

THE HIGH COURT

[2023] IEHC 258

Record No. 2022 8 COS

IN THE MATTER OF WFS FORESTRY IRELAND LIMITED

AND

IN THE MATTER OF SECTION 747 OF THE COMPANIES ACT 2014

Judgment of Mr. Justice Quinn delivered on the 18th day of May 2023

1. WFS Forestry Ireland Limited (“the Company”) was held out by its promoter to be engaged in the business of growing and supplying Christmas trees. It solicited retail investments to fund that business.
2. On 26 July 2022, this Court appointed Mr. Declan DeLacey as Inspector pursuant to s. 747 of the Companies Act 2014 and ordered that he enquire into and report on the affairs of the Company.
3. The Inspector has reported to the court that he has ascertained that the Company’s *raison d’etre* was to defraud investors. He found that the Company received at least €7.1 million from investors and is unable to repay these amounts. He has found that crops of Christmas trees referred to in the Company’s communications with investors either did not exist or existed on lands in which the Company had no interest.

4. The Inspector has made an interim report to the court and on my direction the matter has come back before this Court, on notice to interested parties, for the purpose of determining whether an order should be made pursuant to s. 760 (2) of the Act for the winding up of the Company.

5. I have concluded that it is not appropriate, at this time, to make an order for the winding up of the Company. No person who has consented to act as liquidator has been nominated for appointment. The question of whether to make a winding up order in that circumstance, has raised a number of novel questions concerning the operation of Part 13 of the Act.

6. This judgment is concerned principally with the question of whether to make a winding up order. In the course of the evidence introduced and the submissions made, matters affecting the future course of the investigation were also addressed. Of necessity therefore, in the course of this judgment I describe also a number of those matters, and at the conclusion I make some required observations and an interim direction regarding the future of the investigation.

Appointment of Inspector

7. These proceedings commenced with an application by an originating notice of motion issued on 20 January 2022 by Mr. John Kearney, one of the investors, seeking the appointment of an inspector pursuant to s. 747. This was the first application to come before this Court for such an appointment on the application of a creditor pursuant to s. 747, and no such application was ever made pursuant to the predecessor of the section, namely s. 7 of the Companies Act 1990.

8. The application was opposed by the Company and its sole director and shareholder, Mr. Craig Hands.

9. On 19 July 2022, this Court delivered its judgment, giving reasons for the decision to appoint the inspector ([2022] IEHC 512) (“the First Judgment”).

10. At the hearing of Mr. Kearney’s application, I heard submissions on behalf of the applicant Mr. Kearney, and from Mr. Hands on behalf of the Company, and in his capacity as the Company’s sole director and shareholder.

11. I also heard submissions from the Corporate Enforcement Authority (“the Authority”), being a required notice party on such an application pursuant to s. 747 (5) of the Act.

12. I had also directed that notice of the application be served on the Minister for Justice. This was done because s. 762 of the Act provides that the expenses of and incidental to an investigation must be defrayed in the first instance by the Minister.

13. Section 762 (2) provides that the court may direct repayment to the Minister of all or part of the expenses by a body corporate dealt with in the report or the applicant for the appointment. Nonetheless, the burden of discharging the costs of an investigation falls in the first instance on the Minister pursuant to the section, and indirectly of course, on the taxpayer.

14. Neither the Minister or the Authority opposed the application for the appointment of an inspector. However, each of them submitted that since there was before the court overwhelming evidence of insolvency, a winding up order would be the more appropriate remedy.

15. Section 760 provides that the court may make certain orders, including an order of its own motion for the winding up of the subject company, after considering a report made under s. 758 of the Act. Because this jurisdiction only arises after a report has been made by the Inspector, it was clear that however appropriate a winding up may appear on the evidence, on the application for the appointment of an inspector, the court has no jurisdiction to order a

winding up. No petition for a winding up had been presented either by any creditor or by the Authority, which has standing to present such a petition on the “just and equitable” grounds conferred by s. 761 of the Act or on “public interest” grounds under s. 571(4).

16. In the judgment, I considered the criteria for the appointment of an inspector and the case law by reference to applications for such appointments under s. 747, the similar jurisdiction arising under s. 748, and the predecessor provisions of these two sections, namely ss. 7 and 8 of the Companies Act 1990.

17. Having considered also the affidavits exchanged on the application and the submissions of all interested parties, including the Company’s opposition, I determined that the conditions for an appointment had been satisfied and I exercised the discretion to appoint the Inspector.

18. By the order made on 26 July 2022, I ordered that the Inspector inquire into and report on the affairs of the Company including: -

(i) Whether the affairs of the Company are being or have been conducted with intent to defraud its creditors.

