

THE HIGH COURT

[2024] IEHC 80

High Court Record Number: 2016 389 COS

IN THE MATTER OF ARDEN FORESTRY MANAGEMENT LIMITED
(IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACT 2014
AND IN THE MATTER OF SECTION 610 OF THE COMPANIES ACT
2014

BETWEEN/

DECLAN DE LACY

APPLICANT

-AND-

GARRET HEVEY AND DAVIT PEILE

RESPONDENTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 15th day of February, 2024

1. Arden Forestry Management Limited (“the Company”) operated a fraudulent business from its incorporation in 2013 until its liquidation in 2016. The fraud perpetrated by the company was simple. It offered investments in forestry schemes allegedly operated by the company. Ultimately, a total of 166 investors placed money with the company for the purpose of acquiring interest in lands in Ireland. The company raised a total of €6,432,745 from individual investors. The company represented that these investors had obtained

interests in lands extending to 938.54 acres. The average investment was in the region of €20,000. The largest individual investment was €491,381.81. Many of the investors were retired.

2. The investors believed that the monies they placed with the company had, in the main at least, gone to acquire interests in forestry. This was sadly untrue. The liquidator's investigations have disclosed that a total of 30.2 acres of forestry land was acquired by the company, at a cost to it of €133,925. A further sum of €392,641 was paid back to investors. Much of the balance of the monies received by the company appears to have been misappropriated.

3. In the current application, the liquidator of the company seeks the following orders: -

- “(1) A declaration pursuant to section 610(1)(a) and/or section 610(1)(b) of the Companies Act, 2014 that Garret Hevey ... was, while an officer of [the Company] knowingly a party to the carrying on the business of the Company in a reckless manner and/or the carrying on of the business of the Company with intent to defraud creditors of the company and/or for another fraudulent purpose;
- (2) A declaration pursuant to section 610(1)(b) of the Companies Act, 2014 that David Peile, ... was, knowingly a party to the carrying on of the business of the company with intent to defraud creditors of the company and/or for another fraudulent purpose;
- (3) An order pursuant to section 610(2) of the Companies Act, 2014 declaring that the respondents, each or either of them, shall be personally liable for all, or such part as may be specified by this Honourable Court, of the debts and other liabilities of the company...”

4. As of the date of the hearing of this application, the outstanding debts of the company amounted to €3,807,142.
5. The liquidator also seeks the costs of the application against the two respondents.
6. This judgment is arranged under the following headings: -
 - (1) The evidence on the motion.
 - (2) The submissions of the liquidator and of Mr. Peile.
 - (3) Decision on the motion.

(1) The evidence on the motion

7. The grounding affidavit of Mr. De Lacy, the liquidator of the company, constitutes the main evidence upon which he relies for the purpose of obtaining the order sought against Mr. Hevey and Mr. Peile. At all material times, Mr. Hevey was a director of the company. Mr. Peile was never either a director or a member of the company. However, Mr. De Lacy avers (at para. 10 of his affidavit) that: -

“... My investigations disclose that beginning in 2015 Mr. Peile was centrally involved in the business of the company in his capacity as a consultant to the company and second in command to Mr. Hevey. In particular, while Mr. Hevey was the chief engineer of the fraudulent scheme as described below, Mr. Peile operated as head of sales of the company and in this capacity was instrumental in perpetrating the fraud.”

8. At this stage, it should be said that Mr. Hevey has not sought to contest the motion brought against him by the liquidator, and has filed no evidence in the motion. Mr. Peile has

filed three affidavits, and does contest the liquidator's entitlement to secure any of the order sought against him.

9. Mr. De Lacy goes on to record that the company's principal business was obtaining investments "*ostensibly for the purchase of forestry sales in Ireland*"; para. 12. He says that the investment was marketed primarily to UK investors, and states that these individuals "*would not have a detailed knowledge of the Irish forestry sector*"; para. 15 of the affidavit.

10. Mr. De Lacy also gives evidence that both Mr. Hevey and Mr. Peile used pseudonyms in their dealings with investors and prospective investors. Mr. Hevey called himself "*James Baker*", and David Peile "*used the pseudonym of David Marshall*".

11. The offer made by the company (through, among other people, Mr. Hevey and Mr. Peile) was as follows: -

- (a) The company would sell forested lands in Ireland to the investors;
- (b) the trees on the lands would have five or ten years left to maturity;
- (c) there would be an annual payment of 4.5% made to the investors, ostensibly being the proceeds of grants payable by the Irish Government;
- (d) the investors would receive as additional payments the proceeds of thinning of trees on the lands they had purchased;
- (e) there would be a final payment "*of at least 150% of the funds invested after approximately five years when the trees on the lands had reached maturity and were sold*"; para. 18 of Mr De Lacy's affidavit.

12. As far as the company was concerned, it was to receive a purchase fee of 6% (calculated on the purchase price of each forestry plot acquired by the company), 5% of the purchase price *“for marketing and administrative purposes”* and a management fee of STG£50 per acre *“which was said to include insurance for the timber.”*

13. Mr. De Lacy stated that Mr. Hevey and Mr. Peile were responsible for the distribution of promotional material which set out this offer to potential investors.

14. I have already noted the number of investors, the range of the investments, the total amount received from investors by the company, and the amount of land apparently purchased by the company. Mr. De Lacy goes on to describe the issuing of *“timber certificates”* to investors. These documents purported to identify the number of acres of land acquired by the investor and, importantly, the Land Registry Folio Number for those lands. Mr. De Lacy states that: -

“Both Mr. Hevey and Mr. Peile were responsible for the preparation and issue of the *‘timber certificates’*”

15. A number of the *“timber certificates”* appear on their face to have been issued by Forestry Enterprises Limited. That is described by Mr. De Lacy as *“an Irish company that is well known in the forestry sphere but is not related to the company.”* He goes on (at para. 25 of his affidavit): -

“25. Shortly after my appointment as provisional liquidator, I forwarded a specimen ‘timber certificate’ issued by the company to a particular investor to a representative of Forestry Enterprises Limited and made enquiries as to whether any relationship existed between the company and Forestry Enterprises Limited, and as to whether the specimen ‘timber certificate’ appearing to have been issued by

Forestry Enterprises Limited was authentic. Lacy Walsh Solicitors, who represented Forestry Enterprises Limited, responded at that time to state that:

‘The document is not authentic, nor has it emanated from our client. Our client has been in the Forestry business for over twenty five years and instructs us that it has never issued any document known as or referred to as a timber certificate.’”

16. At paragraph 27, Mr. De Lacy goes on to say the following: -

“27. The company issued copies of false folios purporting to show that the company was the full owner of the lands and that the investors were co-owners as tenants in common. The Folio numbers appearing on some of the ‘timber certificates’ were numbers taken from the genuine purchases of the small amount of the land acquired by the company, with the same Folio numbers being used and reused again and again. The Folio numbers appearing on other ‘timber certificates’ were simply invented.”

Mr De Lacy then exhibits copies of sample forged folios.

17. Mr. De Lacy gives evidence about an affidavit sworn by Mr. Hevey which grounded the initial application for Mr. De Lacy’s appointment as provisional liquidator of the company. In that affidavit, Mr. Hevey averred that the company was involved in “*detailed negotiations with the State agents for the purpose of acquiring further lands which would potentially have increased the forestry under the company’s ownership to approximately 375 acres*”; para. 29 of the De Lacy Affidavit. Mr. De Lacy has made significant efforts to find documentary or “*other independent evidence*” of any such negotiations but no such evidence was found.

18. Mr. De Lacy then describes the repayments made to investors. Under the arrangements between investors and the company, investors were entitled to periodic payments from the company. However, these payments (which, as I have already observed, totalled €392,641) were simply sourced from funds provided by other investors. To that extent, the fraud has the hallmarks of a classic Ponzi Scheme.

19. Very importantly, at paras. 31 and 32 of his affidavit Mr De Lacy gives evidence about the involvement of Mr. Peile in the fraudulent operation of the company. In the first of these paragraphs, he refers to an interview with Mr. Hevey which is of limited use to me as evidence identifying the precise role played by Mr. Peile. However, at para. 32 of Mr. De Lacy's affidavit is testimony of great importance. It reads as follows: -

“32. In or about May 2016 a Finnish national who had invested €52,000 in the company in February 2016, Kari Wahlstrom, contacted representatives of the company and asked to visit his investment. Mr. Wahlstrom came to Ireland, and asked to be taken both to the forestry site he owned and the Land Registry to view the record of his ownership. When the Gardaí examined Mr. Hevey's computer they identified an email from Mr. Peile to Mr. Hevey on the day of Mr. Wahlstrom's visit wherein he said *'Shit, he wants to visit the Land Registry, how do we get over that?'*”. Mr. Wahlstrom met Mr. Peile and Mr. Hevey, and was taken to a forest said to represent his investment in Frenchpark, County Roscommon. However when he asked Mr. Peile and Mr. Hevey to take him to the Land Registry he was told there was no time. He carried out further enquiries upon returning home, and discovered that the land was registered to somebody else. Mr. Wahlstrom then complained to An Garda Síochána regarding the company's activities.”

