

THE HIGH COURT

[2021] IEHC 826

[2020 276 COS]

IN THE MATTER OF MERIDIAN MOTORS LIMITED (IN LIQUIDATION) AND  
IN THE MATTER OF THE COMPANIES ACT, 2014

BETWEEN

GEORGE MALONEY

APPLICANT

AND

STEPHEN MURPHY AND LIAM MURPHY

RESPONDENTS

**JUDGMENT of Mr. Justice Quinn delivered on the 21st day of December, 2021**

1. The applicant was appointed liquidator of Meridian Motors Ltd ("the Company") by a resolution of creditors passed on 5 December 2017.
2. The applicant seeks orders of disqualification of the respondents pursuant to s. 842 of the Companies Act, 2014 ("the Act") and in the alternative declarations of restriction pursuant to s. 819 of the Act.
3. This case brings into stark relief the difference between disqualification and restriction, in terms not only of the sanction, but also the proofs required before an order would be made and, importantly, the onus of proof as between an applicant and respondents. I have concluded that in this case, in respect of the most serious allegations, which concern alleged fraudulent trading activity and VAT fraud, the applicant has not discharged the onus of proof of matters which would ground an order of disqualification. He has identified a number of grounds which if proved would warrant the making of an order of disqualification, but has failed to discharge the onus of proof. I have also concluded that the respondents have not discharged the onus which rests on them of establishing that they acted honestly and responsibly in relation to the affairs of the company, and I shall make a declaration of restriction pursuant to s.819.

**Restriction of directors – Section 819 of the Companies Act, 2014**

4. Section 819 provides as follows:

"(1) *On the application of a person referred to in section 820 (1) and subject to subsection (2), the court shall declare that a person who was a director of an insolvent company shall not, for a period of 5 years, be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned in or take part in the formation or promotion of a company, unless the company meets the requirements set out in subsection (3). (emphasis added)*

(2) *The court shall make a declaration under subsection (1) unless it is satisfied that—*

- (a) *the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,*

- (b) *he or she has, when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and*
- (c) *there is no other reason why it would be just and equitable that he or she should be subject to the restrictions imposed by an order under subsection (1).*

(3) *The requirements referred to in subsection (1) are—*

- (a) *the company shall have an allotted share capital of nominal value not less than—*
  - (i) *€500,000 in the case of a public limited company (other than an investment company) or a public unlimited company, or*
  - (ii) *€100,000 in the case of any other company,*
- (b) *each allotted share shall be paid up to an aggregate amount not less than the amount referred to in paragraph (a), including the whole of any premium on that share, and*
- (c) *each allotted share and the whole of any premium on each allotted share shall be paid for in cash.”*

5. In every application under this section the onus is on the respondent persons to satisfy the three requirements in 819 (2) (a), (b) and (c) quoted above if an order is not to be made.

**Disqualification of directors: Section 842 of Companies Act, 2014**

6. A disqualification order is defined by s. 838 to mean an order in respect of a person that:

*“the persons being disqualified 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 each of the following:*

- (a) *a company within the meaning of section 819 (6);*
- (b) *any friendly society within the meaning of the Friendly Societies Acts 1896 to 2014;*
- (c) *any society registered under the Industrial and Provident Societies Acts 1893 to 2014.”*

7. Section 842 provides as follows:

*“On the application of a person specified in section 844 or of its own motion, the court may make a disqualification order in respect of a person for such period as it sees fit if satisfied—*

- (a) *that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors,*
- (b) *that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any breach of his or her duty as such promoter, officer, auditor, receiver, liquidator or examiner,*
- (c) *that a declaration has been granted under section 610 in respect of the person, (a declaration of personal liability for fraudulent or reckless trading)*
- (d) *that the conduct of the person as promoter, officer, statutory auditor, receiver, liquidator or examiner of a company makes him or her unfit to be concerned in the management of a company”.*

Further grounds are recited under (d) to (j) which are not relevant to this application.

- 8. By contrast with applications for restriction, on an application pursuant to s.842 the onus rests on the applicant to establish the grounds relied on.
- 9. Section 845(3) provides that “on an application for a disqualification order, the court may as an alternative, if it considers the disqualification is not justified, make a declaration under section 819” (restriction).
- 10. The notice of motion grounding this application sought declarations pursuant to “s. 842 (a) and/or (b) and/or (c) and/or (d) of the Act”. It seeks in the alternative a declaration pursuant to section 819.
- 11. During the course of the hearing counsel for the applicant stated that the declaration was being sought pursuant to s. 842 (d), namely conduct which makes the respondent “unfit to be concerned in the management of a company”.

### **The Company**

- 12. The company was incorporated on 2 November 2005 and traded up to or immediately prior to the time of its liquidation on 5 December 2017.
- 13. The company was engaged in buying, selling and importing “high end” motor vehicles. It operated from an address at Sleaty Road, Co. Carlow, which is also its registered office.
- 14. The applicant states in his grounding affidavit that he is referring to the respondents in their joint capacity as directors “on the basis that both of the directors shared responsibility for the proper management of the company in accordance with the Companies Act, 2014”.
- 15. The provisions of s.819 apply to every person who was a director of the company at the date of or within a period of twelve months before the commencement of the winding up. Section 842 contains no such limitation.

16. At the commencement of the winding up the first named respondent Stephen Murphy was the sole director of the company.
17. The second named respondent Mr. Liam Murphy, who is the father of the first named respondent, had been a director of the company until his resignation on a date in May 2017. Section 819 therefore applies to him.
18. The application is grounded on an affidavit sworn by the applicant on 28 February 2020. A replying affidavit was sworn by the first named respondent Stephen Murphy on 8 January 2021. Notably, the applicant did not deliver any further affidavit. Therefore those two affidavits are the only evidence before the court.
19. The first named respondent states that he has made his affidavit on his own behalf and on behalf of the second named respondent "with his consent and authority". No affidavit was sworn by the second named respondent. The first named respondent states as follows:

*"The second named respondent was a non-executive director of the company. He relied on your deponent for information in respect of the company. We have regular, albeit informal, discussions about the affairs of the company in the course of which your deponent kept him informed appropriately. I say, believe and am advised that it was reasonable for the second named respondent to rely on the information which was provided to him by your deponent (and the company's advisors). For those reasons (coupled with the reasons set out earlier in this affidavit) I do not believe any order should be made against the second named respondent."*

20. I shall refer to the first named respondent as "the respondent", and I shall return to the position of the second named respondent later in this judgment.

