

THE HIGH COURT

[2020] IEHC 565

2010/651 COS

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

AND

IN THE MATTER OF WHELAN LIMESTONE QUARRIES (CONTRACTS) LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 1963 TO 2013

AND

**IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF
THE COMPANY LAW ENFORCEMENT ACT 2001**

BETWEEN

CARL DILLON

APPLICANT

-AND-

**ENDA WHELAN, CHRISTINA WHELAN, EDWIN RYAN, BRIAN WHELAN AND JOHN
MCKEOGH**

RESPONDENTS

JUDGMENT of Mr. Justice Quinn delivered on the 6th day of November 2020

1. The applicant is the official liquidator of five companies in the "Whelan Group". In these proceedings, he sought declarations pursuant to s.150 of the Companies Act 1990 (as amended) that the respondents shall not for a period of five years be appointed or act in any way whether directly or indirectly as a director or secretary, or be concerned or take part in the promotion or formation of any company unless that company meets the requirements set out in subs. 3 of s. 150 of the Act of 1990 (as amended).
2. Declarations of restriction have already been made against the first, third and fourth named respondents. The second named respondent is deceased.
3. The application as against the fifth named respondent, John McKeogh, (referred to in this judgment as "the respondent"), is opposed by him and this judgment relates to an application by the respondent for an order pursuant to the inherent jurisdiction of the court striking out and/or staying the proceedings against the respondent.
4. The application is grounded on a claim by the respondent that information and documents requested by him of the liquidator have not been provided to him and he claims that the liquidator's failure to provide the documentation has prejudiced his ability to defend himself and has prejudiced his ability to discharge the onus of proof that he acted at all times honestly and responsibly in relation to the affairs of the company.
5. I have concluded that the respondent's contribution to any documentary deficit he now encounters, notably by his failure to take up opportunities to inspect relevant documents, is so material that the interests of justice are not served by granting the order now sought by him.

Chronology

6. The liquidator was appointed on 3 December, 2010. These proceedings were commenced by him on 24 February, 2015. This application was issued in January 2020, being in the

tenth year of the liquidation of the companies. The exchanges which have taken place between the liquidator and the respondent throughout that period are directly relevant to and inform my decision on this application and, accordingly it is necessary to detail the chronology of events, including certain critical correspondence from the outset.

7. On 1 November, 2007, the respondent was appointed to the position of Chief Executive Officer in the Whelan Group. His letter of appointment was issued by Whelan Limestone Quarries Limited, but the role concerned the group of companies of which that company was a part.
8. The respondent is a certified accountant and it is said by the liquidator that he was also the finance director of the relevant companies.
9. On 11 November, 2010, the respondent resigned as a director. The circumstances of this resignation are likely to require closer examination outside the scope of the application to which this judgment relates.
10. In late November 2010, or early December 2010, the companies presented a petition for the appointment of an examiner. Ultimately, that petition was withdrawn and on 3 December, 2010, the applicant, Carl Dillon, was appointed official liquidator of all the companies in the group.
11. On 5 December, 2010, an order was made pursuant to s. 141 of the Companies Act 1990 for the "pooling" of assets of the companies in the group. The pooling order specifically "carved out" any intended application under s.150 of the Companies Act 1990 having regard to the fact that different persons served on different boards of directors of the companies.
12. The proceedings to which this application relates have been brought against the respondent in the matter of Whelan Limestone Quarries Limited and in the matter of Whelan Limestone Quarries (Contracts) Ltd. ("Quarries" and "Contracts" respectively).
13. On 14 February, 2011, the liquidator wrote to the respondent in relation to his appointment and the respondent replied. The respondent says that he heard nothing further from the liquidator for the next three years.

2014 Correspondence

14. On 15 April, 2014, the liquidator wrote to the respondent informing him that he had investigated the affairs of the company and the conduct of the directors and that he was required to make a report to the Office of the Director of Corporate Enforcement ("the ODCE").
15. In relation to Contracts, the liquidator stated as follows: -

"You occupy the position of managing director and CEO and actively participated in the management of the company on a daily basis. I have therefore formed the view that you both knew of and failed to address or did not inform yourself of, the very

serious matters outlined below. I intend to set out below my reasons for concluding that in your capacity as a director you acted neither honestly or responsibly in relation to the affairs of the company.

I now require you to respond in detail to the matters outlined below within a period of ten days from the date hereof. This letter and your reply will be drawn to the attention of the ODCE in the context of my reporting obligations, and I reserve the right to issue proceedings pursuant to s. 160 of the Companies Act 1990 and in particular subsection 2 (d) thereof.

16. The liquidator continued under the heading "Fraud" as follows. He referred to a Business Finance Agreement between Quarries and Bank of Scotland (Ireland) Commercial Finance Limited ("BOS"), being an invoice discounting agreement.

17. The liquidator said that he had found that invoices totalling an amount of €6.5 million which had been notified for sale by Quarries to BOS under the relevant agreement were for the most part invoices for work done by Contracts. He said that the true provider of goods and services underlying the relevant invoices was in fact Contracts and not Quarries and that this fact was concealed from BOS. The purchase price for the invoices under the agreement was then paid by BOS to Quarries, for goods and services delivered by Contracts. He said that the value of such invoices in the period "from 1/9/2009 – 28/3/2011 was approximately €6.5m."

18. The liquidator continued: -

"A second aspect of the fraud appears to concern aged debtors. Pursuant to Clause 6 of the Agreement, in the event that the Client Account of the Company was not credited with payment on foot of an invoice within 90 days of payment by BOS, then BOS could require repayment of the purchase price from the Company. It appears from my investigations that in order to get around the disruption to cash flow arising as a result of aged debtors, you caused or allowed unpaid invoices to be reissued after 120 days. This practice had the dual effect of preventing BOS from clawing back payments made, and secondly of obtaining a further purchase price for the second invoice issued. I understand that as a result of this activity the debtor's ledger of Quarries was inflated by some €5 million.

