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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION
(COMPANIES)

IN THE MATTER OF SEATEM ATTRACTION TICKETS (UK) LTD
(IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION
(NORTHERN IRELAND) ORDER 2002

Between:

THE DEPARTMENT FOR THE ECONOMY

Applicant

and

RORY BRENDAN BURNS

Respondent

The Respondent appeared as a Litigant in Person
Mr McAteer (instructed by the Departmental Solicitor's Office) for the Applicant

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McBRIDE J

Application

[1] This is an application by the Department for the Economy ("the Department") seeking the disqualification of Rory Brendan Burns ("the respondent") from acting as a company director, pursuant to Article 9 of the Company Directors Disqualification (Northern Ireland) Order 2002 on the grounds that he is unfit to be concerned in the management of a company.

[2] The matters of unfit conduct relied on by the Department are as follows:

(a) Causing or permitting Seatem Attraction Tickets (UK) Ltd to retain £333,036.92 properly due to the Crown in respect of NIC and PAYE.

(b) Causing or permitting Seatem Attraction Tickets (UK) Ltd to fail to pay £71,233.66 properly due to the Crown in respect of corporation tax.

(c) Failing to file accounts for the year ended 31 December 2008.

(d) Causing or permitting Seatem Attraction Tickets (UK) Ltd to fail to file the annual returns for the years ended 28 February 2007 to 28 February 2009 inclusive, within the prescribed periods with Companies House and failing to file the annual return for the year ended 28 February 2010.

(e) Failing to fully cooperate with the Official Receiver in contravention of Article 199(2) of the Insolvency (Northern Ireland) Order 1989 by failing to provide the Official Receiver with information/documentation as requested.

[3] The application was grounded on the affidavit of David Bell, a senior examiner in the Disqualification Unit of the Insolvency Service sworn on 21 September 2012. He averred that based on information received from Joseph Hasson, Official Receiver, it appeared to the Department to be expedient in the public interest that a Disqualification Order under Article 9 of the 2002 Order should be made against the respondent.

Representation

[4] The Department was represented by Mr McAteer of counsel. The respondent appeared as a litigant in person. I am grateful to all parties for their industry in preparing chronologies and skeleton arguments.

The evidence

[5] The evidence was contained within a large volume of affidavits and accompanying exhibits. It commenced with the grounding affidavit of Joseph Hasson sworn on 21 September 2012. The respondent then filed a replying affidavit sworn on 6 November 2013. In his replying affidavit the respondent raised several issues which precipitated rejoinder affidavits from Gary McCappin, Senior Examiner in the Disqualification Unit, Pauline Brown, an employee in the Official Receiver's Office and Peter Cash, an employee in the Directors' Disqualification Unit. All these affidavits were sworn on 14 May 2014. In response the respondent filed three rejoinder affidavits sworn on 12 August 2014 and a filed further general rejoinder affidavit on 8 November 2016. Gary McCappin then filed a second affidavit on 9 November 2016 and a final affidavit was filed by the respondent on 15 January 2019.

[6] Notwithstanding the multiplicity of affidavits in this case the respondent applied to cross examine Gary McCappin and Mr Bell on the basis that issues involving credibility were at play. The Department did not object to this application and the court therefore heard evidence from Gary McCappin and Mr Bell who were both cross examined by the respondent over a period of three days.

A. Chronology of events

[7] The evidence in this case was both lengthy and factually complex as each party produced large volumes of documentation in support of their respective cases. The voluminous nature of the affidavit evidence and associated documentation containing allegations and counter allegations made it difficult at times to decipher the chronology of events and what exactly took place at each stage of the process.

[8] To determine the issues in dispute in this case, however it is both necessary and important to establish a precise chronology of when a significant event took place, where it took place, who was present and what was said or done. Accordingly, having regard to both the affidavit and oral evidence I made several findings of fact in respect of the chronology which I set out below. Although there were several hotly contested issues, I refer only to those matters that have a bearing on the issues I must determine.

(i) Background Facts

[9] The following background facts are not much in dispute:

(i) Seatem Attraction Tickets (UK) Ltd ("the Company") was incorporated on 23 March 1993 and carried on the business of providing tickets for entertainment.

(ii) The company ceased trading on 11 August 2010.

(iii) On 22 April 2010 a winding up petition was presented. The petitioning creditor was HMRC.

(iv) On 23 September 2010 a winding up order was made with an estimated total deficiency of £13,187,673.

(v) At the date of winding up the respondent was a director of the company, having been appointed on 3 June 1993.

(vi) The respondent was involved in a group of companies. The group structure is complex and consists of numerous UK and non-UK registered companies. He is also director of several other UK registered companies.

(vii) On 12 January 2011 the respondent was adjudicated bankrupt with an estimated deficiency of approximately £15,000,000 at the date of the bankruptcy.

(ii) Chronology of correspondence and meetings between the Official Receiver and the respondent

[10] The chronology of correspondence and meetings between the Official Receiver and the respondent was the subject of much dispute. I set out below my findings of fact.

(i) On 18 October 2010 the respondent attended the preliminary examination and completed the questionnaire. At the meeting he agreed to provide 20 items of information within a period of three weeks.

(ii) On 3 November 2010 in response to the request for further information, the respondent's accountant Mr McGinnity provided a "blue" file of papers. Pauline Brown avers in her affidavit that this file was not received by her until 22 November 2010 "at the earliest." On the same date the respondent sent an email attaching accounting records for the company for two years prior to the cessation of trading.