**Statement of affairs**

21. The applicant exhibited the directors' estimated statement of affairs presented to the meeting of creditors held on 5 December, 2017. The statement of affairs is signed by the first named respondent. In its description of assets, it shows "vehicle stocks" having a book value of €223,350, estimated to realise €236,500. The notes to the statement of affairs explain that vehicle stock is subject to a charge on each vehicle for finance provided by Next Gear Capital. The amount stated to be owing to Next Gear is €174,861, leaving a net value of vehicles stock, on the directors' estimate of €61,639. The only remaining asset included is "corporation tax recoverable" in an amount of €39,926, leaving a total net value of assets estimated to realise €101,565.
22. The statement refers to a super preferential liability of €224 in respect of employers' PRSI, and a total amount for preferential creditors of €38,222.
23. The amount for preferential creditors is said to comprise rates at €24,678, employee claims of €12,666 and PAYE/PRSI at €878. A line under this heading for VAT contains a figure of nil.

24. The notes to the statement of affairs contain a note at item 5 as follows:

*"This statement does not include contingent liability for assessments raised by Revenue in April and September 2015 of €579,284 which are under appeal".*

25. The statement of affairs then estimates the total liabilities to unsecured creditors at an amount of €1,156,311. This is the aggregate amount said to be owed to a total of 58 creditors.

26. The largest recorded unsecured creditor by a significant margin is a company called Meridian Motors 2014 Limited, a connected party, for a sum of €345,222. This is followed by Cyc-Lok Limited, also connected, for a sum of €232,324. The next largest creditors listed are Bank of Ireland for €214,039 and American Express for €200,189. Thereafter the amounts listed are much smaller. They include Consultus Chartered Accountants for €29,827. Mr. Aidan Finn, a connected party at €26,000, "Management" for €8,173, and Carzone for €5,724. The first respondent is listed for €5,500.

27. The effect of the directors' statement of affairs is to show a deficit as regards unsecured creditors of €1,093,192. This is on the basis of a nil liability for VAT.

#### **VAT assessments**

28. A central feature of this case is the question of the Company's liability for Value Added Tax. The first respondent says that the assessments raised by Revenue are incorrect.

29. The applicant exhibits a table identifying assessments raised by Revenue in respect of VAT totalling €2,413,062 of which he states that a sum of €247,723 was paid, leaving a balance of €2,205,264.

30. On 13 April, 2015 Revenue raised three assessments, in respect of the full years 2012, and 2013 and the period 1 January to 20 June 2014, totalling €573,280. €200,125 has since been paid, leaving a balance claimed of €373,155.

31. Those assessments were appealed by the company. According to the liquidator no statement of case was ever submitted to pursue those appeals and he states that he was informed by Revenue that the appeals are no longer live.

32. On 2 September 2015 Revenue raised five assessments in respect of periods from 1 July, 2014 to 30 April, 2015, totalling €208,004, of which it is said a balance is claimed of €206,129. No appeal was ever lodged in respect of those assessments.

33. On 14 November, 2017, three weeks before the appointment of the liquidator, Revenue raised assessments in respect of the period 1 July, 2015 to 31 December, 2015, for the entire year 2016 and for the period 1 January, 2017 to 31 August, 2017 totalling €1,631,778 of which a balance is claimed of €1,625,980.95.

34. No appeal has ever been lodged in respect of the assessments raised on 14 November 2017. The respondent says that if the company had not entered liquidation some weeks later this assessment would have been appealed.

35. The respondent says that the Revenue's assessments are incorrect. He says that the Revenue Commissioners misunderstood the dealings between the company and SLDS Limited, a connected company whose invoices to the company were the subject of VAT reclaims.
36. The respondent says that cars were imported from the UK by SLDS and then sold on to the company and therefore VAT was properly charged by SLDS to the company in those invoices.
37. The applicant found in the records of the company two sets of invoices for a number of vehicles, one from a UK company Fynnbrook Car Sales Limited for the total price of the car without any reference to VAT and a second one from SLDS, including VAT. It was the SLDS invoices which were used by the company to reclaim VAT on those purchases. The respondent states that it was due to the "close working relationship between the company and SLDS that Fynnbrook issued invoices to the company as distinct from SLDS". He says that *"there were in fact two separate transactions, one between Fynnbrook and SLDS and the other between SLDS and the Company. The fact that Fynnbrook would from time to time invoice the Company directly explains why the two invoices were stapled together by the Company."*
38. The respondent states that he does not know what VAT returns were made by SLDS, but he states that the company was charged VAT on the purchase of cars from SLDS and it charged VAT on the sales of those cars and that "all of these transactions were properly recorded in the company's VAT returns."
39. After the applicant's appointment correspondence was exchanged between him and the first respondent concerning a number of matters, including the VAT assessments. In the correspondence the respondent requested that the applicant pursue the appeals in respect of the assessments made in 2015 and that the applicant submit an appeal in respect of the assessments raised in November 2017.
40. On 2 November 2018 the applicant referred the respondent to the assessments which had been raised in 2015 totalling €573,280. He informed the respondent that the Revenue Commissioners had contacted him notifying him of their intent to dismiss the appeal on the grounds that a Statement of Case had never been submitted by the company. Revenue had referred to correspondence in which extensions had been sought and agreed to for the purpose of the submitting the statement of case.
41. The applicant informed the respondent that he did not have the necessary company records to submit a Statement of Case to pursue the appeals. He said that in particular he had not been provided with the working papers for the VAT periods which were under assessment and which would be necessary for any VAT assessment appeal.
42. The applicant says that the necessary records to pursue such appeals were never provided to him.