The activities described above were at no stage disclosed to BOS. They were discovered by BOS in late 2010 and on 5 November 2010 the facilities under the agreement were withdrawn. The excess drawn down on the facility was €2,920,329."

19. The liquidator then referred to an estimated deficiency disclosed in the statement of affairs of €41.3m.

20. The liquidator referred to two remaining issues. Firstly he noted that annual returns in respect of 2005, 2006, 2007 and 2008 were filed late, and that the annual returns for 2009 and 2010 were never filed.

21. Secondly, the liquidator said that there had been a "failure to address insolvency" as follows: -

"It appears to me that you have failed to address the cause or consequences of the company's insolvency at any time prior to the failed attempt of the company (together with related companies) to petition for examinership in December 2010. While it is acknowledged that the examinership process is a means of addressing insolvency, the application itself served to reveal to some degree the serious management failings that contributed greatly to the extent of creditor losses. The company appears to have been insolvent from at least November 2009 but that no adequate steps were taken to address it. Furthermore, the company's failure to ensure that it adhered to its financial reporting obligations was a factor, but not the only factor that contributed to this failure".

22. The liquidator concludes as follows: -

"I have concluded that you were or should have been aware of a fraud of the most serious kind that was perpetrated over an extended period of time, on an enormous scale. The discovery by BOS of the fraud appears to have been the catalyst for the attempted examinership, and ultimately the liquidation of the company. There is no evidence that this fraud would have been disclosed to BOS absent its own investigations. You failed to take any or any adequate steps to ensure that the company met its financial reporting requirements over an extended period of time with the result that it was strike off listed in 2010 and risked dissolution.

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

23. On 24 April, 2014, the respondent replied to this letter. He pointed out firstly that three years earlier he had responded to the liquidator's letter of 14 February, 2011, and had heard nothing further from the liquidator since then. He said that he did not then have any books or records of the company.

24. The respondent identified documents and information which he said would be necessary to enable him to respond fully. The categories of documents requested were those relating to "alleged fraudulent operation of invoice discounting facility", "liability/creditors", "failure to file accounts", "Revenue debts", "Assets unaccounted for", "Alleged failure to address insolvency" and "documentation upon which you [the liquidator] have reached this conclusion." The respondent concluded by stating that he considered it more beneficial to make one comprehensive response to the allegations

rather than dealing with it on a piecemeal basis, after he had received the relevant documents.

25. On 28 May, 2014, the liquidator responded. He provided certain documents and correspondence in relation to the Bank of Scotland invoice discounting facility, copies of the statements of affairs of the companies, certain revenue printouts, and other material in relation to "assets unaccounted for".
26. The liquidator stated the following: -

"I am advised that in November 2009 Anglo Irish Bank issued letters to a number of group companies advising them that they were in default of the terms of their loans. This is an indication of the insolvent status of the company at that time. Whilst Anglo did not call in the loans they reserved the right to do so. Furthermore, I am advised that in late 2009 the company entered into an agreement with Irish Cement Limited which incorporated a payment schedule in respect of an outstanding debt and the company failed to adhere to this agreement.."

"My conclusion is based upon the detail in my letters of 15th April, my enclosures to this letter and the totality of my investigations as liquidator. If there are matters which you wish to draw to my attention, or materials that you wish to rely on in response to this correspondence, then please ensure that you furnish the same to me and I will ensure that your correspondence and materials are furnished to the ODCE."

27. On 25 August, 2014, the liquidator made a report pursuant to s.56 of the Company Law Enforcement Act 2001.
28. On 12 September, 2014, the ODCE wrote to the liquidator informing him that he had not been relieved of the obligation to bring applications for declarations under s. 150 of the Act of 1990.

The restriction application

29. On 24 February, 2015, the liquidator issued proceedings seeking declarations pursuant to s. 150 of the Act of 1990. The notice of motion was returnable for 13 April, 2015, and was adjourned to 18 May, 2015.
30. The application was grounded on an affidavit sworn by the liquidator on 20 February, 2015. In this affidavit, he refers to and expands, somewhat, on the matters which he had identified in his letter to the respondent of 15 April, 2014.
31. He says that from his investigations it would appear that "*neither the first named respondent (Enda Whelan) as the managing/operations director of the Company, nor the fifth named respondent (Mr. McKeogh), as the Chief Executive Office (sic) and finance director, acted either honestly or responsibly in relation to their conduct in the affairs of the company in the particular circumstances outlined below*".

32. The liquidator states that the respondent *"was responsible for leading the management team in execution and delivery of the annual targets established by the board of directors, developing the strategic plan and vision for the company, achieving planned revenue growth while controlling costs and reducing the overall level of debt being carried by the company and managing investor relations. The Fifth Named Respondent resigned as a director of the Company on 11 November 2010 prior to the Company being put into liquidation. I am satisfied from my investigations that he had an integral role in the running of the company and that his resignation does not absolve him from his responsibility."*
33. The liquidator identified what he described as issues of concern as follows: -
- (i) *"Fraudulent management of book debts";*
 - (ii) *"Continuance of trade while company was insolvent, want of financial controls".*
34. The allegation concerning *"fraudulent management of book debts"* related to the notification to BOS of invoices which, although notified as sales by Quarries were in fact generated by Contracts for work done by Contracts, which was not a party to the agreement with BOS. The liquidator states that the amounts wrongfully notified to BOS and paid into a trust account for the benefit of BOS over a period of just over a year amounted to €7.6 million, a figure higher by €1.1 million than the figure referred to by the liquidator in his letter of 15 April, 2014.
35. The liquidator then says that *"a second aspect to the fraud related to aged debtors"*. The liquidator says *"Quarries had been keeping two debtors' ledgers, one for the Bank and an accurate one for a lesser sum."*
36. The liquidator states in relation to this allegation as follows: -
- "I can only conclude that the systematic duplication of invoices was both deliberate and dishonest. Those directors of Contracts who were also directors of Quarries must, in my view, bear primary responsibility for what has occurred – they either knew or ought to have known the practices that were engaged in on an extremely significant scale and over an extended period of time.*
- Certainly, I find it very hard to accept that anyone in an executive role within Contracts was not aware of it. I also believe however, that those that were not aware – whether executive or non-executive should have been.*
- I do not accept that the resignation of Mr. John McKeogh which I understand may have been prompted by the uncovering by the Bank of the practices described exonerates either him or any of the other directors named herein from their share of responsibility."*

