THE HIGH COURT

[2022] IEHC 513

[Record No. 2021/297 COS]

IN THE MATTER OF AN APPLICATION BY MAURICE ELLIOT SHERLING,

FIRST NAMED APPLICANT

AND

IN THE MATTER OF AN APPLICATION BY GRAHAM CHARLES HUDSON,

SECOND NAMED APPLICANT

AND

IN THE MATTER OF (1) SB STEEL LIMITED,

(2) NBT INTERNATIONAL LIMITED,

(3) JAMESTOWN METAL RESOURCES LIMITED,

(4) SILVERWOOD DUBLIN PROPERTY ACQUISITIONS LIMITED, AND

(5) TRAILGLEN LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, 2014

JUDGMENT of Mr. Justice Quinn delivered on the 27th day of July 2022

1. This is the first recorded application pursuant to the provisions of s. 847 of the Companies Act 2014 ("*the Act*"). That section provides that a person who is subject to a disqualification order pursuant to Part 14, Chapter 4 of the Act may apply for and may, if the court considers it just and equitable, be granted relief from the disqualification in whole or in part and on such terms and conditions as the courts deems fit.

2. The applicants seek relief in circumstances where they have been the subject not of a disqualification order, but of a *"deemed disqualification"* pursuant to s. 840(2). This deeming

provision arises from a failure to give notice to the Registrar of Companies of the fact that the applicants have been the subject of a disqualification under the laws of another state, in this case England and Wales.

Relevant provisions of the Act

3. Section 149 of the Act requires that every company shall keep a register of its directors and secretaries and, at subs. (8), shall give notice to the Registrar of Companies in the prescribed form (a form B74a) of any change among its directors or of secretary, within fourteen days of the date of such change.

4. Section 150 provides as follows:-

> *"(1) ...a change among the directors for the purposes of that provision shall be deemed to include the case of a director's becoming disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking..."* (emphasis added)

5. Section 840 of the Act provides as follows:-

> *"(1) ..."relevant change amongst its directors", in relation to a company, means the change referred to in section 150 (1), namely the case of a director's becoming disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking;*
>
> *...*
>
> *(2) If—*
>
> *(a) a company fails to comply with the requirement under section 149 (8) to send to the Registrar the notification of the relevant change amongst*

its directors and that failure is by reason of a default of the relevant director,

....

the relevant director shall be deemed, for the purposes of this Act, to be subject to a disqualification order for the period specified in subsection (3).

(3) The period of disqualification—

(a) commences—

(i) in the case of a failure referred to in subsection (2)(a), on the expiry of 14 days after the date on which the relevant director has become disqualified, as mentioned in the definition of "relevant change amongst its directors" in subsection (1), under the law of another state,…

…

and

(b) continues only for so much of—

(i) the period of foreign disqualification as remains unexpired as at the date of commencement referred to in paragraph (a)…"

The disqualification undertakings

6. On 1 March 2021, each of the applicants entered into what are referred to in the United Kingdom as *"competition disqualification undertakings"* pursuant to the Company Directors Disqualification Act 1986, which undertakings became effective on 30 May 2021. The undertakings were given to the Competition and Markets Authority ("*the CMA*") arising from the activities of companies in England of which they were directors. The events giving rise to these undertakings are described in more detail below. This application is made in circumstances where the applicants were advised that the giving of such undertakings

amounted to, or could amount to, a disqualification and that the requirement to give notice to the Registrar of Companies of the fact of such disqualification pursuant to ss. 149 and 150 of the Act applied. Therefore s. 840(2), referred to above, had the effect that by reason of the failure to give such notice each of them would be deemed to be subject to a disqualification order under the Companies Act 2014.

7. The application before this Court is for orders in the following terms:-

(1) An order pursuant to s. 847(1) of the Companies Act 2014, granting the first named applicant relief in whole or in part from any disqualification deemed to have arisen in respect of the five named companies herein ("*the companies*") by virtue of the operation of s. 840(2) of the Companies Act 2014

(2) A declaration that the second named applicant is not deemed to be disqualified from acting as a company director by virtue of the operation of s. 840(2) of the Companies Act 2014.

(At the hearing, the second named applicant did not pursue this relief and accepted that the deeming provision applied to him.)

(3) In the alternative, an order pursuant to s. 847(1) of the Companies Act 2014 granting the second named applicant relief in whole or in part from any disqualification deemed to have arisen in respect of Jamestown Metal Resources Limited ("JMR") by virtue of the operation of s. 840(2) of the Companies Act 2014.

(4) An order extending the time for the filing of Forms B74a in respect of the companies.

8. The applications are made on notice to each of the companies and, as required by s. 847, on notice to the Director of Corporate Enforcement. Notice of the application was served also on the Registrar of Companies.

9. The Registrar of Companies was represented at the hearing of this application but did not participate with any submissions.

10. The Director of Corporate Enforcement was represented at the hearing by counsel. Arising from extensive engagement between the Director and the applicants and on the basis of certain modifications to the application made and of certain terms and conditions, described in more detail below, the Director informed the court that he had determined to adopt a neutral position to the applications.

11. I have decided to grant the relief sought, subject to certain conditions described later in this judgment.

Background

12. The first named applicant has been engaged in the family business of steel and metals since 1965, working originally in a business which was established by his grandfather. He is the ultimate beneficial owner of all the shares in the companies the subject of these proceedings.

13. One of the companies, JMR, is part of a group of companies referred to as the IMI Group ("the Group"), which carries on business principally in the United Kingdom, but partly through JMR, in the State from premises at Jamestown Road in Inchicore. It has eight employees.

