

THE HIGH COURT

[2022] IEHC 711

Record No. 2021/ 271 COS

IN THE MATTER OF GRANJA LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF S. 819 OF THE COMPANIES ACT 2014

BETWEEN

SHANE MCCARTHY

APPLICANT

AND

GERARD FEEHILY, YEOKSEE OOI, TIAN SU OOI, AND BRIAN MCDONAGH

RESPONDENTS

Judgment of Mr. Justice Quinn delivered the 16th day of December 2022

1. The applicant was appointed liquidator of Granja Limited (“the Company”) by order of this Court (Haughton J.) made on 31 July 2019. In these proceedings, the applicant sought a declaration that each of the respondents shall not for a period of five years be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned to take part in the promotion or formation of any company, unless that company meets the requirements set out in s. 819(3) of the Companies Act, 2014, (a “restriction declaration”).
2. The second, third and fourth named respondents did not appear to or oppose these proceedings and on 9 May 2022, declarations of restriction were made against each of them. This judgment relates to the application against the first named respondent, who has opposed

the application, delivered replying affidavits, and made submissions in person at the hearing of the application on 24 and 25 October 2022.

The Company and the respondents

3. The Company was incorporated on 5 September 2013. Its only activity was an unsuccessful attempt to purchase from the fourth respondent and his brothers certain lands at Kilpeddar, Co. Wicklow in respect of which planning permission had been obtained for the development of a data centre.

4. The circumstances in which the Company attempted to purchase the lands have been controversial in many respects and the subject of a series of separate legal proceedings.

5. The first named respondent was appointed a director of the Company on 6 September 2013. He resigned with effect from 22 March 2019. He claims that he ceased to be a director in March 2018, more than 12 months before the commencement of the winding up of the Company and therefore that he is not a person to whom the provisions of s. 819 apply. I have determined that he was a director until 23 March 2019 and my consideration of that question is set out in more detail later.

6. The second and third named respondents, who are brother and sister, were directors of the Company up to and including the commencement of the winding up.

7. The fourth named respondent was never registered as a director of the Company. He is the partner in life of the second respondent. In the uncontested hearing on 9 May 2022, this Court concluded, on the evidence presented by the applicant, that he was a shadow director and accordingly that the provisions of s. 819 applied to him.

Background

8. In August 2007 the fourth named respondent and his two brothers, Ken McDonagh, and Maurice McDonagh, purchased the lands at Kilpeddar with the assistance of loans from Ulster Bank Ireland Limited (“the bank”). Their stated intention was to develop the lands as a

data centre and planning permission was obtained. Ultimately the development did not proceed. The loan with Ulster Bank was restructured from time to time, and on 13 March 2013, the McDonaghs entered into a Compromise Agreement with the bank.

9. The Compromise Agreement contained a commitment on the part of the McDonaghs to dispose of specified assets, including the lands at Kilpeddar, by stipulated dates and remit the net proceeds of sale to the bank. The bank had agreed to accept such payments in full and final settlement of the debt, which would have resulted in forgiveness of the balance of the loan, said to be in the order then of €20 million.

10. For the lands at Kilpeddar, the stipulation was that a sale would be concluded by no later than 31 July 2014.

11. The bank were not informed of a sale of the lands by the deadline, and the loan was not repaid or otherwise restructured. On 1 October 2014, the bank appointed receivers over assets of the McDonaghs, including the Kilpeddar lands.

12. Also on 1 October 2014, one of the McDonagh brothers commenced proceedings against the bank for specific performance of the Compromise Agreement and on the same day applied ex parte and obtained an interim injunction to restrain the bank from taking any steps to enforce the recovery of the loan, including the appointment of a receiver.

13. On 22 October 2014, the interim injunction was vacated by the court and those proceedings were not pursued to trial.

14. In the affidavit grounding the application for an injunction, Mr. Brian McDonagh averred that he and his brothers had secured a purchaser for the lands and there was produced a document dated 13 June 2014 described as a “*Heads of Agreement to Sell – Memorandum of Agreement*” which the McDonaghs claimed was a binding agreement to sell the lands to the Company for €1,501,000. This document has been the subject of prolonged controversy between the McDonaghs and the bank and others in which disputes arise as to its authenticity

and provenance, when it was executed, and its meaning and effect. Facts which emerged in relation to that document in litigation between the Company and the bank and the receivers and between the bank and the McDonaghs are relevant to the determination of this application and are therefore described in detail below.

Heads of Agreement

15. Having regard to its central importance in relation to the issues I have to consider, it is appropriate to quote in full the text of the Heads of Agreement.

16. The document was printed on the letterhead of Messrs Dooley Auctioneers, a firm of auctioneers in Delgany, Co. Wicklow retained by the McDonaghs.

Day: Friday
Date: 13th June 2014
Time: 3 p.m.

Re: 81 Acres at Kilpeddar Co. Wicklow.

Heads of Agreement to Sell.

Memorandum of Agreement.

Vendors: Brian McDonagh Drummond House, Drummond East Delgany Co. Wicklow	Kenneth McDonagh 48 Charleston Road Ranelagh Dublin 6	Maurice McDonagh, 50 Charleston Road, Ranelagh, Dublin 6
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Purchasers: Granja Limited
Unit 2,
Ballinteer Business Centre,
Ballinteer Avenue,
Dublin 16

This is to confirm that the vendors of circa 81 acres at Kilpeddar Co. Wicklow, Folio no. 10117 F Part WW 21790 F and D 2007 KW 011999 J, being part Folios 1516 F and 5204 WW 36738 F, have agreed to sell the above lands to the said purchasers Granja Limited for the amount of €1,501,000 (One Million, five hundred and one thousand Euros). The funding of this transaction is in cash. The proof of funds have been produced to Dooley Auctioneers from Cathal L. Flynn and Co. Solicitors in a letter of confirmation of monies in client account of Cathal L. Flynn and Co. Solicitors.

The contract for sale to be signed by both parties and exchange of contract to be signed simultaneously with 10% deposit on signing.

Dooley Auctioneers confirmed that a booking deposit of €50K, fifty thousand euros, has been received from Granja Limited in the form of a bank draft. This is to be held by Dooley Auctioneers until the closing of the sale.

Please note the undertaking from Granja regarding the outstanding fees claim by architect has been taken into consideration in acceptance of their offer. Copy of same is attached with letter of offer best bids process signed.

17. The document is signed by each of Brian McDonagh, Kenneth McDonagh and Maurice McDonagh as vendors and on behalf of Granja Limited as purchaser by the first respondent Mr. Feehily, who was Managing Director of the Company, and a Mr. Liam Whelan, who at the time was a director of the Company but has since deceased.

18. In presenting this document the McDonaghs asserted to Ulster Bank Limited that its signing constituted compliance with the condition to sell the lands at Kilpeddar by 31 July 2014 and that they were therefore entitled to enforce the Compromise Agreement and avail of the release of the balance of the debt.

Specific performance proceedings

19. On 3 December 2014, the Company issued proceedings (2014 10190 P) against the bank, the receivers and the three McDonagh Brothers. The Company sued as “bona fide purchaser for value and as beneficial owner of” the lands, and sought inter alia specific performance of the Heads of Agreement and a direction that the defendants complete the sale of the lands to Granja.

20. The proceedings were fully defended by the bank and the receivers. The McDonagh brothers did not defend the proceedings and they pleaded that the Company was entitled to purchase the lands for €1,501,000. They also contended that the Compromise Agreement itself constituted the bank’s consent to the sale.

21. The hearing of the specific performance proceedings opened before Haughton J. in March 2018. On the morning of 14 March 2018, being the fifth day of the hearing, the first respondent Mr. Feehily, who had been under cross – examination in the hearing for three days, became ill, and was taken from the Four Courts to hospital by ambulance. The Company immediately served a notice of discontinuance of the proceedings on the bank and the receivers. As between the Company and the McDonaghs, the action was not at that point discontinued, but a settlement was entered into later that year on 16 October 2018. The essential terms of that settlement as far as they are relevant were as follows: -

- (i) In the event that the McDonagh defendants should obtain an order directing the receivers to complete the sale of property, the sale to the Company would be duly completed;
- (ii) In the event that the McDonagh brothers were not successful in obtaining that relief, the Company agreed that the contract for sale of the lands would be “at an end”;

(iii) The proceedings as between the Company and the McDonagh brothers were struck out with liberty to apply and no order as to costs.

22. This settlement agreement was signed by each of the McDonaghs, and on behalf of the Company by the second named respondent, Yeoksee Ooi.