37. The liquidator continued by referring to what he described as the second and third issues of concern namely “*continuance of trade while company was insolvent, want of financial controls*”. The liquidator says that he believed that the company was insolvent: -

“... for a very significant time prior to the commencement of the winding up (in December 2010). It appears from my investigations that from – at the very latest – November 2009, the respondents should have been aware that a situation of insolvency had arisen of the most serious kind. The duplication of invoices served both to disguise the insolvency of the wider group as a whole (by the procurement of further funds from the bank) but also to deprive Contracts of monies to which it, and by extension its creditors in insolvency was entitled. The estimated deficits in Contracts at the commencement of the winding up was €41,301,358.80 [exhibits Statement of Affairs] ... The sheer scale of the deficit points to the need for and want of robust, ongoing financial control which was wholly lacking as far as I can see.”

38. The liquidator then referred to the delays in the filing of annual returns for 2005 to 2008 and the absence of filed annual returns thereafter. He concludes by saying: -

“I cannot be satisfied that the respondents herein have acted either honestly or responsibly and I say and believe and am advised that there is no other reason why it is just or equitable that a restriction order should not be made.”

39. The liquidator exhibits to his grounding affidavit basic statutory information such as Companies Registration Office returns dealing with the particulars of the company, the letter of “*no relief*” from the ODCE, his correspondence with the respondent directors, and the statement of affairs made in the winding up by Enda Whelan and Christina Whelan.
40. Having been first listed before the court on 13 April, 2015, the restriction application was adjourned from time to time through 2015 and 2016 whilst the parties exchanged communications regarding the respondent’s request for documents and access to documents to enable him to prepare his replying affidavit. These exchanges continued for a period of over two years. Ultimately a replying affidavit was sworn by the respondent on 3 March, 2017.

Respondent’s affidavit of 3 March, 2017

41. The central thrust of the replying affidavit is that the respondent refers to the correspondence exchanged and states that he still requires the detailed information requested by him in a letter dated 24 April, 2015, to enable him to make a comprehensive and meaningful response to the application. He says that “*very little information has been furnished to me by the Liquidator over a two year period and I am not in a position to respond to the allegations with the precision they require*”.
42. I shall return to the contents of the correspondence. Having made this objection, and exhibited certain correspondence, the respondent addresses the “*issues of concern*” identified by the liquidator. He states that without the information he has sought “*this*

Affidavit is of necessity a preliminary response to the Liquidator's Affidavit and I reserve the right to respond in more detail when, and if, I have the documentation initially requested in the letter of 24 April, 2015."

43. Mr. McKeogh states that he was reliant on the accuracy of information submitted to him by the three financial accountants and a financial controller within the group, in particular in relation to the operation of the Business Finance Agreement with Bank of Scotland (Ireland) Limited.
44. Mr. McKeogh states that he was not a shareholder or a stakeholder in any of the companies, or an authorised cheque signatory on bank accounts. He states that he did not have authority to make payments to suppliers or stakeholders or to deal with payroll issues and that he did not have direct access to the banking information of the group.
45. The respondent says that in June 2009 he requested the shareholders of the group to have an external review of group affairs undertaken by the accountancy firm HBC, Horwath Bastow Charlton, and that he requested an improvement in corporate governance within the group. He says that he presented a document at a board meeting in June 2009 outlining these concerns.
46. In relation to the allegations of fraud concerning the treatment of BOS the respondent says that it is his recollection that *"no invoices were issued by Contracts to any party and submitted to BOS for payment under the Business Finance Agreement"*.
47. In relation to the allegation that the company was trading whilst insolvent, the respondent repeats his request for access to certain reports which had been made available to the shareholders and others during 2009 and 2010. He states that *"from memory, I believe the position of the secured creditors and unsecured creditors improved between November 2009 and December 2010"*.

2015 correspondence

48. On 24 April, 2015, the respondent's solicitors, McMahon O'Brien Tynan, wrote to the liquidator's solicitors, McGuire Desmond, stating that the respondent intended to swear rebuttal affidavits to the liquidator's grounding affidavit. However, they stated that their client was at a documentary disadvantage and referred to the letter which their client had written on 24 April, 2014. They protested that the liquidator's reply of 28 May, 2014, being a response to the respondent's initial letter of 24 April, 2014, did not in many respects furnish the information requested. They then requested extensive information including the following: -
 - (i) Copies of the creditors ledgers for the companies from November 2009 to December 2010;
 - (ii) Authority to obtain documents from the solicitors who had acted in the examinership petition;

