THE HIGH COURT

[2021] IEHC 364

2010 No. 651 COS

IN THE MATTER OF WHELAN LIMESTONE QUARRIES LIMITED (IN LIQUIDATION) AND RELATED COMPANIES

AND

IN THE MATTER OF WHELANS LIMESTONE QUARRIES (CONTRACTS) LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 1963

AND

IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990

AND

SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

CARL DILLON

APPLICANT

AND

ENDA WHELAN, CHRISTINA WHELAN, BRIAN WHELAN, EDWIN RYAN, THOMAS MCCONWAY AND JOHN MCKEOGH

RESPONDENTS

JUDGMENT of Mr. Justice Quinn delivered on the 19th day of May, 2021

1. The applicant is the liquidator of five companies in the "Whelans Limestone" Group, namely Whelan Group (Ennis) Limited, Shannon Explosives Limited, Whelans Limestone Quarries Limited, Whelans Limestone Quarries (Carrigtwohill) Limited and Whelan Limestone Quarries (Contracts) Limited.

2. On 5 December, 2011, an order was made pursuant to s. 141 of the Companies Act 1990 that the companies in the Group be wound up together as if they were one company. That order contained a "carve out" in respect of any intended applications for restriction orders pursuant to s. 150 of the Companies Act 1990, having regard to the fact that some of the companies had different boards of directors.

3. Section 150 of the Companies Act, 1990, provides: –

"150.—(1) The court shall, unless it is satisfied as to any of the matters specified in subsection (2), declare that a person to whom this Chapter 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 or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in subsection (3) [as to allotted share capital]; and, in subsequent provisions of this Part, the expression "a person to whom section 150 applies" shall be construed as a reference to a person in respect of whom such a declaration has been made.

(2) The matters referred to in subsection (1) are—

(a) that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason

why it would be just and equitable that he should be subject to the restrictions imposed by this section, or …"

4. On 24 February, 2015, the applicant issued applications pursuant to s. 150 against six named directors of companies in the Group.

5. Declarations of restriction have already been made against Enda Whelan, Edwin Ryan, Thomas McConway and Brian Whelan. Christina Whelan is deceased. This judgment relates to the application in the matter of Whelan Limestone Quarries Limited ("Quarries") and Whelan Limestone Quarries (Contracts) Limited ("Contracts") for a declaration against John McKeogh, the respondent.

6. The business of Quarries was the manufacture of quarry stone and concrete products from eight locations in Connacht and Munster supplying product to large infrastructural building companies. The business of Contracts was the laying of asphalt/tarmacadam products for local authorities on a large scale.

Initial correspondence

7. The applicant was appointed liquidator on 3 December, 2010. On 14 February, 2011, the applicant made initial contact with the directors of the companies. The respondent says that he replied to that letter on a timely basis. He says that the next he heard from the applicant was when he received a letter dated 15 April, 2014, in which the applicant informed the respondent that he had investigated the affairs of the companies and the conduct of the directors and that he was required to make a report to the Office of the Director of Corporate Enforcement (the "ODCE"). By this letter, the applicant identified areas of concern that had come to his attention in the course of his investigation of the affairs of the companies. The issues referred to in that letter were described under the following headings:

   (1) Fraudulent operation of invoice discounting facility;

   (2) Liabilities / creditors;

   (3) Failure to file accounts;

   (4) Revenue debts;

   (5) Assets unaccounted for;

   (6) Failure to address insolvency.

   The applicant stated that this correspondence would be drawn to the attention of the ODCE in the context of his reporting obligations and he stated that "*I reserve the right to issue proceedings pursuant to s.160 of the Companies Act 1990 and in particular subs. 2 (d) thereof.*"

8. Section 160 is the provision in the Act of 1990 for the disqualification of a person from acting as a director or otherwise being concerned in the affairs of the company in any way.

9. Having described the issues of concern the applicant then stated as follows:

> *"I have therefore concluded, pending receipt of your responses, that you are unfit to be concerned to take part in the management of the company within the meaning of s. 160 (2) (d) of the Companies Act 1990."*

10. On 24 April, 2014, the respondent replied requesting extensive documentation to enable him to address the substance of the applicant's letter. He stated that three years earlier he had responded to the applicant's initial letter and had heard nothing further. He said that he did not have any books or records of the companies, and that he needed copy documentation to reply. He noted that proceedings pursuant to s. 160 would have serious repercussions for him and his livelihood. He said that he would reply after receiving relevant documents, and that "*it would be more beneficial to have one comprehensive response to you, rather than dealing with it on a piecemeal basis.*"

11. On 28 May, 2014, the applicant replied and enclosed certain documents, which were not exhibited. In relation to the allegation of "*fraudulent operation of invoice discounting facility*", he states that he enclosed the following: -

    (1) A copy of the Agreement with Bank of Scotland (Ireland) Commercial Finance Limited ("BOSI");

    (2) A listing of invoices presented to BOSI;

    (3) An extract from the *"Internal Accountant's Report prepared when the company was seeking to enter examinership*". This was a reference to a report of the Independent Accountant, BDO.