(ii) Whether the affairs of the Company are being or have been conducted for a fraudulent or unlawful purpose.

(iii) Whether the affairs of the Company are being or have been conducted in a manner that is unfairly prejudicial to some or all of its creditors.

(iv) Whether the Company was formed for a fraudulent or unlawful purpose.

(v) Whether the affairs of the Company are being or have been conducted in an unlawful manner.

19. As provided for in s. 758 of the Act, I directed that the Inspector deliver an interim report to the court within four months of the date of that order.

Progress of the investigation

20. The Inspector commenced his investigation and on 14 December 2022 he delivered his first Interim Report to the court. The Interim Report described the investigation and a number of obstacles encountered by the Inspector. I refer to those in more detail below.

21. The matter was mentioned before the court on a number of occasions both before and after the delivery of the Interim Report. Having received and considered the Interim Report, I stated that I considered that the making of an Interim Report constituted a report as required by s. 758 of the Act and therefore that the jurisdiction for the court to make a winding up order of its own motion pursuant to s. 760(2)(a) was now engaged. Having regard to the submissions made at the original application to the effect that a winding up order was an appropriate remedy in this case, I invited the Inspector to address the court on this question, not as an “interested party”, but in his capacity as the Inspector now in possession of substantial information about the affairs and status of the Company. I also directed that a hearing take place in advance of which the Inspector would provide relevant information, either by a report or an affidavit, which he has done, which would enable interested parties to make submissions by reference to s. 760(2)(a). I directed that notice of this hearing be given to the Company and creditors and to the Minister and the Authority, being the parties who had originally submitted that a winding up was an appropriate remedy in this case.

22. Notice was duly given to the Company, certain creditors, the Minister and the Authority. In advance of the hearing the Inspector delivered an affidavit sworn by him on 27 April 2023, summarising the progress of the investigation and providing information to assist the court in deciding whether to make a winding up order.

Obstacles encountered by the Inspector

23. The Inspector has reported that neither the Company or its officers have cooperated with him. They have not provided with him with access to any of the Company’s records.

24. On 16 December 2022, this Court made orders pursuant to s. 757 of the Act directing Mr. Hands to attend for examination, to provide access to company records, to complete and return a questionnaire and to explain the basis for substantial payments made to him by the Company.

25. The Inspector reports that although Mr. Hands very belatedly, i.e., on 16 February 2023 attended for a formal examination, he has otherwise defied the court order.

26. The Inspector has identified a number of other companies said to be controlled by Mr. Hands, which were in receipt of substantial funds from the investors of the Company.

27. In respect of one of those companies, WFS Ireland Property Services Limited (“WFSIPSL”), the Inspector applied for and this Court made on 16 December 2022 an order permitting him to investigate the affairs of that company and directing it to produce records relating to a relevant bank account.

28. In respect of two other companies, namely Walker Property Services Limited, incorporated in England and Wales, and Walker Admin SL, incorporated in Spain, the Inspector applied for and obtained on 16 December 2022 orders of this Court directing that those entities produce records relating to relevant bank accounts.

29. The Inspector reports that the orders made as against WFS Ireland Property Services Limited, Walker Property Services Limited and Walker Admin SL have not been complied with and he continues to encounter resistance from those parties.

Google

30. The Inspector ascertained that the email accounts used by the Company were hosted by companies within the Google Group (“Google”) and that some or all of the Company’s records had been or were located in cloud data storage provided by Google. The Inspector engaged with Google and reports that since Google was not prepared to provide data or information relating to the Company without an order of the court he issued an application in

December 2022 seeking orders directing Google Ireland Limited and Google Cloud EMEA Limited to make the relevant data available to him.

31. Google did not object to limited court orders directing it to provide certain information concerning the Company's accounts and dealings and email addresses. Those matters have been disposed of by unopposed orders and progress has been made between the Inspector and Google in that regard.

32. Google is opposed to orders requiring it to provide records contained within the cloud data storage facility which it provided to the Company. Those records are described as "Customer Data". The Inspector states that his inability to access such records is significant in the light of his inability to access company books and records in any other format or location.

33. The application as against Google in relation to Customer Data has been adjourned from time to time and will if necessary be listed for a full hearing.

34. The issues raised by Google are substantial. Google say that if it were required to produce all of the information requested by the Inspector, which it says is not necessarily the case on a proper reading of ss. 754 and 757 of the Act, issues arise as to the compatibility of these provisions of the Act with the General Data Protection Regulation (EU 2016/679) the Irish e – Privacy Regulation (S.I. No. 336/2011) and potentially with obligations of the State under the European Convention on Human Rights.