(iii) On 8 November 2010 Pauline Brown sent a further letter requesting the respondent provide the 20 items originally requested.

(iv) In response on 12 November 2010 Mr McGinnity emailed Pauline Brown attaching employee and redundancy details and stated:

> "I prepared information for [Mr Burns] during the week ending 22 October 2010, this was based on the … list of requirements you gave him at your meeting … it appears you have not received everything I have prepared so if you could let me know what you have received, and I will send you over any other information immediately."

Pauline Brown did not reply to this letter.

(v) On 22 November 2010 the Official Receiver's Office sent a further letter to the respondent stating the information/items requested on 18 October 2010 and on 8 November 2010 were "not received."

(vi) On 12 January 2011 the respondent was adjudicated bankrupt.

(vii) On 6 May 2011 the respondent attended a meeting at the Official Receiver's office. At this meeting he was asked to provide further information to explain the company's deficiency.

(viii) On 19 May 2011 the respondent attended a deficiency interview. He provided an explanation for the deficiency but refused to sign the statement/record of the meeting prepared by Pauline Brown.

(ix) On 29 September 2011 an internal case review took place. Pauline Brown sent a note to Peter Cash to say she had contacted Mr Paolo Malgeire (employee of the liquidators) who confirmed that no proper books and records were provided to them by the company and that they had no explanation for the deficiency.

(x) On 1 March 2012 Peter Cash corresponded with the respondent in identical terms to the letter of 8 November 2010 and request the same information. The letter did however request an additional six items including an explanation for the company's deficiency.

(xi) On 21 March 2012 there was a meeting between Peter Cash and the respondent to establish what further information needed to be provided. There is no minute of this meeting.

(xii) On 23 March 2012 Peter Cash sent a follow up letter to the respondent requesting the previously requested information and requested a statement of affairs within 14 days. The correspondence enclosed the "blue" file, the preliminary investigation questionnaire and the list of known creditors "to assist the preparation of a statement of affairs."

(xiii) On 30 April 2012 Peter Cash corresponded with the respondent, indicating the information sought had not been received and gave a warning that if it was not received within the set time frame it would be treated as non-cooperation.

(xiv) On 11 May 2012 Peter Cash sent an email noting that the respondent had sought additional time to respond, and he granted him additional time to provide the information requested.

(xv) On 11 May 2012 by letter the respondent provided some but not all the information sought. He provided the 2008 accounts, VAT number, PWC report, a narrative statement and a copy lease. The respondent apologised for the delay in reply and indicated the statement of affairs would follow. He further stated in the correspondence:

> "It has not been possible to determine the quantum of the outstanding loans to the associated companies as at the date of liquidation. In the immediate aftermath of the closure of the business, the bills for the support services for the technology were unpaid and the data on the computer software service was lost. A full backup was kept by the financial accountant on his laptop, but that

computer suffered a major corruption of the hard disc, and the information was lost."

This explanation was also given for failure to provide primary books and records and movement in the debtor figure. This letter is date stamped, as received by the Insolvency Service on 25 May 2012.

(xvi) On 19 June 2012 Peter Cash wrote to the respondent requesting a statement of affairs and sought a response to questions about the creditors referred to in the 2008 accounts.

(xvii) On 2 July 2012 the respondent phoned and asked to meet Peter Cash regarding the 19 June 2012 letter.

(xviii) On 25 July 2012 a meeting took place between Peter Cash and the respondent. No minutes were kept of this meeting.

(xix) On 25 July 2012 Peter Cash corresponded with the respondent seeking the information requested in the letter of 19 June 2012 to be provided within seven days.

(xx) On 10 September 2012 letter before action setting out the matters of unfit conduct was sent to the respondent.

(xxi) On 20 September 2012 the respondent avers he hand delivered the statement of affairs. The Department avers the statement of affairs was not received until 21 September 2012.

(xxii) On 21 September 2012 proceedings were issued.

(xxiii) On 28 March 2013 the respondent met David Bell during which there was a discussion about several matters including the delivery and receipt of the email dated 3 November 2010.

(xxiv) On 11 July 2013 the Departmental Solicitor's Office replied to respondent's letter which repeats queries he raised at the meeting on 28 March 2013.

B. Findings of fact in respect of the alleged matters of unfit conduct

(i) Did the respondent cause or permit the company to retain £333,036.92 properly due to the Crown for NIC and PAYE?

(ii) Did the respondent fail to pay £71,233.66 properly due to the Crown in respect of Corporation Tax?

[11] The Department submits that a proof of debt dated 21 October 2010 was received in the sum of £434,101.97 from the Inland Revenue. This debt included legal costs, post cessation estimates and interest. When these items were deducted, the amount outstanding to the Inland Revenue was £404,260.58. £333,036.92 of this debt was in respect of PAYE and NIC for the years 2004-2005/2010-2011 and £71,233.66 was in respect of corporation tax for years end 2008 and 2014.

[12] The Department alleges that the respondent therefore retained moneys properly due to the Crown in respect of NIC, PAYE and corporation tax.

[13] In response, the respondent avers that VAT and PAYE refunds totalling £332,538.24 were due to the company and the refunds due would have virtually set off the entire Crown debt of £333,000 approximately in respect of PAYE and NIC. He further avers that the company had appealed the corporation tax assessment. At a meeting with HMRC adjustment assessments had been agreed in principle by HMRC which, if implemented, would have wiped out the corporation tax due by the company in its entirety. These adjustments, however, were not implemented before the company ceased trading.