Mr. De Lacy then refers to a summary of these events set out at para. 9 of the judgment of McCarthy J. in the Court of Appeal delivered in criminal proceedings, to which I will now turn.

20. The only factual basis for this element of Mr. De Lacy's affidavit appears to be the section of the judgment of the Court of Appeal. That judgment was delivered in the context of an appeal, by the Director of Public Prosecutions, against the sentence imposed not on Mr. Peile but on Mr. Hevey. The Director asserted that that sentence was unduly lenient.

21. No authorities have been opened to me to suggest that findings of fact (if that is how one can characterise this portion of the judgment of an appellate court) made in an appeal in which Mr. Peile played no part whatsoever can in some way constitute evidence against Mr. Peile. As a matter of first principles, the passage from the judgment of McCarthy J. cannot in my view stand as evidence against Mr. Peile in this motion. No supporting evidence, of any nature whatsoever, was produced by the liquidator to sustain his account on affidavit of Mr. Wahlstrom's visit to Ireland and in particular the email sent by Mr. Peile to Mr. Hevey. The liquidator does not exhibit a copy of that email, despite the fact that the Gardai identifying that email presumably would have made a copy available to Mr. De Lacy for the purposes of the current application. One would also expect the email, given it was sent from Mr. Peile to Mr. Hevey, to be on the company's email system and therefore available to the liquidator. However, I am given no evidence about the presence (or otherwise) of the email on the company's email system or of any difficulty on the part of the liquidator in accessing the company's emails.

22. Both the liquidator's side and Mr. Peile rely upon comments of various judges as though they constituted evidence of fact. They do not do so.

23. Fortunately for the liquidator, Mr. Peile (in his second replying affidavit) effectively accepts the summary contained in para. 32 of Mr. De Lacy's affidavit, and goes on to explain the contents of the email. The explanation is as follows:

“10. I did not have access to or download or forge any forestry ownership documents. The email I sent to Gareth Hevey asking him how we got over the fact that the clients from Finland wanted to visit the Land Registry Office was simply because Gareth Hevey had indicated that the purchase of this forest hadn't been finalised yet and also, as mentioned above, I had nothing to do with the purchase of forestries and I felt out of my depth dealing with this aspect of the clients' visit. I did, however, meet the clients at the airport and take them to the forest and have lunch with them which was part of my job role and responsibilities.”

24. Like much of Mr. Peile's evidence, this explanation seems self serving. However, an important aspect of the motion brought by the liquidator is that, after Mr. Peile delivered his second and third affidavits (which deal with the substance of the liquidator's evidence) there was no application to cross examine Mr. Peile on either of these affidavits. While the details will emerge later in this judgment, in broad terms Mr. Peile denied any knowledge of the dishonesty involved in the running of the company, says that his role was solely in sales, and indicates that Mr. Hevey orchestrated the fraudulent manner in which the company operated (effectively behind the back of Mr. Peile).

25. Unfortunately the liquidator did not seek to cross examine Mr. Peile on either his second or third affidavit. Given that these affidavits were delivered at and after the opening of the motion, and given their contents, liberty to cross examine Mr. Peile on these affidavits would almost certainly have been granted. No such application to cross examine was made and instead the liquidator confined himself to the delivery of an affidavit (from a member of

his firm) taking issue with certain of the averments of Mr. Peile in his second affidavit. However the challenge to Mr. Peile's affidavit was not carried further. It need hardly be said that an affidavit from a member of Mr. De Lacy's firm protesting that Mr. Peile's evidence was hard to accept is no substitute for the challenge in that evidence by cross examination. The proper approach to take is that set out by Hardiman J in *Boliden v Tara Mines* [2010] IESC 62 where he held (at pages 17 – 18);

“It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a Notice of Intention to Cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which have been deposed to. In a case where there is no contradictory evidence an attack on the evidence which is before the court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height.”

26. It is worth reflecting, at this point of the judgment, on just how significant the failure to cross examine Mr. Peile is in the context of this motion. The liquidator has chosen to bring these applications both against Mr. Hevey and Mr. Peile. The application is a very serious one. It places upon the liquidator the burden of showing that the business of the company was carried on either with intent to defraud creditors or for some other fraudulent purpose. Having established this, it is for the liquidator to show that Mr. Hevey and Mr. Peile were (separately and individually) party to the carrying on of the business of the company for these fraudulent ends. Careful consideration must have been given by the liquidator, and possibly his advisors, to the prospects of obtaining these orders. Given the fact that, as we shall see, Mr. Peile pleaded guilty to criminal charges relating to the operation

of the company, the liquidator would be entitled not to have expected the defence mounted by Mr. Peile to this motion, which I have summarised a short time ago. However, when that defence was raised (and set out in not one but two affidavits) it was incumbent on the liquidator to analyse the situation and to consider whether or not he could in fact obtain the orders sought against Mr. Peile on the affidavits as they stood. If he was to challenge Mr. Peile – and that effectively is what was attempted in the affidavit of his colleague, Mr. Massey – this should have been done by having Mr. Peile cross examined. This would certainly have added to the costs of the motion, but would have been more direct than the course actually adopted by the liquidator. In addition, if the motion against Mr. Peile (a discharged bankrupt) had the potential to bring any commercial advantage to the creditors of the company the preferable course of action was for the liquidator to press on with the motion by incurring the cost of cross examining Mr. Peile, and not by falling back on the understandable but less effective device of having Mr. Massey comment on the credibility of Mr. Peile’s averments. Deciding whether or not the averments are credible is, of course, not a function of any witness but a function of the court. Fair procedures require that, in assessing whether evidence is mistaken, dishonest or incredible the witness should have a chance to have put to him in terms in the witness box that his testimony is not to be accepted for some or all of these reasons.

27. The evidence of Mr. De Lacy (given in his grounding affidavit) goes on to describe the consequences of the making of the complaint to an Garda Síochána by Mr. Wahlstrom. On 16 June 2006 An Garda Síochána was granted an order freezing the company’s main bank account. This order was made at a District Court hearing, and was renewed periodically. Funds of €1,967,825.00 were frozen in the account from that date on.

28. Days after the freezing order was made, on 21 June 2016 a company called Arden FM Limited was incorporated in England and Wales. Mr. Peile was the sole director and shareholder of Arden FM. Shortly after that company was incorporated, it opened an account with Barclays Bank. The liquidator's examination of the company's email records disclose that a retired social worker living in Nottingham had an investment in the company diverted to the Arden FM account by a person using the name "Ben Harper". The liquidator then obtained an order from the High Court in England directing Barclays Bank to provide him with details of the transactions on the Arden FM account. From that, it became apparent that the sum of £591,463.87 sterling "was received from intending investors in the scheme operated by the company in the period between 4 July 2016 and 5 August 2016"; para. 38 of Mr. De Lacy's affidavit. On the latter of those dates, Barclays Bank refused to allow the Arden FM account to continue to operate, returned the balance in the account (£130,266.44 sterling) to intending investors.

29. At around the time that Barclays Bank refused to continue to allow the Arden FM account to be operated, Mr. Hevey made contact with a Trust and Corporate Service provider in Gibraltar (Octopus). Octopus was requested by Mr. Hevey to provide him with "a ready made company incorporated in the United Kingdom with a bank account and nominee directors and shareholders." Such a company, Spencer Fernandes Limited, was provided to Mr. Hevey and a Mr. Stephen Spencer Fernandes agreed to act as a nominee shareholder and director.

30. By an email of 29 September 2016, Mr. Hevey advised Mr. Fernandes that he had "shortened the name Spencer Fernandes Limited to just SFL which we felt was more appropriate for the purpose of our forestry investment." The email communications are exhibited by Mr. De Lacy at para. 41 of his affidavit.

31. At para. 42 onwards in his affidavit, Mr. De Lacy gives important evidence about the activities of SFL. I will set them out in full. They read:-

“42. The period subsequent to 16 August 2016, the second respondent, using the pseudonym “David Marshall”, advised intending investors that they should make payments to a company identified as SFL Limited which he described as an escrow agent for the company. The intending investors then received emails either from the second respondent, or ostensibly from Ben Taylor of SFL Limited, with details of the bank account held by Spencer Fernandes Limited in Barclays Bank (the SFL account). In these emails Spencer Fernandes Limited was referred to as “SFL Limited”. In this regard I beg to refer to a true copy of an email from the second named respondent to Ian Smith on 23 August 2016, and to affidavits sworn by Stephen Baldwin and Colin Hendra on 7 December and 2016 and 2 December 2016 respectively, which appear at Tab 19 of the folder.

