant. The second, third and fourth respondents were employed by Gemini.
40. The company purported to transfer substantially all of its assets to Gemini for what is now acknowledged to have been a significant undervalue, and which was not then even immediately payable but was payable in instalments over two years. The business transfer agreement was made at a time when the respondents now acknowledge that they knew (a) that the company was either insolvent or on the brink of insolvency, (b) that the Revenue Commissioners were about to raise large assessments for unpaid taxes, and (c) that the assets the subject of the transfer were the principal means by which the company could discharge its debts. On 11th May, 2016 the Revenue Commissioners raised assessments in the amount of €3,490,875.99, exclusive of interest and penalties. Following his appointment, the applicant took advice as to the validity of the purported business transfer agreement and by originating notice of motion issued on 27th October, 2017 applied for a declaration that the transfer was void *ab initio*. On 29th January, 2018 Gemini consented to an order to that effect.
41. In the meantime, on 24th May, 2016 the applicant had an offer from a company called Hospital Services Limited to purchase the business and assets of the company. The net

realisable stock was estimated at €900,000 but the offer put a higher value – estimated to be about €2,253,500 over three years – on the company’s goodwill. However, earlier in May, 2016 the third respondent had purportedly terminated the distribution agreements with one of the company’s German suppliers, and on 1st June, 2016 Gemini notified its customers – which had all been customers of the company – that the German suppliers had terminated their exclusive distribution agreements with the company. The confusion so created as to Gemini’s status, its claims to have acquired distribution rights for the products, and its claim to be entitled to exclusive distribution rights for several agencies, had the result that the applicant had to renegotiate the sale to Hospital Services Limited. The price ultimately achieved for the company’s goodwill was €600,000, i.e. €1,653,500.00 less than the initial offer.

42. The points of claim, having summarised the wrongdoing complained of, concluded – and each of the respondents now admits – that:-
- (a) The conduct of the respondents amounted to wholesale breach of their duties under s. 288 of the Act of 2014, in particular s. 288(1)(a),(d), (f) and (g);
  - (b) A fraud was perpetrated on the company, its creditors and members, within the meaning of s. 608(1)(b) of the Act of 2014;
  - (c) The respondents failed to keep books of account or to take any reasonable steps to ensure that books of account were kept: which failure contributed to the company’s inability to meet its debts and/or resulted in substantial uncertainty as to its assets and liabilities and/or had substantially impeded its orderly winding up;
  - (d) In spite of having been given the opportunity over the course of several years to explain the matters complained of, the respondents have failed, refused and neglected to do so;
  - (e) It was just and equitable that the court should make orders to recover the total of €27,516,181.62;
  - (f) The court should make a disqualification order against each of the respondents pursuant to s. 842(a), (b), (d) and (f), for such period as the court should deem fit.

**Legal principles**

43. The principles to be applied in determining whether there should be a disqualification order and, if so, the appropriate period of disqualification were most recently restated by O’Moore J. in *Westman Plant and Civils Limited (In liquidation)* [2020] IEHC 703. Starting at para. 53, O’Moore J. said:-

*"53. The judgment of O'Donnell J. in Re Kentford Securities Ltd. [2011] 1 I.R. 585 sets out the two-stage test for the making of an order of disqualification. Firstly, for such an order to be made it must be established as a matter of fact that conduct falling within the relevant statutory categories has been established.*



*Secondly, the Court must decide whether, in the exercise of its discretion, it should proceed to disqualify.”*

44. As the respondent in *Westman Plant* did, so have the respondents in this case consented to a disqualification order. As O’Moore J. did in *Westman Plant*, so in this case I record that I have found facts such as establish that each of the respondents have conducted themselves in a way which falls within s. 842(a) – that they have been guilty of fraud – s. 842(b) – that they have been in breach of duty – and s. 842(d) – that their conduct is such that they are unfit to be concerned with the management of a company; and that the nature of their misconduct is such that in the exercise of my discretion a disqualification order should be made in the case of each of the respondents.