- (iii) Correspondence which had passed between BDO Simpson Xavier and the ODCE regarding the filing of accounts which it was said had led to certain dispensations being obtained;
- (iv) Copies of consolidated management accounts for the month ending 30 November, 2009, and 30 September, 2010;
- (v) Copies of certain internal and third party financial/business/management reports which had been prepared for the group in considering how to deal with difficult trading periods in 2009 and 2010. These included the following: -
 - (a) Independent Accountants Reports prepared in connection with the examinership,
 - (b) a Deloitte report prepared for Anglo Irish Bank in September 2009,
 - (c) a report by TMS Valuation prepared in November 2009 for Bank of Scotland,
 - (d) a *"two-year business plan (internal – HBC sent to stakeholders)"*,
 - (e) a *"Lewis Meade"* report for BOS prepared in September 2010, and
 - (f) a report prepared for BOS on the invoice discounting facility;
- (vi) Documents relied on by the liquidator to make his allegations regarding the sale of invoices to BOS;
- (vii) Documents relied on by the liquidator supporting the allegation regarding fraud in terms of the treatment of aged debtors;
- (viii) A copy of the liquidator's letter to the ODCE and Section 56 Report;
- (ix) Further information in relation to the BOS invoice discounting complaints;
- (x) Copies of the debtor's reports supporting the allegation made by the liquidator that the relevant company had been *"keeping two debtors' ledgers, one for the bank and an accurate one for a lesser sum"*;
- (xi) Further information regarding other disputed matters, bank statements for the period of twelve months prior to the liquidation, and further information in relation to the invoice discounting issue;
- (xii) Workings and spreadsheets prepared by the liquidator detailing as to where he arrived at the deficit figures calculated by him in respect of each company.

49. During the remainder of 2015 a series of reminders was issued by McMahon O'Brien Tynan to McGuire Desmond.

2016 correspondence

50. On 7 January, 2016, McGuire O'Halloran, formerly McGuire Desmond, wrote to McMahon O'Brien Tynan. This appears to be the first attempt at any meaningful reply to the request for information contained in the letter of 24 April, 2015.

51. An unexplained feature of that letter is a statement in it by McGuire O'Halloran to the effect that *"our client has sought relief from the ODCE in respect of this matter and we are still awaiting confirmation from ODCE as to their stance in this regard"*. This statement would infer that despite the fact that on 12 September, 2014, the ODCE had confirmed that the liquidator was not relieved of his obligation to bring these proceedings, there may still have been pending a request for relief. No more information was provided in relation to this issue, and the restriction application itself was stated to have been brought pursuant to the ODCE letter of 12 September, 2014.

52. No documents were enclosed with this letter. McGuire O'Halloran make statements in relation to various individual requests such as: -

"You will be aware that the file in this matter is quite substantial and we have requested from our client the copy ledger requested by you;

(i) Our client has no objection to liaising with Harrison O'Dowd in this matter (this relate to the request for access to examinership related papers) and we will furnish in the next few days our client's written authority in this regard;

(ii) We have requested our client to furnish this documentation;

(iii) We have requested this information from our client and are also taking counsel's advice in respect of this request;

(iv) We are taking counsel's advice". This statement related to ten of the categories of documents requested on 24 April, 2015.

53. It is clear from the contents of this letter that it was the first time the liquidator or his solicitors addressed, in any fashion other than a holding letter, the substance of the requests made by the respondent on 24 April, 2015. McGuire O'Halloran concluded: -

"We would expect to be in a position to revert positively to you in respect of the above matters within the time allowed by your letter".

This was a reference to a further reminder written by McMahon O'Brien Tynan on 5 January, 2016, requesting information within 14 days.

54. Further letters were exchanged and on 1 March, 2016, McGuire O'Halloran wrote to McMahon O'Brien Tynan providing copies of the Independent Accountant's Reports for the examinership and stating as follows: -

"Under the circumstances we have asked our counsel to apply last Monday to have the matter as against your client adjourned for a period of two months to enable all information to be furnished to you". [emphasis added]

55. On 4 March, 2016, McGuire O'Halloran wrote to McMahon O'Brien Tynan enclosing some further information, comprising principally consolidated management accounts for the

years ended 31 December, 2009, and the six months ended 30 June, 2010. They stated that the liquidator did not have sight of management accounts ending 30 November, 2009, and 30 September, 2010.

56. In this letter, McGuire O'Halloran stated for the first time that a receiver of the company, Mr. Paul McCann of Grant Thornton, was in possession of the physical books and records of the companies to include the accounting package of the companies and stated that McMahon O'Brien Tynan should contact Mr. McCann directly *"to get a copy of whatever documentation you need on this"*.
57. In relation to a number of other requests, they indicated that they needed to revert having taken further instructions and in relation to at least five other categories of information, they stated *"there is a question of privilege"* which needed to be addressed and which they were considering with counsel. This was the first reference to *"a question of privilege"*.
58. In reply to this letter on 31 March, 2016, McMahon O'Brien Tynan stated that they did not believe their client had an entitlement to receive documents from the receiver and that this was a matter for the liquidator to pursue. On 1 April, 2016, McGuire O'Halloran wrote stating:-

"We are unsure as to the status of your several enquiries and the degree to which (a) there is any obligation on us to help you; and (b) the degree to which we are in a position to help you."

They proposed a further adjournment of the application before the court.

59. On 16 May, 2016, McGuire O'Halloran informed McMahon O'Brien Tynan that they had made inquiries with the office of the receiver who in turn had advised them that all company papers are currently situated at the company's former head office at Fountain Cross, Limerick. They said that *"as Lagan have control of the site we have, through the receiver, made arrangements with Mr. Brian Downes for you to call to the premises to review the papers you are seeking. It is a condition of that visit that a representative of our client will also be in attendance"*. They then invited McMahon O'Brien Tynan to revert as to a suitable date so that arrangements could be made for this visit.
60. On 25 May, 2016, McMahon O'Brien Tynan replied reserving their position as to this method of accessing information, and stating that they propose to visit the property with their client's financial advisor on 2 and/or 3 June, 2016.
61. On 27 May, 2016, McGuire O'Halloran replied, saying that they would take further instructions regarding the timing of the proposed visit. The visit to the premises at Limerick by the respondent never occurred. They continued with a statement: -

"Our client does not have access to the documents you seek, but has made requests of the receiver to have these documents made available to him. The receiver is making access available to our clients and through them your client".

