THE HIGH COURT

[Record No. 2022/8 COS]

BETWEEN

WFS FORESTRY IRELAND LIMITED

AND

IN THE MATTER OF SECTION 747 OF THE COMPANIES ACT 2014

JOHN KEARNEY

APPLICANT

JUDGMENT of Mr. Justice Quinn delivered on the 19th day of July 2022

1. Part 13 of the Companies Act 2014 governs the regime for statutory investigation of the affairs of a company.

2. Chapter 3 of that Part provides for the appointment of an inspector by the Director of Corporate Enforcement. Investigations under Chapter 3 are concerned only with matters relating to share dealings and ownership of interests in a company.

3. Chapter 2 provides for the appointment of an inspector to perform a wider investigation into the affairs of a company. Such appointments are made by the court, either on the application of the Director of Corporate Enforcement (S. 748) or of other parties, including the Company, certain members, a director or a creditor (s.747).

4. Many applications have been made and inspectors appointed pursuant to s.748 (and its predecessor s. 8 of the Companies Act 1990) which provides for an application by the Director of Corporate Enforcement (or previously the Minister for

Enterprise and Employment). This case is the first recorded application by a creditor pursuant to section s.747, or its predecessor s. 7 of the Act of 1990.

5. The applicant is a creditor of WFS Forestry Ireland Limited ("the Company"). The Company was said to be engaged in the business of growing and supplying Christmas trees and solicited retail investments to fund the business. The applicant and at least seventeen others claim that investments they made in the Company, structured variously as loans and other advances, were not repaid when due. He makes a series of allegations in relation to the assets and activities of the Company and its sole shareholder and director and claims that the circumstances outlined in his evidence are suggestive of the Company having been formed for the purpose of engaging in a fraudulent scheme involving the soliciting of loans and other investments to fund fictitious forestry projects and to defraud creditors.

6. The allegations are denied and I shall return later to the affidavit evidence.

Representation and position of the parties

7. When the application was first issued and served the Company retained solicitors (Messrs Clarkin Lynch), who filed a replying affidavit on behalf of the Company. The affidavit was sworn by Mr. Craig Hands on 8th March, 2022.

8. Mr. Hands is the sole director and shareholder of the Company. He said that he was making the affidavit on its behalf and on his own behalf.

9. At the hearing of the application the Company was not represented by counsel or solicitors. Mr. Hands, on whom the application had been served, in his capacity as sole director and shareholder, represented both himself and the Company. No objection was taken by any party to this representation.

10. Mr. Hands opposed the appointment of an inspector.

11. Section 747(5) of the Act requires that notice of an application be given to the Director of Corporate Enforcement ('the Director'). The Director was represented at the hearing and made extensive and helpful submissions as to the law and considerations relevant to the exercise of the court's discretion under the section. He did not oppose the appointment of an inspector.

12. Conflicting affidavits were filed by the applicant and other investors on the one hand, and Mr. Hands on the other hand. The Director indicated that he did not have direct knowledge of those matters and accordingly did not wish to adduce any evidence as to the factual matters in controversy between those parties. He delivered an affidavit, sworn by a Principal Officer of his office, Ms. Sharon Sterritt, referring to certain complaints which the Director had received from investors in relation to the affairs of the Company, to which I shall return.

13. At the initial mention of the matter before the court I directed that notice of the application be given also to the Minister for Justice and Equality. This was done because s.762 provides that expenses of an investigation by an inspector appointed under the section must be defrayed in the first instance by the Minister. Accordingly, the Minister has a direct, if involuntary, "pecuniary" interest in the outcome of the application.

14. No affidavit evidence was adduced by or on behalf of the Minister. However, counsel for the Minister also made extensive submissions which were helpful to the court, again concerning the law and the manner in which the court should exercise its discretion. The Minister did not oppose the application.

Part 13, Chapter 2

15. Section 747 provides as follows: -

"747(1) On the application of a person or persons specified in subsection (2), the court may appoint one or more competent inspectors to investigate the affairs of a company in order to enquire into matters specified by the court and to report on those matters in such manner as the court directs.

(2) The court may make the appointment on the application of any of the following persons:

(a) the company;

(b) not less than 10 members of the company;

(c) a member or members holding one-tenth or more of the paid up share capital of the company (but shares held as treasury shares shall be excluded for the purposes of this paragraph);

(d) a director of the company; or

(e) a creditor of the company.

(3) The court's power of appointment under subsection (1) is exercisable notwithstanding that the company is in the course of being wound up.