14. The other four companies are within what is referred to as the Brandyford Group, which are companies carrying on business principally within the State. SB Steel Limited carries on steel stockholding and operates from a premises at Coolrain, County Carlow. It has eight employees. NBT International Limited is engaged in the business of selling and

distributing nuts, bolts and ancillaries and operates from a premises at Jamestown Road, Inchicore. It has eleven employees.

15. Silverwood Dublin Property Acquisitions Limited and Trailglen Limited are each property holding companies. They do not currently have any employees. Arising from engagement between the applicants and the Director, the application before the court was not pursued in respect of Silverwood or Trailglen.

16. On 11 July 2017, the UK's competition and consumer law body, the Competition and Markets Authority ("*CMA*") launched an investigation into suspected anti-competitive arrangements in the UK roofing materials sector. The businesses investigated by the CMA included a number of companies in the IMI Group, namely companies referred to as Associated Lead Mill Limited ("*ALM*"), Royston Sheet Lead Limited ("*JML*"), Jamestown Sheet Lead Limited and 2IM. These companies cooperated in the investigation by the CMA and this led ultimately to a settlement concluded with the CMA on 1 May 2021. Under the terms of the settlement, the companies in the IMI Group accepted liability for participation in four agreements or concerted practices which are said to have infringed the Competition Act 1998.

17. By its decision, the CMA found that ALM and JML infringed the Competition Act 1998 by entering into four particular agreements or concerted practices with another industry participant, British Lead Mills Limited. The nature of the practices is described in the grounding affidavit of Mr. Sherling, sworn on 8 December 2021. The activities were agreements not to supply a certain other undertaking, underpinned by an exchange of commercially sensitive information regarding strategies towards that undertaking, and agreements to "share the markets" with the allocation of a particular customer and certain price fixing arrangements.

18. The infringements occurred in October 2015, July 2016, August 2016 and in 2017.

19. The CMA made its findings by a decision issued on 4 November 2020. The undertakings given by each of the applicants on 1 March 2021 contain acknowledgments of the conduct referred to in the CMA's decision and undertakings that they will not, for a period of three years in the case of the first applicant, and for a period of four years in the case of the second applicant, be a director of a company or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless in each case he has the leave of the court.

Application to High Court of England and Wales

20. After the giving of the undertakings, the applicants applied to the High Court (Business and Property Courts of England and Wales – Companies Court) for orders pursuant to s. 17 of the Company Directors Disqualification Act 1986 ("*CDDA*") for leave to act as directors of certain companies in the IMI Group, notwithstanding the competition disqualification undertakings given by each of them. The relevant companies included JMR.

21. The CMA was joined as a respondent on that application and participated in the hearing.

22. The application for leave to act as a director notwithstanding the competition disqualification undertakings was heard by Mr. Eason Rajah QC, sitting as a judge of the High Court. He delivered his judgment on the application on 22 July 2021 and granted leave to the applicants to act as directors of the companies the subject of the application.

23. The court referred to the investigation conducted by the CMA and the undertaking given by the applicants. The court then described the provisions of ss. 9(a) to 9(e) of the Company Directors Disqualification Act 1986 which contain a particular regime for disqualification orders in respect of infringements of competition law. Those sections provide that the court must make a disqualification order of no more than fifteen years against a person if it is satisfied in respect of certain conditions stated in s. 9. Those conditions are,

firstly, that an undertaking, which is a company of which that person was a director, has committed a breach of competition law and, secondly, that his conduct as a director makes him unfit to be concerned with the management of a company.

24. The undertakings in this case, which were given by the applicants and accepted by the CMA, were for periods of three and four years respectively.

25. The judge was satisfied that there was a need for both of the applicants to be involved in the management of the relevant companies and that based on the facts which were outlined to him, it was necessary that they should be directors of the relevant companies. He found that if the applicants were not permitted to be directors, then it was very likely that the companies would fail. He said that the main points which weighed with him were as follows:-

(a) The applicants are and have been intimately involved with all operational aspects of the business and their continued involvement was key to the companies' continued operation.

(b) That only they have the necessary knowledge and experience in what he described as a *"shallow leadership team"*, meaning shallow in terms of depth of numbers rather than in terms of the quality of the leadership team. He was satisfied that the applicants were the only persons in the companies who had the confidence of the lenders and creditors and the necessary relationship with key customers and suppliers for continued successful trading.

(c) There were no suitable persons who could take on their role.

(d) Significant further cash needed to be injected into the business. Mr. Sherling had agreed to commit £3.8 million in addition to £2 million invested in April 2020 into the business. He was not willing to inject that cash unless he and Mr. Hudson were directors, for fear that the business would fail and the funds would be lost.

(e) If the companies were to fail, apart from loss to the shareholders, there would be a loss of 247 jobs in the group, including 142 jobs in an economically deprived area of South Wales.

26. The court referred also to measures which had been adopted at group level, which addressed the risk of repetition of the anti-competitive conduct which led to the infringement in the first place. The judge was satisfied that genuine attempts were being made to secure future compliance with competition law. The programme implemented within the Group was a robust one and not one which simply paid "lip service" to the principles of competition law.

27. The Group had appointed a Competition Compliance Officer for the next five years.

28. A Mr. David Rintoul, a partner with the firm of solicitors Hill Dickinson, had been appointed a non-Executive Director. He had been given specific responsibility for overseeing competition law compliance and supervising the companies' compliance.

29. The court was satisfied that there was evidence that the group would have in place, by 26 July 2021, a formal written whistleblowing policy and the court was satisfied with evidence filed by directors of the companies that they understand their duties and that each has undergone training in competition law.

30. The court concluded that the risk to the public of future misconduct was minimised by the measures introduced and the high standards of corporate governance now promoted within the Group.