“43. I obtained an order from the High Court in England directing Barclays Bank to provide me with details of transactions on the SFL account, and it was apparent from the information provided by Barclays Bank that the sum of £180,240.20 sterling was received from investors in the scheme operated by the company in the period between 17 August 2016 and 4 October 2016, and in this regard I beg to refer to copies of the relevant bank records which appears as Tab 20 of the folder.

“44. In the latter part of October 2016 the activity on the SFL account aroused suspicions of the fraud department within Barclays Bank, and the account was frozen. On 30 October 2016 the nominee director of Spencer Fernandes Limited was advised by Barclays Bank that the SFL account was under review and had been locked, and in this regard I beg to refer to a true copy of an email from Stephen

Spencer Fernandes to Gareth Hevey on 30 October 2016 which appears at Tab 21 of the folder.”

32. On 12 October 2016, an inspector of the Garda National Economic Crime Bureau contacted a number of investors stating that she and a colleague hoped to travel to the UK “to take a statement next week or the week of 1 November 2016”. The investors were also told that a local police officer would be calling to their home to confirm that they were willing to meet with the Gardaí and make a statement. On 14 October 2016 this email was forwarded by at least one of the investors to two email addresses. One of these was the email address of Mr. Peile, though it is in the name of his pseudonym David Marshall.

33. At para. 46 of his affidavit, Mr. De Lacy states that arising from the freezing of the company’s main bank account, the freezing of the Arden FM account, and the freezing of the SFL account “and the evident progress of the investigation by the Gardaí into the company’s activities” that the Company itself presented a petition for its winding up on 25 October 2016. On foot of that petition, Mr. De Lacy was appointed as provisional liquidator, and ultimately as official liquidator of the Company on 21 November 2016.

34. Mr. De Lacy then sets out the way in which funds received by the company were dispersed. The company’s own bank account contained, at the time of Mr. De Lacy’s appointment, the sum of €1,967,826.00. This is in essence the sums frozen on foot of the district court order, though there is €1.00 in the difference between the two amounts.

35. Of the amounts paid out, the lion’s share (€1,545,000.022) went to GTD, a company which the liquidator says “the respondents – with assistance from Octopus – caused to be incorporated in the United Arab Emirates on 29 October 2015 and in which they were equal shareholders.”

36. There were also significant transfers to Mr. Hevey (€514,400) Tracey Hevey – Mr. Hevey’s wife – (€14,700), to Mr. Peile (€288,015) and other payments which effectively were the costs incurred in conducting the fraud. These included payments to investors misrepresented as “grant payments”.

37. As to the Arden FM account, there were further transfers to Mr. Peile (£301,300 sterling), payments to investors misrepresented as “grant payments” (£1,899), transfers to Clarence International Limited (£160,000) and the costs of purchasing the lands (£45,573). It will be remembered that Mr. Peile was the sole shareholder and the sole director of Arden FM. Clarence International Limited is a Gibraltar company with, according to Mr. Hevey, a bank account in Latvia. Clarence is beneficially owned by Mr. Hevey, who is also the sole employee of Clarence. Mr. Hevey claimed, in his interview with the liquidator, that Clarence provided a “full digital marketing” service to the Company from Mr. Hevey’s home. On that description, which is undisputed, I find that the monies paid to Clarence were essentially for the benefit of Mr. Hevey. Any services provided by it were in pursuance of the fraudulent business of the Company.

38. With regard to the SFL account, £124,000 sterling was transferred to Money Corp, and international foreign exchange services provider. That money was then transferred to an account held by Everwood International Limited in Poland. Everwood International Limited incorporated in Hong Kong. The sole director of Everwood International Limited is Ramin Sadeghi, described by Mr. De Lacy as “the director of hundreds of companies, and consequently appears to be a nominee”; para. 50 of Mr. De Lacy’s affidavit.

39. As already set out, sums in excess of €1.5million transferred to GTD in the UAE. The liquidator obtained an order from the Dubai International Financial Centre Court

directing Noor Bank to provide him with details of transactions on the GTD accounts. In his affidavit, the liquidator summarises these transfers: -

- “(a) Transfer to Mr. Healy’s personal account with Noor Bank in Dubai: €290,000;
- (b) Transfer for purposes of Spanish property by Mr. Hevey: €173,554;
- (c) Cost of perpetrating the fraud: €111,171;
- (d) Transfers to the company: €100,000;
- (e) Transfers yet to be explained: €81,396;
- (f) Transfers to Arden FM Ltd.: €55,000
- (g) Repayment of funds to investors: €14,530
- (h) Payment to Mr. Hevey’s personal solicitor: €6,851”

40. At para. 55, Mr. De Lacey helpfully summarises the movement of money in respect of the company:

“In this respect, by the time of my appointment the total sum of €3,607,483 out of the sum of €5,575,309 received in Euro currency from investors, at Stg£715,464 after the sum of Stg£771,704 received in Sterling currency from investors, have been transferred out of the company.”

41. The only value received by investors was the sum of €392,641 which was transferred to certain of those under the guise of “*Grant Repayments*”. Apart from that, nothing of value had been received by investors in return for their investments.

42. Mr. De Lacy then proceeds, at paras. 56-61 inclusive of his affidavit, to set out his efforts to recover the proceeds of the fraud. He was required to issue company law proceedings in Ireland against Mr. Hevey, to issue High Court company law proceedings in England in respect of the Barclays bank accounts of Arden FM and Spencer Ferendez Ltd., and to travel personally to the UAE in *“order to set in train a process to restore GTD to the Registrar of Companies in Ajman”*. He then records that he had to issue further legal proceedings in Dubai *“in circumstances where I could not access the funds because the bank had been informed by persons unknown that the monies at issue were in fact the personal property of Mr. Hevey and Mr. Peile”*.

43. Having set out the funds actually recovered, the liquidator then goes on to describe the criminal proceedings against Mr. Hevey and Mr. Peile. He states that in January 2019 Mr Hevey pleaded guilty to one count of carrying on the business of a company for a fraudulent purpose contrary to s.722 of the Companies Act 2014 and three counts of deception causing loss to investors contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001. At para. 69, he avers:

“69. In or about January 2019 Mr. Peile also pleaded guilty to one count of fraudulent trading contrary to s.722 of the Companies Act 2014, and to three offences of deception causing loss to investors contrary to s.6 of the Criminal Justice (Theft and Fraud Offences) Act 2001.”

44. Mr. Peile received a sentence of four years imprisonment with one year suspended. Mr. Hevey initially received a sentence of five years imprisonment with the final year suspended, but this was increased to six years imprisonment on foot of the judgment of The Court of Appeal to which I have already referred.

45. Both Mr. Hevey and Mr. Peile had been automatically disqualified as company directors for a period of five years pursuant to s.839 of the Companies Act 2014.

46. Towards the end of his affidavit, Mr. De Lacy sets out his conclusions in relation to the actions of Mr. Hevey and of Mr. Peile. It is unnecessary to set out the liquidator's summary of Mr. Heavy's actions. The evidence set out in Mr. De Lacey's affidavit overwhelmingly supports the view that Mr. Hevey operated the company in a fraudulent manner. He authorised the use of promotional material which contains fraudulent representations as to what would be done with the investors' money. Mr. Hevey authorised the issuing of promotional material which contained references to reputable third parties which, in fact, had no connection with the company or its business. Mr. Hevey authorised the creation of forged timber certificates and forged folios. He expressly misled individual investors regarding what had been done with their money. This includes Mr. Wahlstrom, which is an episode to which I will return in some detail considering Mr. Peile's evidence.

47. Mr. Hevey arranged for the establishment of bank accounts and corporate structures in foreign jurisdictions with a view to evading the effects of the District Court freezing order on the Company's bank accounts, and with a view to placing these funds beyond reach of the creditors of the Company. He expressly directed investors to transfers monies to the Arden F.M. account, for similar purposes. Large sums of the monies of the investors were transferred to Mr. Hevey personally or to entities connected to him.

48. The liquidator reached similar conclusions about Mr. Peile, which I will set out in full. They are:

“77. I am similarly satisfied that Mr. Peile was knowingly a party to the carrying on of the business of the company with the intent to defraud creditors. In so concluding, I have had regard to the following matters.:

- (a) *Mr. Peile uses a pseudonym in the context of the company's promotional material and was involved in distributing that material;*
- (b) *Mr. Peile expressly misled individual investors, including Mr. Volstrem, regarding what had been done with their money;*
- (c) *Mr. Peile directed and/or authorised the establishment of bank accounts and corporate structures in foreign jurisdictions with a view to dissipating investors' funds and frustrating their recovery;*
- (d) *Large sums of investors monies were transferred to Mr. Peile personally and to entities connected to Mr. Peil. A large portion of those monies have not been recovered and those monies which have been returned to the liquidation fund were only recovered after expensive and complex litigation in three jurisdictions;*
- (e) *Mr. Peile is the sole director of Arden FM, been an entity established to frustrate the effect of the District Court Freezing Order by diverting investors monies intended for the company to a bank account in England, and expressly directed investors to transfer monies to that entities account and to the account held by Spencer Ferendez Ltd. in order to circumvent the District Court Freezing Order;*
- (f) *Mr. Peile's criminal convictions for forgery and trade dealing for deception causing loss to investors."*

49. Mr. De Lacey concludes his evidence by setting out the loss caused to creditors by virtue of the actions of Mr. Hevey and Mr. Peile. He states that a shortfall in the sum of €3,870,141 will remain due and owing to investor creditors at the conclusion of the liquidation. This takes into account the sum of approximately €150,000 which will be

realised from sale of the Irish lands, €125,669 which had to be expended to redeem a charge on the Spanish property (acquired in the name of Mr. Heavey) and the costs of the liquidation (a very substantial sum of €1,183,367, which I was informed at the opening of the motion had been approved by the Committee of Inspection).