35. At first pass, it would be surprising to find that the provision of documents and information relating to the affairs of the Company in compliance with a request by an inspector appointed by the High Court and performing an investigation in accordance with a process governed by Part 13 of the Act would violate the enactments referred to above or that there would be such incompatibility. However, this Court should be slow to speculate on the substance of the arguments to be made and I must not prejudge the issues raised. The court

has not yet seen a replying affidavit of Google on these matters or any exchanges of legal submissions. If Google maintains its opposition and such important and potentially complex questions were required to be fully determined, further submissions would need to be exchanged between the Inspector and Google and a hearing fixed for the determination of the matter. I do not suggest that Google is not entitled to have such questions tested, but it is likely this could necessitate a protracted and costly further process requiring exchanges of affidavits, legal submissions and a full hearing.

Affidavit of the Inspector Sworn 27 April 2023

36. The Inspector describes in detail the obstacles which I have summarised above and at paras. 16 and 23 he identifies matters which he has ascertained to date. In para. 16 he states the following: -

“Notwithstanding the obstacles I have encountered in my inquiries, I have ascertained the following: -

(a) Substantially all of the funds received by the Company and WFSIPSL from the investors were applied for purposes other than those for which they were intended, and more particularly were transferred either to companies controlled by Mr. Hands, to Mr. Hands directly, or to one of a group of people said by Mr. Hands to have been salespeople.

(b) Out of the funds in the amount of c. €7.1 million received by the Company and WFSIPSL from the investors, €1.2 million was transferred to Mr. Hands and his wife, €1.5 million was transferred to companies associated with Mr. Hands, and €2.3 million was transferred to salespeople. The manner in which the funds were applied after they were transferred to Mr. Hands or companies associated with him remains to be ascertained.

(c) The crops of Christmas trees referred to in the Company's communications and said to be located at Little Heath Farm in Lutterworth, Merton Farm in Kent and at various locations in Ireland, and purported to have been sold to the investors, did not exist.

(d) The crops of Christmas trees referred to in the Company's communications and said to be located at Wold Farm, Crick Lodge and Knighton, and which the Company purported to have sold to the investors, did exist but the Company did not have any interest in them. In the case of Wold Farm and Crick Lodge a related company did at a point in time have an interest therein. However, neither the Company nor any connected party of which I am aware had any interest in Christmas trees in Knighton.

(e) Five individuals associated with other companies against which allegations of selling fraudulent forestry investments have previously been made were involved in the Company's activities and received substantial sums from the company and WFSIPSL.

(f) Saving for Mr. Hands and Mr. Moir, the Company's representatives used pseudonyms in the course of their interactions with the investors.

(g) The company and WFSIPSL were operated as one entity."

37. At paragraph 23 the Inspector states that he has ascertained that the entire raison d'être of the Company was to defraud investors.

38. The Inspector identified a number of matters which he says remain to be enquired into. These include particular inquiries concerning loan capital investments in the Company and questions of who benefitted from the funds received from investors. They include also the very fundamental questions of: -

(a) By whom were the Company's affairs directed and conducted;

(b) Whether in the context of what the Inspector has ascertained so far the Company was a limb of a larger fraudulent enterprise and established for that purpose.

39. The Inspector identifies the further substantive steps which he believes would need to be taken to enable him to complete his enquiries and prepare a final report. These include steps to secure compliance with orders of the court already made against a number of parties, including applications in foreign courts, and further analysis of such records and communications as the Inspector can obtain, whether they may be provided by Mr. Hands directly or by Google.

Findings relevant to a winding up

40. The Inspector says that there are no assets in the Company except for balances due from a related company, Walker Forestry Services Limited. He believes that company is unable to repay the amount to the Company and Mr. Hands confirmed to him at the interview that this amount would be irrecoverable.

41. The Inspector says that the Company is in wholesale default of its obligations under the Companies Act vis – a – vis filing and returns, filing financial statements, and having a registered resident director.

42. The Inspector expresses the view that in principle it is desirable that the Company should be placed in liquidation for two reasons. Firstly, the Company is unable to pay its debts as they fall due. Secondly, as the company's *raison d'être* was to defraud investors and it is in wholesale default of its obligations under the Companies Acts there is a basis for a winding up on the grounds that it is just and equitable and in the public interest to do so.

43. The Inspector says that were a liquidator to be appointed, his or her duties "might" include taking steps to recover intercompany balances and funds for the benefit of the investors. That is a liquidator's duty. He considers it likely that if a liquidator were appointed without any further steps being taken in the investigation a number of further litigious steps

would have to be taken by such a liquidator to investigate matters before a liquidator could be in a position to seek the recovery of assets.