[14] As appears from the affidavit evidence and the oral evidence, there was much dispute about whether HMRC had provided accurate information to the Insolvency Service about the amount of debt due and owing. Based on the affidavit evidence, I am satisfied that initially there were conflicting responses from HMRC as to whether the VAT refunds due had been offset against the final debt claimed by HMRC. Having carefully considered all the evidence however I am satisfied that the sums claimed by HMRC are correct. Due to the confusion which had arisen from the initially conflicting responses given by HMRC Peter Cash went to great lengths to confirm and double check the position with HMRC. After the initial confusion, HMRC confirmed on at least seven subsequent occasions that the claim of £434,101.97 had been calculated after it had taken into account all refunds due to the company. HMRC therefore stood by its claim and in an email dated 22 May 2015, HMRC stated:

> "I can confirm that there is no amount to be repaid or offset against other HMRC debt."

[15] Further, importantly, the winding up order was made by the Court on foot of this debt figure. The amount of the debt was not appealed or challenged by the respondent at that time and therefore cannot now be challenged in disqualification proceedings. Further the independent report from PWC confirmed these debts were due to the Crown by the company and most recently in the statement of affairs filed by the respondent he accepts the Crown debt and does not attempt to resile from it in any way.

[16] I am therefore satisfied that the company failed to pay £404,260.58 due and owing to the Crown in respect of NIC, PAYE and corporation tax.

(iii) Did the respondent fail to file accounts for the year ending 31 December 2008?

[17] The Department avers that a search of the Companies House discloses that the last annual accounts for the company were filed for year ending 31 December 2007. Although the respondent provided the Official Receiver with draft accounts for year ending December 2008, accounts for year ending December 2008 were never filed with Companies House.

[18] The respondent accepts that the accounts were not filed but submits that he did not do so as he had a fiduciary duty to act in the best interests of the company. After taking legal advice, (details of which were not provided to the court), it was considered by the directors that filing these accounts would have had a destabilising effect on the customer base and would have led to a loss of contracts and therefore diminished the value of the company. As such the company decided not to file these accounts as they considered it was not in the best interests of the company. The respondent further submitted that failure to file the accounts did not cause any prejudice to creditors or third parties.

[19] On the basis of the evidence and in particular the admission by the respondent that the accounts were not filed I am satisfied the respondent failed to file the 2008 accounts with Companies House.

(iv) Did the respondent cause or permit the company to fail to file annual returns within the prescribed periods?

[20] The Department avers that a search of Companies House discloses that the company filed late annual returns in that the annual returns due on 28 February 2008 were not filed until 27 May 2009, namely a delay of over one year and the returns due on 28 February 2009 were not filed until 12 March 2009, namely a delay of twelve days.

[21] The respondent submitted that under the relevant legislation annual returns cannot be judged as being late if filed more than 28 days after the date "to" which they are made up and can only be judged by reference to the date "on" which they are made up. As all the returns were filed within 28 days after they were made up, he submitted there was no breach of the statutory obligations placed on the company in this regard. He further submitted that even if he was wrong in his interpretation of the statute only two returns were filed late in a context where there was a pattern of general overall compliance with statutory obligations by the company.

[22] Article 371(2) of the Companies (Northern Ireland) Order 1986 provides:

> "… the return must be delivered not later than 28 days after the date on which it is made up."

[23] The website of Companies House, which provides guidance to companies states that "the annual return must be delivered to Companies House within 28 days of … the anniversary of the made-up date of the last return."

[24] I consider that the purpose of the statutory requirement to file annual returns is to inform creditors about the financial state of the company and therefore it is important that this information is made available to them in a timely manner to inform their decision making. To interpret the statute in the manner advocated by the respondent would frustrate its purpose as a company could deliberately only make up annual returns long after the date they relate to and then file them within 28 days of completion. Such returns would serve no useful purpose. Accordingly, in line with the guidance provided by Companies House I consider that the intention of Parliament was to ensure annual returns were filed within 28 days from the date to which they relate. Therefore, based on the agreed evidence I am satisfied that two annual returns were filed late.

(v) Did the respondent fail to fully cooperate with the Official Receiver?

[25] As appears from the "Chronology of correspondence and meetings between the Official Receiver and the respondent" set out above I find that there was a level of cooperation by the respondent, especially at the beginning of his engagement with the Official Receiver. In particular, he attended the initial preliminary examination and completed the questionnaire. Thereafter, he responded to some correspondence by sending emails and in addition he instructed his accountant to obtain the information requested and his accountant, on his behalf sent a "blue" file of papers to the Official Receiver's office. Thereafter, although the respondent did not always answer correspondence he did arrange and attended several meetings with representatives of the Official Receiver's office. Because of his engagement, either personally or through his accountant the respondent ultimately provided most but importantly not all the information requested by the Official Receiver.

[26] Notwithstanding my finding that the respondent did engage with the Official Receiver, I am satisfied that his engagement did not represent full co-operation. This is because much of the Official Receiver's correspondence went unanswered and when information was provided by the respondent it was often late, piecemeal and incomplete.