50. In support of the motion, the liquidator obtained an affidavit of Kate Rogers, barrister of Radcliffe Chambers, in Lincolns Inn. Ms. Rodgers exhibited a very full and careful opinion about the effect of Mr. Peile's bankruptcy on the current application. Ms. Rogers had been asked four questions. I will set out both the questions and the summary of her response.

51. The first question was:

“As a matter of English law, what was the effect of Mr. Peile's adjudication as a bankrupt on Mr. De Lacy's entitlement to issue the Proceedings?”

Ms. Rogers' response was that the potential debt that the Company will have against Mr. Peile following the successful conclusion of the Irish Companies Act application, was a bankruptcy debt within the meaning of s.382 (1A) 1986 and provable in the bankruptcy of Mr. Peile.

52. The second question was:

“(b) in particular, as a matter of English law did Mr. Peile's adjudication as a bankrupt preclude Mr. De Lacy from instituting the proceedings against him?”

Ms. Rogers' answer was that the normal rule under s.281(1)(iA) 1986 is that discharge from bankruptcy operates to release the debtor from all bankruptcy debts.

53. The third question was:

“(c) Further, as a matter of English law, does Mr. Peile’s adjudication as a bankrupt preclude a court from granting the order sought the proceedings against him?”

Ms. Rogers' answer was that the debt that the company would have against Mr. Peile would survive such release because the debt was incurred in respect of a fraud to which he was a party;

54. The final question asked of Ms. Rogers was:

“(d) In answering the above questions, can the expert consider, as a matter of English law, whether the fact that a declaration has been sought in the Proceedings that Mr. Peile should be personally responsible for all or any part of the debts of another entity, namely Arden Forestry Management Limited, mean that Mr. De Lacey was not a creditor of Mr. Peile at the time of his bankruptcy and the proceedings do not relate to a debt owed by Mr. Peile at the date of his bankruptcy?”

Ms. Roger's response is that the Irish Company Acts application can therefore continue against Mr. Peile, despite having been issued against his discharge from bankruptcy.

55. It is worth elaborating upon the last of these questions. The questions posed to Ms. Roger's appeared to be whether the bankruptcy (and its effects) could be circumvented by the fact that any declaration made in the current motion post dated Mr. Peile's release from bankruptcy. It was explained that Ms. Rogers did not believe that that was the case. At para. 27 of her opinion she stated:

"27. I do not consider that (as a matter of English law) the company needed to await a declaration that Mr. Peile be personally responsible for its debts before it was considered a creditor of Mr. Peile."

56. Ms. Roger's evidence was not contradicted in any way. I therefore find, on foot of this evidence, that the bankruptcy of Mr. Peile does not constitute any bar to Mr. De Lacy's application against him, but only in as much as I might find that Mr. Peile was party to fraud. Establishing fraudulent behaviour on the part of Mr. Peile is, in any event, something the liquidator has to prove in the current application in order for him to succeed against that respondent.

57. As a matter of sequence, Ms. Roger's affidavit postdated the first affidavit of Mr. Peile sworn in response to the motion. It is convenient, however, to take all of Mr. Peile's three affidavits together in setting out the evidence contained in them in meeting the liquidator's application.

58. The first affidavit of Mr. Peile runs to six paragraphs. His first paragraph states that he was "*forced to declare bankruptcy*" and that this was a direct result of his prison sentence arising from what he describes as "*The Arden Forestry court case*". It might be more accurate to say that his prison sentence arose from his plea of guilty to allegations of fraud.

59. Following his release from prison, Mr. Peile avers that he had to claim benefits for a period of time.

60. At para. 3 he states that he has three children with two of his former partners who he supports “*through monthly child support payments...*”. He also notes that he travels to see his daughter (whose medical condition he describes) in Gothenburg, where she lives with his ex-wife.

61. At para. 4, Mr. Peile avers that he does not own any property either in the United Kingdom or abroad. At para. 5 he describes a very serious illness from which his mother suffers and explains how this restricts his movements. Finally, at para. 6 he says:

“I do not own any assets apart from a 2007 Nissan car which is currently valued at approximately £2,000.”

62. That is the entirety of Mr. Peile’s evidence. He says nothing about the detailed factual account provided in the affidavit of the liquidator. That approach changed in his second affidavit, delivered in circumstances of some confusion, at around the time of the hearing of the motion.

63. The hearing of the motion was a hybrid one, and Mr. Peil appeared remotely. Counsel for the liquidator was in court. Giving that all the papers had been read in advance of the hearing, it was with some surprise that I received the news that Mr. Peile was resisting the reliefs sought against him on the basis of an affidavit in which he set out his involvement in the business of the company. No such affidavit had been made available to me or to the solicitors for Mr. De Lacy before the day of the hearing. In the affidavit of Mr. Massey, to which I have already referred, there is a helpful account of the hearing at para. 4, where Mr. Massey says; “*...The Court was informed by Mr. David Peile...that he had sworn an*

affidavit in the United Kingdom sometime before appearing by remote link in Court. Mr. Peile informed the Court that he had had difficulty in serving the affidavit due to transport difficulties and postal strikes.”

64. Mr. Massey goes on, at para. 5, to say that an unsworn draft affidavit was received by e-mail on the day of the hearing and that the following day the liquidator’s solicitors “ultimately received a sworn, but unfiled, version of [Mr. Peile’s] affidavit...”. That affidavit was stated to have been sworn on the day following the hearing of the motions.

65. Giving that his affidavit was sworn on the day after the hearing of the motion, Mr. Peile’s statement to the court that he had encountered difficulties in serving the affidavit “*due to transport difficulties and postal strikes*” was simply untrue. At the time of the hearing, of course, this was not known to me, and I made directions for the delivery of Mr. Peile’s affidavit and for a further exchange of affidavits should the liquidator which to respond.

66. Mr. Peile’s second affidavit repeats, in essence, the six paragraphs of his first affidavit. The subsequent eleven paragraphs of the affidavit, however, go much further in setting out Mr. Peile’s position with regard to his role in the company and his lack of responsibility (as he argues) for the way in which the company was run.

67. Mr. Peile says that he joined the company “*over 12 months after the company was registered and had been fraudulently trading for some time*”. He says he was never a director of the company, had no access to the company’s bank account, and “*for the majority*” of the time that he worked for the company he was a sales executive and paid “*a small basic salary and a commission of 8% to 10%...*” (para. 7 of Mr. Peile’s second affidavit).

68. Mr. Peile says that at no stage did he have control over or access to the GTD bank account in Dubai, nor did he ever process any transactions from this bank account “*for [his] own financial benefit...*”. He did not know the balance on the account, and he did not know that the company’s clients’ money was been transferred to this account. He says the account was set up for a completely separate European property business which Octopus advised “*us to do*”. He says the company never traded, had no clients and did not generate any revenue. This, of course, would make one wonder about the amount of transactions through the account of GTD. Mr. Peile goes on that Mr. Heavy “*was the main shareholder of this company...*” and was given sole access to the bank account. Mr. Peile says that he received nothing from the GTD accounts as he was “*unaware that they were actively being used*”.

69. While Mr. Peile uses phrases such as “*the main shareholder*” and that he worked as a sales executive “*for the majority of time that he was with the company...*”, he does not, in terms, deny certain of the evidence of Mr. De Lacy. For example, Mr. De Lacey has said that Mr. Peile was a shareholder in GTD. That is not inconsistent with Mr. Peile’s evidence that Mr. Hevey was the “*main*” shareholder of GTD. Being in charge of sales for most of his time with the company clearly suggests that Mr. Peale had other functions in the company for some of the time that he was involved with it. Consistent with that view is that Octopus, according to Mr. Peile, had advised “*us*” to set up a bank account in the UAE, in respect of a European property business of which no detail whatsoever is given.

70. At para. 9 of the second affidavit, Mr. Peile avers:

“My job role did not involve anything to do with purchasing forestries. I was, at all times, unaware of how much forestry the company did or didn’t own. It was the end of my employment with Arden Forestry Management and on Garret Hevey’s behalf, I

did visit a solicitor to represent him to discuss the purchase of two forests. So, in my mind, Garret Hevey was purchasing the forest we were selling.”