**Professional advice as to VAT**

43. The respondent exhibited two letters which he received on 23 January 2017. One was from his solicitor Mr. Ciaran Desmond and the other from Mr. Terence Noone of Consultus, Chartered Accountants the auditors to the Company. In each of these letters reference is made to potential refinancing with AIB and the treatment of the contingent liability, as they described it, in respect of VAT.
44. Heavy reliance is placed by the respondent on these letters of advice and it is pertinent to quote them extensively.
45. Mr. Desmond's letter states the following:

*"For the avoidance of doubt I confirm the following:*

- 1. Any tax liability which is a contingent liability is now owing for in excess of one year and hence is not a preferential debt to the Revenue Commissioners.*
- 2. The taking of funds from the bank can be totally secured by the bank taking a first fixed and floating charge over the assets of Meridian Motors Limited and Meridian Motors 2014 Limited which would then prioritise them ahead of unsecured creditors.*
- 3. The Revenue debt which at levels of €500,000 to be paid per the accounts is clearly only a possibility if not remote, whereas the probability of a settlement payment in the order of €50,000 to €100,000 in the future is a probability.*
- 4. It is also worth noting from my discussions with Terry Noone that, notwithstanding an alleged liability that Revenue might pursue in the future, which is clearly contingent and the subject of much technical debate and discussion, this contingent liability will not, on the basis of current figures within the group, render the company insolvent. All solvency tests, are from what Terry Noone has seen of the accounts, satisfactory and thus there is absolute capacity to deal with this particular issue as we are instructed.*
- 5. We would point out that the assessments that are the subject of appeals, are therefore assessments that could take many years to be resolved in the context that Revenue may move to reach settlement and/or Revenue may move to pursue this matter as a technical case. If they pursue this matter as a technical case, it could be a couple of years before it is addressed within the tax system. Meanwhile based on your accounts at the moment you are not recognising the transaction in your accounts because clearly you don't accept that there is a liability. You are perfectly entitled as with any legal matter to pursue this case and produce your accounts based on the contingent liability note that Terry Noone's firm has prepared.*

*For avoidance of doubt I reiterate that in some instances, Revenue are settling these cases for in the order of 10 - 20% of the liability due to the fraught nature of pursuing the matter through the courts system.*

*Finally, I note that you have returned the letter recently issued by Revenue Commissioners in regard to the possibility of entering into settlement talks as per the new conversion entitlements of tax payers pursuant to the conversion from the old taxes appeal system to the new Tax Commission case system.*

*I trust that this letter gives you the added scope to engage with the bank but with the clear knowledge that if the bank issue proper security paperwork their risk will be secured by the business of the company by way of first charge and floating charge and in the circumstances this is what I recommend you agree with the bank”.*

46. The letter of the same date from Mr. Noone refers also to discussions with AIB and refers to the letter of the same date written by Mr. Desmond and continues:

*“I wish to confirm the following:*

- 1. Meridian Motor Limited’s VAT liabilities that are under appeal with the Revenue for all periods up to 31 December, 2015 were disclosed as a contingent liability in the draft accounts for 31 December, 2015. It is probable that a settlement in the region of €50,000 to €100,000 will be reached for this contingent liability and this is a view supported by Ciaran Desmond.*
- 2. The total value of the VAT liabilities is under appeal (the contingent liability) has been owing for in excess of one year and would not now be viewed as a preferential debt to the Revenue Commissioners in an insolvency scenario. Therefore, if AIB take a fixed and floating charge over the assets of the two companies, this security would rank ahead of this contingent liability.*
- 3. Even if the full value of the contingent liability was recognised in the 31 December, 2015 accounts, Meridian Motor Limited’s balance sheet would still remain solvent.*

*I would be happy to discuss the above directly with AIB if required.”*

47. The respondent says that the same issues which were the subject of the advice he had received applied not only to the assessments raised in April 2015 but also to the assessments raised on 2nd September 2015 and to the assessments raised on 14th November, 2017. He says that the advice he had received is that the company had a “reasonable prospect of successfully winning its appeal”. He says also that notwithstanding this advice he had also been advised that because the appeal involved complex issues of VAT law the company ought to consider settling the case with Revenue.

48. It is clear that the advice letters of 23 January 2017 were written in the context of financing discussions with A.I.B. The advice centred not on the merits of the appeal against VAT assessments, of which there is no analysis, but on the effect of the assessments, even if treated as a contingency, on the solvency status of the company. Two noteworthy and related features of the advices are as follows:
1. That it could take a number of years to resolve the appeal if Revenue pursue the matter "as a technical case", and
  2. That if the appeal takes some years to resolve, the relevant tax liabilities will have become non-preferential and therefore would rank behind A.I.B. security, even a floating charge.
49. The respondent submits that the relevance of the advice letters is not the substantive merits of the advice but the fact that professional advice was received to the effect that the company was solvent. In many cases, this submission would have some force, but a close examination of the advice reveals that the company was being advised that delay in determining the VAT position would have the effect that A.I.B. should be persuaded that its security would rank its debt ahead of the Revenue liabilities. The advice was clearly taken in support of those negotiations and identified as a tactic an advantage AIB could be granted over Revenue. As matters transpired, A.I.B. did not become a creditor of the company.
50. The applicant exhibits an email written by Mr. Noone to Revenue on 21 July, 2017. As the parties place importance on the content of this email I shall quote it fully: -

*"Dear Ms. Hickey,*

*We refer to our introduction as tax agents in this matter and to the potential complexity of the tax case that might have to be heard in front of the Tax Commission.*

*We would make a number of observations.*

- (1) Section 31 of the legislation that gives effect to the new appeals body gives the entitlement to the parties to settle the matter. The word "settlement" envisages compromise.*
- (2) The tax submissions already with the tax commission demonstrate huge complexity which could lead to a three/four-day hearing with the attendant legal costs for both sides that could be in the order of €200,000.*
- (3) Our client is now demonstrating a willingness to pay up on taxes owing and in this context all undisputed taxes are being settled.*

- (4) *This case is very technical on VAT and it does now appear that our client is an innocent commercial victim of unintended activities within the motor industry by certain parties.*
- (5) *The assessments as raised will put our client into insolvency as they cannot be met.*
- (6) *Whilst our client will dispute same our client would like to preserve jobs and maintain its lease in the existing premises but this will be lost to him if the Revenue and himself do not settle.*
- (7) *Our strong contention is that our client should volunteer a payment of €50,000 to bring this entire sorry episode with yourselves to a conclusion. This would be on the understanding that all other taxes are kept up to date for the next 24 months without blemish.*
- (8) *This is an absolute cost to our client in that our client sold to the market based on what he understood to have been the correct VAT treatment at the time.*