31. The judge concluded as follows:-

"So far as deterrence is concerned, I am satisfied that a fair minded observer would not regard the granting of leave in this case as undermining the disqualification regime or the seriousness of the disqualification undertakings which the claimants have given. There are good reasons, for the companies and the communities in which they operate, to allow the claimants to be directors of these companies representing

as they do one commercial enterprise. The extensive conditions required by the proposed order take into account any concerns which the CMA have had and mean that the public is well protected from future misconduct.

Finally, the conditions proposed ultimately by the CMA are rightly onerous. No one can sensibly think that these claimants have got this order easily. The deterrent objective of the regime is not, in my judgment, undermined by the proposed order."

32. Judge Rajah referred to s. 17 of the Company Directors Disqualification Act 1986 (the direct equivalent of s. 847 of the Act of 2014) and a number of principles summarised by Miles J. in Rwamba v. Secretary of State for Business, Energy and Industrial Strategy [2001] BCC 184, where he said the following: -

"a) The court has a discretion under section 17 to allow a person who has been disqualified to be a director of a company or be concerned or take part in the promotion, formation, or management of a company.

b) The onus is on an applicant under the section to persuade the court to grant permission. The starting point when approaching the jurisdiction is that the applicant has been held unfit to be a director for the period of the order (or has accepted the equivalent when giving an undertaking). Nonetheless leave may be given in a proper case.

iii) It is for the court (and not for the Secretary of State) to be satisfied that it is appropriate to give leave for the applicant to be a director etc.

iv) The discretion under section 17 to give leave is unfettered. It is wrong to seek to add glosses or preconditions. The question for the court is whether in all the circumstances it is appropriate to give leave; and in approaching this question the court balances all the relevant factors.

v) Though it is usual to establish that the Company has a "need" for the applicant to

be a director or involved in the management, this is not a precondition. For instance, the appointment may be made to allow the director to obtain a tax advantage.

vi) The court should, among other things, have regard to the nature and seriousness of the conduct that led to the disqualification order or undertaking and the length of the disqualification. Where that conduct was dishonest a court may be reluctant to give leave.

vii) The court should, when deciding whether to give leave for a director to act as a director have regard to the purposes of a disqualification order. These include: -

a) Protecting the public directly by prohibiting the disqualified person from acting and

b) deterring both the particular director and others from the kind of conduct that has led to the order

viii) Leave should not be too freely given as this would tend to undermine the protective and deterrent purposes of a disqualification order. The court would not wish anyone dealing with a director to be misled as to the gravity of a disqualification order.

ix) On the other hand, the power of the court to grant leave under section 17 is inherent in the disqualification regime and in an appropriate case it may serve the public interest to allow a disqualified person to be a director of a specific company.

x) Moreover, the fact that the applicant for leave has agreed to the imposition of conditions designed to ensure high standards of corporate conduct may itself be seen as promoting the policy of deterring misconduct".

33. Judge Rajah QC decided that those principles identified by Miles J. were the principles to be applied in this particular case. He then noted the importance of competition

law for the day to day business activities of all markets within the jurisdiction and that breaches of competition law are serious.

Relief from sanctions under Part 14 of the Act

34. Although there have been no reported cases of applications pursuant to s. 847(1), the equivalent provision concerning relief from a declaration of restriction under Part 14, Chapter 3, now contained in s. 822 of the Act has been considered in a number of cases. In Re: Xnet Information Systems Ltd. [2006] IEHC 289, O'Neill J. identified that the fundamental purpose of a restriction declaration provided for in s. 150 of the Companies Act 1990 is to protect the public from the dishonesty and/or the responsibility of persons who in the discharge of their duties as directors of companies have acted dishonestly or irresponsibly.

35. Similarly, the purpose of Part 14 Chapter 4 is to protect the public against conduct which would justify the making of a disqualification order. Such conduct in the case of s. 842 of the Act is typically conduct such as fraud, breach of duty, findings of reckless trading or fraudulent trading, conduct rendering a person unfit to be concerned in the management of the company and other serious matters.

36. In X-Net, O'Neill J. identified a number of considerations relevant to an application for relief from a restriction order which may be summarised as follows: -

(a) That the court must have regard to the reasons which led to the restriction in the first place. An overriding principle is that relief should not be granted unless the court is satisfied that the public will not be harmed, either by the total removal of the restriction or by its partial removal in conjunction with appropriate conditions.

(b) The court should have regard to the "need" or "interest" that an applicant has for having the restriction removed. The court should not elevate the "need" or "interest" factors to the level of an obstacle to the granting of relief in a case where an applicant otherwise merited relief.

(c) The court must have regard to the deterrent effect of a restriction order which he described as "integrally connected with the fundamental objective of this part of the Act, namely the protection of the public from dishonest and irresponsible directors". That in turn gives rise to a consideration as to whether the deterrent effect of these provisions of the Act would be undermined by the removal in whole or in part of the restriction in any individual case.

(d) The court should have regard to the hardship suffered by the applicant. O'Neill J. found that this consideration necessitated an analysis of the capacity of the applicant in a restriction case to source capital were he not granted relief. He considered that while hardship was a factor to be taken into account and given due weight it was not one which could outweigh the paramount consideration which is the protection of the public.

37. It seems to me that the principles identified above should inform my decision in this case. At the risk of repetition, I would summarise those which are relevant to this case as follows: -

(i) The starting point is that the deeming provision of s. 840(2) applies and the onus is on the applicant to show that it is just and equitable that relief should be granted.

(ii) The court has a wide discretion on this application.

(iii) The court should not lightly or freely grant relief. The purpose of this chapter of the Act is the protection of the public. If relief were granted lightly or unnecessarily that purpose would be defeated.

(iv) The court should examine the events and reasons which gave rise to the disqualification or, as in this case, the deemed disqualification, and be satisfied that the risk of repetition is at least minimised. If so

satisfied, the court must balance the needs of the applicants and the companies against the overriding mandate of the protection of the public interest.