71. In the light of this averment, Mr. Peile had to explain the e-mail which he sent to Mr. Hevey in advance of Mr. Wahlstrom’s visit. The text of the email appears at para. 19 of this judgment. He does so at para. 10 in the following terms:

“The e-mail I sent to Garret Hevey asking him how we got over the fact that the client from Finland wanted to visit the Land Registry Office was simply because Garret Hevey had indicated that the purchase of this forest hasn’t been finalised yet and also, as mentioned above, that I had nothing to do with the purchase of forestry so I felt out of my depth dealing with this aspect of the client’s visit. I did, however, meet the clients at the airport and take them to the forest and have lunch to them which is part of my job roles and responsibilities.”

72. In his affidavit, Mr. Massey states that this account *“is so far-fetched as to be utterly lacking in any credibility”* (para. 9 of Mr. Massey’s affidavit). This is simply Mr. Massey’s view. It is not evidence of anything apart from his personal opinion. It is the sort of proposition that should, and could, have been put to Mr. Peile in cross-examination but was not. However, it is important to consider exactly what Mr. Peile is saying even by his own account. On his evidence, Mr. Peile is giving evidence that Mr. Wahlstrom was shown forestry land which the latter believed had been purchased on his behalf by the Company. Mr. Peile is also giving evidence that the lands were not, at the time of the visit, owned by the Company. On Mr. Peile’s account, this is something which was consciously not communicated to Mr. Wahlstrom. It is plain that, in accepting the summary of this episode contained in Mr. De Lacy’s affidavit, Mr. Peile has accepted that Mr. Wahlstrom (a) believed that he had acquired title to the forestry he was shown on his trip to Ireland, (b) wished to be

given evidence of that title by a visit to the Land Registry, and, (c) Mr. Peile was extremely alarmed by this because he knew that the property had not, in fact, been purchased, notwithstanding representations to Mr. Wahlstrom that this had been done. If Mr. Wahlstrom had have been told that the forestry in his name was in the process of being acquired (as opposed to having been finally purchased) then there would have been no need for the concern that Mr. Peile expressed in his e-mail and sets out in his affidavit.

73. On Mr. Peile's own account he was party to the continuing deceit of Mr. Wahlstrom about the true ownership of the area of forest which Mr. Peile himself took Mr. Wahlstrom to visit.

74. Separate to this analysis of the evidence, there is the fact (as Mr. Massey states) the deception of Mr. Wahlstrom was the offence to which Mr. Peile pleaded guilty. In dealing with this simple fact, Mr. Peile has given somewhat involved evidence which I will now describe.

75. At para. 11 of his second affidavit, Mr. Peile says:

"I was fully prepared to take the court case to trial but was advised by a barrister that, because of the headlines caused by the Kinehan gang in Dubai at the time, as soon as money laundering and Dubai were mentioned in court, I would be seen as guilty in the eyes of the jury. He said that I would probably get a suspended sentence as I wasn't the main perpetrator of the fraud which, unfortunately for me, wasn't the case and caused me the loss of my relationship at the time and access to all of my children for over three years as well as the loss of the relationships I had with longstanding friends from my days at school and, from a financial point of view, forced me to declare bankruptcy which, still to this day makes it very difficult for me to try and rebuild my life."

76. At para. 16 of the same affidavit, Mr. Peile says:

“On the advice of my barrister, I have admitted my part in working for a fraudulent company based solely on the fact that I encouraged investors to invest into the forestry investment as marketed by Garret Hevey and Arden Forestry Management. My barrister advised me that, even as an employee of the company, I would be found guilty at trial. Hence, why, in addition to Point 12 above, I entered a guilty plea.”

77. Mr. Peile goes on to emphasise the harsher penalty imposed on Mr. Hevey, and describes comments by the trial judge to the effect that Mr. Hevey was the “*engineer*” of the fraud. Revealingly, Mr. Peile states that this characterisation of Mr. Hevey “*reflects [Mr. Peile’s] involvement in the fraud*”. Of course, the fact that Mr. Hevey may have been the engineer of the fraud does not in itself mean that Mr. Peile did not have an “*involvement*” – to use his own words – in the fraudulent activities of the business. In this regard, there is further echo of this hierarchy of involvement in the fraudulent activities of the company to be found at para. 11 of Mr. Peile’s third affidavit where he says that he is deeply sorry for “*my part in the fraud [Garret Hevey] so selfishly carried out which defrauded investors of huge sums of monies.*” Accepting a part in the fraud is quite inconsistent with denying any knowledge of fraudulent activity.

78. In order to have a complete account of the reasons why, Mr. Peile says, he pleaded guilty it is also necessary to move ahead to Mr. Peile’s third affidavit. Referring back to the intervening affidavit of Mr. Massey, Mr. Peile avers:

“I assume that Mr. Massey has not approached Mr. James B. Dwyer S.C. for verification of the advice I received and, again, Mr. Massey, is solely relying on his own opinion of the matter not the actual facts.”

79. Despite the plain waiver of privilege in his second affidavit, and the clear invitation to the liquidator to obtain from Mr. Peile's senior counsel an account of the advice that led Mr. Peile to plead guilty, no such evidence from the liquidator's side about this advice is forthcoming. It may, of course, be that the relevant senior counsel has understandably declined to provide any insight into the advice he gave to a former client. It may equally be that he was simply never approached by the liquidator. Either way, the only evidence before me as to Mr. Peile's motivation on pleading guilty is the affidavit evidence which I have just set out. It is exceptional evidence. I would have struggled to accept this evidence had Mr. Peile been challenged on it through cross examination. It may well, of course, have been the case that counsel advised that allegations of money laundering in Dubai were unhelpful, giving the public linkage of the UAE with a notorious crime family. One would be sceptical, however, about evidence suggesting that this was either the only reason (or even a significant reason) why Mr. Peile should plead guilty. Slightly more credible is the evidence that a guilty plea would lead to a suspended sentence. As against that, however, one would expect that a person who pleads guilty in the belief that this would result in a suspended sentence would, at the very least, have appealed the severity of the sentence when an immediate custodial sentence running to several years was imposed. The final reason giving for the guilty plea, namely that "*even as an employee of the company, [he] would be found guilty at trial...*" does not avail Mr. Peile at all. One cannot avoid the consequences of pleading guilty to a charge of fraud simply because you followed advice to the affect that the evidence was such that you were likely to be convicted.

80. In the final section of this judgment, I will return to Mr. Peile's guilty plea and the conclusions that I have reached in respect of it. However it is worth reiterating at this stage that, precisely because the liquidator's team felt Mr. Peile's explanations to be utterly

fanciful, it was important that Mr. Peile be cross-examined about the factors which, he said, led to his guilty plea.

81. To return to Mr. Peile's second affidavit, he contrasts his activities with those of Mr. Hevey. He says, for example, that he cooperated fully with the liquidator (a point not disputed by Mr. Massey), that he did not try to withdraw funds from the Company bank account in the UAE, that he cut all ties with Mr. Hevey as soon as he found out about the investigation into the Company, did not attempt to flee the country and complied with all of his bail conditions. Again, none of this is disputed by Mr. Massey in his subsequent affidavit.

82. At para. 15 of his second affidavit, Mr. Peile addresses the establishment of Arden FM in England. He accepts this was set up "as a direct result of the freezing order on [the Company] in Ireland...". However, he goes on to say that Arden FM was established "based on false information provided to me and coercion by Garrett Hevey". He is not clear about exactly what this coercion was. No detail, of any type, is given by Mr. Peile about the way in which he was allegedly coerced by Mr. Hevey. This reduces the allegation of coercion to a bald assertion, of no real weight whatsoever. The "false information" is stated to be advice to Mr. Peile from Mr. Hevey that "it would be a temporary measure and there were sums of money that, on Garrett Hevey's instructions, were sent to other companies from this account that he had set up in his, his wife's and other third parties names". This is also very vague, but even taking it at its height the undisputed fact is that Arden FM was established on the 21st of June 2016, days after the District Court freezing order. Mr. Peile was the sole shareholder in Arden FM. He was the sole director of that company. Arden FM set up a bank account. This bank account received almost £600,000 Sterling between the 4th of July 2016 and the 5th of August 2016, from persons who intended to invest in the company's forestry scheme. These facts were all the more striking

in light of Mr. Peile's averment, already noted, that in the main he was involved in the sales side of the company rather than in other company activities such as the handling of bank accounts or the purchase of forested lands.

83. The only conclusion that can be drawn from these uncontradicted facts is that, while Arden FM may well have been thought to be a temporary reaction to the freezing order on the company's bank accounts in Dublin, it involved the diversion of investor's money into the bank account of a company owned and controlled by Mr. Peile. Mr. Peile nowhere in his evidence engages with these fundamental facts, and in particular does not explain in any coherent way (a) the purpose of the establishment of Arden FM (b) the purpose of the placing of investor's funds in the bank account of Arden FM, and (c) his role as owner and sole director of Arden FM (d) the payment out of monies from the bank account of Arden FM.