*The purpose of next week's meeting is to debate the above in an open and transparent manner taking into account the fact that our client has now appointed us and accepted the advice initially given to him by Stephen Gahan and Ciaran Desmond, namely to put his records and filings in order, deal with all other tax heads and then come to a resolution on the disputed VAT point.*

*We look forward to meeting with you and your colleagues."*

51. One of the most stark inconsistencies between this email and the advice letters of 23 January 2017 is the statement by Mr. Noone that "the assessments as raised will put our client into insolvency as they cannot be met." The advice letters are based on a proposition that the company has, as Mr. Desmond put it, "absolute capacity to deal with this particular issue as we are instructed." Mr. Noone said "even if the full value of the contingent liability was recognised the balance sheet would still remain solvent."
52. The true extent of the liability, if any, for VAT is not a matter on which this Court can adjudicate in the course of these proceedings. Nonetheless, it is a compelling feature of the case that the appeal in respect of the assessment raised on 13th April, 2015 for €573,280 had not been pursued by reason of a failure to deliver a statement of case by the time the company entered liquidation on 5 December, 2017. No appeal had been lodged in respect of the assessments totalling €208,004.00 raised on 2 September, 2015. The liquidator says that the information necessary to appeal the assessments of 14 November, 2017 totalling €1,631.778 was not provided to him.
53. Even though the directors' statement of affairs as at the date of liquidation contains no provision for VAT it is noteworthy that it still shows a deficiency as regards unsecured creditors in an amount of €1,093,292.00.

54. The applicant states that it was the quantum of Revenue liabilities of €2.2m which was the most relevant factor which caused the company to cease to trade and the liquidation of the company. The respondent claims that no such amount was due. The applicant observes also that in his view the settlement offer of €50,000 made by the company in July 2017 was "blatantly unacceptable given the level of Revenue liabilities".

**Issues identified by applicant**

55. The applicant has identified eight (some overlapping) areas of concern in his grounding affidavit. They may be summarised under the following headings: -

- (1) Alleged theft of vehicles before liquidation.
- (2) VAT fraud.
- (3) "Missing traders". This is an allegation of falsification of invoices.
- (4) Failure to cooperate with the liquidator.
- (5) Failure to maintain proper books of account and other records.
- (6) The company's treatment of liabilities to Revenue.
- (7) Trading whilst insolvent.
- (8) A related party transaction.

56. I shall consider the evidence as to each of these in light of the different test and onus applying to restriction and disqualification applications respectively.

**(1) Alleged theft of cars.**

57. The applicant states that when he attended at the company's premises on the day after his appointment he found no cars. Not surprisingly, he says that this was unusual in circumstances where the company had operated a car dealership and had been trading up to the time of liquidation. He was informed by the directors that there had been a theft of all of the company's stock of cars in November "a week or so prior to his appointment". The directors informed the applicant that a total of fifteen cars had been stolen and they provided the applicant with Garda statements regarding the alleged theft.

58. The applicant states as follows: -

*"What is apparent however is that the alleged perpetrators were allowed access to the premises during the course of a working day when the premises were occupied by staff and were not prevented from removing all the logbooks and other registration documents for the vehicles".*

59. The applicant says that he spoke to the Gardaí and he exhibits also correspondence with the company's insurers Aviva dated 7th February, 2018. The insurers stated that their investigations were ongoing and that they would not be in a position to confirm that the

insurance policy would cover the loss "until their investigations are complete". No update on this investigation is before the court.

60. The applicant exhibited correspondence from the solicitors acting for Next Gear Capital, which had financed a number of the vehicles reported stolen, including a demand served on the respondent as personal guarantor of that facility, and a reply from a solicitor then acting for him.

61. The applicant concludes by stating as follows: -

*"I have significant concerns and suspicions regarding the unsubstantiated removal and dissipation of company stock, in the period prior to liquidation, which is ultimately to the significant detriment of the company's creditors."*

62. The respondent in his replying affidavit denies any part in the theft of the vehicles. He says that he reported the matter to the Garda Síochána and that he had informed the gardaí of the names of the individuals who stole the vehicles. He continues: -

*"They are sophisticated conmen who persuaded company employees that they were genuinely going to purchase the vehicles."*

63. This description is implausible, and would not explain why there was absent from the company not only the vehicles themselves but also logbooks and other registration documents relating to the vehicles.

64. The applicant did not update any of the information regarding the investigations undertaken by Aviva, by the Gardaí or by Next Gear Vehicles. There is therefore no evidence before the court as to what actually occurred in relation to the vehicles.

65. In the absence of proof, this "concern" would not of itself be a ground for a disqualification order. I shall however take into account the implausibility of the respondent's explanation in considering the application of the test for a restriction order, namely whether the directors have shown themselves to have acted honestly and responsibly in relation to the affairs of the company. The implausible explanation by the respondent that "conmen" were involved does not explain why logbooks and registration documents were also absent. These matters demonstrates a want of responsibility on the part of the respondents, relevant for the application for the test for restriction.

**(2) VAT fraud.**

66. The applicant says that from his investigations "it would appear that the Company was engaged in fraudulent trading activity." He says that vehicles were sourced from a UK trader free of VAT, whereas an invoice in respect of the same vehicles and including VAT was sourced from an Irish trader, being a connected company. He says that this enabled the company to reclaim VAT on the purchase of a vehicle where there was no entitlement to reclaim VAT. The applicant instances and exhibits a selection of VAT invoices received by a company called SLDS Limited. The first respondent's wife Ms. Louise Finn is a director of SLDS, and the second director of SLDS is Ms. Finn's brother Mr. Kenneth Finn.