    The applicant said that the respondent was aware that there was: -

    > *"an issue of the most serious nature in respect of the reissuing of invoices. You were a party to a number of meetings and discussions with representatives of BOS and others in early November 2010. It is my understanding that an investigation by a third party on behalf of BOS revealed the extent of the duplication and this subsequently led to you resigning as Group Finance Director. From my investigations it appears that prior to your resignation you were the Group Finance Director and therefore had full responsibility for the financial affairs of the Company…"*

    The applicant concluded: -

    > *"My conclusion is based on the detail in my letters (sic) of 15 April, my enclosures to this letter and the totality of my investigations as liquidator…"*

Finally, the applicant invited the respondent to furnish any information so that it could be forwarded to the ODCE.

12. There followed a protracted exchange of correspondence regarding access to information and documents which continued for more than five years.

13. On 12 September, 2014, the ODCE wrote to the liquidator informing him that he had not been relieved of the obligation to bring applications for declarations under s. 150 of the Act of 1990. That of itself does not explain why the applicant in his initial correspondence having cited s. 160 (disqualification) proceeded only by reference to s. 150 (restriction).

These proceedings: interlocutory applications

14. On 24 February, 2015, the applicant issued these proceedings seeking declarations of restriction. The proceedings have a long and protracted history, some of which it is necessary to recite.

15. The application was first listed before the court on 13 April, 2015. It was adjourned from time to time throughout 2015 and 2016 whilst the parties exchanged communications regarding the respondent's request for access to documents and company information to enable him to prepare a replying affidavit.

16. The respondent swore an affidavit on 3 March, 2017. He made a preliminary response to the substantive issues raised by the applicant but the central thrust of that affidavit was to say that the respondent still required information and documents to make a comprehensive and meaningful response to the applicant's application. He asserted that because the onus is on him as respondent to a s. 150 application to prove that he acted honestly and responsibly in relation to the affairs of the companies, it was unfair that he should be required to meet the application without access to relevant documents and records of the companies. The matter was adjourned on numerous further occasions and further correspondence and communications were exchanged between the parties regarding access to documents.

17. On 22 July, 2017, the respondent issued a motion pursuant to O. 31 of the Rules of the Superior Courts ("RSC") seeking an order for discovery of eight categories of documents. That application was heard by Haughton J. in November 2017, who declined to make an order for discovery. The principal reasons for this decision were that the respondent had been afforded ample opportunities to obtain access to documents which he claimed he needed to defend the application and that the respondent had contributed to any information deficit by not providing documents to the applicant in the first place.

18. The respondent appealed the judgment of Haughton J. and the appeal was dismissed by the Court of Appeal on 25 October, 2019.

19. Following the delivery of the judgment of the Court of Appeal, the respondent stated that he wished to take up certain offers which had previously been made to inspect documents. It emerged at this point that the premises where records had been stored

had been sold by a receiver appointed to the companies and that the relevant documents, according to the liquidator's solicitors, were "*presumably destroyed*".

20. The respondent then brought an application seeking an order pursuant to the inherent jurisdiction of the court striking out or staying the proceedings. The grounds advanced for that application were that information and documents requested by the respondent of the applicant had not been provided to him. He claimed that the applicant's failure to provide the relevant documentation had prejudiced his ability to defend himself and in particular his ability to discharge the onus of proof that he had acted at all times honestly and responsibly in relation to the affairs of the companies.

21. I delivered a judgment on 6 November, 2020, ("the First Judgment"), dismissing that application. See *Re Whelan Limestone Quarries Limited (In Liquidation) and Related Companies* [2020] IEHC 564. In short, I found that the respondent's contribution to any documentary deficit he encountered in meeting this application, notably by his failure to take up opportunities to inspect relevant documents on a series of occasions over a long number of years, was so material that the order dismissing these proceedings should not be made.

22. The long and protracted chronology of these proceedings and interlocutory applications is set out in detail in the First Judgment and it is unnecessary to repeat that here save for certain observations quoted below.

23. In that judgment, the court was not required to determine the substantive merits of the restriction application. Nonetheless, the court was required to consider the respondent's submission as to the unfairness and prejudice he claimed was visited on him by reason of the absence of access to documents and material sought by him from the applicant.

