

**THE HIGH COURT**

**2018 No.188 COS**

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

**BETWEEN**

**CLAIRE KELLY**

**APPLICANT**

**- AND -**

**BRIAN STENSON AND DAVID STENSON**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Quinn delivered on the 2nd day of June, 2020**

1. The applicant liquidator seeks a declaration that both 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, whether directly or indirectly as a director or secretary of a company or be concerned to take part in the formation or promotion of a company unless that company meets the requirements set out in subsection 3 of section 819 of the Companies Act 2014.
2. Winning Ways Limited ('the Company') was incorporated on 21 December, 1992 with a registered office at Unit 9 Century Business Park, St Margaret's Road, Finglas, Dublin 11.
3. The Company carried on business as wholesale traders of pet products to retail shops.
4. The first named respondent, Mr. Brian Stenson, was the Managing Director of the Company and oversaw the running of the Company. This function included primary responsibility for finance. He dealt with making bank payments, and lodgements and checking cash on a daily basis. He also managed cash flow, debtors and suppliers. He was responsible for seeking new sales opportunities and the negotiation of pricing.
5. The second named respondent, Mr. David Stenson, was in charge of operations of the Company. He was involved in the day to day running of the business including scheduling on-site staff and warehouse staff.
6. The respondents are directors also of a retail company called Pet Zone Limited ("Pet Zone"), established in 2006. The first respondent is also a 25% shareholder of Pet Zone.
7. The Company traded profitably and without significant issues between 1992 and 2012.
8. The Company ceased trading on 4 August, 2016. On 22 August, 2016, it was resolved to wind up the Company and to appoint the applicant liquidator.
9. At the commencement of the winding up, the first respondent and second respondent were directors of the Company, the former since 1995 and the latter since 2003. Other family members, Jennifer Stenson and Kieran Stenson were also directors of the Company at the date of liquidation but no order was sought against them. The Office of the Director of Corporate Enforcement ("ODCE") relieved the liquidator of her obligations in that regard.

10. The applicant submitted her report to the ODCE pursuant to section 682 of the Companies Act 2014 on 11 April, 2017.
11. On 12 February, 2018, the ODCE wrote to the applicant to inform her that the respondents had declined to accept the offer to give Restriction Undertakings. Consequently, the applicant was obliged to make an application to this court pursuant to section 819 of the Companies Act 2014 for a declaration of restriction in respect of each of the respondent directors.
12. This application is grounded on the affidavit of the applicant sworn 8 May 2019 and her supplemental affidavit sworn 7 June 2019. The first respondent swore two affidavits dated 27 February 2019 and 29 October, 2019, addressing the substance of the liquidator's complaints. The second respondent swore an affidavit dated 29 October, 2019, for the purposes of adopting the contents of the first respondents affidavits.
13. It is accepted that the Company was unable to pay its debts at the date of winding up. The applicant certified in a letter dated 3 May, 2018, that the Company has at all times from the date of the commencement of the winding up, been and continues to be, unable to pay its debts within the meaning of section 569 (1)(d) of the Companies Act 2014.
14. At the date of liquidation, a total sum of €91,392 was due to the Revenue Commissioners for outstanding VAT and PAYE/PRSI payments. A total sum of € 95,546 was due to the Ulster Bank (the "Bank"). The Company had debts owed to unsecured trade creditors of €856,326, giving rise to an excess of liabilities over assets of over €1 million.
15. It is common case that the principal cause of the failure of the Company was the loss in December 2014 of a contract with Royal Canin, a major supplier of pet food products. At that time Royal Canin commenced direct supply to MaxiZoo, which was a chain of approximately 16 retail stores and was a key customer of the Company. The impact of this loss was a decrease in revenues between 2014 and 2015, of approximately €3,000,000, representing 50% of turnover.
16. Although the Company began to experience trading losses in 2013 and again in 2014, it is said by the respondents that these were capable of being absorbed by significant profits retained from previous years' trading. This was true in part and only up to a certain point in time, but the losses sustained following the loss of Royal Canin / MaxiZoo were at a level from which the Company never recovered. The accounts of the Company from the period to end of February 2013 onwards show the following:

YEAR	SALES	NET LOSS
2013	€7,185,133	(€110,710)
2014	€6,097,165	(€196,252)
2015	€3,575,577	(€609,451)
2016	€3,008,368	(€436,268)

17. The liquidator brings the attention of the Court to eight matters which she believes should be considered in determining whether it is appropriate to make orders under s.819(2);
- (i) Failure to place the company in a timely liquidation,
  - (ii) Failure to deliver an accurate statement of affairs to the liquidator,
  - (iii) Failure to file tax returns,
  - (iv) Preferential payments to reduce personally guaranteed bank facilities,
  - (v) Excessive pension payments to directors,
  - (vi) Preferential payment of rent to directors,
  - (vii) Failure to protect the rights of employees,
  - (viii) Failure to comply with obligations under company law.
18. Counsel on behalf of the respondents correctly pointed out that "(viii) Failure to comply with obligations under Company Law" was not later substantively addressed by the liquidator in her affidavits.
19. Both respondents raise the defence under s.819(2)(a) that they acted honestly and responsibly in relation to the conduct of the affairs of the Company, whether before or after it became insolvent.
20. The applicant says in her first affidavit that the respondents "failed in their obligations under the Companies Act 2014 and acted dishonestly in the management of the Company". This is a very general allegation of dishonesty made once only and to which the applicant does not return. There is no focus in any of the affidavits on evidence establishing dishonesty as distinct from evidence of "failure to act honestly and responsibly". Throughout both of her affidavits the applicant says that the respondents failed to demonstrate that they acted honestly and responsibly. Therefore, it is unclear whether the applicant intended to allege dishonesty, as opposed to a failure to act "honestly and responsibly". If her intention was the former, she has not made clear what parts of her evidence support such a claim. I do not in this judgment make a finding of dishonesty.
21. I have concluded that the respondents have not proved that they acted responsibly in relation to the affairs of the Company and therefore that a declaration should be made under Section 819 (1) of the Act.