67. Sample invoices and payment vouchers are exhibited relating to four vehicles. In respect of one example, a Nissan Navara chassis no. VSKCTND2340045112 the following appear:
- (1) An invoice dated 4 January, 2017 from Fynnbrook Cars Limited to the Company for a total sum of Stg. £20,505.00.
  - (2) A "settlement voucher" of the Company dated 4 January, 2017 for payment to Fynnbrook of a total sum of €25,181.79.
  - (3) An invoice dated 24 January, 2017 from SDLS Limited to the Company in a sum of €20,473.00 plus VAT at 23% in the amount of €4,708.79 making a total of €25,181.79.
  - (4) A "settlement voucher" for payment by the Company to SLDS of the invoice dated 24 January, 2017 in the total sum of €25,181.00.
68. The applicant says that he found among the books and records of the company both the Fynnbrook invoices and the SDLS invoices stapled together, and the settlement vouchers generated by the company.
69. During the course of the hearing there was extensive debate as to the significance of these exhibits. In respect of each of the invoices there appears a settlement voucher. No allegation is made that invoices were paid in duplicate or that the Company paid both Fynnbrook and SDLS. The applicant states his opinion that the VAT invoices from SLDS were utilised to claim VAT in respect of amounts which were not charged to the company in the first instance by Fynnbrook Limited.
70. The respondent's explanation is that SLDS imported the cars from Fynnbrook Cars in the UK and then sold them to the Company. He says that there was no VAT payable on the import by SLDS but VAT was properly chargeable by SLDS to the company and it was on foot of those invoices that it reclaimed VAT. No documents are exhibited as to the transaction between Fynnbrook and SLDS.
71. The respondent then states "the fact that Fynnbrook would from time to time invoice the company directly explains why the two invoices were stapled together by the company".
72. The respondent states that he does not know what VAT returns were made by SLDS. He asserts that the company was charged VAT on the purchase of the cars, and that it charged VAT on the sale of the cars and that all of these transactions were properly recorded in the company's VAT returns.
73. The material exhibited by the liquidator raises questions as to why the Company was in receipt of more than one invoice for each vehicle sampled in the exhibits. Equally unexplained is why the company processed settlement vouchers for more than one invoice. The applicant did not deliver a replying affidavit addressing the respondent's explanation for the documents found and that explanation is uncontradicted by evidence. The applicant submits that the existence of the four transaction documents for each

vehicle establishes the fraudulent scheme. However, in circumstances where the liquidator's counsel was unable to offer any evidence or even a theory as to which of the invoices was actually paid there is no proof before the court that a scheme of the kind described by the liquidator was implemented.

74. The failure or inability of the applicant to prove the implementation of a fraudulent scheme on this application does not mean that the Company would have succeeded if it had pursued appeals of the VAT assessment. It is instead the result of the limitation of hearing this application by reference only to the affidavits exchanged. I should not speculate as to whether the operation of such a scheme would be proved in another forum, whether by way of disposal of the appeals had they proceeded or by any other process. It is not proved on the basis of the material before the court on this application.

### **(3) Missing Traders**

75. The applicant states that the company was engaged in what is known as a practice concerning "missing traders". He says that this is a practice where the company records invoices from entities which either did not supply goods to the company or in some cases from entities which did not exist. In support of this allegation the liquidator in paragraph 17 of his affidavit refers to three exhibits, only two of which are provided. The first was intended apparently to be a "diagram identifying missing traders associated with the company". This is not exhibited. Secondly, he exhibits four invoices from an entity which he refers to as Stephen Farrelly Limited. In fact they are invoices from "SFP Cars and Commercials". These invoices are dated 10 January, 2014, 13 February, 2014, 3 April, 2014 and 8 April, 2014. Thirdly, he exhibits a printout from the Companies Registration Office showing that a company designated Stephen Farrelly Plant Limited was dissolved on 23 October, 2013.
76. The respondent denies that the company invented invoices. He says that he is not familiar with the term "missing traders". He says that the four invoices exhibited are not from a limited company but in fact from a sole trader and he says that they are legitimate invoices.
77. During the hearing it emerged that the applicant had prepared a diagram which would illustrate a scheme which the liquidator describes as "missing traders". However, it was fairly accepted by counsel for the applicant that as this diagram had been omitted it could not be referred to or relied on. Of central importance is that it was intended that this diagram would explain the alleged scheme and identify the relevant "missing traders". Instead the only exhibits are four invoices from one unincorporated trader, and a CRO search evidencing the dissolution of a company with a similar name.
78. It may well be that there is a connection between Stephen Farrelly Plant Limited, dissolved on 23 October, 2013 and "SFP Cars and Commercials", which issued the invoices of January, February and April 2014. However, the applicant does not say this and puts before the court no evidence to that effect. Further, the applicant delivered no replying affidavit after the respondent pointed out the difference. Nor are any other examples of this alleged practice exhibited.

79. The allegation that the company was engaged in a practice of recording invoices either for vehicles which were not supplied or for entities that did not exist is a serious allegation. If established, it would amount to fraud. It is surprising that such a serious allegation was made without evidence.

**(4) Failure to cooperate with the liquidator.**

80. The applicant says that he has received only limited and insufficient cooperation from the directors in the performance of his functions. He exhibits correspondence with the directors in which he provided a questionnaire for completion and identified books and records which he said were missing and raised a number of queries in relation to particular assets and their whereabouts.

81. Following the issue of the liquidator's first letter dated 15 December, 2017 the parties met on 20 December, 2017 and the first named respondent handed over a certain volume of information. The applicant acknowledged that further records were delivered subsequent to that meeting. There is one letter from the respondent dated 12 February, 2018 with which he encloses a certain amount of material in response to the earlier correspondence including the provision of the password for the software package "autoview" which the respondent says was the software frequently used by companies in the business of selling cars. Other contact information was provided including the details of the email provider and software provider, the relevant contact at Aviva Insurance and the Garda Pulse number in relation to the theft allegation. He also by this letter confirmed that certain company cars were held at a car dealership at Enniscorthy.

82. Following the delivery of this material further letters were exchanged and ultimately the applicant states that while he had received a quantity of records from the respondent there were significant deficiencies in the records received. In his letter of 25 April, 2019, the applicant says that the items missing included: -

*"... key accounting records necessary for my investigation such as purchase ledgers and sales ledgers for the final twelve months of trading and VAT working papers for periods of assessment raised."*

83. The respondent asserts that he met with the liquidator immediately following receipt of the first letter and that there has been no lack of cooperation on his part. He says that the company used a computer accounting system known as "autoview", a system frequently used by companies in the trade, and he had provided the necessary passcode for the liquidator to access this system.