62. This was the first occasion on which it was suggested that the liquidator did not himself have access to relevant documents.
63. On 27 June, 2016, McGuire O'Halloran wrote again to McMahon O'Brien stating that their clients were having *"some difficulty liaising with the receivers' office in connection with access to the premises"*.
64. On 28 November, 2016, McGuire O'Halloran wrote again enclosing further information and documents, and referring to the original request for information made on 24 April, 2015. In this letter they indicated that the books and records of the company are in the possession of the receiver and not of the liquidator.
65. This reply was made in relation to numerous document requests. Of particular note is that the reply was made in relation to a request by the respondent for six particular reports, which the liquidator said were not available to him.
66. One of the categories of documents in respect of which the respondent had sought information was documents relied on by the liquidator to make his allegations of fraud concerning the treatment of aged debtors. At para. 7 of the letter of 28 November, 2016, McGuire O'Halloran provided in response to this request three documents comprising file notes and emails exchanged within BOS concerning their findings regarding the treatment of invoice discounting within the company. These were stated to be the three documents relied upon by the liquidator to ground the allegation of fraud.
67. McMahon O'Brien Tynan had also requested, at para. 10, copies of certain *"debtor's reports"* which were said to support the allegation that the company *"had been keeping two debtor's ledgers, one for the Bank and an accurate one for a lesser sum"*. In response to this, McGuire O'Halloran stated as follows: -

"We do not have access to this documentation and it is we understand in the hands of the receiver. However, please also refer to the report of Paul Daly from Bank of Scotland Ireland referred to and enclosed at Item 7 above".

An extraordinary feature of this response is that the documentation which the liquidator was now saying he did not have access to is the documentation said to support the allegations regarding the treatment of aged debtors, a central feature of his grounding affidavit.

68. A further item relating to documents concerning balances due on invoices sold to BOS was met with the response *"We will need to discuss this further with our clients"*.

2017 correspondence

69. Arising from further mentions of the proceedings before the court, on 8 March, 2017, McMahon O'Brien Tynan wrote to McGuire O'Halloran setting out the outstanding documents then required.

70. On 22 March, 2017, McGuire O'Halloran wrote to the receiver Mr. McCann describing the context namely, the ongoing s.150 proceedings and identifying the categories of documents which were sought by the respondent.
71. No explanation was given as to why it took the liquidator until 22 March, 2017, to make such a request of the receiver.
72. In this letter, McGuire O'Halloran informed the receiver that the court had made clear its view that the receiver should make these documents available and that *"it would be unjust for Mr. McKeogh to seek to have to defend the proceedings in the absence of him having access to documents which he has requested"*.
73. On 24 March, 2017, McGuire O'Halloran wrote back to McMahon O'Brien Tynan to say that they had made these further inquiries with the receiver and that he had confirmed that he would make arrangements to facilitate access to the premises at Ennis for inspection of the relevant documents, and they invited McMahon O'Brien Tynan and the respondent to attend at that appointment.
74. On 27 March, 2017, McGuire O'Halloran informed McMahon O'Brien Tynan that an appointment had been made for an inspection on Wednesday, 29 March, 2017, and requested confirmation that the respondent would confirm his proposed attendance.
75. On 28 March, 2017, McMahon O'Brien Tynan replied stating: -
- "When your client has confirmed that the information requested in ours of 8 March 2017 is available, our client will inspect same with a view to taking copies.*
- Would you please confirm your client has inspected the files and that the requested information is now available and is segregated from any other records of the company."*
76. On 12 April, 2017, McGuire O'Halloran replied stating that if there was anything in particular that the respondent wished to have retrieved he could meet with the liquidator's office on site to go through the records and point out any documents that he wished to have access to for the purpose of defending these proceedings.
77. McGuire O'Halloran stated that the liquidator was of the view that the respondent was more than familiar with the documents.
78. On 18 April, 2017, McMahon O'Brien Tynan replied, this time referring the liquidator to his obligations pursuant to s.596 of the Companies Act 2014 to take into his custody the books and records of the company and stating that they believed that the liquidator had failed to comply with this obligation. They repeated that *"it is important that your client has segregated the requested information from other books and records of the company"*.
79. On 7 June, 2017, McGuire O'Halloran sent certain folders of documents to McMahon O'Brien Tynan. They stated that the responses and information given in this letter had

been compiled as a result of a thorough inspection of all documentation furnished to them by the liquidator. Having provided certain documents, they added the following: -

"Please also note that the liquidator's office was originally told by the receiver's office that he was not allowed access to the books and records of the company. You know we recently got access to them and visited the property and retrieved some written documents from there. Your client was invited to attend at that visit so that he could also point to relevant papers if he wished, but declined to do so".

80. The material provided with the letter of 7 June, 2017, appears, from the terms of the letter, to have been extensive. However, the court was informed in the course of this application that the enclosures to that letter are no longer retained either by the liquidator or the applicant or their respective solicitors. (See paragraphs 103 - 107 below).
81. On 14 June, 2017, McMahon O'Brien Tynan replied, stating that the respondent *"had wished to inspect when your client had assembled the information in response to ours of the 8th March 2017 and you did not come back to us to confirm that the information had been assembled"*.

Motion for discovery: High Court

82. On 20 July, 2017, the respondent issued a motion pursuant to O. 31 of the Rules of the Superior Courts seeking an order for discovery of eight categories of documents. The motion was heard by Haughton J. in November 2017 and a decision was given on 27 November, 2017. Counsel's note of the *ex tempore* decision of Haughton J. delivered on that day is agreed and a copy of that note signed by counsel for each party was shown to the court on this application.
83. Haughton J. declined to make any order for discovery. The reasons given for this decision were as follows: -
- (i) That the respondent was under an obligation to seek out certain documentation from BOS, relevant particularly to the allegations concerning invoice discounting;
 - (ii) That in respect of many of the documents concerned the liquidator had sought the documents from the directors in the ordinary way as liquidator of the company but they had not been provided and the court considered that it would be inappropriate in those circumstances for the liquidator to be ordered to make discovery;
 - (iii) The court accepted the averments of the liquidator to the effect that certain documents were in the possession of the receiver and noted that the respondent could have undertaken inspection of those documents as previously offered;
 - (iv) In relation to bank statements sought, the court noted an undertaking from the liquidator to give to the respondent a letter of authority authorising the respondent's solicitors to obtain these bank statements from the relevant bank;