45. In *Westman Plant* O’Moore J. continued at para. 55:-

55. *In Re Bovale Developments Ltd. [2013] IEHC 561, Finlay Geoghegan J. reformulated the principles she had set out in Re Ansbacher [2007] 1 I.R. 580. This reformulation was thought appropriate in order to align the Ansbacher principles with the decision in Kentford. The resultant approach to the question of the length of any disqualification was set out as follows:-*

- (i) A primary but not the only purpose of an order of disqualification is to protect the public against future conduct of companies by persons whose past record has shown them to be a danger to creditors and others.*
- (ii) It is also a purpose of an order of disqualification to improve corporate governance (Re Kentford, O’Donnell J. para. 27 and Re Wood Products Ltd.: Director of Corporate Enforcement v. McGowan [2008] IESC 28, [2008] 4 I.R. 498 per Fennelly J. at para. 46).*
- (iii) A further purpose of an order of disqualification is that it act as a deterrent, both in respect of the respondent director and other directors of companies (Re Kentford, O’Donnell J. at para. 27, quoting with approval Lord Woolf M.R. in Re Westmid Packing Ltd. [1998] 2 All E.R. 124 at pp. 131 to 132). Hence, the period of disqualification should contain deterrent elements.*
- (iv) The period of disqualification should reflect the gravity of the conduct or wrongdoing as found by the Court in relation to the relevant sub-paragraphs of s. 160(2) in respect of which the order of disqualification is being made;*
- (v) A period of disqualification in excess of ten years should be reserved for particularly serious cases;*
- (vi) The Court should firstly assess the correct period in accordance with the foregoing and then take into account mitigating factors prior to fixing the actual period of disqualification.”*

46. I have not been referred to any case in which the headline period of disqualification was greater than fifteen years.
47. In *Bovale* Finlay Geoghegan J. identified the appropriate period of disqualification before mitigating factors, as fourteen years. She identified two particular aspects of the respondents' behaviours as meriting such a lengthy period: being the systematic falsification of the company's books and the scale of the understatement of the respondents' remuneration. Finlay Geoghegan J. went on to identify a number of significant mitigating factors, not least the fact that the respondents had made significant amends and had averred to having learned from their mistakes and their intention to put matters right. She attached significance also to the fact that the hearing of the disqualification application had been delayed for a number of reasons beyond the control of the respondents. The scale of the misstatement of the respondents' remuneration was very large but it related to a two year period ending on 30th June, 1998.
48. In *Custom House Capital Limited* [2016] IEHC 689 Keane J. found that the appropriate period of disqualification was fifteen years. In so finding, he took into account that:-
- "The conduct of the respondents [...] was deeply dishonest; continued over a protracted period of time until, for a variety of reasons, it could no longer be concealed; and was devastating on those innocent persons who had the grave misfortune to entrust the company with their pensions or savings. This is, undoubtedly, a particularly serious case."*
48. In *Westman Plant* O'Moore J. also took a disqualification of fifteen years as the appropriate starting point. In that case the respondent had perpetrated a systematic fraud over about two years which resulted in a loss to the Revenue of about €1.2 million but very little direct reward to the respondent – which O'Moore J. took as an aggravating rather than a mitigating factor.

**The appropriate period of disqualification**

49. The agreement reached between the parties as to the appropriate periods of disqualification does not sit altogether easily with the established legal principles, which were also agreed. Specifically, each of the respondents has agreed that the appropriate period of disqualification should be not less than fifteen, twelve, or seven years, or such longer period as the court might determine. Applying the approach laid down in *Kentford* and *Bovale*, the first step is to determine the "correct" period of disqualification and the second to fix the "actual period of disqualification." The settlement agreement does not in terms spell out that the agreed minimum periods take account of such mitigating factors as there are, but I understand that they do. As I will come to, the solicitors for the respondents each pointed to a number of factors which it was suggested went to mitigation, but neither sought to argue that the appropriate periods of disqualification to be imposed should be less than those agreed. I therefore understand the arguments put forward in mitigation to have been addressed to forestalling any view that the court might take that the periods of disqualification ought to be longer than those agreed.