84. In his affidavit, Mr. Massey finds the explanation provided by Mr. Peile "so far fetched as to be lacking in any credibility". An identical form of words is used by Mr. Massey in respect of other aspects of Mr. Peile's evidence. Mr. Massey also refers to para. 10 of the judgment of McCarthy J. in "the Court of Criminal Appeal". As already indicated, the judgment of the Court of Appeal is not evidence of anything against Mr. Peile. It was open to the liquidator to try to obtain from An Garda Siochana or the office of the DPP the underlying evidence which gave rise to the observations of McCarthy J. in the Court of Appeal. Whether or not this was done, the evidence is not before the court on this application.

85. Mr. Peile makes two other points in his second affidavit. The first is to say that he was "completely unaware of the fraudulent nature of the business, hence why I was not charged with the more severe charges that Garrett Hevey was charged with....". As Mr.

Massey correctly points out in his replying affidavit, Mr. Peile's evidence in this regard is mistaken. As a matter of fact, supported by an email from Det. Insp. Gunn to the liquidator and exhibited by Mr. DeLacey in his grounding affidavit, both Mr. Peile and Mr. Hevey were charged with, and pleaded guilty to, an identical offence of fraudulent trading, and two identical offences of deception causing loss. Mr. Hevey and Mr. Peile were also charged with, and pleaded guilty to, a further offence "comprising of different charges of deception causing loss which – although different charges – were similar in terms of the nature of the wrongdoing and the amount of money involved"; para. 13 of Mr. Massey's affidavit. It is therefore quite wrong of Mr. Peile to suggest there was any material difference between the charges faced by Mr. Hevey and the charges faced by Mr. Peile. More importantly, it is profoundly irrational of Mr. Peile to assert in his evidence that any difference between the charges faced by the two men shows that Mr. Peile "was completely unaware of the fraudulent nature of the business....". If Mr. Peile was, indeed, so unaware he would have faced no charges, rather than charges of fraud which (he incorrectly states) were less serious than those levied against Mr. Hevey.

86. The final piece of evidence given by Mr. Peile in his second affidavit which I wish to record is to be found at para. 13 of his affidavit. Mr. Peile says that, because his surname is difficult to spell or to pronounce, he used the name "David Marshall". In the absence of cross – examination, I have no alternative but to accept this evidence, notwithstanding the inevitable scepticism which one would have about it.

87. The contents of Mr. Massey's replying affidavit have, in large measure, already been set out in this judgment. There are, however, a number of other aspects of Mr. Massey's evidence which I should recite here.

88. In the first place, Mr. Massey repeats the evidence of Mr. DeLacey about the amount of money paid to Mr. Peile out of the company account and out of the Arden FM account. Secondly, Mr. Massey exhibits the account opening form for the GTD account in Dubai which, he says, was signed by both Mr. Hevey and Mr. Peile. Both Mr. Hevey and Mr. Peile were identified as directors of GTD, though Mr. Massey accepts that Mr. Hevey was the person identified as having authority to process fund transfer requests.

89. In his third affidavit, Mr. Peile addresses these two points. He says that the amounts paid by him from the Company's AIB account (€288,015) is "the salary and commission....referred to in Point 7" of Mr. Peile's second affidavit. Strangely, Mr. Peile does not identify as remuneration (either as salary or commission) the £310,000 Sterling which he extracted from the Arden FM account. Nowhere is that payment explained.

90. With regard to the GTD account, Mr. Peile does not engage with the fact that the opening of the account in the UAE was authorised by his signature (as well as that of Mr. Hevey) or that he was a director of GTD. Instead, Mr. Peile challenges the liquidator to exhibit bank statements on the account which he says "would prove inconclusively (sic) that [he] did receive funds to the GTD account in Dubai". In fact, the evidence before me, there is no suggestion that Mr. Peile received money from the GTD account. That does not, in itself, exclude from scrutiny the fact that he was a director of GTD and instrumental in the setting up of a bank account into which a significant amount of investors' funds were channelled.

91. At para. 4 of his third affidavit, Mr. Peile states that the habit of using a pseudonym is "an incredibly common practice utilised by many of the large Blue Chip corporations who have established call centres in India....". I have already indicated my findings on the use by Mr. Peile of a false name during the course of his involvement with the company.

92. Para. 5 of Mr. Peile's third affidavit constitutes somewhat involved evidence, but which has a significance for what it does not say. It reads: -

“5. I refer to point 11 in Mr. Massey's affidavit [relating to the Arden FM bank account] which, again, states some explanation for establishing Arden FM in the UK lacks credibility although, acting on the behalf of the liquidator, I assume Mr. Massey has seen bank statements and transfers to other accounts of companies set up by Garret Hevey such as Spencer Fernandez Ltd., which I understand is a company that Garret Hevey bought through Octopus in Gibraltar that advises to establish the company GTD in Dubai and the associated bank account, and even manipulated his wife into establishing a company that, unwittingly received proceeds from the fraud. Therefore, it shouldn't be deemed to be too far fetched that I too was manipulating into signing as a director and establishing companies and bank accounts for the dispersal of the proceeds of the fraud. If there are bank statements from these associated companies including his wife's company and Spencer Fernandez showing that I too received funds from them, I would be keen to see them but, again, they do not exist which further shows the lack of involvement, control over and ultimately my involvement in the fraud”.

93. The sole purpose of this paragraph appears to be to divert attention from some basic facts which have been established in respect of the Arden FM account. I have set these out at paragraphs 82 and 83 of this judgment. To them is to be added the fact, noted at para. 89 of this judgment, that the very significant amount of money paid out to Mr. Peile from the Arden FM account is not explained by him in any way, and is certainly not described as legitimate remuneration of any type which he was owed by the company. As Arden FM carried out no business itself, the payment Mr. Peile cannot have been a legitimate payment

for services provided to that entity. The only conclusion to which the court is driven, therefore, is that the payment to Mr. Peile of £301,300 Sterling out of the Arden FM account was an inappropriate and improper payment, ultimately funded by monies taken from investors defrauded by the Company. Notwithstanding convoluted references to Spencer Fernandez Limited to GTD, to Octopus, and to an unnamed company which involved Mr. Hevey's wife, there is no coherent explanation by Mr. Peile either in his third or his second affidavit which addresses in any meaningful way his role in, and benefit from, Arden FM.

94. In the balance of his third affidavit, Mr. Peile gives evidence about the manipulative nature of Garrett Hevey. There is no doubt, on the evidence before me, that Mr. Hevey is a dishonest and manipulative person. That does not, of course, mean that Mr. Peile did not knowingly participate in the fraud which Mr. Hevey has orchestrated. Mr. Peile goes on to describe a range of things which have not been disputed by Mr. Massey, many of them irrelevant. One of these factors includes the following piece of special pleading (at para. 9):

-

“If the judge imposed a sentence which was later deemed to be far too lenient and overturned and extended by the high court, surely this incident alone highlights my lack of involvement in the fraud and highlights who was truly and ultimately responsible”

95. This, like a similar argument made by Mr. Peile elsewhere, is completely without logic. The fact that Mr. Hevey was given a more lengthy prison sentence than that imposed on Mr. Peile does not mean that Mr. Peile had any “lack of involvement...” in the fraudulent business of the company.

96. Mr. Peile concludes his evidence with the following self pitying sentence: -

“I now find myself in the similar situation to many of [Mr. Hevey’s] company’s clients in that I am nearly 46 years of age so that in the latter stage of my life, I own no property, I have very little savings and have to finance hefty government imposed childcare expenses to support my children who I very rarely see and, ultimately, I have been the target of and subject to a deception that I, quite clearly, was convinced of by a master fraudster and the engineer of a multimillion pound Ponzi scheme”.

97. There is one striking qualitative difference between Mr. Peile and the people who were defrauded by the Company’s activities. Mr. Peile, even on his own account, was party to the deceit of Mr. Wahlstrom. Mr. Peile was also, for no apparent reason, paid hundreds of thousands of Euro out of the Arden FM account. For the individuals defrauded by the company, it would be truly galling to see Mr. Peile claim a moral equivalence with their situation. Such a comparison is utterly unjustified.

The submissions of the parties

98. As already noted, the first affidavit of Mr. Peile gave no reason to believe that he was resisting the liquidator’s application on the grounds ultimately set out in his second and third affidavits. The second affidavit was not available to the court until after the motion was opened by counsel for the liquidator. The third affidavit post – dated the hearing of the motion, as did the affidavit of Mr. Massey. At the adjourned date for the hearing, no substantive submissions were made by either side. The submissions of the liquidator, recorded here, should therefore be read in that context.

99. Section 610 (1) of the Companies Act 2014 reads as follows: -

“610 (1) If in the course of the winding up of a company . . . it appears that—

(a) any person was, while an officer of the company, knowingly a party to the carrying on of any business of the company in a reckless manner, or

(b) any person was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose,

the court, on the application of the liquidator or examiner of the company, a receiver of property of the company or any creditor or the contributory of it, has the following power”.