The evidence on this application

38. The application is grounded on affidavits sworn on 8 December 2021 by each of the applicants together with supporting affidavits sworn by a number of directors of the relevant companies, by an independent consultant, Mr. Glynn Thomas and by two experienced and respected solicitors who have been appointed non – executive directors of certain companies in the group, namely Mr. Douglas Heather, a consultant at Gore & Grimes, Dublin and Mr. David Alastair James Rintoul, a partner at the firm of Hill Dickinson LLP, London.

Evidence of Mr. Sherling

39. In Mr. Sherling's grounding affidavit, he describes the background to the establishment and development of the companies and other companies in the IMI and Brandyford groups. Mr. Sherling refers to the investigation by the CMA, its findings, the disqualification undertaking given by each of the applicants and the judgment of Mr. Rajah QC. Mr. Sherling acknowledges unequivocally his role in the infringements of the Competition Act 1998 which gave rise to these proceedings. He states that he accepts the seriousness of the case and states that the findings that relate to him are a matter of "sincere and profound regret". He continues: -

> *"The conduct which led to the CMA's investigation arose as a result of my own ignorance of competition law. I have since learned a great deal from the CMA's investigation and subsequent competition compliance training which I have undertaken. That includes an understanding of competition law and how my actions in relation to the conduct described above were below the standard required of me as a director".*

40. Mr. Sherling expands on the measures which have been implemented in the companies to avoid a repetition of the events which gave rise to the disqualification undertakings. There has been designed and implemented within the IMI Group a programme to ensure compliance with competition law. This was designed with the assistance of a competition specialist Lesley Ainsworth. Ms. Ainsworth is a former partner at the firm of Hogan Lovells, London, a former member of the CMA and a current member of the Competition Decisions Committee of the Financial Conduct Authority and the Payments Systems Regulator.

41. Mr. Sherling referred to the appointment as a director of the companies in the IMI Group of Mr. David Rintoul, a partner with the firm of Hill Dickinson in London. Mr. Rintoul is now a non – executive director of JMR. He has been given specific responsibility for overseeing competition law compliance across the companies in the Group and supervising compliance with competition law by the applicants. The appointment of Mr. Rintoul was considered significant by Judge Rajah QC.

42. Mr. Sherling gave evidence that the companies were in the course of putting in place a formal whistleblowing policy which would identify formal reporting lines for all staff.

43. In relation to the failure to file the Form B74 a at the Companies Registration Office, Mr. Sherling said that after he and Mr. Hudson had given the disqualification undertaking, the companies' solicitors, Gore & Grimes, had prepared a Form B74 a in respect of each of the companies which were intended to be filed with the Companies Registration Office within the requisite time. He said that the forms were given to him to be signed and that although he signed them, he failed to return them to the companies due to "an innocent oversight on my part". He describes the circumstance in which this oversight occurred which include such matters as an extensive volume of paperwork encountered by him, the absence of his personal secretary over a protracted period by reason of the Covid 19 restrictions, the

limited amount of time spent by him in Ireland in the period after the disqualification undertaking was given, and difficulties deriving from his own age (73 years) and his poor health.

44. Mr. Sherling says that the failure to file the forms or return them to the companies for filing was an oversight and he states that he never intended to withhold from the CRO or from any other persons the fact that he had given the disqualification undertaking.

45. Mr. Sherling says that in relation to the Form B74a for Mr. Hudson in relation to JMR that failure was not attributable to any default on Mr. Hudson's part but was due to oversight on the part of Mr. Sherling himself.

46. Mr. Sherling described in detail the importance to the business operations of the continuance of the applicants as directors.

47. Mr. Sherling's responsibilities for the day to day management of the companies extended to such central functions as the sourcing of materials, processing and manufacturing, customer relationships, the management of certain property holding companies and the importance of his directorship to funding requirements of the group.

48. Mr. Sherling has provided financial support to the companies through capital injections, debt and guarantees. He says that as of 28 February 2021 he has lent €2.2 million to the five companies the subject of the application and a further €849,270 to another Irish company called Jamestown Manufacturing Limited, bringing his total advances to the group to €3,079,675. He believes that the companies have significant capital requirements and he estimates that an additional funding of approximately €1.8 million will be required. Mr. Sherling then continues as follows: -

> *"I confirm that I would not be willing to inject any additional money into the companies in circumstances where not only would I not be able to control the use of such funds, but where the businesses also face significant risks outlined above in the*

event that neither Mr. Hudson nor I are permitted to act as directors of the relevant companies. It is my belief that if we are not permitted to continue to act as directors, the companies would not survive, and I have no desire to inject cash into a business I believe would fail regardless of that injection".

49. Mr. Sherling states that the application was made only in respect of the small number of companies in which he is "deeply embedded at both a strategic and operational level". He says that there are no alternative candidates with the knowledge and experience to run the companies who would inspire the necessary confidence on the part of lenders, suppliers and customers. He refers also to the industry expertise which he says very few people possess given what he describes as the "relatively niche nature of this industry". There are no external candidates with the knowledge and experience to run the companies who would inspire the same level of confidence.

50. Mr. Sherling then refers to the measures implemented pursuant to the conditions imposed by the order of the English High Court which include the implementation of a comprehensive competition compliance programme which he says will benefit the companies the subject of this application.

51. Mr. Sherling refers also to the appointment of Mr. Douglas Heather as a non – executive director and separate evidence is given in this application by Mr. Heather.

52. Following the filing and service of notice of this application extensive exchanges took place between the applicants on the one hand and the Director of Corporate Enforcement and the Companies Registration Office on the other hand. Arising from these exchanges, further affidavits were delivered by the applicants, including a supplemental affidavit of Mr. Sherling sworn on 19 April 2022.