44. The Inspector says that a liquidator's ability to take the further steps required to realise assets would be contingent upon him or her being in funds for that purpose and being satisfied that doing so was on balance likely to be of net benefit to the creditors of the Company.

45. Finally, the Inspector says that he believes that it would be irresponsible for him to consent to be nominated for appointment as liquidator without being satisfied as to the availability of funds to meet the costs which would necessarily be incurred in the performance of a liquidator's duty, which would likely include significant legal costs.

46. At the hearing, counsel for the Inspector confirmed to the court that Mr. DeLacey does not consent to act as liquidator.

47. No criticism is made, either by any of the parties or by this court, of Mr. DeLacey for declining to consent to act as liquidator of the Company. It appears that when first approached about this matter he consented to act as an Inspector and not in any other role.

The Minister for Justice

48. An affidavit was sworn on 2 May 2023 by Mr. Aidan O'Brien, Principal Officer of the Department of Justice.

49. Mr. O'Brien refers to the progress of the investigation thus far and to extensive engagement between the Department and the Inspector. Whilst having a general interest in the matter, the Department's principal concern is the question of the cost of the process, having regard to the Minister's obligation to defray those costs pursuant to s. 762 of the Act. Since the appointment of the Inspector the Department has discharged invoices totalling €504,328.84, (including VAT) which have been presented by the Inspector. A memorandum of Understanding was signed between the Department and the Inspector in August 2022

setting out the rates of remuneration for the Inspector, his staff and his legal team and the mechanics of payments.

50. The Minister makes a number of observations in relation to the future conduct of the investigation to which I shall return later. As far as concerns winding up of the Company, Mr. O'Brien confirms that the Department is not in a position to fund or part fund the costs of a liquidation. He points out that the Department is obliged to defray the costs of an inspection, as required by s. 762, but this legislative obligation does not translate into an obligation or a willingness to fund the costs of a liquidation of the Company under investigation which could, he says, lead to unknown costs and have unknown consequences in future matters.

51. Apart from confirming that he will not underwrite liquidation costs, the Minister does not advocate either way as to whether a winding up order should be made. His submissions were directed principally towards the application of balance and proportionality in the future conduct of the investigation and costs associated therewith.

The Corporate Enforcement Authority (“the Authority”)

52. The Authority confirmed that it does not intend in this case to exercise its power to present a petition for the winding up of the Company pursuant to s. 761 of the Act, which is the ‘public-interest’ ground.

53. At the hearing of the application to appoint an inspector, certain submissions had been made as to the respective powers of an inspector on the one hand, and a liquidator on the other hand. At this hearing the Authority noted, correctly, that in certain respects a liquidator has greater powers. It noted in particular the prospect that a liquidator may find it easier to obtain access to books and records of the Company, including electronic or remotely stored records. This would extend to records maintained in the “cloud” and could mean that a liquidator would be faced with less obstacles than the Inspector in terms of the objections raised by Google. The potential response of Google to information and document requests by

a liquidator, as distinct from an inspector, is not known and Google were not, for good reason, party to this hearing.

54. The Authority made the important point that although the “Google” question could be one of a number of factors tending to militate in favour of a winding up order, that is predicated on there being a liquidator appointed to exercise the powers available under Part 11 of the Act (winding up of companies). If the Authority believed that such an appointment would address this obstacle, then, consistent with its submissions on Mr. Kearney’s original application, it could nominate a liquidator.

55. The Authority referred the court to the judgment of Laffoy J. in *Re: Davis Joinery Limited* [2013] 3 IR 792 discussed below. In summary, the Authority submitted that although the court may have jurisdiction to order a winding up of the Company, the court should generally refrain from doing so unless there are very good reasons.

56. In *Re: Davis Joinery*, a petition was presented by an employee who was a creditor of the company for sums awarded by the Employment Appeals Tribunal and then the subject of decrees and orders made in the District and Circuit Court, totalling €53,080. An issue arose as to the eligibility of the employee to payment pursuant to the Protection of Employees (Employers Insolvency) Acts 1984 – 2004. At that time, it was considered necessary that the employer company be not only insolvent but also in liquidation to enable the employee to avail of the Insolvency Fund. There was therefore a good reason why a winding up order was said to be necessary. Ultimately, a practitioner agreed to act as liquidator and a winding up order was made, but Laffoy J. examined the question of the jurisdiction of the court to make a winding up order without at the same time appointing a liquidator.

57. Laffoy J. continued: -

“30. The crucial question for consideration by the court at the stage when the appointment of a provisional liquidator was suggested was whether the court should

make a winding up order if no appropriate person were to come forward to act as official liquidator for the purposes of the winding up. Section 225 of the Act of 1963 deals with the appointment of a liquidator and provides that, for the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court "may" appoint a liquidator.