[27] Examples of the respondent failing to provide important information to the Official Receiver in a timely manner thereby making it difficult for him to undertake his work include his failure to provide the Statement of Affairs when requested. Although the respondent ultimately did provide a Statement of Affairs this was not received by the Insolvency Service until 21 September 2021, some two years after it was initially requested and on the day on which proceedings were issued. The

respondent averred that the statement of affairs was delayed because he was waiting for the Northern Bank to pursue a third-party claim which would have had the effect of reducing the company's liability to the bank. The respondent, who is a qualified accountant, however, accepted that this matter could, in the usual way, have been explained by "a note" on the Statement of Affairs. Accordingly, I do not consider that he proffered any acceptable or credible reason for the substantial delay in failing to provide a Statement of Affairs before proceedings were issued. The Statement of Affairs is a very important document and one which greatly assists the Official Receiver in undertaking his role. I therefore consider that failure to provide the Statement of Affairs in a timely fashion amounted to a failure to fully cooperate with the Official Receiver.

[28] Another example of the respondent failing to provide information requested by the Official Receiver relates to the Official Receiver's requests for information and documentation to explain the company's deficiency. The company deficiency stood at £20m approximately at the date of winding up in a context where the company had moved from having net assets in December 2007 before winding up of approximately £8m to a deficiency at winding up of £12m approximately. Although the respondent attended a "deficiency" meeting with Pauline Brown, at the end of this meeting he refused to sign the minute of the meeting, prepared by Pauline Brown. He averred that he did not sign this minute as he did not fully understand what was meant by a company deficiency. I do not accept this explanation as credible. The respondent, who is a qualified accountant is, I consider, well versed in understanding what is meant by a company deficiency. Indeed, it is clear from his deficiency interview with Pauline Brown that he was able to explain the company's deficiency. He was simply not prepared to sign up to what he had stated at the interview. Subsequently, Peter Cash, by letters dated 1 March 2012 and 23 March 2012 again asked the respondent to explain the company's deficiency and by further letter dated 11 June 2012 asked for specific documentation which would have enabled him to gain an understanding of the company's deficiency. In particular, the respondent was asked to provide details of the exact amount of the loans made to the company by directors, the outstanding loans to the associated companies, the primary books and records from January 2008 to the date of winding up, details of bad debt and a list of customers who were owed money. None of these five items were ever provided by the respondent. Although the respondent says his letter of 11 May 2012 with accompanying attachments including the PWC report addressed these matters, I am satisfied that this email and attachments do not adequately explain the company's deficiency. Firstly, I do not accept the explanation given in the email that he could not provide the documents requested because this data was lost both from the company computer and the back-up computer. I find this explanation is incredible. Further, although he sought to persuade the court that the deficiency was fully explained in the PWC report that he provided to the Official Receiver, I do not accept it did. Having considered this report I agree with the Official Receiver that the PWC report does not explain why the company had a deficiency of over £20,000,000 at the date of winding up. Indeed, within the report the author refers to a lack of visibility which it stated, "adds to the uncertainty of the

recoverability of the intergroup debt." In all the circumstances I am satisfied that the respondent's failure to provide documentation to explain the company's deficiency meant the Official Receiver was unable to independently review the explanation provided by the respondent and in particular was unable to ascertain whether debts were owed by the company to associated companies and/or the directors; when these debts were incurred; why these debts were incurred and whether it was likely that these debts would be recoverable. I am satisfied that the respondent could have provided much more information to explain the deficit and was in a position to provide details of the loans made by him as a director to the company and loans owed by the company to associated companies of which he was also a director. I find that the respondent sought to hide behind the complexity of the company group to deliberately fail to explain how the deficiency of some £20,000,000 existed at the date of winding up. Failure to provide information to explain the company deficiency made it much more difficult for the Official Receiver to undertake his role.

[29] I am therefore satisfied that the respondent did not fully cooperate with the Official Receiver as he failed, without reasonable excuse, to provide important documentation to the Official Receiver either at all or in a timely fashion.

[30] As a consequence of the respondent's failure to cooperate fully, especially having regard to his failure to provide a Statement of Affairs in a timely fashion and to adequately explain the company's deficiency I am satisfied the Official Receiver has been unable to:

(i) Form a complete picture of the affairs of the company.

(ii) Obtain an explanation for the company's deficiency.

(iii) Establish the assets and liabilities and financial position of the company at the date of winding up.

(iv) Determine whether the company became insolvent through genuine trading difficulties.

(v) Define what monies, if any, were loaned to the company by the directors and/or shareholders and establish how these funds were dispersed throughout the company and/or its group.

(vi) Establish which customers, if any, paid deposits to the company for goods or services that were subsequently not provided by the company.

C. Practices, processes and systems within the Official Receiver's office

[31] This case raised concerns about the practices, processes and systems within the Official Receiver's office, which I wish to highlight. First and foremost, the Official Receiver and the officials who swear affidavits on his behalf owe a duty of

candour and good faith to the court. They have a duty to be fair to respondents and in particular to present any evidence which is in his or her favour. This is especially so in circumstances where respondents are often unrepresented and financially disadvantaged.

[32] Secondly, affidavits should only set out facts. They should not contain comments, particularly adverse personal comments or matters of law. These are matters for submission and putting such comments in affidavits leads to unnecessary proliferation of affidavits precipitated by a perceived need to answer such comments. This occurred in this case. It is preferable in the future for those preparing and swearing affidavits to make sure they distinguish between facts and the inferences they invite the court to draw from the facts. Affidavits should also avoid generalised sweeping statements which can be misleading.