53. The Director raised a concern regarding what was described as the "overconcentration of control in the applicants". Mr. Sherling stated that he has been working with his solicitors,

accountants and corporate financiers in relation to a succession plan. He identifies a number of persons working in the companies who have already gained experience in the steel and lead industry who have been mentored. He refers in particular to a Mr. Ian Crabbe who performs executive functions in the companies in the IMI group, and is a non – executive director of JMR. Mr. Sherling states that Mr. Crabbe will continue to benefit from mentoring if he, Mr. Sherling, is reinstated as a director and is in a position to resume a management role within the group. He concludes by stating "I am hoping that over the next five years or so, I will have put a succession plan in place which will ensure the continued success of the various companies within the group."

Evidence of Mr. Hudson

54. Mr. Hudson swore a grounding affidavit on December 8, 2021. He refers also to the history of the group and his role in the group. He is a director of JMR and not of the other companies the subject of this application. He describes his career in the industry which commenced in or around 1984. He refers also to the investigation by the CMA and the undertakings given and the decision of the English High Court.

55. Mr. Hudson also states that he accepts the seriousness of the CMA case and states that his involvement is "a matter of sincere and profound regret". He continues: -

> *"I have learned a great deal from the CMA's investigation and subsequent competition compliance training, including an understanding of competition law and how my actions were below the standard required of me as a director. I have learned of the critical importance of compliance with competition law and the benefits of establishing a strong group wide competition law compliance programme. I have undertaken competition compliance training to further extend my own understanding of competition compliance requirements and to foster a culture of compliance within the IMI group".*

56. Mr. Hudson describes his functions concerning strategy, communications with managers, engagement with customers, product development, finance, legal matters and marketing.

57. Mr. Hudson states that he believes that it would not be sufficient for him to only be granted permission to be involved in the management of the relevant companies. He states that he effectively "runs" JMR with Mr. Sherling and therefore that it is vital that he continue to act as a director of that company. In summary, he states that he has accumulated 37 years of experience in the industry including 24 years in various key roles within the IMI Group.

58. Mr. Hudson refers also to the failure to file the form B74 a at the Companies Registration Office. He acknowledges that there has been a default and says that this occurred out of an act of inadvertence and not any intention to mislead the Companies Registration Office or others.

59. In a supplemental affidavit sworn by Mr. Hudson on 11 April 2022, he states that he accepts that the default in filing the Form B74 a was attributable to a failure on his part and accordingly he does not seek a declaration (originally sought in para. 2 of the originating notice of motion) to the effect that he is not deemed to be disqualified. Instead he focuses, as does the first applicant, on the application for relief from the deemed disqualification.

Glynn Robert Thomas

60. Mr. Thomas is a chartered accountant who has been acting as a business advisor to the IMI group since early 2020 and has assisted the group to restructure the business and its debts and with the introduction of new sources of finance. Mr. Thomas acted as an expert witness in support of the application made to the High Court of England and Wales under s. 17 of the Company Directors Disqualification Act 1986, for permission to continue acting as directors of certain companies.

61. Mr. Thomas has exhibited a report which he was asked to prepare for the purpose of this application.

62. Mr. Thomas discloses the background to his relationship with the applicants, having been introduced to them by the group's principal bankers, HSBC. His report deals with the restructuring of the business undertaken in 2020 by securing increased funding from both the owner, Mr. Sherling, and from HSBC. Additional funding had also been raised through a UK government backed loan scheme to minimise the impact of the Covid pandemic.

63. The conclusion of Mr. Thomas's report are summarised in his affidavit where he states as follows: -

> *"(a) Mr. Sherling is intimately involved in the day to day running of the operations of the companies and is essential to their continued operation.*
>
> *(b) The general management of both NBT International and JMR are intending to retire over the next few months. The head of finance who covered both SB Steel Limited and NB International Limited, has also resigned .*
>
> *(c) NBT International Limited is loss making and requires shareholder support.*
>
> *(d) Having regard to the volatile economic backdrop caused by the Covid – 19 pandemic, it is difficult to predict the performance and cash flow of the various businesses.*
>
> *(e) JMR is part of a group of companies in the UK which is being scrutinised by the Competition and Markets Authority. A disqualification of the applicants from continuing to act as directors of JMR could have potentially dire consequences for HSBC's desires to continue to support the business. The lead group as a whole owes HSBC in the region of £STG 40 million (of which JMR's share is £STG 2.3 million). The business is being monitored by two risk committees within HSBC".*

64. Mr. Thomas concludes by stating as follows: -

"Thus, in the light of: -

(i) the level of bank debt held by the companies and the potential impact on liquidity

(ii) the ongoing pandemic

(iii) the degree to which the applicants exercise centralised control over the businesses and;

(iv) the difficulty in hiring new management teams in a global pandemic,

I have come to the conclusion that the companies will face severe difficulties if the applicants are not permitted to continue to act as directors".

65. In the exhibited report, Mr. Thomas details the work which he has undertaken to review the affairs of the companies. The report contains appendices detailing the financial performance of the companies from 2018 onwards.

Douglas Heather

66. Mr. Heather swore an initial affidavit on 15 December 2021 and a second affidavit on 19 April 2022 for the purpose of addressing certain concerns raised by the ODCE in the interim.

67. Mr. Heather qualified as a solicitor in 1980 and has practiced as a solicitor continuously over the last 40 years, specialising principally in commercial and corporate law, together with property and insurance.