- (v) That certain working papers and spreadsheets of the liquidator sought were the liquidator's own working and not discoverable, and that certain other categories of documents could be obtained by requests to the relevant parties, including the authors of various reports requested.
84. The court found that it was open to the respondent to pursue the inspection of company records which were in the possession of the receiver, which the liquidator had offered to facilitate, and that in relation to certain other categories, it was open to the respondent to seek non-party discovery in circumstances where the liquidator had himself sworn that he did not have the relevant documents.
85. The agreed note records that Haughton J. stated that the respondent should have inspected the documents at Ennis before bringing the application and he concluded by granting *"liberty to apply in relation to this motion if any difficulties were encountered with respect to the inspection of documents in Ennis"*.
86. On 7 December, 2014, McGuire O'Halloran wrote to McMahon O'Brien Tynan repeating the liquidator's offer for a representative of the liquidator and of the respondent to meet at the company's premises *"so that your client can specifically point out any documents which you believe would be of assistance to you"*. It was stated that the offer was open for two weeks from the date of this letter, expiring on 21 December, 2017.
87. On 14 December, 2017, McGuire O'Halloran wrote again to McMahon O'Brien Tynan referring to the offer of inspection facilities made on the 7 December, 2017. In that letter they referred also to the question of documents sought from BOS and/or the receiver concerning discovery and stated as follows: -

"We reiterate here that this remains the case and insofar as is required you may take this letter as Mr. Dillon's authority, in his capacity as official liquidator to the Whelan Group of companies, for your client to follow up with both Bank of Scotland and the receiver and if necessary to make this discovery application should he wish to do so".

88. Rather than take up the liquidator's renewed offer of authorisation to obtain documents from BOS or from the receiver, or to inspect in December 2017 following the decision of Haughton J., the respondent appealed the judgment of Haughton J. He cannot be faulted as a general principle for exercising the right to appeal, but the appeal was dismissed and the order of Haughton J. affirmed in its entirety.

Motion for discovery: Court of Appeal

89. The court has been referred to the judgment given ex tempore by McGovern J. on behalf of the Court of Appeal on 25 October, 2019.
90. McGovern J. noted that in the High Court, Haughton J. had refused to order discovery on the basis of undisputed evidence on affidavit from the liquidator: -

- "(i) That he did not have, or have access to, the documents or categories of documents sought by the appellant;*
- (ii) That the documents concerned could and should more appropriately be sought by the appellant from other parties and other sources who were readily identifiable or ascertainable".*

91. McGovern J. noted that the liquidator had stated that he did not have the documents concerned and in some cases had tried to obtain them. He continued: -

"The appellant has been told where those documents may probably be found and apparently has not availed of an informal means of obtaining them as provided for in the ruling of the High Court judge or by way of non-party discovery".

92. McGovern J. continued as follows: -

- "3. It is a striking feature of the application that the order appealed is one made almost two years ago and if the appellant had sought non-party discovery it is reasonable to assume that the discovery process would have been completed some time ago and the s. 150 application, which is the subject matter of the proceedings, may well have been determined by now.*
- 4. The respondent, who is the liquidator of the companies is obliged by statute to bring a restriction application unless relieved of the obligation to do so, and has no personal interest in the outcome of the application. Where such an application is brought, the person who is the subject of the restriction application (in this case the appellant) is required to discharge the burden of proving that he acted honestly and responsibly in relation to his conduct in the affairs of the company. In this case the Whelan Group of companies is also in receivership and many of the documents sought by the appellant are held by the receiver who was appointed on behalf of Bank of Scotland. The appellant was offered the opportunity to inspect documents held by the receiver at a storage facility in Ennis, Co. Clare, but declined to take up that offer (Categories 1, 4 and 5). Other documents sought were requested from the directors but were not furnished to the liquidator (Categories 2 and 3).*
- 5. The appellant has not offered an explanation as to why he declined to avail of the opportunity to inspect the documents held by the receiver, and he did not make any reference in his second affidavit to a substantial volume of bank statements which have already been furnished. The High Court judge clearly regarded it as unnecessary that the liquidator would be required to swear an affidavit of discovery merely repeating what the appellant had been told in the liquidator's affidavit and in circumstances where the appellant had not sought non – party discovery, as he was entitled to do".*

93. McGovern J. considered the case law which had been cited in the appeal, particularly recent cases discussing the requirement as to necessity for discovery (*Tobin v. Minister for Defence* [2019] IESC 57, *Ryanair plc. v. Aer Lingus cpt.* [2003] 4 IR 264).
94. McGovern J. concluded that there was no error on the part of the High Court Judge in the manner in which he exercised his discretion to refuse the discovery sought and concluded as follows: -
- "The failure of the appellant to seek non-party discovery or other means to obtain the documents sought has resulted in a delay of almost two years in the s. 150 proceedings and this is to be regretted. The fact that the companies were in examinership means that the appellant would have had significant number of documents disclosed to him through that process".*
95. At the centre of the judgment of the Court of Appeal in dismissing the appeal was the finding that the respondent had failed to take up the opportunity to access the documents which he sought either through inspection facilities at the company's premises in the possession of the receiver, or by non-party discovery or other methods. However, it is noteworthy that when the matter was before the Court of Appeal no reference had been made to the fact, which emerged later (see paragraphs 99 – 102 below), that documents previously available for inspection at the company's location but in the possession of the receiver had been destroyed. This is apparent from the following: -
- (i) The outline legal submissions of the liquidator in the Court of Appeal refer three times to the availability of documents through the receiver, in the present tense as follows: -
- (a) At para. 11 reference is made to documents relating to the borrowings of the group "*are held by the receiver*".
- (b) In para. 13 it is stated that "*this is a case where that party can access those documents but steadfastly refuses to do so*", and;
- (c) In para. 22, it is submitted that an order for discovery cannot be justified where the relevant documents "*are otherwise available to*" the respondent.
- (ii) In the judgment of McGovern J., he refers at para. 4 to the group of companies being in receivership and "*many of the documents sought by the appellant are held by the receiver*". [emphasis added]
96. Therefore, it is clear that all parties before the Court of Appeal and the Court itself had no reason to believe that documents held by the receiver at the company's premises were no longer available for inspection.
97. I cannot speculate on whether the Court of Appeal would have decided the matter any differently had it known that the time for inspecting any further documents or material had passed, in that the records had, apparently unbeknownst to any of the parties at the Court of Appeal, been destroyed following the sale of the property by the receiver. Since the essence of the decision was that the respondent had not already availed of inspection