23. Although the first respondent had acted as Managing Director of the Company up to 14 March 2018, the day he was taken from the Four Courts to hospital, he did not thereafter participate in any of its actions or activities.

24. The bank and the receivers were entitled to their costs against the Company arising from the discontinuance of the proceedings and on 1 July 2019, a Certificate of Taxation was issued by the Taxing Master certifying those costs in an amount of €569,404.51.

25. An amount of €250,000 had been lodged as security for costs, and this left a balance of unpaid costs certified in the amount of €319,404.51.

26. On 2 July 2019 the bank presented a petition for the winding up of the Company, grounded on the unpaid balance of certified costs.

27. Earlier on 2 July 2019, unbeknownst to the bank, the Company convened meetings of members and shareholders for 17 July 2019. On that date a resolution was passed that the Company be wound up as a creditors' voluntary winding up and that Mr. Barry Forrest be appointed liquidator.

28. At the hearing of the petition on 31 July 2019 it was opposed by the second named respondent. Haughton J. heard submissions and made an order for the winding up of the Company and appointed the applicant liquidator.

29. Haughton J. also ordered that Mr. Forrest be discharged as liquidator with immediate effect consequent upon the appointment of the applicant. The judgment of Haughton J. is relevant to this application and is described in more detail later (paragraphs 41 - 47)

The Judgment proceedings

30. On 2 July 2018, the bank and the receivers commenced proceedings against the McDonagh brothers, seeking judgment against them jointly and severally in the sum of €22,090,302.64. This was the balance of the loan drawn by the McDonaghs in connection with the purchase of the lands at Kilpeddar.

31. The defendants claimed that they had complied with the terms of the Compromise Agreement and that the bank was not entitled to judgment.

32. On 6 April 2020 Twomey J. delivered his judgment in these proceedings (Ulster Bank DAC, Paul McCann and Patrick Dillon v. Brian McDonagh & Ors. [2020] IEHC 185). Twomey J. held that the defendants had not complied with the Compromise Agreement and that the bank was entitled to judgment in the amount claimed.

33. The trial of this action ran for several weeks and the judgment of Twomey J. runs to 84 pages. It contains a comprehensive in depth analysis of the evidence given by the bank and the McDonaghs, and other witnesses.

34. Neither the Company or Mr. Feehily were a party to these proceedings and, although he had been served with a subpoena, Mr. Feehily was not called as a witness in the case.

35. Twomey J. held that the Heads of Agreement were not a binding contract, that there was no sale of the Kilpeddar lands and that the McDonaghs breached the Compromise Agreement and the bank was therefore entitled to judgment. This judgment was upheld by the Court of Appeal.

36. Twomey J. also made the following findings: -

(i) By reason of the discontinuance of its specific performance proceedings, the Company was no longer claiming that the Heads of Agreement were a binding contract.

(ii) That a sum of €1.5 million, which at one point in time was available to the Company and held in the client account of its solicitors Cathal L. Flynn &

Company for the purpose of demonstrating its capacity to conclude the purchase of the Kilpeddar lands, was money which was beneficially owned by Mr. Brian McDonagh the fourth named respondent and not, as had been asserted by Mr. McDonagh and his co – defendants, by Mr. Ooi the third named respondent.

(iii) That Mr. Brian McDonagh was the beneficial owner of the funds which were to be used by the Company to attempt to purchase the lands at Kilpeddar.

(iv) That the Company was a front used by the fourth named respondent to seek to purchase the site. It is said that this device was employed to conceal from the bank the fact that the fourth respondent had access to such monies, a fact not disclosed when making the Compromise Agreement.

37. These conclusions by Twomey J. were based on a series of findings he made by reference to the evidence before him including findings that certain Declarations of Trust which were placed before the court for the purpose of seeking to establish that the fourth named respondent was not a beneficial owner of the relevant monies were forgeries and that false evidence had been given in the hearing.

38. In relation to the Heads of Agreement, Twomey J. concluded: -

“ on the balance of probabilities that the Heads of Agreement were never executed on the 13th of June, 2014 as alleged by the McDonaghs”.

In making that conclusion, Twomey J. was informed by a number of factors including the failure of any of the parties to produce the Heads of Agreement dated 13 June 2014 to the bank before October 2014, and the absence of any reference in communications with the bank before October 2014 to signed Heads of Agreement. Instead, references had been made from time to time by the Company’s solicitors to the existence of “offers” and the like.

39. It appears from the judgment of Twomey J. that there was not shown to him certain correspondence (now exhibited in this application) between the first respondent Mr. Feehily and the Company's solicitors Cathal L. Flynn in June and July 2014 which refers to the existence of the Heads of Agreement. Critically however, the finding of Twomey J. to the effect that the Company was a front for the fourth respondent and that he was the beneficial owner of the monies intended to be used to acquire the property, was not grounded on any conclusion regarding the timing of the execution of the Heads of Agreement. That finding was grounded on his conclusion that the Heads of Agreement was not a binding contract, and more importantly, that the funds were beneficially owned by the fourth named respondent. These were the conclusions on which he based his judgment that the company was a front and that the intended acquisition of the lands by the company was a "scheme" to defeat the efforts of the bank to recover its debt and enforce its security over the lands.
40. A central question for the court on this application is whether, in light of that finding, the role and conduct of the first respondent in the affairs of the Company is such that he has discharged the onus of proving that he acted honestly and responsibly in relation to the affairs of the Company.

Judgment of Haughton J. on the petition 31 July 2019

41. In making the order for the winding up of the Company and appointing the applicant in place of Mr. Forrest, Haughton J. delivered an *ex tempore* judgment which contains a number of findings and observations relevant to this application.
42. Haughton J. noted that there was no criticism in the present case of the qualifications and professionalism of Mr. Forrest, but a query had been raised by the petitioner regarding his suitability in circumstances where he had previously acted as liquidator of a company controlled by the fourth respondent and in circumstances where the fourth respondent, not

being a duly appointed registered director of the company, had suggested to the second named respondent, that Mr. Forrest be appointed. The fourth respondent himself had contacted Mr. Forrest to ask him to act.

43. Haughton J. concluded that although the steps to initiate a voluntary winding up of the Company were taken, at 6:00 am on the morning of 2 July 2019, before the company had actual knowledge of the presentation of the petition, the decision of the directors to initiate the creditors voluntary liquidation was made in reaction to the threat of a winding up petition following the service of a statutory demand by the bank.

44. The attention of Haughton J. was drawn to the question of monies which had been available to the Company, purportedly to complete the purchase of the lands at Kilpeddar.

Haughton J. continued: -

“When the court came to consider the €1.501 million that was in court in context of an application brought on behalf of Ulster Bank to freeze the monies in court, given that it now had a costs order in its favour following discontinuance of the proceedings, it emerged that all of the monies had been paid out. The court had occasion then to inquire how this could be and it emerged that the sum €800,000 plus, had been paid out to Kimeon Accountants Limited, and that was the firm run by a former director of Granja Limited [being the first named respondent] who was a witness in the specific performance proceedings. And it emerged from that enquiry, and particularly from cross – examination of Brian McDonagh that he had been paid out, in differing amounts, a total of €608,502.

....

Those concerns in themselves are sufficient for the court, and to decide that there is special reason in this case, and clear and special reason, why the court should appoint a liquidator. But the court also takes into account those issues in relation to

the statement of affairs and the unsecured liquidators (sic) in the context of the inquiries that a liquidator is going to have to undertake in undertaking this liquidation. Clearly it is going to have to inquire more closely in relation to each and every one of those claims of unsecured indebtedness other than that of Ulster Bank itself”.

45. Haughton J. continued by stating that there was a substantial issue to be addressed by the liquidator in this case, namely the question of whether the fourth respondent Brian McDonagh is a shadow director. Haughton J. concluded by stating that this issue was another factor in his determination that any liquidator appointed in a case such as this “. . . must be and be seen to be, entirely independent of any directors or potential shadow director”.

46. Haughton J. quoted from a judgment of Lawrence Collins QC sitting as a Judge of the Chancery Division in re: Zirciram Limited (in liquidation) [2001] BC LC 750 where he stated as follows: -

“The liquidator appointed in the voluntary winding up must be seen not to be taking sides, even if there is no attack on the probity or competence of the liquidator or any other criticism. It may nevertheless be right to protect the creditors by a full investigation into the affairs of the company and by a fully independent liquidator appointed in the context of a compulsory winding up”. (emphasis added)

47. These observations of Haughton J. are relevant in the context of an issue raised at the hearing of this application by the respondent concerning the representation of the applicant (see paras. 158 et seq below).