While that section seems to be open to the inference that a court can make a winding up order without appointing a liquidator, in reality, it is difficult to see how a compulsory winding up could proceed without a liquidator being appointed. ...

31. Having given careful consideration to the provisions of the Act of 1963, I came to the conclusion that it would not be appropriate to make a winding up order without ensuring that the office of official liquidator is filled from the time of the making of the winding up order. Accordingly, I adjourned the petition for a very short period to enable the petitioner's solicitors to ascertain whether Mr. Wallace would be prepared to act as official liquidator, as distinct from provisional liquidator, or, if he was not, whether some other qualified person would be prepared to take on that office. I pointed out that the role of an official liquidator performed under the supervision of the High Court is an onerous role and may involve the official liquidator incurring expenditure which he may not be in a position to recoup. I also made it clear that a qualified person who is prepared to take on the role in this case should carefully consider the implications of so doing and, if necessary, obtain legal advice as to the burden which he will be taking on if he consents to acting as official liquidator”.

58. Section 575 of the Act of 2014 repeats section 225 of the Act of 1963 in providing that “for the purpose of conducting the proceedings in winding up as company, the court may (emphasis added) appoint a liquidator or liquidators.”

59. It is clear from that provision and from the analysis by Laffoy J. that a court has jurisdiction to make a winding up order without appointing a liquidator, either at the same time or at all. But it is also clear that such a course is undesirable, since an independent liquidator is the most logical person to conduct the winding up. None of the parties in this case submitted that a winding up order made without also the appointing a liquidator would serve any valuable purpose.

60. The Authority made an interesting submission as to two potential scenarios by which the life of a company could be terminated if an order were made for the winding up of the company without appointing a liquidator.

61. Firstly, an order could be made for the winding up of the Company on the basis that any creditor or other interested party could have liberty to thereafter apply for the appointment of a liquidator. It was suggested that whilst creditor could at any time petition for a winding up order and the appointment of a liquidator it may seem to a creditor to be a simpler process to simply apply for the appointment of a liquidator pursuant to such a liberty, the winding up order already having been made. This is possible in theory, but this scenario would not cure the difficulty that any applicant for such an appointment would need to make proposals for the funding of the liquidation, unless a liquidator were identified who was willing to act without such arrangements in place.

62. Secondly, the Authority referred the court to the provisions of ss. 725 and 726 contained in Part 12 of the Act. Under these provisions one of the grounds on which the Registrar of Companies can move to strike a company off the Register leading ultimately to its dissolution is that the company is being wound up and the Registrar has reasonable cause to believe that no liquidator is acting (s. 726 (d)). It was suggested that if an order were made for the winding up of the Company without the appointment of a liquidator the Registrar of Companies could later pursue the strike off route because no liquidator is acting.

63. Two difficulties arise on this scenario. Firstly, the provisions of s. 726 which identify the grounds for involuntary strike off are generally grounded on defaults by the company, its officers or a liquidator. Secondly, although s. 762(d) does not stipulate that it applies where a liquidator stood appointed but is no longer acting, it seems logical that the subsection was intended to apply to such a situation, and not to one where no liquidator was ever appointed. I do not believe it would be appropriate for this Court to deploy the “device” described here which would be something of a contrivance.

64. In fairness to the Authority it was not urging the court to follow such a course. It was simply assisting the court in assessing all the possible routes under the Act.

65. S. 747 (3) provides that the court’s power to appoint an inspector is exercisable notwithstanding that the company is in the course of being wound up. A logical corollary of this provision is that where an inspector stands appointed an order may still be made for the winding up of the company. In such a scenario, the investigation may continue in accordance with Part 13 of the Act, subject to any particular directions made in relation to its future conduct pursuant to s. 749. In the submissions of the parties there was a measure of overlap between the question of whether a winding up should be ordered and possible directions affecting the future course of the investigation. The court must first decide whether it is appropriate to make an order for the winding up and thereafter consider what directions if any should be given in relation to the future conduct of the investigation.

Conclusion as regards a winding up

66. The court has jurisdiction at this time to make an order for the winding up (s. 760 (1) (a)).

67. There is undisputed evidence that the Company is insolvent. It has no assets except inter company receivables which are said to be irrecoverable.

68. No person has been proposed as liquidator and no person has consented to act as liquidator. The inspector has pointed out that it would be inappropriate to accept an appointment to act as liquidator without access to the resources required to perform the duties of a liquidator.

69. Section 639 of the Act provides that: -

“The appointment of a liquidator . . . shall be of no effect unless the person nominated has, prior to his or her appointment, signified his or her written consent to the appointment”.