100. The power is to declare the relevant person: -

“personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct”.

101. The liquidator squarely relied upon 610(1)(b) as the basis upon which Mr. Peile shall be subject to the declaration sought. As far as Mr. Hevey was concerned, the liquidator relied on both Clause (a) and Clause (b) of s. 610(1).

102. Counsel also relied upon s. 722 of the 2014 Act, being a section establishing an offence to which both Mr. Peile and Mr. Hevey pleaded guilty. That section reads: -

“722. If any persons knowingly a party to the carrying on of the business of a company with intent to defraud creditors of the company or creditors of any other person or for any other fraudulent purpose, the person shall be guilty of a category 1 offence.”

103. Counsel submitted that, in pleading guilty to an offence under s. 722, both Mr. Hevey and Mr. Peile had in effect accepted that they were a person described by s. 610(1)(b) of the 2014 Act.

104. As to the admissibility of the guilty pleas of Mr. Hevey and Mr. Peile, counsel relied upon *Nevin v Nevin* [2020] 1 IR 626. In her judgment, O'Malley J. (at para. 86) noted that, "*the record of conviction is admissible as an exception to the hearsay rule...*". However, the forensic significance of the admission of a record of conviction was then further considered by O'Malley J., who concluded (at para. 90): -

"I would therefore agree with the analysis of Kearns P., the judgments of the Court of Appeal, the judgments in *Jorgensen v News Media Limited* [1969] NZLR 961 drawn upon by them, and the analysis of the Law Reform Committee. The evidence in question suffers from none of the normal infirmities of hearsay or opinion and has the quality of reliability that comes from a criminal trial concerned with the question whether or not the prosecution has proved a case beyond reasonable doubt. It is difficult to see how confidence in the administration of justice would be aided if civil courts were to exclude that evidence on the application of a technical and out-dated rule, and could then to come to a conclusion on that a plaintiff has not shown that it is more likely than not that the defendant committed the crime."

105. While the authorities referred to by O'Malley J. in each case refer to the findings of a jury in a criminal trial, it is difficult to see why such findings will be thought to be more reliable than a plea of guilty entered by an individual who has the advantage of full legal representation. In fact, a plea of guilty would in my view in any event be admissible as a declaration against interest. This simpler exception to the hearsay rule avoids the need for the analysis carried out by O'Malley J. in the section of her judgment to which I was

referred. As it happens, and in an *obiter* section of her judgment, O'Malley J. reaches the same conclusion when (at para. 103) she says: -

“It should perhaps be noted that this judgment is concerned only with the situation that arises where the defendant, whose conviction is proposed to be proved, maintains his or her innocence of the crime. An admission of guilt is always admissible, as an admission against interest.”

In the subsequent paragraph, O'Malley J. finds that evidence of the conviction is “*in principle admissible*”. However, I think the proper analysis is that the guilty plea by Mr. Hevey and Mr. Peile is a declaration against interest and it is in that context that the explanations provided by Mr. Peile are to be assessed.

106. I should note that, while para. 103 of the judgment of O'Malley J. in *Nevin v Nevin* was not opened to me, counsel did open her conclusion at para. 104 of the judgment.

107. Finally, counsel for the liquidator relied upon a portion of *Courtney on the Law of Companies*. At para. 16.189, the author notes that: -

“It is not only the directors of a company that can be made personally liable for the debts and other liabilities of a company that has traded fraudulently.”

108. In assessing the intent to defraud, the authors refer to *Re Williams C Leitch Bros Limited* [1932] All ER 892, where Maugham J. held (at 895): -

“In my opinion, I must hold with regard to the meaning of the phrase carrying on business ‘*with intent to defraud creditors*’ that, if a company continues to carry on business and incur debts at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment of those debts, it is in

general a proper inference the company is carrying on business with intent to defraud.”

The footnote to this quote from the judgment of Maugham J. describes it as a “*widely quoted but only two page judgment.*” The reference to the judgment running to only two pages is, I would hope, an approving one.

109. Finally, I was referred to the judgment of Carroll J. in *Re Hunting Lodges Limited* [1985] ILRM 75. In that judgment, Carroll J. referred back to the judgment of Maugham J. where he said: -

“I am inclined to take the view that [the corresponding section in England and Wales] is in the nature of a punitive provision, and that where the court makes such a declaration in relation to ‘*all or any of the debts or other liabilities to the company*’ it is in the discretion of the court to make an order without limiting the order to the amount of the debts to those creditors proved to have been defrauded by those acts of the director in question, though, no doubt, the order would in general be so limited.”

This is an important discretion, to which I will return in the concluding section of this judgment.

110. The second aspect of *Re Hunting Lodges Limited* to which I was referred is the view of Carroll J. that it was unnecessary that there would be a “*common agreed fraudulent intent.*” Rather, she held, that “*If each of the participants acts for a fraudulent purpose that each may be liable.*”

111. Finally, I was referred to the section of *Courtney* which summarises the view of Carroll J. in *Re Hunting Lodges Limited* in which he emphasised the importance of looking at the

entire circumstances of the case. In that judgment, Carroll J. “*apportioned the extent of personal liability on the basis of individual culpability*”: para. 16.198 of *Courtney*. Again, that is an important consideration in assessing the extent (if any) of the debts of the company to be visited upon Mr. Hevey or Mr. Peile.

112. None of the legal propositions advanced by the liquidator were disputed by Mr. Peile in any meaningful way. Instead, Mr. Peile relied heavily upon the contents of his affidavits and in particular emphasised the lack of responsibility or involvement on his part in the fraudulent business of the company.

Decision

113. The business of this company was carried out in an utterly fraudulent way. Indeed, the company carried out no genuine business and conducted no real trade. The disparity between the funds received from investors for the purchase of forestry, and the actual value of the forestry purchased, is utterly jarring. The business was, as Mr. De Lacy pithily describes it, in effect a Ponzi Scheme with a miniscule return to some investors (presumably to keep them happy) but overwhelmingly involving the obtaining of money for the purpose of investments which were nothing more than a mirage. The liquidator has therefore satisfied me, on any standard of proof, that the business was being carried on with intent to defraud the creditors of the company.

114. The next question is whether Mr. Hevey or Mr. Peile or either of them were knowingly a party to the carrying on of such a business. I have no doubt that Mr. Hevey was a party to the carrying on of the business with intent to defraud. In a way, the most uninhibited evidence to that effect is from Mr. Peile. This is unsurprising. Mr. Peile has attempted to place on Mr. Hevey’s shoulders all of the responsibility for the operation of a company which (Mr. Peile accepts) was a Ponzi Scheme. However, I have not taken into account any of the

evidence of Mr. Peile as this is not evidence on which Mr. Hevey had an opportunity to comment. I have considered solely the evidence of Mr. De Lacy in assessing Mr. Hevey's position. However, that evidence is also absolutely damning as far as Mr. Hevey is concerned. In the first place, Mr. Hevey has accepted (by his guilty plea in the Circuit Court) that he was knowingly a party to the carrying on of the business of the company with an intent to defraud the company's creditors. That acceptance is, in the circumstances of this case, in itself enough to ground an identical finding by this court. However, and independently of Mr. Hevey's guilty plea, Mr. Hevey was a director of the company from its foundation, was the chief engineer of the fraudulent schemes described by the liquidator, was responsible for the investment brochure which made completely dishonest representations to potential investors, had knowledge of the limited amount of forestry actually purchased by the company, was responsible for the issuing of the false "*timber certificates*", was involved in the deceit of Mr. Wahlstrom, procured Spencer Fernandes Limited as a company into which investors' funds could be transferred following the freezing of the company's account by the District Court (on the 16th June, 2016) and the decision by Barclays Bank to cease to permit the Arden FM account to operate (on the 5th August, 2016). The badges of fraud, as far as Mr. Hevey is concerned, includes the transfer of very large amounts of money to himself and to GTD, a company in respect of which he had control of the bank account. In addition, a further badge of fraud as far as Mr. Hevey is concerned is the dispersal of the money out of the GTD accounts, set out already in this judgment.

115. All of these factors point irresistibly to the conclusion that Mr. Hevey was knowingly a party to the carrying on of the business to the company with the intent of defrauding creditors.

116. As far as Mr. Peile is concerned, the situation is more complicated. Even on Mr. De Lacy's account, Mr. Peile was "*second in command*" to Mr. Hevey. Of course, Mr. Peile contests this. It is therefore necessary, in some detail, to consider exactly how far Mr. Peile's evidence goes.