This application

48. On 4 November 2021 this application was issued returnable for 13 December 2021. The hearing was adjourned on numerous occasions having regard to difficulties in effecting service on certain of the respondents. Ultimately, following successful service of the

application, this Court heard on 9 May 2022 the application for restrictions orders as against the second, third and fourth named respondents. The application as against the first respondent was adjourned to enable the parties exchange further affidavits and ultimately heard on 24 and 25 October 2022.

49. No affidavits were delivered by the second, third or fourth named respondents and the application proceeded on 9 May 2022 on foot of an affidavit of the applicant sworn 3 November 2021.

50. The applicant's grounding affidavit refers to the Company's history and its role as a party to the Heads of Agreement, the history of the specific performance proceedings culminating ultimately in the liability to Ulster Bank for legal costs on foot of which the petition for a winding up order was presented.

51. The applicant referred also in some detail to the Judgment proceedings and the judgment of Twomey J.

52. Having recited the role of the Company in relation to the Heads of Agreement and in particular the pursuit by it of the specific performance action the applicant expressed the following view: -

“Therefore it is a proven fact that the company is a front for Mr Brian McDonagh. I say and believe that it was neither honest nor responsible for Mr Brian McDonagh to surreptitiously use the Company as a front to attempt to recover the Kilpeddar lands and that it was neither honest nor responsible for Dr Tian Su Ooi, Dr Yeoksee Ooi or Mr Feehily to allow the Company to be so used and to deny Mr Brian McDonagh's involvement”.

53. The applicant then turned to the question of whether the fourth respondent was a shadow director and stated the following: -

“I accept that it does not automatically follow from the fact that the Company was a front for Brian McDonagh that he was also a person in accordance with whose instructions the directors of the Company were accustomed to act and for this honourable Court to find that he was a shadow director it must be so satisfied.

I also suggest that any continuing assertions by Ms Ooi or Mr Feehily that Mr McDonagh was not a shadow director in accordance with whose instructions they were accustomed to act must be viewed in light of their refusal to concede or accept that the Company was a front for Mr McDonagh, even despite this honourable Court’s finding in this regard.”

54. Before I turn to the grounds on which the applicant asserted that the fourth respondent was a shadow director it is important to recall that on that question this Court considered and accepted the evidence and submission made by the applicant at a hearing which was not opposed, the second, third, and fourth respondents having failed to appear and the application against the first respondent having been adjourned to a later date to facilitate further affidavits. Therefore, whilst I shall refer to and consider the evidence which was advanced by the liquidator to establish that the fourth respondent was a shadow director, in circumstances where the first respondent did not participate in that hearing my decision on this application cannot rest on that prior finding that the fourth respondent was a shadow director. This having been noted, the following were the grounds on which the applicant alleged that Mr Brian McDonagh was a shadow director: -

- (i) the fourth respondent received sums totalling €608,502.00 out of company monies which were held by the company’s solicitors Cathal L Flynn and remitted to the first respondent’s accountancy practice Kimeon which in turn paid them to the fourth respondent. The first respondent was managing

director of the Company and the Company was at the same time pursuing the fourth respondent and others for specific performance of the sale of the lands.

(ii) in the days immediately before the hearing of the specific performance action, including the eve of that trial, the fourth respondent was in constant and regular contact with the first respondent.

(iii) The fourth respondent was the person who approached and engaged the Company's nominee as a liquidator.

(iv) The directors' estimated statement of affairs presented at the creditors' meeting on 17 July 2019 listed the firm of McDonnell Dixon as creditors of the Company in an amount of €860,000. This firm were the architects engaged by the fourth respondent and his brothers to assist in the planning permission application for the lands. They had not been retained by the Company, although it was said that one of the terms of the Heads of Agreement was that the Company would undertake the liability to McDonnell Dixon.

(v) The statement of affairs presented to the creditors' meeting included the McDonagh brothers as creditors for a sum of €500,333.00 each, being one-third each of the total amount for which the Company had purported to contract to acquire the lands. The inclusion of these amounts enabled the fourth respondent to attend at and participate in the meeting of creditors.

(vi) Minutes of the creditors' meeting were exhibited. They record that throughout the meeting the fourth respondent prompted the second respondent, who chaired the meeting, with answers to questions by representatives of the bank, Revenue Commissioners and others.

- (vi) The second named respondent is an ophthalmologist and the life partner of the fourth named respondent. The liquidator says that to the best of his knowledge the second respondent has no background in data centres or commercial land acquisition or other directorships.
- (vii) The third named respondent is a consultant obstetrician and gynaecologist who lives and practices medicine in Malaysia. The applicant says that to his knowledge the third-named respondent has no background in data centres or commercial land acquisition and no other directorships.
- (vii) The first named respondent is (or at least was then) a friend of the fourth named respondent. The Applicant says that despite the fact that the Company having the first respondent as Managing Director was suing the fourth named respondent in High Court commercial proceedings, namely the specific performance proceedings, they remained on very good terms throughout and maintained contact.

55. The applicant continues as follows: -

“While more properly a matter for submission, if a person wishes to orchestrate from the shadows the actions of the directors of a company and to keep their involvement secret, they will ensure that the de jure directors are people who will act on their instructions and who will also not concede that they are doing so. I believe that to be the case here.”

56. The applicant says that the specific performance proceedings initiated by the Company were predicated on the Company being in a position to complete the purchase of the lands for €1.501 million. The Company never operated its own bank account. €1,493,820 was initially lodged to the Company’s client account with Cathal L. Flynn Solicitors on 25

July, 2014 much of which was “whittled down” by payments out to Kimeon Accountants. That money was paid out to the fourth named respondent, and for security for costs and for the Company’s own legal costs in the proceedings, leaving no funds remaining in the solicitor’s client account on the second day of the specific performance trial. The only cash available to the liquidator following his appointment was the booking deposit of €50,000 which was held by Messrs. Dooley, and which was ultimately recovered by the applicant.

57. The applicant says that the fact that there were no funds remaining in the Company’s solicitor’s client account was not disclosed to the bank or the receiver or to the court when the specific performance case opened at hearing. This fact only emerged on 14 March, 2018 when the case was still at hearing and the first named respondent took ill. He says that it was “neither honest nor responsible of the directors to allow the proceedings continue when the Company did not have the ability to perform the contract contended for as it did not have the resources to pay the consideration stated to be due thereunder”.

58. In his replying affidavit the first respondent says that the second named respondent had given an undertaking to discharge any outstanding costs incurred by the Company in connection with the proceedings. The only documented reference to such an undertaking is contained in a statement of affairs of the Company which the first respondent presented to the Applicant on 15 January, 2020, being what he described as an “alternative estimated statement of affairs as at 17 July, 2019”. Although the order for the appointment of the liquidator did not direct that the first respondent file a statement of affairs, he presented this statement of affairs as an attachment to his replies to the liquidator’s standard directors questionnaire. That statement of affairs disclosed total assets comprising the deposit held at Dooleys of €50,000 and cash of €2,928. It disclosed liabilities in the “balance of legal fees at €322,450 and an amount “due to director” €2,928. These figures present a deficiency of €272,450. To that statement of affairs the first respondent had inserted a note in the following

terms “undertaking was given by director Yeoksee Ooi to the court, to introduce funds to Granja Ltd to discharge the remaining outstanding balance of legal fees awarded by the court.”

59. No evidence of the giving of this undertaking was presented by the respondent. The applicant says that even if such an undertaking were given it has not been honoured.

Accordingly the Company was unable to meet the balance of the certified costs.

60. The exhibits included extracts from the Company’s client account at Messrs Cathal L. Flynn and the client account at Messrs Kimeon. The client account of Messrs Flynn showed a sum of €1,493,820 lodged to the credit of the Company on 25 July, 2014. The Kimeon account records that between 24 September, 2014 and 1 December, 2017 sums totalling €804,000 were received from Cathal L. Flynn & Co. Out of that money, sums totalling €801,072 were dispersed, leaving a balance in the account of Kimeon of €2,928.

61. The ‘Kimeon’ disbursements were payments totalling €124,301 to the first respondent, payments totalling €608,502 to the fourth respondent and payments totalling €22,420 to the second respondent.

62. The Cathal L. Flynn account shows a payment of €250,000, being the amount required to be lodged in respect of security for costs. Thereafter it shows payments to senior and junior counsel and a final payment in respect of solicitor’s costs on 7 March, 2018, being the second day of the hearing of the specific performance action, in an amount of €163,975.67, which reduced the balance on the client account to nil.

63. The applicant says that to permit funds belonging to the Company and which were held in the Company client account at its solicitors and at Kimeon resulting in the Company being unable to meet the certified costs was “at best irresponsible as was doing so with little prospect of the funds being repaid”.