[33] In this case I found that the affidavits frequently failed to distinguish between facts and inferences to be drawn from the facts and often made sweeping statements. They also contained comments and matters of law. More concerningly, I considered that some of the affidavits in some respects were misleading and unfair to the respondent and on occasions failed to refer to information which would have been in the respondent's favour. By way of example the affidavit of one official grounding the application repeatedly stated that the respondent had "failed to deliver up the information requested and did not contact my examiner to explain the reasons for failing to do so." The repetition of this statement created the impression that the respondent had failed to make any attempt to cooperate with the Official Receiver. In fact, he had provided documentation either personally or through his accountant and had attended several meetings with the Official Receiver. I therefore consider that the statement did not fairly reflect the cooperation exhibited by the respondent at that date, and more importantly created a very misleading impression that he had not cooperated at all. Under questioning from the court Mr Bell accepted that these statements in the affidavits were misleading.

[34] Another example where I considered the Department created a misleading and unfair impression was the reference in the supporting grounding affidavit to their engagement with an employee of the liquidators, Mr Malgeire. The Department were unable to produce evidence of the email where Mr Malgeire allegedly made the serious adverse comments about the respondent. The Department ultimately did not rely on these comments to establish unfit conduct. This was because they were not able to prove them. In such circumstances I consider these comments should never have been referred to in the affidavit. Their insertion created a false and unfair impression of the respondent. It is important in the future that affidavits are not framed in a misleading way, given the duty of the Department to be fair to respondents. It is important that they refer to any conduct which is in the respondent's favour and omit reference to extraneous prejudicial material which they do not intend to rely on or cannot prove. The duty of officials to be fair is of the utmost importance in these cases as an application for disqualification has an element of public interest and entails serious consequences for respondents.

[35] Part of the duty to be fair of necessity includes the need to be accurate and to refer to all documentation which is in the respondent's favour. In this case several of the Department's officials repeatedly averred in their affidavits that responsibility lay with the respondent to provide the information requested and that they did not seek it from and would not accept it from an employee of the company. In fact, the email chain brought to the attention of the court by the respondent demonstrates that the officials had in fact liaised directly with Mr McGinnity, the company accountant, and had requested and received information from him. The averment made by the officials was therefore not only factually wrong but more concerningly failed to reference the email chain including importantly the fact the email dated 12 November 2010 sent by Mr McGinnity offered to provide any missing information requested. I consider the failure to reference the email chain and the engagement with Mr McGinnity was unfair as it did not reference information which was in favour of the respondent and as a result the affidavit evidence created an emphasis which was unfairly slanted against the respondent. Although I consider this information should have been included within the affidavits and that officials ought to have issued a response to Mr McGinnity, I consider that the mere presence of this email does not excuse the respondent's later non-cooperation. As appears from all the correspondence, the chronology and the meetings with Peter Cash in particular, I am satisfied that the respondent was fully aware that he knew he needed to provide additional information and notwithstanding this knowledge failed to do so.

[36] Thirdly, I have concerns about the lack and/or failure of systems within the Official Receiver's office. It appears that there was a failure to keep minutes of meetings, for example there were no minutes of important meetings between officials and the respondent on 21 March 2012, 25 July 2012 and 28 March 2013. There was also a failure to date stamp receipt of documents. For example, the company accountant alleged he sent in a blue file of papers on 3 November 2010. The officials averred it was not received by them until 22 November 2010 "at the earliest." No evidence was produced to show the date stamp of receipt and as appears from the wording "at the earliest" the deponent could only vaguely state when the documentation was received. All of this indicates, I find, a lack of robustness in the administrative processes within the Official Receiver's office. In the absence of such systems and processes there is no clear record of what information was received and when it was received. The failure of such systems has given rise to a number of unnecessary allegations and counter allegations for the court to rule upon and at this remove it is more difficult to establish the facts. If the Official Receiver wishes to bring proceedings for disqualification based on a lack of cooperation it is essential that he is in a position to establish when the information was requested, what was requested, what information was provided and when it was provided. This can only be done if there are robust administration processes in place.

[37] It also appears that the office relies heavily on precedent letters. As appears from the chronology, precedent letters were repeatedly sent to the respondent. The letters were identical in nature and simply requested the original 20 items requested at the preliminary interview. These letters did not reflect the fact that he had already provided some of the items requested and I have no doubt that this led to confusion on his part. It is important in the future that correspondence is tailored to each individual case so that the recipient of the letter is clear what information remains outstanding. I further note that the fact precedent correspondence was used, which was not individually tailored and did not therefore refer to the fact there had been some information provided led to the affidavits, (which exhibited all this generic correspondence), creating the false impression that the respondent had completely failed to cooperate.

[38] The final matter of concern relates to the email dated 3 November 2010. Much ink has been spilled in respect of whether this document was sent or received. The Department now belatedly accepts that the email was sent but continues to aver that it was not received by the office and Pauline Brown has averred on oath that she did not receive it. Pauline Brown was not called to give evidence and was not cross examined by the respondent in respect of this assertion. In the absence of expert evidence about whether a sent email may not be received even when sent to the correct address, I am unable to rule on this matter. Given that it is accepted by the Department the respondent never received a message that his email was undelivered, and therefore had no way of knowing it had not been received, it was unfair and unwarranted for officials to state in affidavit evidence that he ought to have known that they had not received the information attached to this email. Although correspondence was sent by officials after the date of this email requesting the same information, given the generic nature of the correspondence I find it would not have alerted the respondent to the fact his email had not been received and therefore it was unfair for officials to suggest on affidavit that he ought to have known the information had not been received and such comments ought not to have been made on affidavit. Such commentary is more properly a matter for submission.