70. It is arguable that this requirement for consent only arises in relation to Part 11 of the Act, namely a liquidation following a petition, but the court was not urged to make such a distinction. Even if it could be said that s. 639 did not apply to a liquidator appointed pursuant to s. 760, which I do not believe would be a correct interpretation, all parties were agreed that it would be undesirable for the court to appoint a liquidator who has not given his consent to act.

71. The device of ordering a winding up on the basis that creditors could later apply to appoint a liquidator or that the Registrar would intervene by moving to strike the Company off the Register is not, at least in this case, a sound basis of itself for a winding up order.

72. If any creditor has sufficient interest in a winding up of the Company, it may still at any time petition for the winding up. Doing so may arguably be more cumbersome than applying to appoint a named liquidator after a winding up order has been made, but that of itself would not be a justification at this point for the making of a winding up order.

73. Section 624 envisages the appointment of a liquidator for the purpose of performing functions which include investigation of the Company’s affairs, the realisation of assets (which includes investigation of the whereabouts and recoverability of assets), and after assets are realised the distribution (after costs and expenses) of proceeds among creditors in

accordance with the priorities set out in the Act. If no person is appointed to perform these functions, it is difficult if not impossible to see any purpose being served by the making of a winding up order.

74. Section 567 of the Act provides that where a company is insolvent and it appears to the court that the reason or principal reason for its not being wound up is the insufficiency of its assets, the sections of the Act identified in the Table to s. 567 apply. Many of the sections identified in the Table can be invoked by the Authority. However, a number of them, can also be invoked by parties other than the Authority, including creditors, notably the following: -

- Section 599 - Related company may be required to contribute to debts of company being wound up.
- Section 608 - Power of court to order return of assets which have been improperly transferred.
- Section 609 - Personal liability of officers of company where adequate accounting records not kept.
- Section 610 - Civil liability for reckless or fraudulent trading.
- Section 612 – Assessment of damages for misfeasance.
- Section 675 – The power of the court to make orders for arrest and seizure of persons in certain circumstances.
- Section 684 – Inspection of books by creditors and contributors.

75. S. 842, which provides for disqualification of certain persons from acting as director, or holding other offices, can also be invoked in the absence of a winding up.

76. The availability of these remedies and sanctions in the absence of a winding up order means that no creditor or other interested party is deprived of such remedies, subject (in the case of s. 567) to satisfying the test that the “reason or the principal reason for [the company] not being wound up is the insufficiency of its assets”. At one level that test may appear to be

obviously satisfied from the fact that no person has signified consent to act as a liquidator, but that is not necessarily the case and other evidence could be required.

77. By this judgment I do not make any finding as against any persons who have not participated in this hearing, but the Inspector's affidavit at least suggests that some of these remedies may be relevant in this case.

78. I accept the Inspector's observation that a winding up of the Company is appropriate, were a person be willing to act as liquidator. But no interested party, including the parties who have previously taken that position, has nominated a liquidator. For this reason I have concluded that no order should be made for the winding up of the Company at this time. This does not preclude a future petition either by any party entitled to present a petition pursuant to s. 571 of the Act (the company, creditors, contributories, or in certain cases the Authority), by the Authority pursuant to s. 761 of the Act (the 'just and equitable' ground), or any future application by any interested party for such an order pursuant to s. 760 of the Act (after consideration of the Inspector's Report).

79. This is my conclusion on the question which was set down for determination as to whether a winding up order should be made. Of necessity, during the hearing, a number of submissions were made regarding the future direction of the investigation, which I consider next.

Further directions in the investigation

80. Section 749 provides as follows: -

"749. Where the court appoints an inspector under section 747 (1) or 748 (1), the court may from time to time give such directions as it thinks necessary or expedient, whether to the inspector or any other person, including directions given with a view to ensuring that the investigation is carried out as quickly and inexpensively as possible".

81. Section 758 provides: -

“758. (1) Inspectors appointed under section 747 (1) or 748 (1) may, and if directed by the court shall, make interim reports to the court, and on conclusion of the investigation shall make a final report to the court.

(2) Notwithstanding anything in subsection (1), an inspector appointed under section 747 (1) or 748 (1) may at any time in the course of the investigation, without the necessity of making an interim report, inform the court of matters coming to his or her knowledge as a result of the investigation that tend to show that an offence has been committed”.

82. Section 759 governs the distribution of an inspector’s report. Subsection 1 provides that the court shall provide a copy of every inspector’s report to the Authority. Subsection 2 identifies the parties to whom the court may provide a copy of an inspector’s report. Those parties include the company, members, directors and officers, and importantly, “any other person (including an employee or creditor of the company or other body corporate) whose financial interests appear to the court to be affected by the matters dealt with in the report”.