64. The first respondent says that he does not accept the findings of Twomey J. to the effect that the Company was a front for the fourth respondent and he asserts that the true beneficial owner of the relevant monies was the third named respondent. He says that payments made out of Kimeon to himself and to the fourth respondent related to loans between himself and the fourth named respondent and the third named respondent and did not in truth represent transactions concerning the Company's money.

65. This is to contradict the comprehensive findings of Twomey J. concerning the beneficial ownership of the moneys, which findings were in turn based on his conclusions that certain declarations of trust were forgeries and that other evidence regarding the flow of moneys was false.

66. The first respondent also says that he had secured on behalf of the Company a facility which would enable it to complete the purchase at €1.5 million. No evidence was proffered by the first respondent as to the source of that facility or its terms.

Other issues identified by the Applicant

67. The applicant claims that other evidence shows that none of the respondents have demonstrated that they acted honestly and responsibly in relation to the affairs of the Company. He cites

(a) A failure to file annual returns from March 2017 onwards,

(b) the last set of financial statements produced was for the period ending 31 December, 2015.

(c) That despite registering for corporation tax with the Revenue Commissioners in 2014 the Company never filed any corporation tax returns.

(d) That the applicant has never received any statutory books and records of the Company from the directors, from which he deduces that it must be presumed that

none were ever maintained or that if they were maintained they have been withheld from him.

(e) That there was a failure on the part of the second, third and fourth named defendants to cooperate with the applicant following his appointment, and in particular by their insisting on maintaining that the amounts paid out of the Company solicitors client account to Kimeon and onwards were moneys beneficially owned by the third named respondent, contrary to the findings of Twomey J.

68. In the absence of any contrary evidence by the second, third or fourth named respondent I concluded at the hearing on 9 May, 2022 that the fourth named respondent was a person to whom s. 819 applied and that none of the second, third, or fourth named respondents had demonstrated that they had acted honestly and responsibly in relation to the affairs of the Company. I made the restriction declaration as against each of them.

Does s.819 apply to the first respondent?

69. S.818 defines the expression “director of an insolvent company” to mean “a person who was a director or shadow director of an insolvent company at the date of, or within 12 months before, the commencement of its winding up.”

70. The first respondent resigned as a director of the company effective 22 March, 2019, just over three months prior to the commencement of the winding up. His resignation letter was exhibited and reads as follows:

“Dear Yeok See,

Please accept this letter as formal notification to Granja Ltd that I am resigning my position as director and secretary with immediate effect”.

71. No steps were taken by the Company to record the resignation and on 11 April, 2019 the first respondent wrote again to the Company in the following terms:

“Dear Yeoksee,

I, Gerard Feehily, confirm my resignation from my office as director of Granja Ltd by letter dated 22 March, 2019. I note from the information kept by the Registrar of Companies that the fact of my resignation has not been notified to the Registrar by the filing of a form B10 in the Company Registration Office in accordance with the provisions of s.149 of the Companies Act, 2014.

Please file a form B10 to the Company Registration Office immediately. If the company fails to submit the form B10 returned within 21 days of the date of this letter, then I intend to file a form B69 in the Company Registration Office and to send a written request (enclosing a copy of my letter of resignation) to every person who, to my knowledge, is an officer of the company, that I will take such steps as will ensure that the failure of the company to comply with the notice continues no further”.

72. The search at the Companies Registration Office exhibited by the applicant records that a form B69, being a notice of a person ceasing to be a director, stated to be effective 22 March, 2019 was received by the Registrar of Companies on 13 May, 2019 and registered on 20 May, 2019.

73. It is not in dispute that on 14 March, 2018 the first respondent became ill at the Four Courts and was taken to hospital. Nor is it in dispute that thereafter he took no active part in the activities of the Company. This means that certain of the complaints made by the applicant in relation to events which occurred after 14 March 2018, including the convening and conduct of the meeting of creditors on 17 July, 2019, and questions concerning the failure to deliver a statutory statement of affairs arising from the appointment of the applicant, have no application to the first respondent.

74. The first respondent exhibited correspondence between him and the professional body of which he was a member, CPA Ireland, Professional Standards Department, on various

dates during 2019 in which he sought and was granted deferrals or postponements of scheduled quality assurance reviews in the light of letters from his medical practitioner. This is of no assistance in relation to the affairs of the Company.

75. In court the respondent presented a letter from a consultant dated 21 October 2022 which described his admission to a particular hospital in summer 2018 and referred to a condition which “impacted on your ability to appraise information and to balance that information to make decisions based on that information”.

76. Article 15 (d) of the Constitution of the Company provides as follows:

*“15. The office of a director shall be vacated if a director –
(d) can no longer be reasonably regarded as possessing an adequate decision making capacity;”*.

77. The first respondent submits that by operation of the provisions of Article 15 (d) he ceased to be a director on 14 March, 2018 when he was taken ill and was unable to resume his functions as managing director.

78. No authority was cited to the court by either of the parties in relation to this issue. My conclusion is that the first respondent was a director until 22 March, 2019 and accordingly is a person to whom the provisions of s. 819 apply, being a person who was a director within twelve months prior to the commencement of the winding up. In arriving at this conclusion I am informed by the following:

79. Firstly, the letters and evidence presented from the medical practitioner do not say that on 14 March 2018 the first respondent became unable to make decisions. The letter of 21 October 2022 says only that he was admitted to hospital in summer 2018 and that the episode “impacted on his ability to appraise information and to balance that information and to make decisions based on that information.”

80. Secondly, the covering letter dated 15 January 2020 from the first respondent to Mr. Eoin Doyle of the applicant’s firm, KPMG, contained a statement referring to the events of March 2018. In this letter he states that as and from the date he was taken from the Four Courts by ambulance he was no longer involved in the company or in any decisions taken by the other directors. This is not in dispute. He refers to his subsequent admission to a different hospital and he then says, “I made the decision to formally resign as director of Granja Ltd in March 2019”.

81. Thirdly, in the questionnaire itself he says in section 5 that he resigned on 22 March, 2019.

82. Fourthly, the resignation letter of 22 March 2019 states that it has “immediate”, not retrospective effect.

83. Fifthly, the first respondents letter of 11 April 2019 to the second respondent (paragraph 71 above) contains no suggestion that the resignation was to be effective earlier than 22 March 2019.

84. Sixthly and most tellingly, the assertion that the respondent had ceased to be a director more than 12 months before the commencement of the winding up was first made in response to these proceedings.

85. In conclusion, the first respondent cannot be faulted for events which occurred after 14 March, 2018, but he did not resign until 22 March, 2019 and accordingly is a person to whom s. 819 applies.

The first named respondent

86. This application is grounded on the affidavit of the applicant sworn 3 November 2021 and a supplemental affidavit sworn by the applicant on 27 April 2022.

87. The respondent swore replying affidavits on 18 February 2022 and 8 June 2022.

There is much repetition in the second of these affidavits, but I have carefully considered

their entire contents and the exhibits, and all of the submissions made by the respondent over the course of the two – day hearing.

88. The central concern identified by the liquidator as regards the first named respondent is that in his capacity as managing director of the Company he knowingly permitted and facilitated the function of the Company as a front for the fourth named respondent in the fourth named respondent's efforts to frustrate and thwart the legitimate efforts of the bank to recover the amount of its loans and to enforce its security. The Court (Twomey J.) has upheld the bank's claim for recovery of the debt and right to enforce its security.

89. The applicant says that the first respondent was complicit in this scheme, and he relies extensively as regards the scheme itself on the findings of Twomey J.

90. The applicant says also that it was irresponsible to pursue the specific performance proceedings based on an assertion that the Company was in funds to complete the purchase of the property, and yet to have facilitated, at a time when the first respondent was managing director of the Company, the withdrawal of all funds from the Company's control.

91. On this issue, the respondent says the following: -

- (i) That the Company was not a front for the fourth named respondent,
- (ii) That the fourth respondent was not the beneficial owner of the monies introduced to the Company or indeed of the shareholding in the Company
- (iii) That the fourth respondent was not a shadow director of the Company.
- (iv) That the Company paid its own legal costs and that he believed that the sum of €250,000 lodged by way of security for costs, discharged the Company's liability for adverse costs. He says that he was surprised to find that the amount of the bank's costs was certified at a greater amount.

92. The respondent says that the liability for the costs of the legal proceedings to Ulster Bank is the only external liability of the Company. No Revenue debt has been claimed or proved against the Company.