50. In this case the first respondent in agreeing to submit to a disqualification for not less than fifteen years has correctly acknowledged his misconduct as being at the very top of the scale.
51. Mr. Leggett, solicitor, for the first respondent, submitted that he had cooperated as best he could, that he had met the liquidator and gone through the issues, and that he did not seek to disrupt the liquidation. It was submitted that the first respondent had accepted and agreed his liability long before the hearing; that there had been no loss to shareholders or investors; and that the Revenue liabilities which arose from the matters complained of had been reflected in the debts proved in the first respondent's bankruptcy.
52. I am bound to say that I am by no means convinced of the first respondent's cooperation with the applicant. In the short affidavit which he filed in response to the motion he took issue with "*many of the allegations*" made in the grounding affidavit of the applicant, without identifying which of them he contested. He suggested that his adjudication on 19th December, 2016 would have captured "*any liabilities of the company EuroSurgical Limited for which I may ultimately be found responsible ...*". (My emphasis.) It is true that the first respondent, by his solicitors, advised the applicant's solicitors that he would not be defending the motion but that was because he had no money, rather than because he accepted his responsibility. Incidentally, while the first respondent in his affidavit took issue with many of the allegations against him, in his solicitors' letter of 7th January, 2021 he had denied "*all of the claims levelled against him.*" As was pointed out by the applicant's solicitors in their reply to that letter, the first respondent's declaration that he would not be filing a replying affidavit came at the end of a very protracted correspondence. As far as the evidence goes, the first respondent's first acknowledgment of his liability was in the settlement agreement which was made after the motion had been made ready for trial and was listed to fix a trial date.
53. I do not see it as a mitigating factor that the primary victim of this protracted and elaborate fraud was the Revenue Commissioners, as opposed to investors or shareholders, *a fortiori* given that the beneficiaries of the fraud were the shareholders. Nor do I see it as a mitigating factor that the personal tax liabilities incurred by the first respondent as a result of his dishonesty were dealt with in his bankruptcy.
54. The one significant factor identified by Mr. Leggett is the first respondent's age. He is 67 years old and so will be 82 years old at the end of a fifteen year period of disqualification, at which stage he is highly unlikely to want to go back into business. As Mr. Leggett puts it, fifteen years is enough to ensure that the first respondent will never again serve as a director or other officer of a company or take part in the promotion, formation or management of a company. As I have said, it was not suggested that the actual period of disqualification should be any less than fifteen years.
55. As to the second, third and fourth respondents, Mr. Dore submits that the core wrongdoing was the diversion of funds, the beneficiary of the vast bulk of which was the first respondent. He points to the fact that it was those respondents who proposed mediation and suggests that his clients could not afford to defend themselves. The

settlement agreement, he submits, saved substantial court time and costs. These respondents, it is submitted, were directors only because they were the first respondent's children.

56. The disqualification of the second and third respondents for twelve years, it is submitted, would be "*draconian*" and "*more than meets the case*". Draconian is a word much used and abused by advocates. The second and third respondents having agreed to a minimum period of disqualification of twelve years, cannot be heard to say that I would be excessive or oppressive.
57. In the course of his submission, Mr. Dore suggested that the third and fourth respondents – between them – had made an open offer of settlement of €125,000, which was said to be a multiple of the €15,000 which the applicant had agreed to accept from the first respondent. There was no evidence of any such offer having been made but Mr. Fitzpatrick S.C., for the applicant, acknowledged that it had. However, that offer of settlement had been rejected by the applicant on the ground that he was not satisfied as to those respondents' financial position. As a matter of arithmetic, €125,000 is a multiple of about eight of €15,000. It is also a fraction, one one hundred and forty fourth, of €18,000,000.00. Without any evidence of the third and fourth respondents' means and resources, I could not say that they are entitled to credit for offering to do their best to meet their acknowledged liabilities.
58. In the case of the fourth respondent, the agreed minimum period of disqualification is shorter. Mr. Dore points to the fact – which the applicant agrees was the fact – that she is younger than her brothers and was involved in the matters complained of to a lesser degree and for a shorter period, and that she benefited to a lesser extent than the other respondents from the manner in which the property of the company was dealt with.
59. I have carefully considered the proposed periods of disqualification for the second, third and fourth respondents. It is true that the settlement agreement may ultimately have saved court time and costs, but it seems to me that the manner in which the court application, and before that the correspondence, was met greatly added to the cost. In any event, such modest discount as their late agreement might have attracted is built in to the minimum periods to which these respondents have belatedly agreed. These respondents, having agreed to the disposal of the application on the basis which they have, cannot, in my view, be heard to suggest that they could not afford to defend themselves.
60. Up to the very last minute, the second, third and fourth respondents sought to attribute all of the blame for the manner in which the company's business was conducted to the first respondent, their father, and to play down their own role and responsibility. They have, however belatedly, acknowledged the seriousness of their misconduct and the consequence of disqualification which that must inevitably attract.
61. I am satisfied that the difference in the periods of proposed disqualification correctly reflects the relative culpability of the respondents in the mismanagement of the

company's business and property until the eve of the liquidation but after careful consideration I do not believe that the proposed periods of disqualification in respect of the second, third and fourth respondents take sufficient account of what was done immediately prior to the presentation of the petition.