**Applicable law**

22. Section 819(1) of the Companies Act 2014 provides:

*"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)."*

Subsection (2) provides:

*"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)."*

23. The locus classicus for the factors to be taken into account when considering whether a director has acted honestly and responsibly were set out by Shanley J. in *Re La Moselle Clothing Ltd* (1998) 2 ILRM 401, and approved by the Supreme Court in *Re Squash (Ireland) Limited* [2001] 3 I.R. 35. They are as follows:
- (i) the extent to which the director has or has not complied with any obligations imposed on him by the Companies Acts;
  - (ii) the extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility;
  - (iii) the extent of the directors' responsibility for the insolvency of the company;
  - (iv) the extent of the directors' responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter;
  - (v) the extent to which the director, in the conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards.
24. The Court is obliged to make a declaration of restriction under s.819(1) of the 2014 Act against each of the respondents unless satisfied that he falls within the circumstances set out in s.819(2). The onus is on each respondent director to whom the restriction application is directed to prove that he has satisfied those criteria.
25. In *Business Communications Ltd v. Baxter and Parsons*, (21st July, 1995, unreported) Murphy J. stated:

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

26. In relation to the failure to place the Company in liquidation on a timely basis, the liquidator relies on the recent High Court judgment by Keane J. in *Re Gingersnap Ltd (in Voluntary Liquidation)*; *Leahy v Doyle* [2016] IEHC 177, ("Gingersnap"). The facts of that case are quite different from the present one. In *Gingersnap*, the respondent directors permitted the company to continue trading while insolvent for a period of approximately 3 years until liquidation, and to use monies properly due to the Revenue Commissioners for that purpose. Furthermore, Keane J. cited the leading dicta of Finlay Geoghegan J. in *Re Digital Channel Partners Limited* [2004] 2 ILRM 35 (at para. 40) that a limited failure to make tax returns and failure to pay tax liabilities over a limited period is not, in itself, sufficient to demonstrate irresponsibility.
27. In *Re Fáilte Logistics and Distribution Ltd (in voluntary liquidation)*; *Leahy v O'Keefe* [2016] IEHC 589, Keane J. followed the dicta of Finlay Geoghegan J. in *Re James Murphy & Sons Sales (Dundalk) Ltd*; *Stafford v Murphy and Murphy* [2010] IEHC 115, that a failure to recognise that a company is hopelessly insolvent and unlikely to be able to trade out of its difficulties can show a lack of commercial probity.
28. In *Re USIT World Plc* [2005] IEHC 285, Peart J. considered the question of failure to file returns;

*"It is unlike a worse situation where over perhaps many years of trading, officers of the company have ignored completely the obligations under the Companies Acts regarding the requirement to file returns, and/or other statutory requirements, where such behaviour would be demonstrative of such a degree of irresponsibility of attitude generally, and such egregious and wanton disregard of the obligations upon officers of limited companies as to liabilities as to indicate their complete lack of suitability for the entrustment of the privileges of limited liability. From such persons the public are entitled to be protected in the future."* [emphasis added]

29. Hutchinson in *Keane on Company Law*, (5th ed, Bloomsbury Professional, 2016) (at para. 27.185), states;

*"More recently, in Re MK Fuels Ltd, Cotter v Gilligan & Ors Barrett J. accepted that there could be an element of strain between directors and liquidators and a degree of 'culture clash' which might lead to directors not handling their dealings with a liquidator as well as they could, but that would not amount to a lack of cooperation warranting sanction by restriction."*

30. McGuinness J. in *Re Squash (Ireland) Limited* (at p. 39-41), emphasised that responsibility is to be judged by an objective standard. However, it is important not to view the events in light of what transpired or as Finlay Geoghegan J. in *Re James Murphy*

*& Sons Sales (Dundalk) Limited* [2010] IEHC 115 stated “not to be wise after the event”. Peart J. in *Re USIT World Plc* described it in the following terms:

*“With the benefit of hindsight it is natural perhaps that a liquidator can look at the situation at a particular time and from [sic] a perfectly proper view that a situation should have been looked at differently or that a different decision ought to have been made. But that is not the point in my view when this Court must decide whether it is satisfied whether directors acted honestly and responsibly. It does not mean that decisions taken must turn out later to have been the right decisions. What is at issue is whether it was irresponsible to have taken the decision at the time. That irresponsibility implies some element of recklessness or culpable want of care on the part of a director, which in the present case is absent.”* [emphasis added]

31. As regards inaccurate valuations of stock in the directors’ Estimated Statement of Affairs, the judgment of Barrett J. in *Tailored Homes Ltd* [2017] IEHC 76 (at para. 25) is instructive;

*“A statement of affairs is sworn to by directors and it is not, therefore, a matter to be approached lightly or glibly. But neither is perfection to be expected; errors may unwittingly creep in to even the best prepared and most honest statement of affairs. Provided there is cooperation by directors in explaining such innocent deficiencies as may appear in a statement and that there has been no dishonest intention on their part when swearing to the substance of the statement, that should usually be the end of matters. Dishonesty, by contrast, cannot be tolerated.”*

**Failure to place the Company in a timely liquidation**

32. The liquidator says that the Company continued to trade until August 2016 primarily at the expense of unsecured trade creditors and the Revenue Commissioners. The liquidator avers that the respondents at all times had adequate financial information available to them in order to properly monitor and assess the true financial position of the Company. There were regular management meetings with the benefit of management accounts since early 2014.
33. As appears from the information at paragraph 16 above, the Company’s accounts show that it began experiencing trading difficulties in the year ended February 2013 when there was a net loss of €110,710. Losses increased in 2014 to €196,252. In December 2014, Royal Canin, informed the Company that it was going to supply directly to MaxiZoo, an important customer of the Company, and essentially cut the Company out of the distribution line, “*thereby greatly decreasing the Company’s business with this key customer. This significantly impacted the turnover of the Company in circumstances where MaxiZoo had a chain of approximately 16 stores.*” The practical result of the loss of the MaxiZoo contract was a reduction of approximately €3 million in turnover. This is evident in the Company’s accounts: total sales to February 2014 was €6,097,165 and to February 2015 had fallen to €3,575,557. The net loss to February 2015 was €609,451, and the draft management accounts prepared for 2016 projected a loss of €436,268.