68. Mr. Heather is now a consultant at the firm of Gore & Grimes. Mr. Heather details his relationship initially with Mr. Sherling, whom he has known and acted for, for a period in excess of 20 years. Mr. Heather refers to the fact that the application now before the court has been necessitated by the fact that the applicants failed to deliver Form B74 a's to the Companies Registration Office within the prescribed 14 – day time period. He says that in order to give the court comfort that the companies will observe company law requirements

and follow good corporate governance practices in the event that this application is successful, he has agreed to be appointed as a non – executive director. Mr. Heather's principal functions on the board will be to attend board meetings, to ensure that the companies convene regular board meetings and that appropriate and relevant reports and financial information are made available to all of the directors of the company in a timely fashion. He expects that his role from time to time will be advisory and he hopes that he can assist the companies in their ongoing business endeavours and activities "having regard to his extensive corporate experience garnered over 40 years and to provide a level of independent advice to the executive officers of the companies from time to time."

69. Mr. Heather says that having spoken with the applicants he is confident that they now appreciate the importance of complying in full with the requirements of company law and the necessity to observe recommended corporate governance practice. He continues: -

> *"Coupled with the fact that I have now been appointed to the board of the companies in a non – executive capacity, I do not consider that it would constitute a risk to the public for the applicants to continue to act as directors and I believe that the continued involvement in an executive and operational capacity is essential to ensure the ongoing commercial success of the companies and to safeguard the many positions of employment enjoyed by the employees of the companies".*

70. Mr. Heather cannot be sure how long he would continue to act as a non – executive director. He has given an initial commitment that he will continue to so act for a period of at least one year to ensure that he can assist in guiding the companies in relation to their obligations under Irish company law.

71. Mr. Heather's supplemental affidavit was sworn on 19 April 2022 to address a number of concerns and queries which had been raised by the Director of Corporate Enforcement.

72. Mr. Heather explains the distinction between his role and that of Mr. Rintoul in the case of JMR. JMR is the only company in the group which trades both in Ireland and in the United Kingdom. In relation to JMR, Mr. Heather says that there will be no conflict between his appointment and that of Mr. Rintoul and he expects to defer to Mr. Rintoul in relation to compliance with UK law and UK governance and that he will be of assistance to Mr. Rintoul and to the company in relation to compliance with Irish law and corporate governance.

73. Mr. Heather refers to structures and policies which have been established by Mr. Rintoul in relation to JMR. In relation to the Brandyford companies, he says that he has started to introduce measures which he describes in his affidavit. He identifies no less than 26 measures which he has commenced in relation to the Brandyford companies. A number of these are little more than a description of principles of good conduct and company law compliance on the part of directors and they reflect the legal and fiduciary duties of directors of a company as a matter of Irish law. However, his description of the measures is detailed and extends not only to high level descriptions of the duties of directors but also to specific measures to ensure that directors are kept informed of the activities of the companies at all times so that they can perform their duties. He describes measures which he says will ensure that the directors and officers of the companies adhere to best practices of corporate, social, health and safety and statutory obligations.

74. Mr. Heather then refers to a number of board meetings which he has already attended including important meetings on 23 March 2022 of the JMR board and on 13 April 2022 of the boards of all of the Brandyford companies.

75. Mr. Heather says that having attended those meetings, he is acutely aware of the input and value of the applicants in relation to the companies the subject of the application. He says that while the other directors all provide valuable input into the ongoing management and

direction of the companies, the necessity to have the applicants involved in the day-to-day management and operation of the relevant companies is apparent.

76. Mr. Heather responds also to a query raised by the ODCE as to whether he will have sufficient time to attend to his responsibilities and duties as a non – executive director of the companies. He explains that in his capacity now as a consultant solicitor, and no longer a partner at Gore & Grimes, his commitments are much reduced in comparison to those of a partner and he believes that he will have the appropriate and necessary time to devote to his duties as a non – executive director of the companies.

77. Mr. Heather refers also to the appointment of Mr. Conor Murphy to the board of directors of the Brandyford companies. Mr. Murphy is described as an experienced chartered accountant, who took on a full time role as chief financial officer of part of the group in January 2015. He has been engaged in financing and treasury operations and other such functions. Mr. Heather welcomes the appointment of Mr. Murphy and believes that his contribution will be "immense". He believes that Mr. Murphy will bring "expert financial advice and acumen and financial reporting at the highest level to the Brandyford companies".

David Alistair James Rintoul

78. Mr. Rintoul swore an affidavit on 1 April 2022. He is a partner at Hill Dickinson LLP, London and has agreed to serve as a non – executive director of the companies in the IMI group, including JMR. He was appointed to the IMI companies on 8 April 2021 and to JMR on 21 April 2021.

79. Mr. Rintoul outlines extensively his responsibilities which include the overseeing of competition law compliance across the IMI companies and supervising such compliance on the part of the applicants. He says that this will include discussions with them every month on any competition compliance concerns they may have in the context of business development opportunities.

80. Mr. Rintoul expands on the manner in which he will monitor these matters including a description of the type of questions which he will raise at monthly meetings of the board with a view to identifying circumstances that may give rise to a risk of competition noncompliance. The level of detail contained in this affidavit is impressive as it extends not only to engagement at board meetings but the facility to review from time to time certain phone records, email servers and the implementation and operation of the whistleblowing policy of the company, formulated with the assistance of Ms. Ainsworth.

81. Mr. Rintoul says that the applicants have demonstrated to him their aim of instilling a culture of compliance across the IMI companies and he believes that they remain truly committed to this objective as evidenced by their behaviours since his appointment.

Barry Howard Smith

82. Mr. Smith swore an affidavit on 8 April 2022. He has worked since 1999 for certain companies in what is now the IMI Group. In June 2012 he was appointed General Manager and in October 2014 became a director of a number of companies in the group. He is now the competition law compliance officer for JMR and other companies in the IMI Group.

83. In that capacity, Mr. Smith is charged with the monitoring of emails and other communications to ensure that JMR and the other group companies do not offend or knowingly breach competition law requirements and guidelines, and he prepares regular reports to be submitted to his fellow director, Mr. Rintoul.