[39] Given that these cases are dealt with generally on affidavit evidence only the court expects candour, good faith, fairness and adherence to the court rules in respect of the content of affidavits. It is also important that the Department is able to prove its case by reference to documentation which can be authenticated. In this case there have been a number of failures in all of these respects. It is important that these are considered so that in the future robust systems are put in place and officials are made fully aware of the duties they owe to the court so that the affidavits filed comply with these duties and the rules of court.

D. Consideration - Is the respondent an unfit person to be concerned in the management of a company?

(i) Relevant legislation in respect of disqualification of Company Directors

[40] The Company Directors Disqualification (Northern Ireland) Order 2002 provides as follows:

"9. **Duty of High Court to disqualify unfit directors.**

(1) The High Court shall make a disqualification order against a person in any case where, on an application under this Article -

(a) the court is satisfied—

(i) that the person is or has been a director of a company, which has at any time become insolvent …

(b) the court is satisfied that the person's conduct as a director of that company… makes the person unfit to be concerned in the management of a company …

(3) Under this Article the minimum period of disqualification is 2 years, and the maximum period is 15 years.

17A **Determining unfitness, etc.: Matters to be taken into account**

(1) This Article applies where the High Court must determine:

(a) whether a person's conduct as a director of one or more companies or overseas companies makes the person unfit to be concerned in the management of the company …

(c) where the court … is required to make an order under Article 9, what the period of disqualification should be …

(3) In making any such determination in relation to a person, the High Court, or the Department must:

(a) in every case, have regard to in particular to the matters set out in paras 1-4 of Schedule 1.

(b) in a case where the person concerned is or has been a director of the company or overseas

company, also have regard in particular to the matters set out in paras 5-7 of that Schedule.

SCHEDULE 1 - Determining unfitness etc: matters to be taken into account

Matters to be taken into account in all cases.

1. The extent to which the person was responsible for the causes of any material contravention by a company or overseas company of any applicable legislative or other requirement.

2. Where applicable, the extent to which the person was responsible for the causes of a company or overseas company becoming insolvent.

3. The frequency of conduct of the person who falls within paragraph 1 or 2.

4. The nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person's conduct in relation to a company or overseas company.

5. Any misfeasance or breach of any fiduciary duty by the director in relation to a company or overseas company.

6. Any material breach of any legislative or other obligation of the director which applies as a result of being a director of a company or overseas company.

7. The frequency of conduct of the director which falls within paragraph 5 or 6."

[41] The Companies Act 2006 and the Insolvency Order (Northern Ireland) 1989 impose several legal obligations upon company directors. In particular sections 394-399 of the Companies Act 2006 provide that a director of a company is under a duty to prepare and deliver annual accounts to the registrar and section 854 provides that a director is under duty to deliver to the registrar annual returns. Article 199 of the Insolvency Order (Northern Ireland) 1989 provides that a director has a duty to cooperate with the Official Receiver giving him such information concerning the company as he may, at any time, reasonably require.

(ii) The general legal principles regarding disqualification of Company Directors

[42] The following general principles can be drawn from the jurisprudence on directors' disqualification:

(a) The matters set out in Schedule 1 are not exhaustive. The court can take into consideration any misconduct on the part of the company director in determining whether he is unfit to be concerned in the management of a company.

(b) The standard of proof is the civil standard, and the burden of proof is on the Department.

(c) If the court finds the director is unfit to be concerned in the management of a company, it must impose a period of disqualification. There is no judicial discretion not to impose a period of disqualification.

(d) Unfit conduct is not defined in the legislation.

(e) The test to be applied is whether the person's conduct as the director of the company or companies in question makes him unfit to be concerned in the management of a company. No gloss is to be applied to the words of the statute – see *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch164.

(f) The task of the court is to decide whether the conduct, viewed cumulatively and taking into account any extenuating circumstances, falls below the standard of probity and competence appropriate for persons fit to be directors of companies – see *Re Grayan Building Services Ltd (In Liqui)* [1995] Ch 241.

(g) The test is principally objective, but it has subjective elements to it. In *Re D'Jan of London Ltd* [1994] 1 BCLC 561 Hoffmann LJ stated:

> "The standard to be applied is an objective one. The duty of care, skill and diligence which a director owes a company is that set out in Section 214(4) of the Insolvency Act 1986, namely the conduct of "… a reasonably diligent person having both—
>
> (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and
>
> (b) the general knowledge, skill and experience that that director has."

[43] Whilst each case ultimately turns on its own peculiar facts, it is instructive to consider the jurisprudence which demonstrates the types of conduct which merit disqualification. The following examples are illustrative of the type of conduct which merit disqualification.

(a) Conduct which, if not dishonest, is at any rate in breach of the standards of commercial morality or some really gross incompetence which persuades the court that it would be a danger to the public if the director were allowed to continue to be involved in the management of companies. See *Re Dawson Print Group* [1987] BCLC 601 per Hoffman J.

(b) Where there is some "serious failure or serious failures, either deliberately or through incompetence, to perform those duties of directors which are attendant on the privilege of trading through companies with limited liability" – see *Re Bath Glass Ltd* [1988] BCLC 329.

(c) Unfitness can be established from inactivity or failure to act as well as from positive actions – see *Re Continental Assurance Co of London plc, Secretary of State for Trade and Industry v Burrows* [1997] 1 BCLC 48.