34. In both her grounding affidavit and second affidavit the liquidator states that *"The Directors have indicated that they considered the company to be insolvent from 2013 due to trading difficulties and loss of sales"*, and that *"Despite the Directors confirming that the Company was insolvent since 2013 and that they were having regular management meetings with the benefit of management account since early 2014, they failed to place the Company into liquidation until August 2016."*
35. At paragraph 12 of his first affidavit, the first respondent disputes this averment by the liquidator; *"This is incorrect, the Directors do not believe that they ever told Ms. Kelly that the Company was insolvent from 2013."* In 2013 the Company had a turnover of €7,185,133 which produced a Net Loss of €110,710 and the MaxiZoo contract was not lost until December 2014 – January 2015. Thus, they say that there is no conclusive evidence that the Company was insolvent in 2013.
36. The first respondent differentiates between a loss-making business and an insolvent business. He says that while the Company was loss-making between 2013 and 2016, it was not insolvent in 2013 and 2014 as *"the Company had retained profits and was in a position to absorb those losses."*
37. The first respondent acknowledges that the Company *"was balance sheet insolvent in 2015"*, but that *"In my opinion, the Company became insolvent in 2016 because at that point in time it became clear to the directors of the Company that it could not trade out of its difficulties."* and *"In circumstances where the Company was loss making in 2016, I will accept that the debt owed to trade creditors increased."*
38. I accept the respondent's averment that he had not admitted that the company was insolvent in 2013. Instead, he had acknowledged that the company had returned losses that year, which is not the same thing. However, when the respondent says that the company became insolvent only in 2016 when it became clear to the directors that the company could not trade out of its difficulties that proposition is incorrect. Even if the respondents only recognised that position during 2016, an objective analysis of when the company became insolvent is required. The court must be cautious to avoid applying the benefit of hindsight, but the correct starting point is to identify when the company became insolvent, and then consider the information available to directors and what measures were adapted.
39. The Company accounts recorded retained profits as of February 2013 of €621,000. However, in the year ended February 2013, the Company incurred a loss of €110,710, to February 2014, a loss of €196,252 and in year ended February 2015, a loss of €609,451. The liquidator says:
- "15. Accordingly, by the year ended February 2015, the Company had made consistent significant losses for the three previous accounting periods, which losses totalled €916,413. These losses had completely eroded any retained profits held by the Company as at February 2013. The clear conclusion from this, in my respectful view, is that the Company was both heavily loss-making and balance sheet*

*insolvent in February 2015 at the latest. The accounts for the year ended February 2015 were signed off by the Directors of the Company in July 2015, over a year prior to the decision to cease trading and to place the Company into liquidation. Rather than wind the Company up in July 2015, the Respondents continued to permit the Company to trade for a further year, during which considerable further losses were incurred resulting in a deficit of over €1 million in this liquidation.*

16. *The Directors personally signed a Letter of Representation in respect of the final accounts completed to February 2015, which was dated 16 July 2015 and in which they stated the following:*

*"We confirm we have a reasonable expectation that the company has adequate resources to continue in operational existence for the foreseeable future"*

*This declaration was signed against the backdrop of a Balance Sheet deficit of €185,703, and trading losses increasing year on year, most recently amounting to €609,451 in that particular year. In reality, at the date the declaration was signed, the trading losses had continued to increase and there was no prospect of the Company recovering from its insolvent position. This letter was thirteen months prior to the decision to place the Company in liquidation. The Directors were in possession of all relevant information regarding the increase in losses in July 2015 as the management accounts had been produced to April 2015, which showed a further trading loss in the two month period Mar-Apr 2015 of €92,000 ... As can be seen from the management accounts for the period ended February 2016 (exhibited above), this loss-making trend continued for the entire year to February 2016." [emphasis added]*

40. The liquidator states that the respondents must have been aware of the financial situation of the Company by July 2015, at the latest.
41. The mere assertion by the first respondent that the directors were not aware of the insolvency until 2016 is insufficient to counter the objective evidence based on the signed financial statements on which the applicant has based her conclusion that by February 2015 the company was insolvent. I also accept that the latest date by which the directors were aware of this was July 2015, when they signed the accounts to end of February 2015.
42. The letter of Representation to the auditors included the statement "*...We confirm we have a reasonable expectation that the company has adequate resources to continue in operational existence for the foreseeable future*". By this time the directors must have known from the signed accounts that the resource of retained profits had been exhausted, whatever other "*resources*" they may have been referencing. As regards the term "*...for the foreseeable future*", the central question which then arises is whether the deferral for more than a year to August 2016 of the action of ceasing to trade and liquidating the Company constituted responsible conduct on the part of the respondents.



43. The table set out by the liquidator at paragraph 17 of her grounding affidavit shows that the Company sustained losses of €110,000 to end of February 2013 and €196,000 to end of February 2014. Losses to end of February 2015 grew to €609,000, that particular year partly attributable to the loss of the MaxiZoo contract. It is clear therefore that the Company was sustaining significant losses even before it lost that contract. Further, that contract had been lost only in December 2014, so can only have been one contributor to the almost halving of sales revenues year on year to February 2015.
44. After the loss of the MaxiZoo contract, the first respondent says that the Company attempted to address the resulting difficulties by *“reducing costs and by trying to obtain other customers as is set out above. In terms of cost reductions, salaries were cut and a number of employees left the Company and were not replaced. Furthermore, the Company renegotiated a deal with a third-party delivery company which resulted in considerable costs savings for the Company.”*
45. Correspondence exhibited with third parties demonstrates endeavours of the first respondent to source new business opportunities and to expand existing revenue streams for the Company. The correspondence dates from November 2015 to July 2016, just one month prior to the Company being wound up. However, from an objective reading, many, if not most, of the discussions were not at an advanced stage. The third parties were seeking quotes and inquiring about pricing and product lines supplied by the Company. Deals were not concluded and no new binding commitments to place orders from the company were secured.