84. Mr. Smith says that he intends to retire in the near future but has agreed to maintain his role as competition compliance officer for the group until 2026.

Ian Crabbe

85. Mr. Crabbe joined the IMI Group in 2015. He became a non-executive director of JMR on 9 March 2021. A significant part of Mr. Crabbe's role and function is to ensure that all of the entities in the group have sufficient lead products and lead based raw materials, and

he has responsibility for sourcing and manufacturing of specialist lead products including in connection with the medical industry including nuclear shielding.

86. He says that JMR's lead business comprises about two thirds lead in connection with the roofing industry and one third specialist products in connection with the medical and nuclear shielding industry. He describes the importance of customer and supply relationships and the importance of Mr. Sherling and Mr. Hudson for maintaining and growing relationships in this specialist sector.

87. Mr. Crabb says that whilst the businesses are functioning at an operational level without the direct involvement of the applicants he foresees considerable issues and difficulties if the current position, namely their "suspension" by reasons of the provisions of s. 840, was to continue for any lengthy period of time.

88. Mr. Crabb refers also to competition law compliance training sessions run by Ms. Ainsworth. He supports this programme and believes that it will serve to instil a culture of compliance in JMR.

Director of Corporate Enforcement

89. No affidavit was filed on behalf of the Director. Extensive correspondence was exchanged between Messrs Gore & Grimes and the Director commencing with the required letter of intention to bring this application which was written to the Director of Corporate Enforcement on 23 November 2021. Following the service of the application and grounding affidavits, the Director wrote to Gore & Grimes on 13 January 2022 identifying information and documents required under eleven separate headings. The application was adjourned a number of times to enable this information to be provided. The engagement between the parties was constructive and prompt on both sides and ultimately the Director, by a letter dated 14 June 2022, identified terms and conditions based on which the Director was willing to adopt a neutral position towards the applications. The applicants engaged with the Director

regarding the conditions, and the conditions were the subject of agreement in an exchange of letters dated 14 June 2022, 20 June 2022, and 24 June 2022, and may be summarised as follows.

90. In relation to the application of Mr. Sherling, the following conditions were deemed by the Director to be necessary in order to protect the public interest: -

(a) That Mr. Rintoul or a similarly qualified and experienced person should remain in office at JMR for the remainder of the period of Mr. Hudson's deemed disqualification (being the longer of the two 'undertaking periods').

(b) That Mr. Rintoul or his replacement supervise compliance with competition law by JMR and its officers, supervise the applicants conduct and liaise with the CMA and the Competition and Consumer Protection Commission (if required) and implement the measures outlined in Mr. Rintoul's affidavit sworn 1 April 2022.

(c) That Mr. Heather, or a similarly qualified and experienced person remain as a non – executive director of JMR, SB Steel Limited, and NBT International Limited, for the remainder of the period of Mr. Hudson's deemed disqualification and continue to perform the roles and functions which Mr. Rintoul and Mr. Heather have described in detail in their affidavits before the court.

(d) That Mr. Heather or his replacement shall supervise compliance with company law and good corporate governance by JMR, SB Steel Limited, and NBT International Limited, and their officers and implement the other measures outlined in Mr. Heather's affidavit.

(e) That Mr. Smith and Mr. Crabb will each remain a director of JMR "for as long as is tenable" and may be replaced as directors of JMR.

(f) That Faye Ross and Conor Murphy each remain as directors of SB Steel Limited, and NBT International Limited, for as long as is tenable and may be replaced as directors of those companies.

(g) The relief granted pursuant to s. 847 would cease immediately and without further notice upon any failure to comply with the conditions.

91. In relation to the application of Mr. Hudson the conditions are as follows: -

(a) That Mr. Rintoul, or a similarly qualified and experienced person, shall remain as a non – executive director of JMR for the remainder of the period of Mr. Hudson's deemed disqualification and continue to perform the role and function which Mr. Rintoul and Mr. Heather have described in detail.

(b) That Mr. Rintoul or his replacement supervise compliance with competition law by JMR and its officers, supervise the applicant's conduct and liaise with the CMA and the Competition and Consumer Protection Commission (if required) and implement the other measures outlined in Mr. Rintoul's affidavit sworn 1 April 2021.

(c) That Mr. Heather, or similarly qualified and experienced persons shall remain as a non – executive director of JMR for the period of Mr. Hudson's deemed disqualification and continue to perform the roles and functions which Mr. Rintoul and Mr. Heather have described in their affidavits.

(d) That Mr. Heather or his replacement shall supervise compliance with company law and good corporate governance by JMR and its officers and implement the other measures outlined in Mr. Heather's affidavits.

(e) That Mr. Barry Smith and Mr. Ian Crabbe shall each remain a director of JMR for as long as is tenable and may be replaced as a director of JMR.

(f) The relief granted pursuant to s.847 would cease immediately and without further notice upon any failure to comply with the conditions.

92. The Director also stipulated that the applicants should agree to pay his costs of and incidental to this application, to be adjudicated in default of agreement. This condition has not been the subject of any agreement and I am informed will be the subject of further submissions.

93. The Director of Corporate Enforcement referred the court to the judgment of O'Neill J. in Re: Xnet Information Systems (op. cit.) and the judgment of Miles J. in Rwamba v. Secretary of State for Business, Energy and Industrial Strategy (op. cit.).

94. The Director stated that he is satisfied that the applicants have established that it is necessary that they continue to act as directors of the companies in question in order to ensure that those companies can continue to trade and to provide employment. He is also persuaded that the conditions which have been agreed as a result of the correspondence between the parties are sufficient to protect the public interest if this Court grants the relief sought. The Director refers to the factors which have influenced him in reaching this position including the following: -

(a) The need for the applicants to be involved in the business of the relevant companies.