62. In the second, third and fourth respondents' petition for the appointment of a provisional liquidator, which was presented on 19th May, 2016, the transfer of the company's business to Gemini on 9th May, 2016 was characterised as a recent disposal to an unconnected third party on an arm's length basis for valuable consideration, said to have been in the best interest of the creditors and employees of the company as a whole. The petition shows that the first respondent was involved in what was said to have been the "*decision making process regarding the proposed transfer of the business of the company to Gemini*" but to have changed his mind at the last minute and, through his solicitors, to have questioned the validity of the business transfer agreement. Notwithstanding the opposition of the first respondent and of the Revenue Commissioners, the second, third and fourth respondents went ahead with it. As I have said, the transfer of the company's business to Gemini was challenged by the applicant by originating notice of motion issued on 27th October, 2017 and it was set aside on 29th January, 2018.
63. It is now accepted that the purported transfer to Gemini was made at undervalue and was made at a time when the respondents knew that if the company was not already insolvent, it soon would be. It is accepted that the manner in which Gemini dealt with the company's customers and suppliers had the result that the goodwill of the company realised €1,653,500 less than it otherwise would have realised.
64. The summary of the business transfer agreement in the points of claim starts with the transfer to Gemini but incorporates by express reference the evidence of Mr. Maloney in the two affidavits which he filed. The grounding affidavit of the applicant shows that on 12th November, 2015 the managing director of Hospital Services Limited made an indicative offer to the first respondent which was similar to the offer which was later made to the applicant on 24th May, 2016. From this it is quite clear that the respondents well knew at the time of the purported transfer to Gemini that there was a genuinely unconnected third party interested in negotiating on an arm's length basis for the purchase of the company's business at a far higher price. If, as they deposed when presenting the petition for the winding up of the company, none of the second, third and fourth respondents had an interest in Gemini – save that they were all employees of Gemini – they did not disclose who was behind Gemini.
65. It is now admitted that Gemini was incorporated on 13th January, 2016 – quite soon after the initial approach by Hospital Services Limited – that between then and the date of the purported transfer the second, third and fourth respondents became employees of Gemini, and that Mr. Dore, the company's solicitor, and Mr. McHugh, who had acted an accountant for the company, were appointed as directors of Gemini. With the benefit of hindsight, it is also clear from the petition that the business transfer agreement was the result of a "*decision making process*", and an "*agreed course of action*" and a "*strategy*"

rather than a sale at arm's length, which was later declared by the High Court to have been void *ab initio*. By then, of course, the damage to the value of the company's goodwill had been done. If the reduction in the value of the company's goodwill was not matched by an increase in the value of Gemini's goodwill, that was not for any want of trying on the part of the second, third and fourth respondents.

66. This is not merely a case in which the second, third and fourth respondents facilitated and participated in an egregious and long running fraud until they were exposed but a case in which, when they could see the writing on the wall, they brought with them nearly three quarters of the value of the company's business with a view, at least, to preserving or replacing their jobs. That, in my view, makes the case, as far as each of the respondents are concerned, at least as serious than those in which the appropriate period of disqualification has been assessed at fifteen years.
67. I see no evidence of repentance, or of any effort to make amends. While the second, third and fourth respondents have consented to the making of disqualification orders, they do not appear to me to have truly recognised their responsibility but rather persist in emphasising that the first respondent, their father, had the lion's share of the spoils. It may very well have been that these respondents would not have been directors of the company if they had not been the first respondent's children, but they were directors of the company for, respectively, fifteen, fourteen and about seven years.
68. Taking into account in each case the fact that the application – having been contested for a long time on correspondence and on affidavit – was conceded at the eleventh hour, and in the case of the fourth respondent the fact that her complicity was less, and for a shorter period of time, I have concluded that the actual period of disqualification in the case of the second and third respondents should be fourteen years and three months, and in the case of the fourth respondent nine years and nine months.

#### **Conclusion and order**

69. For these reasons, I will make an order in the terms of the notice of motion disqualifying the first respondent for a period of fifteen years; disqualifying each of the second and third respondents for fourteen years and three months; and disqualifying the fourth respondent for nine years and nine months.
70. As has been agreed in the settlement agreement, there will be judgment against the first respondent on a several basis for €18,000,000.00, with a stay on execution on the terms set out at para. 2; judgment against the second respondent on a several basis for €18,000,000.00, with a stay on execution on the terms set out at para. 3; and judgment against the third and fourth respondents on a joint and several basis for €18,000,000.00, with a stay on execution on the terms set out at paragraph 4.
71. I will make an order to receive and file the settlement agreement and stay all further proceedings with liberty to apply to enforce the terms and conditions of the settlement agreement.