93. As regards the status of the company as a front for the fourth named respondent, and the findings of Twomey J. to that effect, I am again conscious that the first respondent was not a party to the judgment proceedings and did not give evidence at that trial. Nonetheless, those proceedings were fully defended by the McDonaghs. The evidence was tested and the judgment of Twomey J. is a comprehensive analysis after hearing several weeks of evidence and submissions, and was upheld on appeal.

94. The assertion by the first respondent that Mr. McDonagh was not the beneficial owner of monies introduced to the Company and that the monies were sourced from the third named respondent, is unsupported by any evidence. In the absence of such evidence, and taking into account the findings of Twomey J. on this point following a fully contested trial, I am not persuaded to accept the first respondent's denial of the outcome of the judgment proceedings. His persistence in denying the facts as found by Twomey J. is unsustainable.

95. By contrast with the judgment proceedings, the decision of this Court on 9 May 2022 in which I found that the fourth respondent was a shadow director, was not based on a contested hearing. Therefore, I must on this application carefully examine the evidence as to the role and acts of the first respondent in the Company.

96. The respondent was, until his departure on 14 March 2018, managing director of the company. The second and third named respondents were medical practitioners with no involvement in the development of data centres or property acquisition.

97. A particularly telling averment is made in para. 41 of the second affidavit of the respondent where he says the following: -

“I, as director of Granja Limited, objective (sic) was to ensure the completion of the purchase of the Kilpeddar lands and then, source the funding for the development of the lands. Brian McDonagh and Yeoksee Ooi needed me to succeed and to ensure that the data centre development be completed and be put in motion their plans for the utilisation of waste heat”.

98. It is clear from this averment that, wearing his “hat” as managing director of the Company, the first respondent was acting in collaboration with and in support of the fourth respondent’s objective of acquiring the lands at Kilpeddar, using the Company as a front. It is also clear from the findings of Twomey J. that the exercise of using the Company in attempting to acquire the lands at Kilpeddar and asserting that a valid contract was in being, was part of the scheme to delay or defeat the bank’s legitimate (and ultimately validated) efforts to recover its loan and enforce its security. The reference “needed me to succeed” reveals that the first respondent regarded it as his function to pursue this objective.

Correspondence with advisers

99. If there were any doubt about the extent of the first named respondent’s engagement in the matter, it is instructive to consider certain correspondence to which the first respondent was a party in June and July 2014.

100. Having regard to the sequence of emails which follows, I shall give the respondent the benefit of assuming for the purpose of this judgment that the Heads of Agreement were signed on 13 June 2014.

101. On 1 July 2014 the first respondent emailed Claire Moran of Messrs Cathal L. Flynn, requesting a discussion in relation to the Kilpeddar lands. On 9 July, Mr. Feehily emailed Ms. Moran in the following terms: -

“Claire,

Do you think you can get letters out today??

Maybe send out by registered post (more official!!!)

To send to each of the three vendors + Gabriel Dooley + Avril Gallagher (solicitor).

Need to pressure them following best bids process – “demand” contract within short space of time (whatever wording you think is appropriate”).

102. On 14 July 2014, Ms. Moran wrote to the first respondent in relation to the matter, identifying a number of issues in relation to the Heads of Agreement and stating as follows: -

“Dear Ger,

I had started doing the letters seeking the contract paperwork on the 81 acres at Kilpeddar, Co. Wicklow. However, when I looked up the Folio numbers that were listed in the agreement, to say the least it’s in a mess. Folio 1011 F is owned by Dryfields Limited of 10 Pembroke Road, Dublin 4. Folio 21790 F Co Wicklow is owned by Brian, Kenneth and Maurice McDonagh, subject to a number of rights of way”.

103. Ms. Moran continues by referring to other dealing numbers and folios referred to in the Heads of Agreement and concludes her letter by saying the following: -

“We are now in a quandary (sic) in that having checked this, to bind you into this agreement is dangerous as title is not in order. We are in a catch – 22 situation, obviously you want to purchase this, but it appears to me that what they have to sell is a title that is not in order. (They would not be aware that I have checked this title as I checked it independently from the Land Registry website)”.

104. On 18 July 2014 the first respondent replied to Ms. Moran and stated the following: -

“I attach again copy memorandum of agreement of the 13th

And also

I attach, which I hadn’t sent on to you, copy of Granja’s letter of offer of the 13th ult as part of the best bids process.

I would be of the opinion and hopefully you also, that the letter of offer gives the comfort to Granja of being able to acquire the lands under the contract subject to proper title and appropriate rights of way.

I really want Granja now to put pressure on the vendors and to have the lands tied down under contract to Granja – no completion, other than paying contract deposit until title and rights of way.

Do you agree with above and if so can you issue today appropriate letter to each of the vendors, Avril Gallagher and Gabriel Dooley”. (emphasis added)

105. The attached letter of offer referred again to the best bids process and the offer of €1.501 million “subject to contract/contract denied”. It refers also to a “copy of draft contract yet to be furnished”.

106. These communications reveal confusion, at its most benign, and contradiction as to whether the Company, giving its instructions through the first respondent, truly regarded itself as bound by the Heads of Terms and desirous of completing the purchase without resolving title and rights of way matters.

107. On 22 July 2014 Ms. Moran replied to Mr. Feehily in the following terms: -

“Dear Ger,

There is no difficulty seeking contracts on usual terms, i.e., subject to contract and good title etc. However, you could argue that the agreement dated the 13th June 2014 works both ways, i.e., that there is a binding agreement, or you could argue that it states in it that a contract for sale is to issue and be signed.

If we call for the contracts and copy title subject to contract/contract denied on the letter, the vendors (sic) an easy way out. If we on the other hand demand they comply with the terms of the agreement and insist there is a contract in place already, then title issues could become our problem to resolve.

This has High Court written all over it if a row develops”.

108. On 2 October 2014, being the day after the appointment of the receivers and the day after the fourth respondent had initiated injunction proceedings against the bank and receivers Ms. Moran wrote to the Company referring again to a number of the difficulties in relation to the title and the folios which she had inspected. She addressed this: - “*Dear Ger*” being the first named respondent. She refers to the different Folio numbers and a number of outstanding issues regarding identity of the lands, access, planning status, boundaries and services, and she continues: -

“Further to our telephone conversation this morning, I understand that you are fully satisfied, and the urgency is now to compel the McDonaghs and their solicitors to issue contracts to complete the purchase on foot of the heads of agreement to sell.

The document termed ‘Heads of Agreement to Sell/Memorandum of Agreement’ has significant faults but I feel it comprises the essential element of a contract and on foot of this document would argue that you have a beneficial interest in the lands. We can call on the McDonaghs to issue contracts and title to conclude the agreement and in the event that they fail to do so, we can then move to protect your interest in the lands by way of registering lis pendens and also seeking injunctive relief to compel the McDonaghs to complete the sale. However, this is significant litigation with significant costs attached to same and no guarantee of success. Your entitlement to the lands is based solely on the argument the document dated 13 June 2014 comprises a binding agreement to sell the lands on foot of which contracts were to be issued and the sale closed thereafter”.

109. Ms. Moran referred to the fact that Ulster Bank have a charge and have not issued any consent to the sale of the lands and she continues: -

“The only option at this stage as I see it is to up the ante significantly and call for the contracts within a period of three days (or other such timeframe) and in default of same put the vendors on notice that you will immediately be seeking injunctive relief and proceeding to register a lis pendens on the property to protect your interest. I would suggest that a barrister be briefed at this stage to issue legal opinion on the heads of agreement to sell – as to whether or not the courts would use same as a legally binding document and in the event that contracts are not issued, to immediately issue the appropriate proceedings to protect your interest”.

110. The specific performance proceedings were issued later in December 2014 in reliance on the Heads of Agreement, no contract having been issued.

111. The final exhibit in this sequence is a memorandum of a telephone conversation between the first respondent and Aoife McDermott (who I understand to be of Cathal L.Flynn CO) on 7 December 2015. This conversation appears to arise from the exchanges between the Company’s solicitors and the bank and receiver’s solicitors regarding the latter’s request for security for costs in the specific performance action. Having referred to the status of the exchanges regarding the security for costs and the proposal that a sum of €250,000 be lodged, Ms. McDermott said the following: -

“I explained obviously that there is a risk to this money, it will never be given back from court in the event that the company loses the claim and furthermore I advised him that Ken Fogarty’s best advices were to lodge the full amount of monies to show the company’s bona fides and that the company was ready willing and able to complete the sale. However, Ger acknowledged that there is a substantial risk in lodging this amount”.