84. The fact of the meeting of 20 December, 2017, the exact details of which have not been provided by either party, and the letter of 12 February, 2018 imply that significant information was provided by the respondent including credit card statements, logbooks, "all books and records held by the company", USB keys, banking documents, passwords for access to "autoview" and details of the contact details for the email provider and insurers. Importantly in relation to emails Mr. Murphy states in the letter of 12 February,

2018 that "all email accounts are deleted once staff leave, copies of emails were not printed and held in hardcopy".

85. Having regard to the importance the respondent attaches to his claim that the VAT assessments were incorrect, a critical feature of this aspect of the matter is the liquidator's averment that the trading records which would have been required to submit a Statement of Case to advance the appeals in relation to VAT assessments were not provided to him.

86. In his replying affidavit the first respondent states as follows: -

*"I note that in paragraph 19 of his affidavit Mr. Maloney states that he was 'not provided with sufficient records to determine the completeness or accuracy of the VAT returns'. If this is correct I do not know how Mr. Maloney can claim that the company was involved in 'fraudulent trading activity'".*

87. Although the respondent persists in his assertion that the company kept accurate VAT returns, it is clear from the averment quoted above that the respondent recognises the absence of books and records required by the liquidator to pursue the VAT appeals. This is a serious failure to cooperate with the liquidator, particularly where the respondent relies so heavily on his claim that the VAT assessments were incorrect.

**(5) Failure to maintain proper books and records**

88. The liquidator places extensive reliance on the existence of draft financial accounts for the year ended 31 December 2016. Before turning to the contents of those accounts it is important to note that the draft was issued by the auditors to the directors on 13 October 2017, only some weeks before the commencement of the liquidation.

89. The liquidator draws attention to the fact that these draft financial statements show a loss before taxation in the year 2016 of €215,149, but a balance sheet showing a positive net asset position. He says that the contingent liability in respect of the Revenue assessments for VAT, which had been raised on 13 April 2015 and 2 September 2015 ought to have been recognised in those accounts.

90. The liquidator says that if the amount of the VAT assessments had been included in the accounts at their stated sum of €570,000 they would have shown a net liability position for the company for a period of three years prior to liquidation.

91. The financial statements contain a note as to "contingent liabilities" in which reference is made to the Revenue assessments for VAT raised in April and September 2015 in the total amount of €579,000. Reference is made to an appeal having been lodged within 30 days of receiving the notice of assessment. It is said that the appeal is ongoing and this is why the obligation was not being recognised in the financial statements of the company. This ignores the fact that the appeal lodged (albeit not pursued) related only to the April 2015 assessments.

92. The applicant refers also to the assessments raised in November 2017 for a further sum of €1,631,778. They clearly do not affect the accounts to the end of 2016, although the assessments in part relate to amounts said by Revenue to have accrued in 2016.
93. The applicant says that in circumstances where the directors' statement of affairs as at 5 December 2017, the date of liquidation, shows a deficit as regards creditors of €1,093,292, it is clear that if the true liabilities in respect of VAT had been recorded the directors would have known that the company was insolvent and trading with significant liabilities to the Revenue Commissioners from a much earlier date.
94. The applicant says that a failure on the part of the directors to maintain adequate and accurate accounting records had the effect that it was not possible for them to determine at any time the financial position of the company. He says that if proper books and records had been kept it would have been apparent to the directors that the company was insolvent and trading with significant liabilities to the Revenue Commissioners.
95. Finally, under this heading the liquidator states that at the meeting of creditors at which he was appointed the first named respondent was unable to give accurate figures either as to the losses incurred by the company during 2017 or as to the volume of cars sold in the years prior to liquidation.
96. The respondent states that the day of the creditors meeting was a difficult day for him. He says that his business had failed and he was under a significant amount of stress and pressure at the time. He offers that as the explanation for any mistakes he made in answering questions at the meeting of creditors.
97. The respondent also says that proper records were kept on the "auto view" system and he says that the applicant has not "appreciated" all of the records that are maintained on "autoview".
98. The correspondence regarding books and records rests with the applicant's letter of 25 April 2019. At that stage the applicant identified the still outstanding material, namely the key accounting records, and stated that progress in the liquidation had been hampered by protracted delay. There is no evidence that this position was remedied, and I am satisfied that the absence of books and records impeded the performance by the applicant of this functions as liquidator.

**(6) Revenue liabilities**

99. The liquidator says that in his view the directors of the company were "systematically in default of their obligations to make accurate and bona fide returns to the Revenue Commissioners". He says that the directors were aware of their liability to Revenue from the beginning of 2015. He cites the letter from Mr. Noone to Revenue on 21 July 2017 as acknowledging the existence of the liability. In particular, he quotes from the section of that letter in which it was stated that "it does now appear that our client is an innocent commercial victim of unintended activities within the motor industry by certain parties". The nature of these activities is unexplained. Nor are the "certain parties" identified.

100. A central feature of the question relating to VAT is that nothing was done by the company or the respondents to advance the appeal which had been lodged in respect of the assessments raised in April 2015, and no appeal was lodged in respect of the assessments raised in September 2015. The professional advice of 23 January 2017 relied on goes no further than to say that there was a certain complexity which would feature in the hearing of any appeals and that this would be used as a basis to persuade Revenue to accept a settlement of as little as €50 to €100,000. I am not persuaded that the evidence of this advice justifies the assertions by the respondent that the company has been VAT compliant at all times.

**(7) Trading whilst insolvent**

101. The applicant says that given the quantum of revenue liabilities assessed from as early as 2015 he believes that the company was trading for an extended period whilst insolvent.