**Customer contacts**

46. In an email exhibited between the first respondent and a representative of Petmania on 25 March, 2016, at page 167, the first respondent signs off his email with *“Hopefully, when you have a chance to review, we could start some business together.”* A further email is sent by the first respondent 7 days later to the same person. However he does not appear to have received a response to either email.
47. Another email exhibited between the first respondent and a representative of Antalis dated 2 June 2016, just 2 months before the Company was wound up states the following at page 174;

*“Hi Brian,*

*Thanks for below.*

*Leave below with me and I will revert in due course. We are looking at a [sic] number of options as discussed and pretty confident we can do some business together. However, it could be a slow burn but bear with us.*

*Regards*

*Eoin”*

48. Another example is an email dated 18 February, 2016, from the first respondent to an Anne-Marie Lalor, page 161;

*"Hi Anne-Marie,*

*Hope you are well?*

*Now that Rob is working for Gain, you are now left with me!!*

*I've attached a new Wild bird concept that we will be introducing this year.*

*Would it be something you could be interested in? [emphasis added]*

*It is premium, but if you need to sell on price we could also look at alternatives for you.*

*Would probably need a sit down to understand volume and pricing if that's possible?*

*Let me know when is convenient time for you.*

*Regards*

*Brian Stenson"*

No response is exhibited and it is not clear if discussions progressed beyond this stage.

49. In an email from the first respondent to Stephan Descheemaeker, a co-director of Pet Zone, on 24 January, 2016, he states;

*"Hi Stephan,*

*Just a quick mail.*

*Good meeting in Petshop Sligo.*

*Gave another order for 1k approx. and will move Flexi and Kong to WW in the next 2 weeks.*

*They will move these lines and the remaining 3 stores will start ordering then also.*

*Plan is to build this up to 6-8 key brands first, so we become a player!! [emphasis added]*

*Petmania*

*Had a coffee (tea in my case with Shane)*

*Seem to have got their act together and store in Kilkenny looked very well.*

*Most of his products is direct but he is picking up from wholesaler in UK.*

*This was viable when they were exporting Fish to UK, which is no longer happening.*

*Asked me to send on New Items that might be of interest and will look at them for me.*

*They are looking to expand in the next 2 years and hinted they would need a more local wholesaler*

*Also felt that they were holding onto too much stock in their own central warehouse.*

*Agreed there would be a premium to pay for a service where they don't hold stock, and replenish locally.*

*I will cherry pick a few lines, a few key products I know they were getting from UK.*

*He will also look at Flexi from us as currently buying from Chanelle.*

*I reckon we could get 500€ a store a week in the months ahead,*

*10 stores = 5k a week, 20-25k a month. [emphasis added]*

*Off to MaxiZoo early in the am in Cork. [sic]*

*Will keep you posted.*

*Agenda*

*Listing confirmed last meeting*

*Price Increases*

*New Lines*

*Equipet on Wednesday*

*Price Increases*

*New Lines*

*Connaght Gold confirmed on Friday last for meeting this Thursday 28th.*

*Pets & More – TBC this week.*

*Cavan Stock taking Sunday 31st and Mon 1st.*

*I will check your sales for Woodies 2moro evening when back from Cork.*

*Joe sent me Cashflow back on Friday, which I will have to look at on Tuesday when back in office. [emphasis added]*

*I have a feeling your off to China 2moro?*

*Safe travelling and catch you soon.*

*Regards*

*Brian"*

50. In another email from Brian Stenson to Stephan Descheemaecker dated 18 February, 2016, he states:

*"Hi Stephan,*

*I have just sent emails to the following buyers regarding your wild bird concept and also the possibility of Pet Care too.*

*On my travels I have checked some of these stores and some do Petcare but not that well.*

*Jen got an order from one of the Topline stores and he was the guy who expressed interest in Wild Bird as there has been a lot of changes in the [sic]*

*They are buying groups basically.*

*www.unitedhardware.ie 120 stores*

*www.alliedmerchants.ie 29 stores*

*www.topline.ie 160 stores*

*www.dairygold.ie 39 stores*

*If its [sic] good enough for Aveve its [sic] good enough for these stores!!*

*Will probably need some more detail of range in excel etc etc?*

*Petmania will be in touch 2moro re listing and meeting store managers of Aurivo next week to run through the agreed listing.*

*Regards*

*Brian Stenson"*

51. An email dated 17 May, 2016 from Ger Ginnelly, Product Category Manager for Aurivo Agribusiness Retail Stores to Brian Stenson states:

*"Brian,*

*Can you forward on the product details and pricing for the Canagan range on the attached Hubfile."*

52. An email dated 1 July, 2016, from Sharon Doyle, Assistant Category Manager in Woodies, to Brian Stenson states;

*"Hi Brian,*

*As you know Brian and Patricia are working on the launch of the new website and they need suppliers help with this project they are on a tight time line to have categories completed so I have had a review of the current listing and have selected these products as must haves for the website.*

*Can you please forward the relevant details that are required or these products.*

*I am also reviewing the Bray store listing today and will let you know what skus [sic] are relisted for this store.*

*We will need to schedule for a full review as some lines are poor sellers and we will need to re fresh [sic] other products.*

*If you have any queries please do not hesitate to contact me.*

*Thanks,*

*Kind regards,*

*Sharon"*

53. The respondents say that *"the Company was hopeful that it would be able to increase its supply of products to Woodies (25 stores), and also, to begin supplying a UK based retail operator known as The Range"*, [emphasis added].
54. The respondents place emphasis on these emails and contacts with customers and potential customers. There is nothing wrong with the content of these emails in themselves and the respondents cannot be faulted because their efforts did not achieve the required turnaround of the company's fortunes. They undoubtedly evidence activity in the respondents' endeavours to secure new business. However, when the company was demonstrably insolvent by February 2015, and the directors became aware at the latest by July 2015 of that fact and that the losses were continuing, it was incumbent on them to focus their attention on respecting the interests of the creditors to whom they owed their fiduciary duties, by at least mitigating their losses. In that context the reliance now on limited evidence of particular sales efforts is misplaced. More than this was required when the Company was, to the knowledge of the respondents, in such a precarious financial position. No evidence of a serious or fundamental appraisal of the company's financial and trading status and prospects at this time was proffered. I return to this in my conclusions.