112. This correspondence illustrates the extent of the first respondent’s direct engagement in the attempt to acquire the property. Whilst he maintains his denial that the Company was a

front for the fourth named respondent the evidence so carefully analysed and recorded in the judgment of Twomey J. is compelling that the function of the Company as a front is now indisputable.

113. It will not always be an irresponsible or dishonest act on the part of a director of a company to permit the Company to commence legal proceedings against a third party even where the purpose is to “up the ante”. However, the Company commenced High Court specific performance proceedings in which it was maintaining that it was in funds to complete the transaction, and brought them to trial having disbursed all its funds elsewhere, in circumstances where the only evidence of legal advice relating to these proceedings which is before this Court is to the effect that there was a substantial risk associated with the proceedings. The advice of senior counsel was that the Company should be in funds and in a position to show that it was in funds to complete the transaction, and yet, in the time leading up to the hearing of the specific performance proceedings those funds were disbursed, to the first, second and fourth named respondent inter alia, leaving the Company without any funds, even as the hearing of the specific performance action opened.

114. The applicant submits that there is no evidence that the first respondent, being managing director, ever received any remuneration or director’s fees for acting as such, and therefore that the payment to him of €124,301 was a form of compensation for his role in the scheme perpetrated by the fourth named respondent. I do not have to make any finding as to whether the first respondent had any financial or other interest in the outcome of all these matters. However, I am persuaded that his active role in the efforts of the Company to acquire the property, later found by Twomey J. to be a front for the fourth named respondent, reveals on his part a want of responsibility in relation to the affairs of the Company.

Director's loan €124,301

115. On 25 August 2020, the Company, acting by the applicant, commenced summary proceedings against the first respondent for recovery of the amount of €124,301, being the amount distributed to him from the funds in the client account of Cathal L. Flynn Solicitors via Kimeon Accountants between April 2015 and August 2017. The applicant states that the first respondent was not entitled to these monies and that the Company received no consideration for those payments. The court was informed that following a contested hearing, O'Regan J. granted summary judgment against the first respondent for this amount. That judgment is under appeal and the court was informed that the hearing of the appeal is listed for March 2023. It is not appropriate for me to either pre-empt the outcome of that appeal or to defer delivery of this judgment because I can determine the s. 819 application based on the affidavits exchanged and without making assumptions about or anticipating the result of the appeal against the summary judgment.

Misleading financial statements

116. The Applicant refers to the last filed annual report and financial statements of the Company for the year ended 31 December 2015. The balance sheet includes a reference to "investment property valued at €1,501,000".

117. Note 10 to the balance sheet refers to a "contingency" as follows: -

"The company is involved in a legal dispute with regard to the title of the investment property recognised on the company's balance sheet. The directors are confident that the legal dispute will result in a successful outcome. No further information has been given in relation to this case as to give any further information would be deemed prejudicial to the outcome of this case. Any legal costs incurred in relation to this dispute has been recognised in the financial statements".

118. The financial statements were signed by the first and second named respondents as directors and record that they were approved by the directors on 30 June 2017.

119. While it is fair to note that reference had been made to a contingency, the communications referred to earlier in this judgment in which the Company's solicitors expressed very cautious views regarding the prospect of success in the specific performance proceedings reveal that the inclusion in the balance sheet of a figure of €1.5m for an "investment property" was at best imprudent.

120. Although reference is made to legal costs having been recognised in the financial statements it is unclear which of the categories of liabilities are said to have included those costs.

121. I am not required to resolve any question concerning the accuracy of these financial statements, and I must not apply the benefit of hindsight, but it is clear that the description of an investment property having a value of €1.5 million in circumstances where the specific performance proceedings were being so vigorously defended was misleading.

Solvency of the company

122. The respondent says that the Company was not insolvent on the date on which he ceased to act as a director. He acknowledges the insolvency of the Company as of the time of liquidation by referring to the statement of affairs which he furnished to the liquidator on 15 January 2020, recording a deficiency of €272,450. In providing that statement of affairs he referred to the so – called "undertaking" given by the second respondent to introduce funds to the Company to discharge outstanding legal fees awarded by the court. No evidence of such an undertaking was proffered.

123. Submissions regarding solvency were confused by reference to forms E4 filed by the applicant since his appointment, being his account of his acts and dealings and which record the receipts and payments by the liquidator and an estimate of the assets and liabilities.

124. Some of these estimates suggested a surplus, but on closer analysis it emerged that there were typing errors. Therefore, those exhibits were no more than a distraction and of no assistance on the subject of the Company's insolvency.

Statutory books and records of the company

125. The Company has no business activity other than the attempt to purchase the Kilpeddar lands. The applicant says that there was not made available to him on his appointment statutory books or any other records of the Company. The first respondent says that he provided to the applicant the only records which were available to him namely the reconciliation of the bank accounts of Kimeon which I have described earlier.

126. The first respondent says that statutory books were maintained by a former director, Mr. Liam Whelan, who suffered a stroke in March 2017 and died in 2018. He said that the location of the statutory books are not known to him.

127. This means that there has not been available to the applicant or this court, such material as minutes of board meetings of the Company, if such meetings were ever held.

128. In circumstances where it is accepted that the first respondent ceased activity in relation to the affairs of the company on 14 March 2018 and where he swears that Mr. Whelan, now deceased, had maintained books and records I have reservations as to the extent to which this failure can be attributed to the first respondent and this is not a matter which can determine the application.

Revenue returns

129. The applicant says that although the Company had registered for corporation tax, it never since the date of its incorporation, made returns to the Revenue Commissioners.

130. In response, the first respondent says that the Company did not earn any revenues such as would have justified making returns.

131. The applicant points out that in circumstances where the Company had registered for corporation tax and at any time could have deregistered if it was not earning any revenue, it remained under an obligation to make returns. This undoubtedly was a failing on the part of the directors which evidences a want of responsibility.

Director of Corporate Enforcement

132. There was exhibited before the court a copy of a letter written on 9 July 2021 by the Office of the Director of Corporate Enforcement to the first respondent. In this letter, the respondent was informed that the Director had concluded that it had not been demonstrated that he had acted honestly and responsibly in relation to the affairs of the company and therefore that the liquidator should not be relieved of his statutory obligation to apply to court for a restriction declaration against him.

133. In this letter, the first respondent was referred to the option which he had of voluntarily agreeing to a restriction undertaking. Attached to the letter is an explanation of the legal effects of a restriction undertaking and a section headed “Part B” identifying the reasons why the Director had formed the opinion that a period of restriction was warranted in relation to him.

134. The first respondent says that he never received the letter of 9 July 2021 and he exhibited further correspondences and exchanges. By email of 14 January 2022, after this application has been issued, the Director of Corporate Enforcement sent to the first respondent a further copy of the letter of 9 July 2021 and enclosures.

135. The attention of the court has been drawn to the contents of “Part B”, namely the reasons given by the Director of Corporate Enforcement, which it is said are based on information provided to the Director of Corporate Enforcement by the applicant.

136. Unhelpfully, the reasons stated in this correspondence include matters which formed no part of the evidence of the applicant in this application, had no application to the first

respondent and are not relied on by the applicant. Those items were the following (with numbers referred to in Part B of the ODCE's letter): -

“5. The liquidator has reported that you breached a court order which placed the company into liquidation. You did not file a statement of affairs as required per that order.”

“6. The liquidator's report indicates that you, as a director, permitted the presentation of a statement of affairs at the creditors' meeting on 17 July 2019, which contained significant and material differences which arose on foot of the liquidator's investigation”.

137. The order of Haughton J. for the winding up of the company made no order or direction that the first respondent file a statement of affairs, because by that time he was not a director.

138. It is accepted by the applicant that the first respondent had no part in relation to the convening or conduct of the creditors' meeting on 17 July 2019 or the preparation of the statement of affairs presented at that meeting.

139. In these two respects it appears that the grounds identified by the Director of Corporate Enforcement for his decision not to relieve the liquidator of the obligation to bring this application included two grounds which have no application to the first respondent.

140. The respondent says that he could never have returned the form of the undertaking because the Restriction Acceptance Document would contain a confirmation on his part that he does not dispute the reasons set out in Part B. It is clear that the respondent could never have been required to accept the reasons stated at paras. 5 and 6 of Part B of the Restriction Acceptance Document.

141. Separately exhibited on this application are extracts from the reports delivered by the liquidator to the ODCE pursuant to s. 682. Those extracts do not contain references to items 5

and 6 cited in Part B of the Restriction Acceptance Document. Therefore, it is unclear to the court whether Part B was actually based on the completed report of the applicant.

142. Although the first respondent makes much of this unsatisfactory correspondence, it is of limited consequence for the fundamental question of the consequences of the role of the first respondent in relation to the matter of the Kilpeddar lands.