102. Two particular items are referred to under this heading. Firstly, in May 2019 the applicant brought separate proceedings against a related company, Cyc-Lok Limited arising from what he described as an unfair preference within the meaning of s. 604 of the Companies Act, 2014. I shall return to that subject below in more detail. In the context of insolvency generally, their relevance is that on 30 January 2020, in making an order against Cyc-Lok, O'Connor J. declared that the court was satisfied that the company was "not solvent at the date of transfer of an asset of the company." The date of the relevant transfer was 27 April 2017. The applicant states that this constitutes a definitive finding of insolvency as early as that date and says that the respondents caused the company to continue trading whilst insolvent thereafter.

103. Secondly, the applicant says that he has "seen correspondence dating back to August 2015 between the directors and the Company's financial and tax advisors wherein it appears the Company was preparing to restructure the business to "deal with historic revenue issues". He says that he believes that this correspondence shows that there was "an intention to identify an unconnected company, which did 'not appear' to be connected to the respondents and to transition the business of the company to that entity without discharging historic revenue liabilities." He believes that "the apparent intention was that the Company and its connected company would in turn be liquidated leaving certain liabilities, including the Revenue Commissioners behind".

104. The "correspondence" referred to and exhibited is one email of 13 August 2015 from Mr. Ciaran Desmond Solicitors to the first named respondent and copied to a Mr. K. Finn of Meridian Motors and a Stephen Gahan of McCarthy McSweeney.

105. The document opens with a passage in the following terms "I have outlined below the various phases of work required to structure your business going forward and to deal with historic revenue issues."

106. The document identifies seven subjects, with a fee quote under each one. Headings referred to and in respect of which each is given a separate fee quote are as follows:

- “1. New structure for motor business.
2. Historic revenue issues.
3. Group structure/restructure.
4. EI funding.
5. Cyc-Lok funding.
6. Annual audit and compliance.
7. Review of financial reporting systems.”

107. Each of these appears to be a proposed “workflow”, with a fee quote following. It is accepted by the applicant that there is no evidence that the steps described were ever implemented. To advance the allegation of trading whilst insolvent, he quotes phrases used such as the following:

- “identify” “unconnected purchasers”
- “deal to be agreed with receiver for acquisition of property (not in SM name initially)
- Newco to obtain necessary TAN, tax registration and clearances.
- Existing Meridian bank funding / facilities to be transferred to NewCo.
- SM not to appear involved with Newco (directorship, shareholding, payroll, etc.).”

108. Whilst a number of the headings generate suspicion, the section headed “historic revenue issues” is ambiguous. It is said that these are to be dealt with “under the Desmond tax brand” and that all “future correspondence should be routed through Desmond tax”. There is then an item which reads “need to ensure all PAYE/PRSI up to date”. This is followed by a reference to “engagement with Revenue on historic Revenue audits/appeals”.

109. The respondent says that no part of these workflows or action points were implemented. He also says that nothing unlawful was being discussed and that the company was taking advice in circumstances where it had lost bank credit due to the assessments being raised.

110. At one reading this email could be construed as evidence of discussions regarding transfer of assets or trade to a new company with the possibility of leaving historic Revenue liabilities undischarged. However, the applicant is unable to offer evidence beyond putting his construction on this one email. No evidence is proffered of its context or of advice given at that time. In the absence of such evidence I am not persuaded that this email is the “smoking gun” which the applicant appears to believe.

111. Nonetheless, the email is evidence of a recognition of the existence of "historic" Revenue liabilities as far back as 13 August 2015, in the face of which the respondents permitted the company to continue trading. The Revenue and other liabilities increased thereafter.
112. It has been determined (O'Connor J.) that the Company was insolvent from 27 April 2017 at the latest. It is also clear that its liabilities to Revenue were recognised as significant from August 2015. The only conclusion possible is that the respondents caused or permitted the Company to continue to trade and incur liabilities at a time, being April 2017 at the latest when it was unable to pay all its debts. On the balance of probabilities I find that this inability had arisen in 2015 when VAT assessments were raised and "historic" revenue liabilities were noted by Mr. Desmond.

**(8) Related party transaction – Cyc-Lok Limited**

113. Cyc-Lok Limited is a company which is connected to the company. The respondent and his wife Louise Murphy are its directors.
114. On 27 April, 2017 the company purchased from Wavertree Car Centre a Porsche Panamera for which it paid Stg. £87,500.00.
115. On the same day, the directors of the company, then being the two respondents, by a resolution witnessed by the signature of Mr. Kenneth Finn as "consultant" determined that the Porsche then due into stock "would be offered to Cyc-Lok in part-payment against outstanding liabilities owed to Cyc-Lok Limited".
116. On 28 April, 2007 the first respondent wrote to his wife Mrs. Louise Murphy, in her capacity as a director of Cyc-Lok Limited confirming the proposal that Cyc-Lok would "purchase that Porsche Panamera that we have recently acquired". He said that the company would be willing to offer the vehicle at €90,000.00 for an "immediate deal". It was noted also in the correspondence that there was at that time a debt due by the company to Cyc-Lok in an amount of approximately €360,000.00.
117. The applicant says that the company claimed that the Porsche had been transferred to Cyc-Lok as a payment to reduce the outstanding account.
118. This transaction was the subject of successful proceedings by the applicant under ss. 604 and 608 of the Companies Act 2014 for the reversal of the transfer of the Porsche. By order of 30 January, 2020, the court (O'Connor J.) declared as follows: -

*"And the court being satisfied that the company in the title hereof named was not solvent at the date of transfer of an asset of the company, made within two years of the date of the winding up of the company to a connected person. It is ordered the Porsche Panamera 4S diesel motorcar (chassis number given) was transferred by way of an unfair preference which is invalid and is the property of the applicant".*

The order directed that the applicant recover costs against the respondent Cyc-Lok.

119. Following the making of this order the Porsche was returned to the possession of the applicant.
120. The respondent acknowledges that the company had transferred this asset in discharge of a debt due to Cyc-Lok. He says that he does not accept that the directors acted dishonestly in relation to the matter and it was simply that they were anxious that Cyc-Lok "as a new company would be paid some of its debt".
121. The assertion that the respondent did not act dishonestly in relation to this transaction misses the point that unfair preference has the effect of favouring a selected creditor, in this case a connected company. Even if not dishonest, arguably because the respondents were not familiar with s. 608 of the Companies Act, it is a clear instance of proven irresponsibility on the part of the respondents.