24. It is well-established that in proceedings under s. 150 the onus of establishing that a respondent has acted *"honestly and responsibly in relation to the affairs of the company"* rests on the respondent. However, I was concerned that in this case allegations of fraud had been made and I observed that the usual onus of proof may require modification in a case where a applicant alleges fraud: –

> *"The liquidator is correct in submitting that in a restriction case his duty is to present his 'concerns' and any relevant evidence, with the onus resting on the respondent to prove that he acted honestly and responsibly in relation to the affairs of the company. However, most applications for restriction declarations involve no allegation of fraud. A case in which fraud is alleged would frequently give rise to proceedings for sanctions more grave than restriction, such as disqualification or declarations of personal liability for debts of the company. In a restriction case where fraud is alleged, the principle that the onus of proof of acting honestly and responsibly in relation to the affairs of the company rests on the respondent directors must be balanced against the application of the principle that an allegation of fraud in any form of case must not be made lightly, and without the party making the allegation having duly investigated and researched the matter and*

ultimately adducing his evidence to support such a serious allegation. The production of such evidence may be constrained by the limitations as regards documents and records of the company which in many cases apply to liquidators who can only adduce such evidence as they are in a position to extract from company records or otherwise in the exercise of statutory powers."

25. In relation to any deficit of documentation and information available to either of the parties in this case, I made the following observations as regards the role of the liquidator: -

> *"After the judgment of the Court of Appeal, the respondent stated that his client now wished to take up the offer to inspect documents at the storage facility in Ennis. It then emerged that the receiver had sold the premises at Ennis, and that records were removed from the premises 'and presumably destroyed and he has now got no access to them'. That the liquidator permitted circumstances where documents and records of the company were destroyed is surprising having regard to the ongoing liquidation proceedings, these contentious restriction proceedings and the contentious correspondence and applications regarding access to documents. Nonetheless, the respondent contributed materially to the situation in which he then found himself by having failed to avail of inspection opportunities when they were made available to him."*

26. Finally, as regards its relevance to the substance of this application, I said: -

> *"I add the observation that the absence of certain documents does not preclude the respondent from providing to the court at the hearing of the restriction proceedings a full account of his conduct for the period of his tenure as a director of the company (see McGuinness J. in Re Squash (Ireland) Ltd [2001] IESC 200). It is not for the court on this application to direct how the parties should advance their evidence or progress any further hearing. It will be open to the respondent to advance his evidence, and in the course of doing so, make such references to any documents or any documentary deficiency he believes is relevant, particularly where allegations of fraud are made. In determining the substantive application the court will, as always, weigh the balance between the evidence adduced by the liquidator in his grounding affidavit, supported by such documents as the liquidator exhibits, against the sworn evidence adduced by the respondent and any such documents as he may exhibit, but in doing so will be reluctant to reopen matters already canvassed in this application and in the discovery applications and appeal".*

Mindful of these observations, I turn to the substantive issues of concern identified by the applicant.

This application

27. The application is grounded on affidavits sworn by the applicant on 20 February, 2015. A virtually identical affidavit is sworn in relation to each of Quarries and Contracts.

28. The applicant states that Enda Whelan was the Managing/Operations Director of the company who had overall responsibility for the management. He is satisfied that Enda Whelan *"as Managing Director, bears a large degree of responsibility for the manner in which the company was run."*

29. The applicant refers to Brian Whelan as the "*Director of Operations/Transport Director*". He believes that he and Enda Whelan were charged with the running of the Whelan Group of companies following their father's retirement.

30. In relation to the respondent, the applicant states as follows: -

> *"…John McKeown was the Finance Director and Chief Executive Officer of the company. In particular, it appears that he was responsible for leading the management team in execution and delivery of the annual targets established by the board of directors, developing the strategic plan and vision for the company, achieving planned revenue growth while controlling costs and reducing the overall level of debt being carried by the company and managing investor relations."*

31. This description is an extract from the respondent's contract of employment dated 1 November, 2007. The respondent says that the contract is not an accurate reflection of the *de facto* role performed by him.

32. The respondent resigned as a director on 11 November, 2020, in circumstances detailed below. The applicant says "*I am satisfied from my investigations that he had an integral role in the running of the company and that his resignation does not absolve him from his responsibly*".

33. At no point has the respondent suggested that his resignation approximately one month before the liquidation of the companies would absolve him from responsibility for any of the matters the subject of these proceedings.

34. The liquidator says that the failure of the companies *was "caused and contributed to by the severe downturn in the building industry but that the particularly severe exposure for creditors was due to: -*

    (i) Fraudulent management of book debts;

    (ii) want of proper financial management and control and

    (iii) continuing to trade while the company was insolvent.

    I regard the foregoing matters as also the principal matters of concern as regards the conduct of the affairs of the company by each of the respondents."

Substantive issues identified by the applicant

35. Quarries was a party to an invoice financing agreement ("the Agreement") with BOSI dated 5 September, 2003. It also granted a debenture creating a floating charge over book debts in favour of Anglo Irish Bank Corporation.