**Pet Zone**

55. At paragraph 6 of the first respondent's first affidavit, he states "*If Pet Zone Limited had been in a position to open one or two other stores then the Company would also have increased its sales through these outlets.*"
56. At paragraph 4 of his second affidavit, he further states that "*We hoped that this company would be able to open up one or two new stores and that this would in turn result in that company making increased orders from the Company*". In support of this, the respondent exhibits an email dated 25 November 2015, to Stephan Descheemaecker, another director of Pet Zone. The email is titled "Cavan Pet Store" [sic]. However, he concedes at paragraph 6 of his first affidavit that "*it had also been in discussion to take over a store in County Cavan, however those discussions fell through prior to the lease being executed.*"
57. The prospect that this customer itself being a related Company may expand its business was a questionable basis for attaching weight to it as a positive contributor to the future trade of the Company.

**Professional Advice**

58. The first respondent avers that since 2013 the Company took professional advice in relation to its trading on a regular basis and continued to closely monitor the financial performance of the Company with a view to returning it to profitability. At paragraph 5 of his second affidavit he states;

*"In relation to paragraph 8 of Ms Kelly's Affidavit, I can confirm that the Company did take appropriate accountancy and expert advice on a regular basis, The Company took expert advice from Sherry McNabola Murray & Company, Chartered Accountants, and from David Stenson's father-in-law, Patrick Prior. Mr Prior is an accountant who is formerly the chief financial officer of the Penney's Group. Mr Prior has extensive experience in retail and the directors of the Company met with him on a regular basis."*

The first respondent further states at paragraph 16 that there were "*frequent management meetings*" during 2013 and 2014 to monitor the position and to "*explore all avenues to improve the position of the Company.*"

59. Counsel on behalf of the liquidator specifically drew to the attention of the Court the absence of any supporting evidence exhibited on behalf of the respondents to corroborate this averment and urged the Court to view as significant that neither of the first respondent's subsequent affidavits exhibited any such evidence after the concern was raised by the liquidator. Counsel suggested that had such proof been adduced, it could have provided a reasonable basis for the respondents' belief that there was any reality to the Company returning to profitability and thus, their decision to continue to trade in 2014, 2015 and 2016. Yet no such evidence was adduced.
60. In *Re USIT World Plc* Peart J. stated that reasonable efforts to trade out of difficulty will not be seen as irresponsible once proper advice is received:

*"...To attempt to trade out of a difficulty is not an irresponsible act. Care of course must be taken to ensure that effective and realistic steps are taken and that creditors' interests are kept to the fore, rather than that a careless or reckless gamble is taken without proper advice and planning to an achievable end. Some sort of short term emergency fire-fighting must be permitted to take place without those efforts, provided they are reasonable and responsible, from being made. Many companies have survived and prospered after temporary setbacks."*

61. It may not always be appropriate to exhibit the contents of advice obtained, particularly legal advice, although legal advice is not cited. However, the respondent says only that "expert advice" was obtained from Sherry McNabola Murray & Co and Mr. Prior. The Court has no visibility as to the terms or nature of the advice received or, very importantly, when it was obtained. In circumstances where the onus rests on the respondents to satisfy this Court that they acted honestly and responsibly in relation to the affairs of the Company such very general references to the taking of advice at times which are not detailed, falls short of evidence sufficient to discharge that onus.

**Alleged failure to deliver an accurate Estimated Statement of Affairs to the Liquidator**

62. The first respondent categorises the liquidator's complaint regarding the alleged failure to deliver an accurate Statement of Affairs into three separate headings, as follows;

- (i) Display units,
  - (ii) Value of the remaining stock, and
  - (iii) Alleged failures to respond to queries raised by the Liquidator.
- (i) *Display units*

The Liquidator complains that certain bespoke display units manufactured for the Company's premises were not disclosed in the assets of the Company. The first respondent provides a plausible explanation for this omission. He says that the display units were transferred to Pet Zone when it opened a new store (500 yards across the road in Finglas) in November 2015 and that when it came to preparing the Estimated Statement of Affairs, "we simply forgot about these assets". The liquidator acknowledges that when the omission was raised with the respondents, Pet Zone bought the items from the Company for €1,500.

At paragraph 14 of his second affidavit, the first respondent says that a mezzanine floor and warehouse racking, both located in the warehouse from which the Company operated, were set out in the fixtures and fittings of the Statement of Affairs.

I am satisfied, on the affidavits that as a matter of probability, there was no dishonest intention on the part of the respondents in failing to include these items in fixtures and fittings in the Statement of Affairs. The respondents provided a

credible explanation for the exclusion of the display unit, the mezzanine floor and the racking from the Statement of Affairs.

(ii) *Value of the remaining stock*

The value for the stock obtained by the liquidator was €50,000. The respondents estimated the value of the stock in the Statement of Affairs as €218,000, with a realisable value on liquidation of €142,000. The first respondent rejects the contention that the figures in the Estimated Statement of Affairs were inaccurate. He states they were "*our best estimate on the remaining stock*". At paragraph 15 of his second affidavit, he further states, "*I accept that Ms Kelly did not achieve the same price for the stock as your Deponent and my brother believed it was worth at that time.*"

The liquidator avers that upon inspection of the stock it became clear that "*the real value of the stock was considerably less than that stated in the Statement of Affairs, because large volumes of the stock was out of date and/or damaged. The issue was so severe that Royal Canin ... oversaw the physical destruction of the products into skips in order to ensure that the damaged product did not re-enter the market for sale.*" In response, the first respondent provides a credible explanation as to why some Royal Canin stock may have been out of date;