facilities or other modes of accessing relevant documents, there is no reason to consider that the Court of Appeal would have decided the matter differently.

Events after the Court of Appeal judgment

98. On 5 November, 2019, McMahon O'Brien Tynan wrote to McGuire O'Halloran stating that their client *"is now taking up the offer to inspect documents as held at the storage facility in Ennis"* and inquired as to a suitable time.
99. On 14 November, 2019, McGuire O'Halloran referred back to the two-week deadline given in its letter of 7 December, 2017, and stated: *"There were many reasons for this date being used. Not least of which was that the premises may be sold by the receiver appointed over it and which you will understand the liquidator has no control or input"*. They informed the respondent that the receiver has *"now sold these premises and there is no chance of us now being in a position to facilitate your inspection"*.
100. On 5 December, 2019, McMahon O'Brien Tynan inquired as to the whereabouts of the relevant documents so that they could conduct the inspection, and on 6 December, 2019, McGuire O'Halloran replied to the effect that *"all records were removed from the premises and presumably destroyed and he has now got no access to them"*.
101. No information was provided as to precisely when or by whom it was then presumed that the records were destroyed.

Letter of 7 June, 2017

102. One of the significant letters in the exchange of correspondence referred to earlier is a letter of 7 June 2017 from McGuire O'Halloran to McMahon O'Brien Tynan.
103. The respondent says that the information contained in this letter does not adequately meet the various document requests he had made. However, it is clear that a certain amount of relevant material was included with the letter including such items as the following: -
- (a) Creditor's ledger for Contracts and Quarries for the period ended 3 December, 2010;
 - (b) Correspondence between Howarth Bastow Charleton and the Companies Registration Office;
 - (c) A statement of affairs to December 2010 and nominal ledger trial balance to October 2010;
 - (d) Independent Accountants' Reports, petition, and certain affidavits relevant to the examinership filing made for the group in November 2010;
 - (e) A report on invoice discounting for BOS, together with certain historic invoice discounting related material;

- (f) *“the accounts and workings relating to Whelan Group which our liquidator (sic) had in his possession in respect of periods 2006 to 2010”.*

A supplemental affidavit was filed in relation to this application sworn by Lisa O’Brien of McMahon O’Brien Tynan on 9 October, 2020. It appears from that affidavit that when the liquidator was preparing his replying affidavit to this application in June 2020, he wrote on 10 June, 2020, to McMahon O’Brien Tynan indicating that at that time he was unable to locate a copy of the letter of 7 June, 2017, and the documents attached thereto, *“due to various restrictions and access to the office”*. This court was not informed whether those restrictions were continuing or represented a permanent impediment to accessing this material.

104. McMahon O’Brien Tynan then looked into the matter and found that in June 2017 they had forwarded the material enclosed with that letter to their counsel in the context of preparing a proposed replying affidavit to these proceedings. These papers had been sent to counsel without retaining a copy and when McMahon O’Brien Tynan sought copies from counsel in order to respond to McGuire O’Halloran’s request of 10 June 2020, it emerged that counsel had not retained same.
105. The effect of these exchanges is that it transpires that neither party or their representatives have retained the material enclosed with the letter of 7 June 2017.
106. Since the respondent had in correspondence at the time indicated that this information *“does not respond to our letter of 8 March 2017 in any meaningful way”* it was difficult for him to claim that this information was so fundamental as to preclude him from preparing a replying affidavit. Notwithstanding this it is also clear from a plain reading of the contents of the letter of 7 June, 2017, that a certain amount of that material must have been relevant to these proceedings.

Books, records and other documents of the company

107. One of the core functions and powers of a liquidator is to take into his custody all of the books and records of the company (see ss. 229 and 236 of the Companies Act 1963 and s. 596 of the Companies Act 2014).
108. In cases where a receiver is appointed, he/she may be entitled to retain and use certain books and records relevant to the performance of his/her function. However, this does not relieve a liquidator from his/her obligations to take books papers and records of the company into his/her possession ultimately. In this case the liquidator has asserted that in the course of his inspection of books and records of the company he extracted and provided to the respondent such information and documents as were relevant to the matters at issue in these proceedings. Nonetheless, it appears that a certain volume of company records was ultimately lost or destroyed following the sale of the company’s property by the receiver. This gives rise to the following observations: -
- (i) The general obligations of a liquidator to retain books and records of the company prevail for the duration of his/her appointment. Typically, the court (or in a

voluntary winding up, the final resolution) will fix a period of time after the conclusion of the liquidation for which the books and records will be retained before they are destroyed;

- (ii) In circumstances where the liquidator has made allegations of fraud against the respondent in these proceedings and where there was protracted and active correspondence regarding access to such documents as may be relevant and necessary to these proceedings, culminating in a contentious discovery application, no party can have been in doubt that retention of documents was important. It was therefore unusual that the liquidator permitted a situation to arise where company records, wheresoever located were destroyed before the conclusion of these proceedings;
- (iii) It is also unusual that it appears from the correspondence that the liquidator only discovered that the records were no longer available to him or to the respondent when inspection was requested after the final decision of the Court of Appeal.