Section 819

143. Section 819 of the Act provides that on an application by a liquidator of an insolvent company the court shall make a declaration of restriction unless it is satisfied that: -

“(a) the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,

(b) he or she has, when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and

(c) there is no other reason why it would be just and equitable that he or she should be subject to the restrictions imposed by an order under subsection (1)”.

(emphasis added)

144. Because of the manner in which s. 819 is framed, the onus is on a respondent director to demonstrate each of items (a), (b) and (c) above. Unless each of those tests has been satisfied, the court has no discretion and must make a restriction declaration.

145. As regards (a) above, the essence of the applicant’s complaint in this case is that the first named respondent, together with the second and third named respondents, facilitated the function of the company as a front for the fourth named respondent in his scheme to defeat the efforts of Ulster Bank to recover its debt.

146. As regards the matter of cooperation with the liquidator, the applicant states that the first respondent has “merely paid lip service to his obligation to cooperate” in referring to exchanges he has had with the first respondent following his appointment. In this regard, he relies on the following: -

- (i) That the respondent has presented no books and records or notes of any director’s meetings;
- (ii) That the first respondent has maintained the position that the company was not a front for the fourth named respondent despite the finding to the contrary by the court (judgment of Twomey J.);
- (iii) That the first respondent maintains his insistence that Brian McDonagh was not a shadow director of the company, despite the finding of the court that Mr. McDonagh’s conduct was consistent with that of a shadow director;
- (iv) That he maintains his assertion that the money he received from the company’s solicitor’s client account via Kimeon Accountants belonged to the third named respondent and not the fourth named respondent, again contrary to the findings of Twomey J.

147. In Re: La Moselle Clothing Limited [1998] 2 ILRM 345, Shanley J. described the matters to be considered in determining whether a director has acted responsibly: -

- “(a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts 1963– 1990.*
- (b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.*
- (c) The extent of the director’s responsibility for the insolvency of the company.*
- (d) The extent of the director’s responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.*

(e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards”.

148. Many of the cases which come before the court pursuant to s. 819 concern the stewardship of a company’s affairs over a period of time and complaints regarding the manner in which the directors have responded to a deterioration in trade and whether they have failed to respect the interests of the creditors of the company in the face of an impending or prospective insolvency. Many of the cases also concern persistent or repeated failures to comply with statutory obligations or to maintain books and records in relation to the company, failures to make statutory returns to the Registrar of Companies or to Revenue or failure to account for “fiduciary taxes”. This case is somewhat unique, in that the applicant’s principal concern is the role and actions of the respondent in the Company as a “putative” purchaser of the Kilpeddar lands, a transaction which has been found to be part of a scheme to delay or defeat the bank.

149. During the life of the Company, it only entered into one transaction, being the attempt to purchase the lands at Kilpeddar. Payments into and out of the Company were all made through client accounts at its solicitors and accountants, and all were connected to the Kilpeddar transaction. The first respondent’s role in that transaction spans a period from, at the very latest the signing of the Head of Agreement, which he says occurred on 13 June 2014, through to 14 March 2018 when he was taken from the Four Courts to hospital.

150. The first respondent says of the Applicant’s reliance on the judgment of Twomey J. as follows: -

“I do not consider that the conclusions of Justice Twomey based on balance of probabilities, merit classification as fact”.

This was a reference to the conclusion of Twomey J. on the balance of probabilities that the heads of agreement were never executed on 13 June 2014 as alleged by the McDonaghs.

151. As I have said earlier, the conclusion of Twomey J. that the McDonaghs had not complied with the Compromise Agreement did not depend on a finding that the Heads of Agreement were not executed on 13 June 2014, but depended on extensive further evidence, including evidence of the execution of fraudulent Declarations of Trust and other false evidence, which caused the court to conclude that there had been a failure to comply with the Compromise Agreement. The central finding of Twomey J. was that the Heads of Agreement did not constitute a binding legal contract for the sale of the lands at Kilpeddar, and therefore could not be relied on to evidence compliance with the Compromise Agreement.

Conclusion as regards the first named respondent

152. The first named respondent was managing director of the Company from its incorporation on 5 September 2013 to 14 March 2018. There is no evidence that thereafter he perpetrated any acts in relation to the Company itself, but he only resigned with effect from 22 March 2019. The court is required to take into account the conduct of a director over the entire tenure of his directorship.

153. The first respondent signed the Heads of Agreement dated 13 June 2014, and gave instructions to the Company's solicitors, Cathal L. Flynn and Company in pursuing the claim that the Heads of Agreement were a binding contract, culminating in the commencement of the specific performance action and bringing it to trial, only for that case to be discontinued after several days of his cross – examination and when he was no longer able to give evidence.

154. The first respondent acted as managing director of the Company when extensive payments were made into its client account at Cathal L. Flynn and Company, ostensibly with a view to demonstrating the ability of the Company to complete the purchase of the properties at Kilpeddar if specific performance were awarded, and when all of these funds

were disbursed out of the accounts of the Company by the second day of the hearing of the action, more than half through the first respondent's accounting firm Kimeon.

155. The first respondent has adduced no evidence to support his assertion that he had secured an alternative facility for the benefit of the Company which would have enabled it to complete the purchase or his assertion that the second named respondent had given an undertaking to meet any adverse costs awarded against the company in excess of the amount which had been lodged as security for costs.

156. The first respondent does not assert that any of the other de jure directors of the company initiated any of the acts referred to above. That he performed his functions in pursuance of the fourth respondent's plan is put beyond doubt in his second affidavit at para. 41 where he asserts that: -

“Brian McDonagh and Yeoksee Ooi needed me to succeed.”

157. In light of the foregoing, I cannot find that the first respondent has acted honestly and responsibly in relation to the affairs of the company and accordingly I have no alternative but to declare pursuant to s. 819 of the Act that the first respondent shall not for a period of five years, be appointed or act in any way directly or indirectly as a director or secretary of a company or be concerned in or take part in the promotion or formation of a company, unless the company meets the requirements set out in subs. 3 of s. 819.

Representation

158. I cannot conclude this judgment without addressing an issue raised by the respondent concerning the independence of the applicant and his solicitors.

159. In his replying affidavit the respondent referred to the fact that both the applicant and the petitioner in this matter, Ulster Bank Ireland DAC, was represented by Mr. Gavin Simons, a partner in the firm of Amoss Solicitors. He then refers to the extract which I have

quoted earlier from the judgment of Haughton J. quoting Lawrence Collins QC in the Zirciram case where he said: -

“A compulsory liquidation may be ordered so that there can be an investigation which is not only independent but seen to be independent”.

160. The applicant engaged two firms of solicitors, namely Mr. Simons of Amoss Solicitors and also Mason Hayes and Curran. Messrs Mason Hayes and Curran acted in the limited function of the retrieval from Messrs Dooley of the amount of the booking deposit of €50,000 paid on signing the Heads of Agreement.

161. Messrs Amoss represented the applicant in this application.

162. The respondent has not directly alleged any conflict of interest on the part of the applicant or his solicitor. Nonetheless, he has referred to their appointments in the context of the passage quoted by Haughton J. referring to the requirement that an investigation will be independent and seen to be independent.

163. The directors and shareholders had nominated a liquidator, Mr. Forrest, who was appointed at the statutory meetings convened for 17 July 2019. Ulster Bank Ireland DAC then petitioned the court for a winding up order and the appointment of the applicant as liquidator. The petition was granted and there has been exhibited the transcript of the judgment given by Haughton J. It is clear that one of the reasons the court appointed the applicant was that a liquidator be appointed who should be independent of the Company and its directors and shareholders. Haughton J. was not asked to focus on the need for the liquidator to act independently of the petitioner, but his statement that a liquidator must be independent and “seen to be independent” cannot be limited to meaning independent only of the directors.

164. It is not unusual and not always inappropriate for a liquidator to retain as his solicitor the firm who has acted for the petitioning creditor.

165. However, a liquidator and the proposed solicitor should always give careful consideration to whether such an appointment is desirable in a given case.

166. A dominant feature of this case is that the petition and this liquidation forms part of a long history of contention between Ulster Bank on the one hand, and the Company and its directors, including the shadow director the fourth respondent, on the other hand. The litigation referred to earlier in this judgment is only part of this saga. There is more to the entire matter than the bank simply being an unsecured creditor of the Company for costs. Its claim for costs has its roots in the contentious matters to which I have referred earlier. In circumstances where there has been such a history of contention, careful consideration should have been given to whether it was appropriate for the liquidator, acting independently, to retain the solicitors who had acted for the bank.