36. Under the Agreement debts of Quarries were notified to BOSI by way of month-end reconciliations based on cumulative day book listings of all invoices issued by Quarries. The Agreement provided that BOSI would, subject to certain charges, advance to Quarries up to 80% of the "*relevant debts*".

37. The applicant says that over a significant period of time Quarries notified to BOSI invoices that were generated not by Quarries, but by Contracts for work done by Contracts, a company that was not a party to the Agreement. The applicant says that this practice had been engaged in from the middle of 2009 onwards and that sums wrongfully notified to BOSI and paid into the client account of Quarries amounted to €7.6m.

38. The applicant referred then to a "*second aspect of this fraud*". The Agreement provided that in respect of any debt not paid in full to BOSI within ninety days from the invoice date, BOSI could require Quarries to reimburse it. The applicant says that *"to get around the disruption to cash flow which this could cause, it appears that unpaid invoices were re-inputted in the accounting system as current invoices – the bank will therefore not clawback payments under Clause 6 of the Agreement"*.

39. When BOSI investigated the matter it uncovered €5m worth of invoices which appeared not to have been aged properly on the Quarries' debtors' ledger. The bank subsequently located two files containing debtors' reports and the debtors' ledgers were for different total amounts €12m and €16m. The applicant says that it appears that Quarries had been keeping two debtors ledgers, one for the bank and an accurate one for lesser amounts.

40. The bank stopped advancing funds under the Agreement in November 2010 but agreed to continue limited financial support to Quarries for the purpose of an intended examinership.

41. The liquidator states that the consequences of these practices were grave. He states that it is "*impossible to separate the conduct described above from the developing insolvency of Quarries over time, and the deficit that existed at the commencing of the winding up was in the region of €66,434,989.69*".

42. The liquidator concludes as follows: -

> *"Put at its simplest the conduct with which I am concerned increased the liability of Quarries to the bank by some millions on the basis of what I can only conclude was a deliberate, dishonest practice designed to prolong the trading lifespan of Quarries, and of the wider Whelan Group also.*
>
> *I can only conclude that the systematic duplication of invoices was both deliberate and dishonest. I also conclude that the respondents herein and in particular the directors who were directors of Contracts also, must have known and indeed had a duty to make themselves aware that the practice described above was ongoing. Certainly I find it very hard to accept that anyone in an executive role within Contracts was not aware of it. Those that were not aware – whether executive or*

non-executive – should have been. I do not accept that the resignation of Mr. John McKeown which I understand may have been prompted by the uncovering by the bank of the practices described exonerates either him or any of the other directors named herein from their share of responsibility."

43. The liquidator states that he believes the company was insolvent for a significant period of time prior to the commencement of the winding up. He says that it appears from his investigations that at the very latest from November 2009 the respondent should have been aware that a situation of insolvency had arisen of the most serious kind. He continues *"the duplication of invoices served both to disguise the insolvency of the wider group as a whole (by the procurement of further funds from the bank) but also to compound the difficulties of Quarries in particular and thereby its creditors*."

44. He then states "*the sheer scale of the deficit points to the need for and want of robust, ongoing financial control which was wholly lacking as far as I can see*".

45. The applicant states that he acknowledges that an unsuccessful attempt was made to procure a scheme of arrangement through examinership, noting that this attempt was withdrawn at an early stage due to an absence of support from NAMA and he states that he believed it was unrealistic to have attempted an examinership without first securing NAMA support.

46. Finally, the liquidator refers to a failure to comply with the requirements of the Companies Acts. He states that annual returns and accounts for 2005, 2006, 2007 and 2008 were filed at the Companies Registration Office late and that no annual returns or accounts were filed thereafter.

Evidence

47. The only exhibits to the applicant's grounding affidavits are Companies Registration Office printouts, his certificate of the company's insolvency, a letter from the ODCE confirming that the applicant was not relieved from his obligation to bring this application, correspondence exchanged between the applicant and Mr. Enda Whelan and the respondent, without enclosures, and the statements of affairs of the companies.

48. In a supplemental affidavit sworn on 5 March, 2021, the applicant exhibits certain of the previous correspondence exchanged regarding inspection of documents. In particular, he referred to letters sent by his solicitor to the respondent's solicitors on 28 November 2016, and 7 June 2017. He exhibits a list of the documents enclosed with those letters, but does not exhibit the enclosures. By the applicant's own admission, he did not retain the enclosures to the letter of 7 June, 2017. Remarkably, neither did the respondent. Therefore, those enclosures were not before the court on this application.

49. In this affidavit, the applicant complains that a number of the matters raised by the respondent have been raised in the replying affidavits for the first time. Apart from referring to the previous correspondence and opportunities for inspection of documents and the unsuccessful application of the respondent for discovery and the unsuccessful

application to dismiss the proceedings, the applicant does not proffer any evidence to contradict the evidence put forward by the respondent in his three affidavits.