Onus of proof and prejudice to respondent

109. The liquidator says that his function in restriction proceedings is to place before the court such information as is available to him grounding his concerns as are identified in his grounding affidavit. He says that once this has been done the onus shifts to the respondent directors to prove that they have acted honestly and responsibly in relation to the affairs of the company. There is no dispute as to where the onus of proof lies.
110. The respondent submits that in a case where the liquidator is alleging fraud and where there is an information and documentary deficit, it is unfair that ten years after the commencement of the liquidation he should still be faced with the burden of proving that he was not guilty of fraud and acted honestly and responsibly in relation to the affairs of the company.
111. The respondent says that it is unjust that the liquidator should be permitted to “*throw out the grenade*” of a fraud allegation and then not make available the documents which would enable the respondent to discharge the burden of proof which, uniquely to restriction proceedings, rests on him.
112. The liquidator is correct in submitting that in a restriction case his duty is to present his “*concerns*” and any relevant evidence, with the onus resting on the respondent to prove that he acted honestly and responsibly in relation to the affairs of the company. However, most applications for restriction declarations involve no allegation of fraud. A case in which fraud is alleged would frequently give rise to proceedings for sanctions more grave than restriction, such as disqualification or declarations of personal liability for debts of the company. In a restriction case where fraud is alleged, the principle that the onus of proof of acting honestly and responsibly in relation to the affairs of the company rests on the respondent directors must be balanced against the application of the principle that an allegation of fraud in any form of case must not be made lightly, and without the party making the allegation having duly investigated and researched the matter and ultimately

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

113. If there is a deficiency in the documentary proofs available to both parties the court hearing the substantive application will take this into account when assessing the merits of the application. A factor in this exercise may be the question of where rests the responsibility for that deficiency. That is not to say that the hearing of the substantive application should become yet another rehearsal of the issues canvassed both in this application and in the discovery application.
114. The liquidator is properly to be criticised for his protracted delay in replying to the early correspondence from the respondent and then to the respondent's solicitors and for his failure to ensure that books and records of the company were not destroyed while these proceedings were pending. Nonetheless, on the evidence before the court on this application, the respondent has contributed to any documentary deficit which now prevails, by his failure to accede to five invitations to inspect records of the company. This contribution is material to the exercise of this court's discretion on this application.
115. Taking these considerations into account, I have concluded that by reason of the respondent's own conduct, particularly in not acting on invitations to inspect, repeated after the judgment of Haughton J., his complaints regarding a documentary deficit are not so compelling as to justify an order striking out or staying these proceedings.
116. I add the observation that the absence of certain documents does not preclude the respondent from providing to the court at the hearing of the restriction proceedings a full account of his conduct for the period of his tenure as a director of the company (see McGuinness J. in *Re Squash (Ireland) Ltd* [2001] IESC 200). It is not for the court on this application to direct how the parties should advance their evidence or progress any further hearing. It will be open to the respondent to advance his evidence, and in the course of doing so, make such references to any documents or any documentary deficiency he believes is relevant, particularly where allegations of fraud are made. In determining the substantive application the court will, as always, weigh the balance between the evidence adduced by the liquidator in his grounding affidavit, supported by such documents as the liquidator exhibits, against the sworn evidence adduced by the respondent and any such documents as he may exhibit, but in doing so will be reluctant to reopen matters already canvassed in this application and in the discovery applications and appeal.

Conclusion

117.

- (i) The liquidator has sworn that he provided to the respondent such documents as were requested and as were in the liquidator's possession and he has sworn as to

his efforts to make further documents available to the respondent. Haughton J. accepted these averments and his finding in this regard stands.

- (ii) On three separate occasions before November 2017, the liquidator offered to the respondent the facility to inspect records of the company. The respondent declined, stating on certain occasions that he required the liquidator to segregate the requested information from other books and records of the company.
- (iii) On 27 November, 2017, Haughton J. refused the respondent's application for orders for discovery, noting the methods of access to documents which were available to the respondent and noting in particular that if difficulties were encountered with respect to the inspection of documents at Ennis the respondent should have liberty to apply.
- (iv) Following the judgment of Haughton J., two further letters were written to the respondent on 7 and 14 November, 2017, repeating the invitation to inspect documents. The first of these letters contained a deadline of two weeks.
- (v) Notwithstanding the judgment of Haughton J. and the letters of 7 and 14 December, 2017, the respondent elected not to inspect documents, but instead to appeal the judgment of Haughton J.
- (vi) The Court of Appeal upheld in full the judgment of Haughton J.
- (vii) After the judgment of the Court of Appeal, the respondent stated that his client now wished to take up the offer to inspect documents at the storage facility in Ennis. It then emerged that the receiver had sold the premises at Ennis, and that records were removed from the premises "*and presumably destroyed and he has now got no access to them*". That the liquidator permitted circumstances where documents and records of the company were destroyed is surprising having regard to the ongoing liquidation proceedings, these contentious restriction proceedings and the contentious correspondence and applications regarding access to documents. Nonetheless, the respondent contributed materially to the situation in which he then found himself by having failed to avail of inspection opportunities when they were made available to him.
- (viii) The respondent is not closed out from making his case in response to these proceedings by advancing sworn evidence as to his conduct throughout his tenure as a director of the company. Nor is he closed out from referring where appropriate to any document deficiency insofar as it may be relevant to the sworn evidence. Such references should not become a rehearsal or repeat of the issues canvassed on this application.
- (ix) Insofar as the respondent claims to be prejudiced in advancing documentary evidence to discharge the onus of proof upon him, he has been found to have contributed materially to that deficit.

(x) I shall refuse the application to strike out or stay the liquidator's application.

118. I shall make directions concerning any further exchanges of affidavit required in the substantive proceedings so that the matter can be heard without further unnecessary delay. I shall hear the parties as to such directions and as to the form of the order and other relevant matters.