(d) Where there is conduct showing "want of probity in dealing with certain creditors as well as reckless disregard of the interest of creditors including the Crown" – see *Re Ipcon Fashions Ltd* [1989] 5 BCC 773.

(e) Whilst gross negligence or total incompetence is sufficient conduct to merit disqualification, simple commercial mismanagement leading to failures that are "commercially understandable" do no justify disqualification – see *Re Lo-Line Electric Motors Ltd* [1988] Ch 477 where Sir Nicolas Browne-Wilkinson VC stated at 486:

> "Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

(e) Each individual director owes duty to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them – per Lord Woolf MR in *Re Westmid Packaging Services Ltd (No.3), Secretary of State for Trade and Industry v Griffiths (No.2) and others* [1998] 2 All ER 124. It follows that where a director does not involve himself at all in the affairs of a company and/or fails to monitor, supervise or keep himself informed about them; his conduct will almost certainly warrant the imposition of disqualification – see *Re Park House Properties* [1997] 2 BCLC 530.

(iii) Is the Respondent unfit to be a director?

[44] The applicant submits that the respondent is unfit to be a director by reason of his failure to pay Crown debts and operation of a policy of discrimination in favour of other trade creditors and breach of legislative obligations including failure to file accounts, failings late returns and failing to cooperate fully with the Official Receiver.

(a) Did the respondent fail to pay Crown debt and operate a policy of discrimination?

[45] The Department submits the company failed to pay Crown debts including NIC, PAYE and corporation tax and the company operated a policy whereby it discriminated against the Crown in favour of other creditors. To make good this allegation they rely, in particular, upon the statement of affairs filed by the respondent. This shows that from December 2008 to September 2010 the position of trade creditors improved by £2,754,799. In the same period Crown debt increased from £41,991 to £333,036 an increase of 131%. At the date of winding up Crown debt in respect of PAYE and NIC comprised 17.4% of non-preferential creditors. The Department also referred to HMRC documentation which demonstrated a history of arrears from 2006. Various negotiations to agree a repayment plan took place between the directors and HMRC to agree a repayment plan but the Crown debt continued to increase. The PWC report confirms the history of non-payment of Crown debt stating the directors were in the process of agreeing a repayment plan, but Crown debt continued to build throughout 2009. In light of all the evidence, the Department submitted that the respondent was fully aware of the difficulty the company had in paying Crown debt from at least March 2008 but not withstanding this, the company continued to trade until August 2010 in a manner whereby specific Crown creditors were treated less favourably than the general body of trade creditors.

[46] In response the respondent denied that debt was due to the Crown. He further averred that the company did not treat the Crown less favourably as it demonstrated good faith in entering into extensive discussions with HMRC for repayment of the debt preceding the decision to cease trading. He further averred that the only reason the creditors' position improved throughout this period was due to an injection of money by the directors.

[47] Non-payment of Crown debt is not automatically evidence of unfit conduct. If a company however deliberately chooses to withhold payment to a non-pressing creditor for commercial or other reasons, in order to allow it to continue trading, such conduct may amount to a finding of unfitness. It is, however, a necessary ingredient of the charge that the company should have pursued a policy of payment that discriminated against such a creditor. Whether there has been a policy of discrimination will depend upon all the circumstances of the case. The court will readily infer such a policy where a company withholds payment to a non-pressing

creditor over a substantial period of time or where the debts to that creditor form a significant proportion of the company's deficiency. If a director is found to have deliberately operated a policy of non-discrimination against the Crown over a lengthy period of time, such conduct is likely to amount to misconduct which merits disqualification.

[48] I had found, notwithstanding the respondent's averment that no debt was due to the Crown, that the company failed to pay Crown debt in respect of NIC, PAYE and corporation tax. I am further satisfied that that debt had not been met since 2008/2009 and at the date of winding up it comprised 17.4% of non-preferential creditors. I am satisfied that the Crown was not pressing for payment as during this period there were ongoing discussions to agree a repayment plan. I am further satisfied from the Statement of Affairs filed by the respondent that during this period when the Crown was not pressing for payment, trade creditors were prioritised over HMRC in that their position improved and the position of the Crown significantly deteriorated. Throughout this period the respondent knew that debt was due to the Crown as he was engaged in discussions to agree a repayment plan and in light of the forbearance of the Crown, he chose to use the monies due to the Crown as working capital to pay other creditors and to allow the company to continue to trade. In all the circumstances I am satisfied that the respondent operated a policy of discrimination against the Crown. The fact the respondent indicated the creditors' position improved because of the injection of money by the directors is further evidence of a policy of discrimination. The respondent was clearly aware of the difficulty the company had in paying Crown debt and not withstanding this the directors favoured trade creditors so that the company could continue to trade and accordingly treated the Crown less favourably than other creditors. Consequently, I am satisfied that the respondent operated a policy whereby he permitted the company to trade in a manner where trade creditors were prioritised over HMRC. As the authorities indicate such conduct merits disqualification.

(b) Does the failure to file accounts/annual returns constitute misconduct?

[49] The Department submits that the respondent is unfit because he failed to file accounts for year ending 31 December 2008 and filed late annual returns for years ending February 2008 and February 2009. They accept that this conduct in isolation may not merit disqualification but submit it must be viewed in conjunction with the other allegations of unfit conduct.

[50] I have found that the accounts for year ending December 2008 were not filed and two sets of returns were filed late. This conduct amounts to a breach of the legislative requirements placed upon company directors under the Companies Act 2006 which are couched in mandatory terms.