50. The respondent swore three affidavits, on 3 March, 2017, 11 February, 2021, and 26 February, 2021.

51. The respondent states that while his title pursuant to his letter of employment was "*Chief Executive Officer (CEO) and Director"* the de facto managing directors and chief executive were Enda Whelan and Brian Whelan.

52. The respondent states that he was reliant on the accuracy of information submitted to him by three financial accountants and a financial controller within the Whelan Group, in particular in relation to the operation of the Agreement with BOSI. He states that those officers reported to him, but principally to the Whelan brothers.

53. Importantly, the respondent states as follows: -

> *"I was not a shareholder or a stakeholder in any of the Whelan group of companies. I was not paid a bonus profit share or an incentive by reference to performance of the group or otherwise. I was not an authorised cheque signatory on any bank account except for Shannon Explosive Limited. I did not have authority/authorisation to make any payment to any supplier/stakeholder and/or authority to deal with payroll issues or authorise payment of weekly/monthly wages/salaries and I did not have direct access to the banking information of the group."*

54. These are unusual limitations to apply to a person holding the title *"Chief Executive Officer and Director"*, and call into question the reality of the terms of the letter of employment.

BOSI invoice discounting

55. In relation to the allegation concerning duplicate invoices issued to BOSI, the respondent states as follows: -

> *"From my recollection of the limited material available to me I am sure that no invoices were issued by Contracts to any party and submitted to BOSI for payment under the business finance agreement".*

56. In his affidavit of 26 February, 2021, the respondent states as follows: -

> *"The sales and invoicing were managed by a separate department such as the dispatch processing staff, the pricing team, the credit note processing team, customer service and risk management together with the financial accounting staff. All of these functions were managed and controlled by the member of the Whelan family on the Board of Directors and I say that I had no involvement in the operation of same. It does not appear from the affidavit of Mr. Dillon that he says from his investigations that he believes that I had any role to play in these matters.*

He limits his comments to saying that he finds it hard to accept that anyone with an executive role was not aware of it".

57. The only documents before the court in relation to the debtors ledger issue comprise material exhibited by the respondent. He says that under cover of a letter from the applicant's solicitors Maguire O'Halloran dated 28 November, 2016, eighteen months after the commencement of these proceedings, and almost six years after the applicant's appointment, he received copies of certain internal BOSI material.

58. The letter from Maguire O'Halloran enclosed: -

    (a) An email dated 2 November, 2010, from Joseph McCrea to Paul Daly and Suzanne Quinlan (all of Bank of Scotland Ireland),

    (b) An email dated 4 November, 2010, from Katrin Lapstick to Paul Daly (each of Bank of Scotland Ireland);

    (c) Memorandum undated and unsigned, over the name Paul Daly headed "*Whelan's Limestone Quarries Ltd*".

59. In the first email, McCrea says that he has *"significant concerns regarding the integrity of the ageing on the September 2010 ADA*" and he details amounts identified.

60. In the second email, dated 4 November, 2010, Ms. Lapstick refers to certain items being queried, and says that the company had referred her enquiry to the respondent. Only 1 of its 3 pages is exhibited. Ms Lapstick is suggesting that Mr. Daly "follow up", with the company a number of queries over discrepancies on the debtor ledger.

61. The third item is a memo undated, apparently written by Mr. Paul Daly which opens as follows: -

    "Below is a note to the events that occurred in relation to Whelan's Limestone Quarries Ltd from Bank of Scotland (Ireland) (BOSI) perspective. The note covers the period from the 2nd November, 2010 to 9th November, 2010. It was during this period that we discovered significant differences between the value of the debtors ledger held by BOSI and the actual debtors ledger that Whelan had."

62. This note appears to be a record of contacts between BOSI and the company following the discovery of discrepancies on the debtors' ledger. It refers to internal communications at BOSI on 2 November, 2010, and that on that day Mr. Daly contacted the respondent. It notes that the respondent's "*initial reaction was that this situation must be a systems problem."*

63. The note records that BOSI then engaged directly with the company and a meeting was held on 3 November, 2010. The copy of this memo produced appears to have a page, or more, missing and refers to further meetings held on 8 and 9 November, 2010. By this

stage, BOSI had engaged KPMG to assist and the company's auditors BDO attended a meeting with BOSI and KPMG.

64. It is unnecessary to recite here the dialogue which occurred at these meetings, and no evidence is given by any attendees other than the respondent. Mr. Daly's memo is of no probative value, and the only evidence before the court of these communications is the respondent's description of the meetings he attended. He says that he cooperated as best he could but simply did not have the information sought.