83. Subsection 4 provides that the court may cause an inspectors' report to be published.

84. S. 760 confers on the court after considering an inspector’s report to make such order as it thinks fit.

85. Section 762 provides that the Minister for Justice shall defray the expenses of and incidental to the investigation. The subsection also permits the Minister to apply for reimbursement of these expenses against certain parties. If such an order were made he would stand as a substantial creditor of the Company.

86. The Inspector in his affidavit has described certain findings which he has already made and things which he has ascertained (see paragraphs 36 and 37 above and paragraphs 16 and 23 of his affidavit). He says that unless directed otherwise, he is obliged by s. 758 to

make a final report. He says that the following questions which were either identified in this Court's judgment as warranting investigation or which appear to him to be within the scope of the order appointing him remain to be answered: -

- (a) What is the status of the loan capital investments said to be sourced by the company from Optirevenus (a named potential investor in the company) or others?
- (b) By whom were the company's affairs directed and conducted?
- (c) What was the full extent of the funds received by the company from the investors and the identity of those investors?
- (d) By whom was the benefit of the funds received from the investors ultimately obtained?
- (e) Whether ... the Company was a limb of a larger fraudulent enterprise and established for that purpose".

87. The Inspector says that his inquiries into these matters would be advanced considerably if he had access to the Company's email correspondence and other records which he believes to be in the possession or control of Mr. Hands and/or Google and also the information which the court has ordered Walker Forestry Services Limited and Walker Admin SL to provide to him.

88. The Inspector then identifies the substantial steps which he says would need to be taken to enable him to complete his inquiries and prepare a final report as follows (Para. 19): -

- (a) Such steps as may be necessary to procure compliance with the court's order as made on 16 December 2022, which may include applications for assistance from the courts in the United Kingdom and Spain, and analysis of the transaction data to be provided by Walker Forestry Services Limited and Walker Admin SL.*
- (b) Analysis of the company's records and communications, whether provided by Mr. Hands directly or by Google.*

(c) Inquiries to be made of Optirevenus II Foret and/or the parties involved in that company as to their dealings with the Company.

(d) Examination of such other parties involved in the Company's operations as may be identified in the foregoing records and whose whereabouts may be located for that purpose.

(e) Such other steps as may be indicated by the analysis of the foregoing inquiries.

89. Subparagraph (b) above presupposes that either Mr. Hands provides information still required or that Google do so, which in turn may require a determination of the legal questions Google have raised regarding GDPR, the ePrivacy Regulations and the European Convention on Human Rights.

90. It is clear from s. 758 that the Inspector has an obligation to make a final report and it is entirely appropriate that he should identify the further matters on which inquiries should be made and the steps which he would take. This does not mean that he cannot be the subject of a direction pursuant to s. 749, which could include for example a direction that he move to the preparation of a final report without pursuing further court proceedings.

The Minister's submissions on the investigation

91. In Mr. O'Brien's affidavit, and through submissions at the hearing, the Minister emphasises that he does not wish to usurp the function of the court in directing the manner of the investigation going forward. Nonetheless, Mr. O'Brien has identified the following concerns, principally related to costs.

92. Firstly, the Minister has already paid €504,328.84 (including VAT).

93. Secondly, there is little or no prospect of recovering these amounts.

94. Thirdly, the Minister has grave concerns about the further costs which will be incurred as the investigation continues, particularly if contentious court proceedings between

the Inspector and Google are brought to a full contested hearing and applications are made to foreign courts.

95. Fourthly, the Google “entrenched position” presents a risk that if the opposition of Google is successful, this may involve the Department, which has no role in relation to the investigation otherwise than its obligation to pay the expenses thereof, being forced to pay legal costs of all sides in such a contentious matter, with no progress ultimately achieved in the inspection.

96. Fifthly, that based on the Inspector’s findings described in his affidavit, there is sufficient evidence that the matter should be referred now to An Garda Siochana.

97. Sixthly, that in any further directions which the court would make in relation to this matter the court should balance the Department’s concerns as to escalating costs against the following: -

(a) The significant findings which the Inspector has already made.

(b) The likelihood or unlikelihood of significant further progress being made in the matter.

(c) The availability of a full investigation by An Garda Siochana into suspected fraudulent activities by the company. (The Minister does not refer to the Authority in this regard but the Authority is also a body having powers of further investigation and action.)

98. The Minister submits that the particular questions identified in the order appointing the Inspector have been the subject of substantive findings summarised in paras. 16 and 23 of the Inspector’s affidavit sworn 27 April 2023.

Directions

99. The purpose of an investigation under Part 13 of the Act is to ensure compliance with company law. Information gathered in an investigation may be applied to various purposes.