[51] In determining whether this conduct amounts to unfitness, it is necessary not only to look at the nature of the breach, but its frequency and the harm caused. The

purpose of the statutory provisions regarding companies to file audited accounts and annual returns within a specified time limit is to enable members of the public who have dealings with a company to have access to relatively up to date information, especially financial information about the company so they can make informed decisions for example about investment. Failure to provide such information to creditors in a timely way can cause prejudice to them.

[52] I consider that, notwithstanding the failure to file one set of accounts and the late filing of two sets of annual returns, there was an overall pattern of compliance with the statutory obligations placed upon the company directors. I consider that the failure to file accounts and the late failure of two annual returns constituted isolated examples of a failure to have regard to their statutory obligations and I therefore do not consider there was a persistent or blatant disregard for the statutory obligations. I therefore find that there was no wilful disregard by the respondent of the duties placed upon him as a director. I do however consider that breach of the statutory obligations created potential prejudice to creditors. The respondent indicated that after taking legal advice the accounts were not filed because there was a concern that filing the accounts would have had a destabilising effect upon the company. I have not been provided with the legal advice, but I consider this excuse is an aggravating feature as the purpose of the statutory obligations is to prevent prejudice to creditors. It is important creditors know if a company is in financial difficulties. The respondent however decided that the creditors in this case would be denied the opportunity of knowing that the company was facing financial problems. Notwithstanding the potential for prejudice, I am nonetheless satisfied that there is no evidence of actual prejudice to creditors due to the failure to file one set of accounts and the late filing of two sets of returns.

(c) ***Does the respondent's failure to cooperate with the Official Receiver constitute unfit conduct?***

[53] Failure to cooperate with the Official Receiver is a breach of the statutory obligations placed upon a company director and on its own may justify disqualification especially where such non-cooperation significantly impacts on the ability of the Official Receiver to carry out his functions.

[54] I have found that the respondent failed to fully cooperate with the Official Receiver and in particular failed to provide the Statement of Affairs in a timely fashion and failed to provide documentation to fully explain the company's deficit of £20,000,000 + at the date of winding up.

[55] The failure to provide the Statement of Affairs in a timely manner and the failure to explain the company's deficit I have found interfered with the Official Receiver's ability to carry out his function. As a consequence of the information not being provided the Official Receiver was unable to identify the debtors of £17,000,000+. Such information would have provided reassurance in respect of the unexplained company deficit of £20M which arose between the date of the last set of

accounts and winding up. Nonetheless I am satisfied the Official Receiver was not totally hampered in his role. In particular he did not deem it necessary to exercise other powers open to him to obtain information from the respondent and he was able to prepare his own Statement of Affairs from the information supplied by the respondent.

[56] I am satisfied that the failure to co-operate fully with the Official Receiver in conjunction with the failure to abide by the statutory obligations and the operation of a policy of discrimination against the Crown, taken together are sufficient to amount to misconduct which makes the respondent unfit to be concerned in the management of a company and therefore merit disqualification.

(d) What period of disqualification should be applied?

[57] Under Article 9(3) of the Company Directors Disqualification (Northern Ireland) Order 2002 the Court must impose a disqualification period of between two and 15 years.

[58] In *Re Sevenoaks* the Court of Appeal put forward a number of bands in respect of periods of disqualification. It stated that the top bracket of disqualification for periods over 10 years should be reserved for serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again. The top bracket is also likely to include those serious cases involving fraud, dishonesty or deceit. The minimum bracket of two to five years disqualification should be applied where, although disqualification is mandatory, the cases are relatively not very serious. The middle bracket of disqualification from six to 10 years apply to serious cases which do not merit the top bracket.

[59] In determining what period of disqualification should be applied, I take into account a number of aggravating and mitigating factors in this case.

[60] I consider the aggravating features to be:

(a) the number of allegations of unfit conduct which range from failure to file accounts/annual returns through to a policy of discrimination against the Crown and a failure to cooperate fully with the Official Receiver;

(b) the harm caused by the misconduct. I take into account the fact that the Official Receiver was hampered in carrying out his role and in particular was unable to independently explain or understand the reason for the company's deficiency; and

(c) the failure to file accounts which was aggravated by the fact the respondent did not file the accounts because he was seeking to prevent creditors knowing the true financial state of the company and thereby created a risk of harm.

[61] In mitigation I take into account the fact that there was initial co-operation by the respondent with the Official Receiver and the fact he did ultimately provide most of the documentation requested. There was delay on his part in providing some of the information, but I accept that he was a director in a complex group of companies, and it did take time to get the information. Further delay arose because of the personal stress caused to him when he was made bankrupt. I accept that he was not assisted by the generic nature of the letters sent by the office of the Official Receiver. This is not therefore a case where the respondent failed to cooperate at all with the Official Receiver. Further I consider that the failure to file accounts and filing of late annual returns was not a deliberate policy of the company as there was a pattern of overall compliance with the statutory obligations. In relation to the Crown debt, the figures involved are relatively modest comprising 17.4% of preferential creditors at the date of winding up and amounting to over £333,000 in a context where the debts of the company were in excess of £12m at the date of winding up.

[62] Mr McAteer, on behalf of the Department submitted that the minimum bracket of two to five years disqualification was the appropriate bracket. I agree.

[65] Having regard to the aggravating and mitigating factors, I am satisfied that the disqualification period should be at the bottom end of this bracket, and I therefore impose the minimum period of two years disqualification.