65. In the affidavit of 26 February, 2021, the respondent states that he had been under extreme pressure and stress during the course of 2010 and that early that year had spent three days in hospital suffering from stress and high blood pressure. He says that after his release from hospital he wanted to resign as a director of the group but was pressurised by the shareholders to stay on. He says that the pressure and stress continued and resulted in feeling unwell again in October 2010.

66. The respondent refers to the events of 2 to 9 November, 2010. He says that when he was contacted by Mr. Daly on 2 November, 2010, he was shocked by the nature of the telephone call. He says that the management of the BOSI invoice discounting facility was not part of his brief and he relied on the Whelans to whom this function was attributed. He says that he was unable to answer the BOSI questions when the issue was under review by the Whelans. He says that on 10 November, 2010, the shareholders of the companies, including Brian Whelan and Enda Whelan, together with a representative of ICC Venture Capital, put him under serious pressure to resign, saying that his resignation would be necessary for the examinership to have any prospect of success. He concludes by stating:

> *"There was a direct target on me and I was ganged up on and put under severe pressure to resign notwithstanding that I was not involved in any way either directly or indirectly in the allegations which hang over me. I ultimately resigned on the 11th November, 2010. This pressure and stress resulted in damage to my health which has continued as these allegations continue for the past seven years."*

67. The report of the independent accountant, Mr. Neil Kelly of BDO, prepared for the purpose of the examinership is dated 21 November, 2010. In the introduction to that report, Mr. Kelly refers to the "*group reporting inadequacies*" and states that these inaccuracies related to the recording of duplicated sales invoices and the non-recognition of expenses in the profit and loss account. He refers also to the excess drawdown on the invoice discounting facility in 2008, stating that at that time there was a current excess drawdown on the facility of €2.9 million.

68. Mr. Kelly also states, in the section of the report relating to s. 297 of the Companies Act, 1963 the following:

> *"It is my opinion as a result of information disclosed to me in the course of the preparation of this report, as detailed in group reporting inadequacies on p. 7, that*

further enquiries by the examiner may be warranted with a view to proceedings under s. 297 and 297A of the Principal Act."

69. By a letter dated 19 November, 2010, BOSI stated their intention to continue the invoice discounting facility to the company during examinership.

70. Ultimately, the company was unable to secure the support of NAMA for the petition for the appointment of an examiner and it was withdrawn.

71. No information has been provided by the liquidator as to whether any enquiries were made by him by reference to s. 297 and s. 297A of the Act of 1963, or if so what findings he made. I have already referred to the omission of the liquidator to explain why his initial conclusion that these matters would give rise to a disqualification order pursuant to s. 160 was first made and no explanation given as to why these proceedings were brought only as restriction proceedings pursuant to s. 150.

72. In his grounding affidavit, the high point of the applicant's complaint against the respondent under this heading is that he and the other directors had a duty to make themselves aware of the practice described which was ongoing and he concludes *"I find it very hard to accept that anyone in an executive role within Contracts was not aware of it."* In the absence of direct evidence from the applicant to controvert the respondent's evidence this conclusion is based only on surmise.

73. In my First Judgment, I identified the question which arises in terms of the balance to be achieved between the onus of proof on a respondent director in a restriction proceeding and the general rule that a party making an allegation of fraud in any form should not do so lightly and must have thoroughly and duly investigated and researched the matter and be in a position to adduce evidence. I also noted the fact that in this case the applicant had permitted circumstances where documents and records of the company were destroyed and that this was unsatisfactory having regard to the fact that the liquidation proceedings were ongoing, these contentious restriction proceedings were ongoing and that the parties had been in contentious correspondence and applications to this court regarding access to documents. The consequence of this has been a paucity of documentary evidence, a factor contributed to by both the applicant and the respondent.

74. Having regard to the uncontradicted evidence I have come to the conclusion that the allegation that the respondent was a party to or knew or *"must have known"* of the *"fraudulent management of both debts"* has not been made out.

75. This leaves a separate question as to whether in his capacity as Finance Director the respondent's failure to identify BOSI invoices issue amounted in itself to a want of honesty and responsibility in relation to the affairs of the company.

76. As a general rule, it is logical that a person holding the position of Finance Director is under a duty to make himself sufficiently aware of the day to day finances of the company that such a matter would come to his attention so that he could act accordingly.

The applicant refers to the well-established line of authority that a director who is either non-executive or passive cannot be exonerated by virtue of such a role (*Alvonway Investments Limited* [2020] IEHC 376, *Re Walfab Engineering Limited* [2016] IECA 2 and *Mannion v Connolly & Anor* [2013] IEHC 544). The respondent's evidence, uncontradicted, is that he was proactive in the role he performed, that he was positively excluded from management of the invoice financing arrangements and that the mismanagement of the debtors ledger was concealed from him by his fellow directors.