*"The position was that the Company was a supplier of Royal Canin products. As part of the Company's contract with Royal Canin it was obliged to hold the entire range of Royal Canin stock and there was a number of items in the range that were not particularly successful and which the Company was not in a position to sell much of. Therefore, after a period of time, the stock would have gone out of date. However, in the context of the overall stock that was owned by the Company as at the date of liquidation of the Company, not much of the stock of the Company was out of date."*

The consequence of an inaccurate valuation in the directors' Estimated Statement of Affairs was considered Barrett J. in *Tailored Homes Ltd* [2017] IEHC 76 (at para. 25);

*"A statement of affairs is sworn to by directors and it is not, therefore, a matter to be approached lightly or glibly. But neither is perfection to be expected; errors may unwittingly creep in to even the best prepared and most honest of statements of affairs. Provided there is cooperation by directors in explaining such innocent deficiencies as may appear in a statement and that there has been no dishonest intention on their part when swearing to the substance of the statement, that should usually be an end of matters. Dishonesty, by contrast, cannot be tolerated."*

I am satisfied that there was no dishonest intention by the respondents in misstating the value of the stock. Furthermore, I am satisfied on the affidavit



evidence that as a matter of probability, while the respondents held some out of date stock, this was due to the obligation to stock the entire Royal Canin range and was not the result of dishonesty or irresponsibility on the respondents' part. Ultimately, the discrepancy this caused in the final value realised by the liquidator for the stock does not form a basis for restriction under s.819 of the Companies Act 2014.

(iii) *Alleged failures to respond to queries raised by the Liquidator*

The liquidator alleges that the respondents failed to respond to queries raised by her during the liquidation. At paragraph 25 of the liquidator's second affidavit, the liquidator points to one instance where she asked to be provided with a fixed asset register. However, the liquidator separately acknowledges, at paragraph 20, that one did not exist and that this was confirmed to her by the respondents and the Company accountant. Whilst the absence of a fixed asset register does no credit to the respondents, this of itself cannot be taken to demonstrate a lack of co-operation or a failure to answer a query by the respondents in the course of the winding up. Aside from this example the liquidator does not point to any other instance demonstrating a lack of co-operation.

Furthermore, the first respondent, in his second affidavit, exhibits extensive replies by the Company's former accountant, Joe O'Brien of Sherry McNabola Murray & Company, to queries from the liquidator for the books and records of the Company. These replies demonstrate cooperation with the liquidator in the course of the winding up.

**Preferential payments to reduce personally guaranteed bank facilities**

63. In the liquidator's grounding affidavit, she states that in 2014 a sum of €552,105 was due to the Bank cumulatively under three facilities, namely; an invoice discounting arrangement, day-to-day trading facilities (an overdraft) and a term loan secured by way of personal guarantee of the directors. Unhelpfully, she does not provide a breakdown of this figure as between the different facilities, information which would assist the court to understand the position the applicant has adopted in relation to what she describes as preferential payments. She provides the breakdown as at the date of liquidation as follows: *"At the date of liquidation, the balance due to the Bank was €76,538 in respect of the invoice discounting facility, €9,435 under the term loan facility and €9,573 in respect of the overdraft, a reduction of €456,559."*
64. The first respondent rejects the contention that there existed three such facilities. He states that the Company had only two facilities with the Bank, an invoice discounting facility and a term loan.
65. As regards the personal guarantee, Counsel on behalf of the respondents clarified that it existed in respect of the invoice discounting facility only and was limited to €95,230. This means that the exposure of the directors under the personal guarantee at the date of

liquidation was for an amount of €76,538 which in relative terms was still close to the amount of the limit of the guarantee.

66. The first respondent states that the payment amounts under the invoice discounting facility were out of the Company's control, and that after 2014 the sum owing under the facility reduced in line with the Company's decreasing turnover. This again would negative any inference of preference.
67. The second facility, according to the first respondent, was a term loan taken out in 2013 for a term of three years. At the time of liquidation only €9,435 was owing under the loan facility. In other words, only two payments out of thirty-six payments were left to be paid. The first respondent avers that the respondents approached the Bank and requested an extension of the term or the imposition of a moratorium on the payments. There is no evidence of these attempts by the respondents exhibited. Without knowing the original amount of this loan, or having information as to its level from time to time, the court has not been given assistance as to whether the balance was reduced in a manner constituting a preference. This having been noted, the fact that it was repaid in accordance with its terms is generally no answer to an allegation of preference.
68. Finally, the liquidator avers that the Company had an overdraft facility under which the balance of €9,573 was owed at the date of winding up. In this regard, the first named respondent says:

*"The Liquidator describes three facilities, to include "day to day" banking facilities. We are not aware of what the Liquidator is referring to in this regard. If she is in fact referring to an overdraft facility, there was no such facility. If she is referring to the balance of €9,573 as the overdraft facility, that relates to payments cleared by the Bank of its own volition. At the time of the winding up, there had been no overdraft facility since 2013 when we took out the term loan and therefore no personal guarantee as averred to above."*

Again, the court has not been informed of the amount by which it is said that the overdraft was reduced and cannot assess the allegation of preference.

Whilst unfair preference within the meaning of Section 604 of the Companies Act 2014 is not clearly established, the continuance of substantial payments to the bank throughout the loss making years up to the time of liquidation, in combination with other aspects of the respondents' stewardship of the company, is a factor which I take into account in my conclusions below.

#### **Excessive pension payments to directors**

69. The first respondent states that the directors' pension payments were tied to the Company premises which the respondents owned personally. In 2006, the respondents set up a pension backed mortgage with Ulster Bank Wealth in relation to the warehouse from which the Company traded. *"The scheme had been set up with Irish Life and Irish Life had a distribution arrangement with Ulster Bank for their pension products."* Under

the terms of the agreement, interest was to be paid by the respondents every month. The first respondent states that part of the rent paid by the Company equated to the interest being charged on the mortgage. The other portion of the rent represented the pension contributions.