117. As with Mr. Hevey, the starting point in considering the evidence of Mr. Peile is the fact that he has pleaded guilty to, among other things, knowingly being a party to the carrying on of the business of the Company with intent to defraud its creditors. As I have set out earlier, Mr. Peile gives three reasons why he entered this plea. They all involve the advice given to him by his senior counsel. Mr. Peile was "*fully prepared to take the court case to trial ...*"; para. 11 of his second affidavit. He says, however, that he was advised that "*as soon as money laundering and Dubai were mentioned in court, [he] would be seen as guilty in the eyes of the jury.*" This advice, which I accept was given, suggests to me that the jury would associate money laundering in Dubai with shady practices and serious criminal activity to such a degree that they would consider an accused person guilty in light of these allegations. It does not, however, suggest to me that such an impression on the part of the jury would be irreversible, and nowhere does Mr. Peile say that he was advised that that would be the case. Nowhere does Mr. Peile say that the unfortunate association of the Kinahan crime family, Dubai and money laundering was the only reason or even the dominant reason why he entered a guilty plea.

118. The second factor canvassed by Mr. Peile is that he was advised that he would "*probably*" get a suspended sentence. I accept that this advice was given. However, the advice is of limited relevance given the way that it is phrased in Mr. Peile's evidence. He does not say that he entered a guilty plea, notwithstanding his innocence of the charges, solely or primarily because of any advice that his sentence would probably be suspended. In

any event, pleading guilty in the belief that one will receive a suspended sentence is not inconsistent with guilt.

119. Instead, Mr. Peile says (at para. 16 of his second affidavit) that *“on the advice of my barrister, I have admitted my part in working for a fraudulent company based solely on the fact that I encouraged investors to invest into the forestry investment as marketed by Garret Hevey and [the company].”*

120. Mr. Peile therefore links his guilty plea not to the prospect of a suspended sentence, or the notoriety of the Kinahan family’s connection with Dubai, but rather because he encouraged investors to invest in the company. The next two sentences are central. They read: -

“My barrister advised me that, even as an employee of the company, I would be found guilty at trial. Hence why, in addition to Point 12 above, I entered a guilty plea.”

121. Paragraph 12, of course, says nothing about the criminal trial process; in fact, it refers to compliance with the liquidator and the withdrawal of funds from the Dubai bank account. Giving Mr. Peile the benefit of the doubt, and assuming that he was in fact referring to para. 11 of the affidavit, this is the only point at which he links the advice about the Kinahans and the possibility of a suspended sentence with his decision to plead guilty. However, a fair reading of the evidence is that these two considerations were just part of the mix of factors which led Mr. Peile to plead guilty, among which the fact that his counsel advised him that he would be found guilty (notwithstanding that he was only an employee of the company) must have featured prominently.

122. On this analysis of Mr. Peile's evidence, which is evidence that I accept as it was not challenged by the liquidator in any meaningful way, the fact that he pleaded guilty to charges of fraud and dishonesty constitutes a statement against interest which continues to weigh heavily against him in considering the liquidator's motion.

123. As I have done with Mr. Hevey, I now consider the evidence against Mr. Peile independently of his guilty plea. The following factors, already set out at some length in this judgment, appear to me highly significant: -

- (a) Mr. Peile participated in the ongoing deceit of Mr. Wahlstrom. Mr. Peile knew that Mr. Wahlstrom believed that forestry land had been bought in his name, that this was not true, yet continued to conceal this from Mr. Wahlstrom with a view to covering up the hoodwinking of that client.
- (b) Mr. Peile participated in the establishment of Arden FM, of which he was the sole shareholder and director. The sole purpose of the establishment of this company was to get around the District Court freezing order, to receive investors' money and to pass on that money. The establishment of Arden FM and the operation of its bank account was a crucial part of the ongoing fraud, as it circumvented the freezing order imposed by the courts in Dublin.
- (c) Mr. Peile obtained over £300,000 from Arden, and no good reason has been given for the receipt of that money from that source.

124. Given the absence of cross-examination of Mr. Peile on other aspects of his evidence (such as, for example, the GTD account which undoubtedly he was instrumental in establishing) I make no finding adverse to Mr. Peile on other issues. However, the three matters that I have identified establish that Mr. Peile was knowingly a party to the carrying

on of the business of the company with intent to defraud its creditors. While it is easy to be dismissive of the one episode involving Mr. Wahlstrom, in particular given the scale of the fraud involving other creditors, what Mr. Peile did on that occasion is simply shocking. He was aware that Mr. Wahlstrom's interest had not been registered in the Land Registry, contrary to what Mr. Wahlstrom had been led to believe. He raised the alarm with Mr. Hevey in his panicked email on the day of Mr. Wahlstrom's visit, He did not disclose the truth of the situation to Mr. Wahlstrom, he brought Mr. Wahlstrom to forests which Mr. Wahlstrom believed he owned but which Mr. Peile knew he did not, he brought Mr. Wahlstrom and his party out for lunch (again, knowing that Mr. Wahlstrom had been deceived and not telling him the truth of the situation) and then either instigated or connived in a situation where Mr. Wahlstrom did not get to the Land Registry because he was told there was no time. In so characterising the evidence, I have to accept that Mr. Peile did all of this because he understood that "*the purchase of this forest hadn't been finalised yet ...*" Even accepting this last piece of evidence, however, Mr. Peile's behaviour is utterly dishonest and was actively instrumental in the continuing deception of a customer (and creditor) of the company.

125. Taking these three factors into account, and reintroducing (with all the caveats suggested by Mr. Peile in his evidence) the declaration against interest constituted by the guilty plea in the Circuit Court, I find that Mr. Peile was knowingly a party to the carrying on of the business of the company with intent to defraud the creditors of that company.

126. I accept the evidence of Mr. Peile that the architect of the fraud was Mr. Hevey. I also accept the evidence of Mr. Peile that the scope of his involvement in the fraud was significantly and materially less than that of Mr. Hevey. I have already found that there are certain episodes (the knowing transfer of money from customers of the company through

GTD and from there to certain entities connected with Mr. Hevey) for which Mr. Peile is not responsible. However, these are factors which come into play in considering the extent to which these two individuals are to be responsible for the debts of the company.

127. Applying the approach set out by Maugham J. in *Re Williams C Leitch Bros Limited* and by Carroll J. in *Re. Hunting Lodges Limited* I have considered all of the circumstances of the case. In doing so, I must take account of the qualitative difference between the findings I have made against Mr. Hevey and the findings I have made against Mr. Peile. Given the findings I have made against Mr. Hevey, and in particular given his role as the person who devised the fraud in the first place and was its “*engineer*” throughout, I believe the appropriate order to make is an order declaring Mr. Hevey personally liable for all of the debts and other liabilities of the company. On the evidence placed before me by the liquidator, and for the sake of precision, I will declare that Mr. Hevey is liable for the debts and other liabilities to the company being a sum of €3,807,142.

128. From the admirably pithy judgment of Maugham J. I have already quoted his view that “*in general*” a respondent will be found liable for “*the debts of those creditors proved to have been defrauded by those acts of the director in question...*”. At least, then, it would be appropriate to fix Mr. Peile with liability for the loss sustained by Mr. Wahlstrom. As noted earlier, Mr. Wahlstrom invested €52,000 in the company, but it is unclear as to what his actual net loss is going to be.

129. However, the participation in the fraud by Mr. Peile is not confined to dealings with Mr. Wahlstrom. The Arden FM account received STG£591,464. Of that, there was a payment to investors as part of the operation of a Ponzi Scheme. There were also funds returned by Barclays Bank to investors. Lands were purchased, which presumably have now

been resold by the liquidator. Of the funds received into the Arden FM account, therefore, there are three relevant potential headings. These are: -

- (i) Transfers to David Peile - STG£301,300
- (ii) Transfer to Clarence International Limited - STG£160,000
- (iii) Costs for perpetrating the fraud - STG£48,134.

130. My view is that, as this is an aspect of the fraud in which I have found Mr. Peile was centrally involved, he should have a liability in respect of these sums. The total amount is STG£509,434. This appears to me to be the amount lost to the creditors of the company as a result of fraudulent activities knowingly facilitated by Mr. Peile. I therefore will hear submissions from the parties following delivery of the judgment on the following issue -

With regard to the Wahlstrom investment, what is the net loss to Mr. Wahlstrom arising from his €52,000 investment in the company?

131. I therefore propose to make the following orders: -

- (1) A declaration pursuant to s. 610(1)(b) of the Companies Act, 2014 that Garret Hevey was, while an officer of the company, knowingly a party to the carrying on of the business of the company with intent to defraud creditors of the company;
- (2) a declaration pursuant to s. 610(1)(b) of the Companies Act, 2014 that David Peile was knowingly a party to the carrying on of the business of the company with intent to defraud creditors of the company;

- (3) an order pursuant to s. 610(2) of the Companies Act, 2014 declaring that Garret Hevey is personally liable for all of the debts and other liabilities to the company in the sum of €3,807,142.
- (4) an order pursuant to s. 610(2) of the Companies Act, 2014 declaring that David Peile is personally liable for a specified portion of the debts and other liabilities of the company to be determined in accordance with the principles set out in this judgment and to be finalised at a hearing to take place on a date to be notified to the parties.