77. The applicant also refers to the principle that delegation by directors of their functions does not absolve them from the obligation of supervision (per Finlay Geoghegan J in *Re RMF (Ireland) Ltd* [2004] 3 I.R. 498). The applicant says that the contention by the respondent that he was reliant on employed accountants despite himself being an accountant, does not absolve him from his duties. As a general proposition this is correct. However, the unusual feature of this case is that the respondent, despite holding the title "Finance Director" was excluded from involvement in a function so important to a company's cash flow as the operation of the invoice discounting facility. In his supplemental affidavit the applicant proffers no evidence to counter the respondent's description of events, and confines himself to defending the manner in which he addressed requests for access to documents.

Trading whilst insolvent

78. The applicant states that he believes that the company was insolvent *"for a very significant time prior to the commencement of the winding up in December 2010"*. He states:

> *"It appears from my investigation that from – at the latest – November 2009 the respondents should have been aware that a situation of insolvency had arisen of the most serious kind. The duplication of invoices serves both to disguise the insolvency of the wider group as a whole (by the procurement of further funds from the Bank) but also to compound the difficulties of Quarries in particular and thereby its creditors."*

79. The liquidator states that the *"sheer scale of the deficit points to the need for and want of robust, ongoing financial control which was wholly lacking, as far as I can see."*

80. No details are provided by the applicant as to the information which he found during his investigation which leads him to the conclusion that the respondents should have been aware of a situation of insolvency from November 2009.

81. In his grounding affidavit, the applicant states his opinion that the failure of the company was caused and contributed to by the severe downturn in the building industry, but that the particularly severe exposure for creditors was due to the matters identified in his affidavit regarding debts, want of proper financial management and control and the continuance of trade while the company was insolvent.

82. In his affidavit of 26 February, 2021, the respondent rejects the allegation that he failed to address the issue of insolvency. He says that in 2009 all key stakeholders *"including financial institutions and major creditors"* were aware of the Group's position and many of them were obtaining information on the Group's performance. He says that BOSI carried out monthly site audits on the debtor books and that no issues were raised by them until November 2010. He then says that he did his best to assist with what was a difficult time financially and that he took the following steps: -

"(a) I took steps to improve corporate governance.

(b) I assisted in the negotiations resulting in the restructuring of debts to financial institutions.

(c) I assisted in putting in place agreement with financial institutions for the disposal of non-performing assets.

(d) I assisted in the reduction of employees in the company from 280 to circa 120 without a lot of those all put on reduced hours.

(e) I assisted in providing for a reduction of costs in all areas and implementation of a JIT system for all purchases.

(f) I assisted in the company entering into repayment agreements with the main creditors regarding old debts.

(g) A receiver was appointed to protect the group's investment in Uniform Construction.

(h) The services of IBI Corporate were engaged to dispose of Shannon Explosives Limited.

(i) There was an active approach to ensure all work taken on was profitable and

(j) There was a reduction in overheads by merging locations and closing offices."

83. The respondent continues by stating that *"these cost cutting exercises were beginning to work"* and he says that as far as he can recall *"sums due to third party creditors improved in the twelve-month period leading up to the liquidation"*.

84. The report of the independent accountant prepared for the examinership petition is not of itself direct primary evidence of the efforts that were made to restructure the company's affairs over the course of the last year. Nonetheless, it refers also to the events of 2010 and is consistent with the evidence proffered by the respondent.

85. The applicant in his replying affidavit of 5 March, 2021, does not address or contradict the respondent's description of his role in relation to the company's efforts at improving its position over the period of twelve months prior to liquidation.

86. Nor does the applicant contradict the respondent's description of the events of early 2010 when he was under extreme pressure and hospitalised and that when he left hospital he was pressurised by the shareholders to stay on.

87. The applicant does not say when exactly he believes the companies ought to have been liquidated, and does not address the respondent's role in the failure to liquidate earlier. All directors of a company have duties and responsibilities in such circumstances, and the respondent has described the actions he took in his capacity as Finance Director. Nonetheless, a decision to liquidate is a decision of shareholders and the respondent's evidence is that decisions in such fundamental matters were taken by the Whelans. The respondent was not a shareholder and therefore not in control of any decision to cease trading or liquidate the companies.

88. I accept the respondent's evidence that he was not the party in control of the company's destiny over the course of the last year of its trading when it was under severe financial pressures.

Failure to comply with CRO filing requirements

89. The applicant states that the annual returns and accounts for 2005 and 2006 were not filed until 2009, annual returns for 2007 and 2008 not filed until 2010 and that no annual returns or accounts were filed thereafter.