70. The first respondent states that they learned that the market rent for a property comparable to the property occupied by the Company was approximately €180,000 per annum. The respondents charged the Company approximately €108,000 per annum, and thus the first respondent avers that the Company obtained a benefit by paying less than market rent.
71. The first respondent states at paragraph 27 of his first affidavit that the respondents approached the Bank on "numerous" occasions to request a further reduction or cessation of any contributions by the Company to the pension scheme but that the Bank would not allow this due to the type of arrangement which was in place. No evidence was exhibited of these attempts. Nor does this mean that the directors did not, whether directly or indirectly, benefit from these payments.
72. At paragraph 19 of his second affidavit, the first respondent states that "*when the Company began suffering losses, the directors approached the Bank to see if the monthly repayments (being paid by the Company) could be reduced. The Bank agreed to this.*" According to the table provided by the liquidator at paragraph 42 of her grounding affidavit, the contributions to the respondents' pension scheme reduced from €117,037 in 2014 to €69,069 in 2015 and to €61,325 in 2016.

Year	Directors' defined pension contribution pensions	Rates & Rent
2013	€116,012	€132,011
2014	€117,037	€91,483
2015	€69,069	€86,235
2016	€61,325	€117,805
Total	€363,443	€427,534

73. The liquidator, at paragraph 30 of her grounding affidavit, states:

*"It is even more concerning that in the short number of weeks after placing the Company in liquidation, on or about 11 August 2016, the first named Respondent transferred the fund from a defined contribution policy to a personally administered one. The effect of this was to remove the pension plan from being a company administered scheme and beyond the reach of the liquidator in the normal course of business."*

There is some force in the respondents' submission that a defined contribution pension plan is not an asset of the Company and that the fact that a scheme is administered by the Company does not make it an asset of the Company. However,

this does not of itself explain the making by the Company of substantial contributions to the personal pension plan of the directors over a period of four years when the company was returning trading losses which were significant even in proportion to its turnover.

#### **Preferential Payment of Rent to Directors**

74. The Company paid rent to the Directors at a rate which varied between €92,000 and €132,000 per annum, with the last full year of trading having a rent charge of €117,000. At the date of liquidation there were “*no substantial rent arrears*”. The liquidator contends that the rent payments were made at the expense of, and therefore to the detriment of creditors and at a time when the respondents ought to have been acting in the interests of the creditors. At paragraph 37 of her grounding affidavit, the liquidator states “*Despite the serious financial difficulties the Company experienced and while the Directors continued to allow creditors supply the Company, the Directors ensured that monthly payments continued to be paid to them personally as rent for the premises, in addition to their salary and pension contributions.*”
75. The first respondent, at paragraph 23 of his second affidavit, says that due to the fact that the premises was charged to the Bank, the Company was obliged to pay rent and that the rent paid went directly to the Bank. He says that respondents did not benefit from owning the building personally and that “*The rent paid by the Company effectively went directly to service the interest re-payments on the Premises.*” By the time of the winding up of the Company, he states that the respondents had a loan for the premises in excess of its value;
- “Both your Deponent and my brother lost out very significantly in relation to the value of this property. The acquisition of this property in our personal names [sic] ultimately did not benefit us in any way. The fact that there was no rent due as at the date of liquidation was simply a function of the power the Bank had in relation to the debt owed on the warehouse.”*
76. The first respondent states at paragraph 19 of his second affidavit; “*The directors ensured, through their negotiations with the Bank, that the Company would pay as little rent as possible during this time and the directors did not benefit from this arrangement because all rent that was paid by the Company went directly to the Bank.*” The respondents themselves explain that the property was acquired through what they describe as a pension backed mortgage. Such products can take different forms and the mechanics of this one are nowhere described clearly by any of the deponents. Details of the total amount of the mortgage loan were not provided but by definition the respondents, as owners of the property, were the bank’s obligors on that mortgage. Therefore the respondents benefited by the payments applied in reduction of that loan and such payments continued, albeit on a reduced basis, up to the time of liquidation in August 2016.
77. It is to the respondents’ credit that the rental payments were reduced after 2013. However the combined payment of rent and rates rose in 2016.

78. The first respondent makes the point that the value of the property had fallen such that at the time of liquidation the bank debt still exceeded that value. This does not mean that the directors did not benefit from payments made which were made and applied even in part to reduction of that debt, being their debt.

**Services to related company provided with no remuneration**

79. The liquidator, in her grounding affidavit, states that from examination of the books and records of the Company, it appears that the Company paid for all daily administration and accounting costs for Pet Zone free of charge. She estimates that since Pet Zone's incorporation in 2006, the Company is due between €50,000 - €60,000 from this outlay. She further states that the first respondent provided management services to Pet Zone and did not take any remuneration for same. Both arrangements were allowed to continue at a time when the respondents were aware of the Company's insolvency. In response the first respondent states that Pet Zone paid for its own accounting, payroll and taxation services, which were provided by an accountancy firm and for which Pet Zone was billed directly. He says that he and the second respondent worked full time for the Company and that they worked late nights and weekends for Pet Zone. One employee of the Company provided a crossover service to Pet Zone in the form of one half day to one full day per month undertaking data entry for Pet Zone, this *"was the limited extent of any overlap of services of that company."*
80. I am prepared to accept, as a matter of probability, that the Company was not burdened with the cost of the respondents providing services to Pet Zone and that this did not ultimately lead to the insolvency of the Company. There is not sufficient evidence to satisfy me that by providing services to Pet Zone, the respondents deprived the Company of money and time.

**Failure to protect the rights of employees**

81. In the liquidator's grounding affidavit, she stated that the Company's thirteen employees as at the date of liquidation were owed €26,645 in unpaid salaries and that this deficit had led to a claim being made to the Insolvency Payments Scheme in the sum of €126,675.
82. The liquidator concedes, at paragraph 37 of her second affidavit, that all employees were paid their salaries on a weekly basis and that they were fully paid at the date of liquidation. The sum of €126,645 initially advanced by her as relating to unpaid wages in fact only relates to minimum notice period and holiday pay of employees. Therefore, whilst the employees were reliant on the insolvency payment scheme for unpaid minimum notice and holiday pay, the original complaint regarding unpaid salaries is not maintained. The exposure regarding minimum notice and holiday pay, while regrettable, would not of itself establish irresponsible conduct in relation to the affairs of the Company.