The purpose is well summarised by Courtney in *The Law of Companies*, Thomas B.

Courtney, 4th Ed., at para. 28.002 where he states: -

“The investigatory regime exists to ensure compliance with company law, ‘to ensure that companies incorporated under the Acts do not abuse the privileges which incorporation confers on them to the detriment of their members, their creditors, or indeed the public in general’ (per Keane C.J. in Dunnes Stores Ireland Company v. Ryan [2002] IR 60 at 77). Though the legislation is broadly worded it seems unlikely that an investigation can be commenced in the absence of suspected abuse of the privilege of incorporation.

The information gathered in an investigation may be applied to various purposes. In particular, an inspector’s report may be used as evidence in subsequent criminal or civil proceedings (see s. 881 (4) of the Act), and a company may be wound up on foot of information contained in an inspector’s report. The information can also be released to other regulatory authorities (such as the Competition Authority or the Revenue Commissioners) who may decide to act upon it accordingly”.

100. S. 881 (4) of the Act provides that a document purporting to be a copy of an inspector’s report shall be admissible in civil proceedings. This provision does not extend to criminal proceedings, although the report may have certain evidentiary value in such proceedings. The value and weight which such a report would carry in any subsequent proceedings, whether civil or criminal, will be affected by the extent to which a report is qualified or contains reservations. That in turn may depend on whether the Inspector making the Report has been in a position to exhaust all the avenues of inquiry available to him or which he considers appropriate and necessary. There is only so far this court can go in speculating what actions may follow the conclusion of this investigation.

101. The Minister’s obligation to defray costs and expenses pursuant to s. 762 must be taken in the context of proportionality and balance as identified in Mr. O’Brien’s affidavit. In para. 179 of the judgment of 19 July 2022, I observed that if at any point in the course of the performance of his functions the Inspector should form the view that the statutory purpose of his appointment cannot be achieved, he should report to the court which could then consider what form of order might be made pursuant to s. 760 which governs the powers of the court after considering a report. Having regard to the extensive costs already incurred and the Minister’s validly held concerns regarding costs it is appropriate at this juncture that the court should go further than it did in paragraph 179 of the First Judgment and say that if the Inspector considers that the statutory purpose of his appointment cannot be achieved without putting the Minister and the taxpayer to costs which are disproportionate to the objectives of Part 13 of the Act and of his appointment he should so inform the court, the Minister and the Authority.

102. The Inspector says that in order for him to make a proper final report he would need to pursue the matters already identified by him as requiring further processes, including potentially a full determination of the issues raised by Google and which present obstacles to the access the Inspector seeks to books and records of the Company. The “pleadings” in relation to the Google matter are not closed and the detail of the legal and other questions in issue has not been opened to this Court. If directions were to be made touching on how this issue were to be progressed or limiting the performance of the Inspector’s functions, the court would need an informative exposition of the following: -

- (a) The issues remaining to be resolved between the Inspector and Google concerning the access sought by the Inspector, and the differences of position between the parties.
- (b) The extent to which exhausting this process will make the difference between a final report which would be so qualified as to undermine its purpose and a final report

which would achieve the statutory purpose of the Inspector's appointment (discussed below).

(c) The process required to resolve these issues and the likely cost. It may not be possible to provide definitive guidance on costs, but an estimate can be made which would inform the court in assessing proportionality.

(d) any other matters the Inspector considers relevant to the question of proportionality.

103. This information is necessary not only in relation to the Google matter, but also in relation to the potential applications or proceedings in foreign courts.

104. Whilst emphasising that he does not wish to interfere with the course of the investigation or usurp the court's function in giving directions, the Minister is at the least positing the proposition that this Court would direct the Inspector to move to a final report in a defined timeframe without incurring more costs than have already been incurred save those to which he is already committed or potentially exposed. This is understandable in light of his concerns summarised at paragraphs 92 – 98 above. This approach would necessitate the court deciding that it is necessary to make such a direction or a variation thereon. If no such direction is made, the Inspector's intended approach is to pursue the outstanding matters he has identified as required to complete the investigation, subject to the fixing of a reasonable timeframe for delivery of a final report, and to ongoing engagement with the Minister regarding costs and expenses.

105. Before making a decision as to whether to make directions which would limit the actions to be pursued by the Inspector, which is one of the possibilities posited, although not bluntly advocated, by the Minister, this Court would need to receive a second interim report addressing the matters identified at paragraphs 101 to 103 above. This can be a concise

report, referring to the information in his affidavit of 27 April 2023, but most critically it should address the questions I have identified above regarding future progress.

106. This matter will be listed one week after delivery of this judgment for mention when the timeframe for the second interim report can be fixed.