#### Conclusion as regards restriction

122. The tests regarding the application of s. 819 were summarised in the seminal judgment in *La Moselle Clothing Limited* [1998] 2 ILRM 435. Shanley J. identified issues to which the court should have regard in determining the "responsibility" of a director for the purpose of the section, to be the following: -
  - "(a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts –
  - (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".
123. The single most contentious feature of this case is the question of the VAT status of the company.
124. The respondents assert that the assessments raised by Revenue are incorrect. They cite professional advice and exhibit two letters written on the same day, 23rd January, 2017 from their solicitor Mr. Desmond and their accountant Mr. Noone. They say that in their dealings with Revenue in 2017 they relied on this advice. There is no evidence that such advice was received earlier than 2017 and no explanation is offered for the failure to prosecute the appeal in respect of the assessments raised in 2015.
125. The applicant says that at the meeting of creditors at which he was appointed the first named respondent stated that it was due to the unwillingness of Revenue to agree a

schedule for repayment of the VAT outstanding that the company reached the point where it could no longer operate. The applicant states that the true reason for the company ceasing to trade was the extent of the Revenue liabilities, exceeding €2.2m and the company's inability to meet them.

126. The directors' own estimated statement of affairs presented to the creditor's meeting shows a deficit as regard unsecured creditors of €1,093,000. This statement of affairs is made on the basis of no provision whatsoever of VAT. No explanation is proffered for that deficit.
127. The onus on respondents to an application for a restriction order is to demonstrate that they have acted honestly and responsibly in relation to the affairs of the company and that there is no other reason why they should be subject to a restriction order. To discharge that onus it is insufficient for respondents to confine themselves to addressing particular issues identified by the liquidator. It requires each responding director to give his own account, supported by evidence of the trading and financial status of the company prior to the liquidation and, critically, of actions taken by him, both during the ordinary trading lifetime of the company and when the company was facing financial difficulties. In this case the only evidence concerning any of those matters is the repeated assertion by the respondent that the VAT assessments were incorrect. The only evidence proffered as to remedial measures taken by the directors was that an offer was made in July 2017 to settle all VAT claims for €50,000.
128. It is clear from the decision of O'Connor J in the proceedings pursuant to s.604 that the court found as a fact that as of 27 April, 2017 the company was insolvent. The only description given by the respondent of the company's trading activity after that date is that it was taking advice regarding the VAT liability, culminating in the offer made by Mr. Noone on 21 July, 2017.
129. I have taken into account my earlier findings that
- (i) The explanation given as to the theft of vehicles by "conmen" is implausible,
  - (ii) The applicant has demonstrated failures to maintain proper books of account and to co-operate with him in the performance of his functions as liquidator,
  - (iii) The company continued to trade and incur liabilities when insolvent,
  - (iv) The respondents perpetrated an unfair preference of a connected company.

Each of these factors constitutes evidence of a want of responsibility on the part of the respondents which has not been disproved by the respondents.

130. The existence of significant liability to Revenue does not of itself warrant a restriction declaration. However, in this case the entire response of the directors has been to deny the liability for VAT, despite having not pursued appeals in respect of assessments. When this assertion is taken in combination with the directors' own estimated liquidation deficit

exceeding €1 million which is not otherwise explained in the responding affidavit, I conclude that the respondents have not demonstrated that they acted honestly and responsibly in relation to the affairs of the company and accordingly a declaration of restriction will be made.

**The second named respondent**

131. I have already quoted from the affidavit of the first respondent regarding the status of the second named respondent, who is his father. He states that the second respondent was a non – executive director who relied on the first respondent for information in respect of the company. It is said that regular discussions took place about the affairs of the company in which the second named respondent was kept informed.

132. It is well settled that inactivity on the part of a director is no answer to an application for restriction under s. 150 (see *Mannion v. Connolly* [2013] IEHC 544). In this case no evidence whatsoever has been proffered as to measures taken by the second respondent to address the company’s insolvency. In the absence of such evidence I cannot find that he acted honestly and responsibly in relation to the affairs of the company.

**Conclusion as regards disqualification**

133. The most significant matters relied on by the liquidator are (a) alleged VAT fraud, (b) the allegation concerning “missing traders”, (c) trading whilst insolvent, and (d) his “concerns and suspicions” regarding the theft of cars prior to his appointment.

134. The applicant’s counsel in his submissions did not press the court to make a disqualification order on the grounds of fraud by reference to s. 842 (a). This concession was only made at the hearing when counsel stated that the applicant was relying on s.842(d), which relates to conduct rendering a person “unfit to be concerned in the management of a company”. Nonetheless the allegation, at least regarding VAT fraud and regarding “missing traders” was made and presented in the liquidator’s grounding affidavit as an allegation of fraud.

135. However limited the respondent’s affidavit may be on these subjects, the applicant elected not to present any further evidence, relying instead on evidence which I have analysed earlier in this judgment and found to be piecemeal and incomplete.

136. For s.842 the burden is on the applicant to prove grounds for a disqualification order. It is not sufficient, as it may be under s. 819, to simply identify “issues of concern” or “of suspicion” and more is required. Where an applicant applies for a disqualification order it is incumbent on him to identify the provisions within s. 842 he invokes, and adduce evidence to prove the relevant ground.

137. The matters raised by the applicant regarding failure to co-operate with him, the inadequacy of books and records, trading whilst insolvent and the unfair preference of a connected party, are also serious, and could be regarded as conduct rendering the respondents unfit to be concerned in the management of a company, for the purpose of s.842(d). My findings on those matters establish that the court has the discretion to make a disqualification order. It seems to me that in exercising that discretion, I should take

account of the fact that the respondents have had to meet allegations of fraud which were serious in nature but were presented without adducing probative evidence. I have therefore concluded that in all the circumstances I should apply section 845(3) and impose the lesser sanction of a restriction declaration.

**The Declaration**

138. I shall make a declaration that the respondents, being persons to whom Chapter 3 Part 14 of the Companies Act 2014, applies, shall not for a period of five years be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned in or take part in the formation or promotion of a company, unless the company meets the requirements set out in subs. 3 of s. 819 of the Companies Act 2014.