90. In his affidavit of 3 March, 2017, the respondent acknowledges that there were delays in filing of the accounts for the years 2005, 2006 and 2007. He says that this related to a fundamental uncertainty regarding the recoverability of amounts owing by Uniform Construction Limited, a company which had been acquired by the Group at a cost of €50 million. The uncertainty arose from an arbitration dispute between Uniform and Limerick City and County Council which took place over a four-year period ending in 2007/2008, culminating in an award to Uniform of circa €32 million.

91. The respondent states that he believes that there were communications between the company's external auditor, BDO Simpson Xavier, and the CRO explaining this issue and the reasons for the delay. His recollection is that certain dispensations were received from the CRO.

92. The respondent says that he sought access to this correspondence from the liquidator but it was not provided to him and this is why it has not been exhibited.

93. The report of the independent accountant addresses this issue and substantiates the explanation given by the respondent.

94. The respondent states that he did not believe that this issue caused any loss to creditors because the companies kept the substantial creditors up to date on progress with Uniform and advised them of the contents of management accounts and of the difficulties the Group was encountering. He says that this updating was provided both to significant trade creditors and also to the company's principal bankers, Anglo Irish Bank Corporation Plc and BOSI.

95. A persistent failure to comply with requirements to make CRO filings is a serious matter and in many companies falls within the responsibility of a finance director. The description by the respondent of the reason for the delay in the filing of the relevant returns again stands uncontradicted by the liquidator. That description is not a full justification for the failure and delays in relation to the filing of accounts but the respondent has given the reasons for this occurrence. I accept that it was a matter outside his control and not evidence of neglect or a lack of responsibility on his part.

Conclusion

96. To avoid a declaration of restriction pursuant to s. 150 of the Act of 1990 a respondent must discharge the onus of establishing that he has acted honestly and responsibly in relation to the affairs of the company and that there is no other reason why he ought to be subject to such a declaration.

97. Even taking that onus on a respondent, in a case where it is alleged that a respondent has been party to fraud, it is not sufficient for the liquidator to simply outline the circumstances of his concern as to fraud, and to say, as he has done in this case, that he can "*only conclude that the systematic duplication of invoices was both deliberate and dishonest"*. The high point of his assertion is that the respondent "*must have known and indeed had a duty to make himself aware of the practices which were ongoing in relation to invoice financing*". The applicant's conclusion is that he finds it "*very hard to accept that anyone in an executive role within contracts was not aware of it"*.

98. The sworn evidence of the respondent is that he was positively excluded from direct involvement in the invoice financing arrangements the subject of this complaint. That evidence is not controverted.

99. As regards the allegation that the respondent was a party to the companies having traded whilst insolvent for a period of over a year, again the respondent has given detailed evidence describing actions he took to reduce cost, restructure debt and ameliorate the effects on creditors. No evidence is proffered to contradict this account.

100. It is also clear from the respondent's evidence that although he was given the title Finance Director, he was not a shareholder and not in control of any decision which might have been taken to liquidate the companies at an earlier time.

101. The failures to comply with the CRO filing requirements over a period of several years, are serious. Evidence has been given by the respondent as to the reasons for these failures, and external factors applying. It is questionable whether such an explanation would in all cases be acceptable, but the evidence is that the external auditors to the company were engaged in correspondence with the CRO regarding this matter.

102. Many of the well-known judgments concerning s. 150 were referred to in submissions. It seems to me that the most informative of these for this case is the seminal judgment of Shanley J.in *La Moselle Clothing Ltd v Soualhi* [1998] 2 ILRM 345, at page 9, where he identified the following factors to be taken into account: -

"(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".

103. In approving this passage, in *Re Squash (Ireland) Ltd* [2001] IESC 200, [2001] 3 IR 35, McGuinness J. expanded and said the following: -

> *"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 cases of all companies which have become insolvent it is likely that some criticisms of the Directors may be made; but to categorise conduct as irresponsible I feel that one must go further".*

104. A common feature of the factors identified by Shanley J. and by McGuinness J. is the necessity to identify culpability on the part of a respondent and to assess whether his conduct has caused or contributed to the insolvency of the company.

105. The high point of the applicant's concerns, in this case, is a series of conclusions regarding the collective roles and responsibilities of all the directors. Nowhere does he go any further than stating that he "*can only conclude*" that the respondents collectively failed to act honestly and responsibly. In relation to this most serious of his concerns, regarding the management of the debtors ledger, he states that he "*finds it very hard to accept that anyone in an executive role within Contracts was not aware of it*". He does not engage with the very specific evidence adduced by the respondent. I accept the respondent's evidence that he was excluded from a role in relation to this issue and as to the manner in which he was treated by the shareholders and proprietary directors. I also accept that the ultimate outturn for creditors cannot be fairly said to be attributable to his conduct.

106. I am satisfied that the respondent Mr. McKeogh acted honestly and responsibly in relation to the affairs of the companies and I refuse the relief sought.