167. Most of the contention arose between the bank on the one hand, and the McDonagh brothers on the other hand. Nonetheless, it is clear that the Company was central to that dispute.

168. In his supplemental affidavit, the Applicant said the following: -

“It appears from para. 3 of his affidavit that Mr. Feehily may be suggesting, albeit not explicitly, that my investigation into the affairs of the company is in some way biased/ not independent given that I have engaged Gavin Simons to advise me and that Mr. Simons also acted for Ulster Bank, the petitioner herein and a defendant in proceedings brought by the company. I say that this veiled suggestion regarding Mr. Simons’ involvement, if such suggestion is in fact being made, does not in any way inform my view as to the director’s lack of honesty and responsibility, which is based on a review of the documentation available to me. As is clear from the minutes of the meeting of creditors exhibited at Tab 10 of the booklet referred to in my grounding affidavit, Mr. Simons has an intimate knowledge of the company’s dealings with

Ulster Bank and the McDonagh brothers, and so it made eminent sense for him to be engaged to assist me with my investigations and doing so would save on time and costs in conducting my investigation. In appointing me as official liquidator, Judge Haughton did comment that ‘Any liquidator appointed in a case such as this much (sic) be, and be seen to be, entirely independent of any directors or potential shadow director’, and I am so independent”.

169. The applicant’s sworn statement that the involvement of Mr. Simons does not inform his view as to the director’s lack of honesty and responsibly cannot, as far as it goes, be gainsaid. Whether the retention of Mr. Simons “made eminent sense” is a different matter. The averment above reveals that it was considered by the applicant and, I assume by Mr. Simons, that Mr. Simons’ knowledge of the matter would generate an efficiency of time and cost. But that knowledge can only have been based on his role in the matter on behalf of the bank.

170. Mr. Simons appeared on this application on behalf of the applicant and in response to a question from the court, answered that the question of representation had been considered and that the application now before the court was grounded on proven facts.

171. It is indeed the case that this application is grounded on recorded evidence and findings of Twomey J. However, when a liquidator makes his report to the Director of Corporate Enforcement pursuant to s. 682 of the Act, he is required to state whether each of the directors have demonstrated that they acted honestly and responsibly in relation to the affairs of the company. Such a statement requires the liquidator to form and express an opinion. The applicant has said that his view is based “on a review of the documentation available to me.” I have not been told whether or what legal advice was taken in relation to the preparation of the report pursuant to s. 682 and of course any legal advice would attract privilege. But where the court has been told that the retention of Mr. Simons would bring

benefits arising from his prior knowledge of the matter, the only inference to draw is that the liquidator did not form his opinion regarding the conduct of the directors without having taken legal advice and, in this case informed by Mr. Simons' knowledge of the contentious history. This knowledge and the facts were known to Mr. Simons from the perspective of his client, Ulster Bank.

172. I must also infer that the same resource was provided to the applicant in preparing his evidence for this application.

173. A similar question arose in *Re: Gillstone Limited, Keane v. Gill* [2019] IEHC 554. The facts of that case were very different from this case, but again the solicitor retained by the liquidator had acted in previous contentious proceedings between the petitioner and the company and its directors prior to the making of the winding up order.

174. In that judgment, I referred to a practice which the court had previously adopted of requiring that where a liquidator appointed by the court sought to retain as his solicitors the solicitors who acted for the petitioner, he should first obtain the leave of the court to do so and that an application should be made to the court for that purpose. I continued: -

“In light of the fact that the practice of obtaining such leave appears to have fallen into disuse, I accept the explanation offered on the subject by Mr. Nuding. However, in circumstances where highly contentious issues and litigation arose between the petitioner, the Company and its directors prior to the making of the winding up order and having regard to the allegations of incomplete information and disclosure now made by the respondents against the applicant, this case illustrates why it will not always be appropriate for a liquidator to retain the petitioners solicitors. At the very least, an application for leave to do so should have been made, in which all relevant circumstances would be disclosed, including, in this case, the history of dispute between the petitioner and the Company and the respondents, and the fact that the

applicant intended to retain the petitioner's solicitor. This should at least eliminate the scope for allegations of the nature now made and leave no room for doubt as to the independence of the liquidator from all interested parties. The failure of the liquidator to provide a comprehensive narrative concerning the property, even after he was directed by this Court to do, aggravates this aspect of the case.

None of these matters excuse the respondents from their conduct and breach of duty”.

175. Mr. Simons submitted that the previous practice of requiring leave of the court to act related to the pre – 2014 Act procedure whereby all appointments of solicitors by official liquidators required the sanction of the court, a sanction typically granted through the Office of the Examiner. In *Keane v. Gill*, I was referring to a different practice, namely that in a case where the liquidator intends to appoint the solicitor who had acted for the petitioner, an application for leave to appoint him would be made to the court itself. On such an application appropriate assurance and if necessary, undertakings would be given in relation to such matters as potential conflicts of interest or perceived conflicts of interest. Regrettably, as noted in *Keane v. Gill*, that practice appears to have fallen into disuse.

176. In a case with such a contentious history as this, an application for such leave ought to have been made. Again it appears that the parties, however experienced, may not have been aware of the practice.

177. This does not mean that it will never be appropriate for a petitioner’s solicitor to act for the liquidator. By definition the petitioner is frequently the party most interested in having the company properly wound up and its affairs investigated. In many cases there is commonality of interest between the interests of a petitioning creditor and the interests of creditors as a whole. In this case the vast majority, or substantially all of the Company’s debt is owed to the petitioner. In many of those cases it may well be that the time and cost savings achieved by a liquidator appointing the petitioner’s solicitor, which will benefit the creditors

as a whole, can be achieved without any doubt or concern about the independence of his role. But the requirement for a liquidator to investigate the affairs of the Company and to make a report to the Corporate Enforcement Authority pursuant to s. 682 of the Act necessitates that he form an independent and objective view of the conduct of the directors. That means fully independent, and it will be rare that such independence can be seen to be achieved if the liquidator performs his investigation and forms an opinion with the benefit of legal advice from the solicitor who advised parties with whom the Company and its directors have been in dispute. In this case that history of dispute is long and protracted, and was ultimately the root of the petition. If an application by the liquidator for leave to appoint the petitioner's solicitor were made, this would at least cause the parties to turn their attention to this question and the court to determine it.

178. I add the following in relation to the petitioner's position and expectations. A creditor who can establish any one of the circumstances in which a company may be wound up by the court is entitled to petition for a winding up. The making of a winding up order is discretionary, but if the petitioner can prove insolvency a winding up order will generally be made unless there are good grounds to dismiss the petition. (See sections 569 – 577 of the Act).

179. The motivation of the petitioner will generally not be relevant, unless it is alleged that the petition is presented for an improper or ulterior purpose, which does not arise here. Even then allegations of such purpose may not in all cases result in refusal of the winding up order.

180. In this case, it was clear, and accepted by the court, that the petitioner's objective was to ensure that an orderly winding up would be conducted, and that an independent liquidator would be appointed. Whether the bank seriously expected to recover from the Company in liquidation any meaningful proportion of the debt due to it, is a separate question, but that also is a perfectly valid objective and motive.

181. This court has no information as to whether the petitioner also expected that the directors and shadow directors of the Company would be subject to sanctions, whether that be a restriction declaration or other sanctions. Again, an expectation by a petitioner that the appointed liquidator would perform a full and independent investigation of the affairs of the company, and the conduct of its directors and that he would, after making his report to the Director of Corporate Enforcement, pursue such sanctions as were appropriate, is a wholly proper expectation. It is also entirely proper for the petitioner or any other creditor or interested party to provide information to the liquidator concerning the affairs of the company. Doing so is to be expected and is desirable to enable the liquidator to perform his functions. But the liquidator once appointed is an officer of the court and must perform his duties independently. The transparency brought to that independence is compromised in a case such as this, if the liquidator performs his investigation and forms his opinions with the benefit of the advice of the solicitors who represent the party, in this case the petitioner, with such a history of contention with the Company and its directors.

Conclusion

182. In deciding this case, I have carefully considered the sworn affidavits of the applicant and the first respondent, and all the submissions made, including those made by the respondent in person over the two day hearing. The onus of establishing that he acted honestly and responsibly in relation to the affairs of the Company rested on the first respondent, and my assessment of his evidence and submissions is that he has failed to discharge that onus. He is not absolved from that failure by my observations in relation to the matter of the applicant's legal representation. Accordingly, there will be a declaration that the first respondent shall not for a period of five years be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned in or take part in the

formation or promotion of a company, unless the company meets the requirements set out in section 819 (3) of the Act.