**Failure to File Tax Returns**

83. The liquidator states that the Company was in default of its obligation to make appropriate returns to the Revenue Commissioners *"in the last number of months prior to being wound up."*

84. As regards VAT, for May/June 2016, €62,608 went unpaid and for July/August 2016, an amount of €16,944. For PAYE/PRSI, for July 2016, €8,350 was unpaid and for August 2016, €3,490 is due. Totalling €91,392.
85. The first respondent averred that the return for the May/June VAT liability was filed in July 2016, and that the July/August VAT return was not due until September 2016 by which stage the Company had already been wound up. Thus, while VAT was unpaid for these periods, the respondent states that the Company did not fail in its obligation to make the appropriate return. In relation to PAYE and PRSI due for July and August 2016, the respondent accepts that the tax was not paid. However he says that the Company had been wound up by the time the returns were due for those months.
86. The Company appears to have had no prior history of non-compliance in respect of tax obligations before May 2016. This is unlike the situation in *Gingersnap* where the companies failed to pay the taxes due from it to the Revenue Commissioners over a "protracted period of time". Ultimately, I do not believe the Company's limited failure to pay outstanding taxes to the Revenue Commissioners in this particular case and having regard to the Company's long history was of such gravity as to evidence failure to act honestly and responsibly.

#### **Conclusion**

87. According to the Profit and Loss Account for the year ended 28 February 2015, the Company recorded a net loss of €609,451, an increase from €196,252 in the previous year. The Balance Sheet as at 28 February 2015, recorded a deficit of €185,703 in shareholders' equity, a negative swing of approximately €611,000 from 2014. Amounts falling due to creditors within one year in 2015 was €1,863,461, an increase of approximately €260,000 from 2014. €807,639 of this figure was due to trade creditors, an increase of almost €190,000. Against this, the amount owing from trade debtors decreased by approximately €156,000 in line with a reduction in trade.

Year	Sales	Net Loss	Directors' Salary (for 3 directors)	Directors' defined contribution pensions (for 2 directors)	Rates & Rents
2013	€7,185,133	-€110,710	€215,998	€116,012	€132,011
2014	€6,097,165	-€196,252	€192,149	€117,037	€91,483
2015	€3,575,577	-€609,451	€153,939	€69,069	€86,235
2016	€3,008,368	-€436,268	€159,582	€61,325	€117,805

88. The accounts to February 2015 were completed approximately six weeks after the loss of the MaxiZoo contract. While this contract was a major loss to the Company, from examination of the accounts from 2012 to 2014 inclusive, the Company was in financial difficulty prior to losing the contract. The 2013 accounts show shareholders' equity reduced by €110,710, compounded by a further reduction of €196,252 in 2014.
89. The accounts to February 2015 were signed by the respondents on 16 July, 2015. By that time the serious impact of the loss of the Royal Canin contract had become clear. Therefore, the respondents were cognisant of the above figures by that date. Management accounts were produced to April 2015 showing a further trading loss for March and April 2015 of €92,000.
90. From, at the latest, July 2015, when clear financial information was available to them, the directors were under a duty, both collectively and individually, "*to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors*" per Jonathan Parker J. in *Re Barings plc. and Ors. (No.5); Secretary of State for Trade and Industry v Baker and Ors.* [1999] 1 BCLC 433, cited with approval by Finlay Geoghegan J. in *Re James Murphy & Sons Sales (Dundalk) Ltd.*
91. The first respondent states that the Company traded for over twenty-two years without any difficulties. This is a fair and relevant fact to take into consideration when it comes to balancing such a history against the events in the final 18 months of the company's trading history. However, this does not justify the delay from July 2015 to August 2016 in taking the decision to cease trading and liquidate.
92. When faced with such information as to the challenging state of the Company's finances and its deteriorating trading position, the directors were not under an absolute obligation to initiate a liquidation of the Company, thereby triggering immediate and certain losses to creditors and others. However, from the point in time when they were aware of the insolvency they were under to have regard to the interests of the creditors of the Company and to act accordingly. In this case the respondents refer to their belief that the Company could trade out of its difficulties. They refer to efforts made to secure new business and say that they took advice from persons having relevant experience. I have found that the evidence of such measures is insufficient in this case to discharge the onus of proving that the respondents acted responsibly in relation to the affairs of the Company.
93. The evidence of continuing payments to the Company's bank directly under its facilities is not such as would clearly establish that the bank was being unfairly preferred within the meaning of Section 604 of the Companies Act 2014. However the continuance of the Company's trade and the failure to liquidate for a full year at least after the insolvency had become known to the respondents had the effect that substantial payments to the bank directly, to the directors for rent and ultimately to their bank and payments to the respondents personal pension schemes continued to accumulate for the year to February 2016 and thereafter.

94. It was submitted that in respect of the last full year for which financial statements were available, namely the year to end of February 2016, the payments in respect of directors' salaries, defined pension contributions and rates and rent in respect of the premises, which totalled €338,712, were not disproportionate to the turnover of €3,008,368. In circumstances where that was the fourth continuous year of losses, which that year were €436,268, and had by then accumulated to €1,352,681 and where any retained profits had been clearly extinguished, I cannot accept that submission.
95. The ultimate result of this continuance was a deficit as regards unsecured creditors which, on the respondents' own estimated statement of affairs grew to €856,326 and in the final outcome at liquidation exceeded €1 million. These factors lead me to the conclusion that the respondents have not demonstrated that they acted honestly and responsibly in relation to the affairs of the Company. Accordingly, I shall make a declaration pursuant to s.819 of the Companies Act 2014 that each respondent shall not for a period of five years be appointed to act in any way directly or indirectly as a director or secretary of a company or be concerned in or take part in the formation or promotion of a company unless that company meets the requirement set out in ss.3 of s.819.