(b) The fact that the companies provide employment in the State and abroad.

(c) The Director considers that the public would be protected if the applicants are granted relief from disqualification.

(d) The deemed disqualification arose from the failure to ensure that the Companies Registration Office was notified in a timely manner of the disqualification undertakings.

(e) The Director was satisfied with the constructive engagement between his office and the applicants in an effort to address his concerns.

95. Based on these considerations, the Director informed the court that he decided to adopt a neutral position on the applications, subject to the terms and conditions summarised above, which he states were necessary to protect the public.

Conclusions

96. Section 847 confers a wide discretion on the court. The section prescribes no conditions or criteria. In determining whether it is just and equitable to grant relief I am informed by the following considerations.

97. The purpose of Part 14 of the Act is the protection of the public from the conduct of directors and other persons which is otherwise than honest and responsible, in the case of restriction declarations (s. 819), and culpable wrongdoing in the case of disqualifications (s.842). This protection is achieved in two ways. Firstly, the fact that a restriction or disqualification order is made should prevent a recurrence, at least for the duration of the order, of the events or conduct which lead to the order. Secondly, there is an element of deterrence, in that the sanction is a public sanction which it is expected will have a general deterrent effect on those who avail of the privilege of limited liability companies. That deterrent would be greatly diminished, to the point of defeating the purpose of the Act, if relief from the sanction were granted lightly. In the context of those objectives and the policy of the Act, on an application for relief under s.847 this court should examine the following:

(a) The conduct which has given rise to the disqualification or deemed disqualification,

(b) Whether there is evidence to persuade the court that the relevant conduct will not be repeated if relief is granted.

98. The less proximate cause of the disqualification in this case is the infringements of the competition laws of England and Wales. The applicants have not come to this court

suggesting that these infringements should not be taken seriously. On the contrary, they have in their affidavits acknowledged that those infringements were sufficiently serious to warrant an investigation and adverse findings by the CMA and the giving of undertakings pursuant to the Company Directors Disqualification Act 1986.

99. The evidence proferred by the applicants was scrutinised firstly by the CMA and then by the High Court of England and Wales. It is not necessary for me to repeat the findings of Judge Rajah QC. However, I believe it is appropriate that I take into account that the Group wide measures to avoid repeated infringements were of such comfort to that court that it was satisfied to grant relief.

100. The evidence before this court as to measures to ensure compliance with both competition law and company law is comprehensive and impressive. It is clear that the applicants have taken very seriously the lessons learned from their experience of the CMA investigation and the sanctions which followed it. They have caused the companies to invest in a well documented programme of compliance and prevention of a recurrence of competition law infringement. I am persuaded that this is not a token or hollow gesture.

101. Professional persons of good standing and experience have agreed to take appointments as non-executive directors of the companies and have made commitments directed at high standards of compliance. That itself is an onerous commitment which carries its own duties and obligations. It is also evidence of the substance of the applicants' dedication to avoid conduct which would harm the interests of those who engage with the companies and the interests of the public.

102. There was some force in the Director's concerns, raised in the course of correspondence, that there was an "overconcentration" of management and control in the two applicants. Nonetheless, the affidavits reveal a recognition that a plan is required for succession, and that there are persons holding positions of responsibility in the companies

who are being mentored with a view to the future. That mentoring and succession plan is being developed in the context of a regime implemented to adhere to high standards of compliance with competition and company law, and with the legal and fiduciary duties of directors and officers.

103. There can never be certainty that the measures described in the evidence or adherence to the conditions will eliminate future difficulties or the possibility of future infringements. Nonetheless, the evidence describing the events and actions taken already and the measures put in place to address the future is uncontradicted. I have no reason to believe that the companies the subject of this application, the applicants themselves, or the newly appointed non-executive directors, would have gone to such lengths and incurred such costs if they did not believe that doing so would place the companies on a sound footing as regards the issues which gave rise to the disqualification.

104. The proximate cause of the deemed disqualification under the Act of 2014 (as distinct from the disqualification of the applicants pursuant to the Company Directors Disqualification Act 1986) is the omission to notify the Registrar of Companies of the making of the undertakings.

105. The failure to file Form B74 a is not a trivial matter, and the applicants have, rightly, not sought to portray it as such. The purpose of the requirement to notify is, again, the protection of the public. However, I accept the evidence that this omission was not the result of any intention on the part of the applicants to conceal the disqualification undertakings from the Registrar of Companies or others.

106. The evidence of Mr. Sherling as to the time, resources and other pressures which led to the omission to file Forms B74 a, is at one level a cause of residual concern. One would expect that companies which have the substantial trade and resources of these companies would have in place systems to ensure that important statutory procedures of this nature

would be complied with. For example, the absence of Mr. Sherling from this jurisdiction for prolonged periods or the prolonged absence of his secretary due to the constraints of the Covid 19 pandemic would not of themselves explain failures to ensure compliance with company law. However, I accept not only that this omission was not intentional, but that as soon as the applicants realised that this breach had occurred they instructed their advisers to prepare this application.

107. When account is taken of the serious approach adopted by the applicants when they realised the omission to comply with the statutory notification requirement, evidenced by the application made to the High Court of England and Wales and the affidavits now before this court, and of the position of conditional neutrality adopted by the Director, I am satisfied that it is just and equitable to grant to the applicants relief pursuant to s. 847(1) of the Act from the disqualification deemed to arise pursuant to s. 840(2) of the Act, the relief being leave to act as directors of SB Steel Limited, NBT International Limited and Jamestown Metal Resources Limited. The relief will be conditional on the matters described in paragraphs 90 and 91 of this judgment and these matters will be recorded in the final form of the order. I shall hear the parties as to the form of the order and any other matters arising.