(4) The court may require the applicant or the applicants to give security for payment of the costs of the investigation.

(5) A person who intends making an application under this section shall give not less than 14 days' notice in writing of his or her intention to apply to the Director, and the Director shall be entitled to appear and be heard on the hearing of the application."

16. Subsection 6 provides that the application be made to the High Court unless the company concerned is a small or medium company within the meaning of Section 350 of the Act, in which case the application should be made to the Circuit Court.

17. The applicant in his grounding affidavit states that because the Company has for a number of years been in default as regards the filing of annual returns or financial statements with the Companies Registration Office it is impossible for him to ascertain whether the company fell to be treated as a small or medium company and therefore he was making the application to this Court. No party contested the jurisdiction of this Court or suggested the application should be remitted to the Circuit Court.

18. The fact that the Act permits an appointment to small and medium companies is relevant to certain submissions made by the Director and the Minister considered later. (see paragraph 146(c) below)

19. Section 748 provides as follows: -

"(1) On the application of the Director, the court may appoint one or more competent inspectors to investigate the affairs of a company and to report on those affairs in such manner as the court directs, if the court is satisfied that there are circumstances suggesting that –

(a) the affairs of the company are being or have been conducted with intent to defraud -

(i) its creditors;

(ii) the creditors of any other person; or

(iii) its members;

(b) the affairs of the company are being or have been conducted for a fraudulent or unlawful purpose other than described in paragraph (a);

(c) the affairs of the company are being or have been conducted in an unlawful manner;

(d) the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to some part of its members;

(e) the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to some or all of its creditors;

(f) any actual or proposed act or omission of the company (including an act or omission on its behalf) was, is or would be unfairly prejudicial to some part of its members;

(g) any actual or proposed act or omission of the company (including an act or omission on its behalf) was, is or would be unfairly prejudicial to some or all of its creditors;

(h) the company was formed for a fraudulent or unlawful purpose;

(i) persons connected with its formation or the management of its affairs have, in that connection, been guilty of fraud, misfeasance or other misconduct towards the company or its members; or

(j) the company's members have not been given all the information relating to its affairs which they might reasonably expect.

(2) The court's power of appointment under this section is without prejudice to its powers under section 747 and is exercisable notwithstanding that the company is in the course of being wound up.

(3) Inspectors appointed under this section may be or include an officer or officers of the Director.

(4) A reference in subsection (1) to the members of a company shall have effect as if it included a reference to any person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law."

20. Subsections 5 to 8 govern the jurisdiction of the court and again there is provision for the application to be made in the Circuit Court in the case of the small or medium company.

Provisions common to Section 747 and 748

21. Section 749 provides as follows: -

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

22. Section 750 provides that an inspector may investigate the affairs of a related company where the inspector considers that doing so is necessary for the purpose of the investigation and has first obtained the approval of the court. In the affidavit evidence many references are made to companies related to the Company, but no application is before this court in relation to any related company. Any such an application would be made where appropriate by an inspector appointed to the Company.

23. Section 752 to 756 confer on an inspector, whether appointed under s.747 or 748, power to require officers, agents or other persons to produce to him all books or documents relating to the company which are under such persons control, to attend before the inspector and to give all required assistance in connection with the investigation. Section 756 authorises an inspector to examine certain persons on oath in relation to the affairs of the company or a related body under investigation.

24. Section 757 confers on the court certain powers which arise where persons default in cooperating with the inspectors and provides as follows: -

"(1) The court may make any order or give any direction it thinks fit if –

(a) an officer or agent of a company or related body corporate under investigation or a person referred to in section 754 refuses or fails within a reasonable time to –

(i) produce to the inspectors any book or document that it is that person's duty under sections 753 to 755 to produce.

(ii) attend before the inspectors when required to do so; or

(iii) answer a question put to that person by the inspectors with respect to the affairs of the company or other body corporate as the case may be;

(b) the inspectors [sic] have certified the refusal or failure to the court in a certificate signed by them; and (emphasis added)

(c) the court has taken the steps set out in subsection (2).

(2) The court may make an order or give a direction under subsection (1) if the court has –

(a) enquired into the case;

(b) heard any witnesses who may be produced against or on behalf of the person alleged to be in default; and

(c)heard any statement made in that person's defence."

25. Sections 758-761 govern the production of reports by inspectors and matters arising therefrom.

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

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

26. Section 759(1) *The court shall provide a copy of every inspectors' report to the Director.*

(2) The court may –

(a) forward a copy of an inspectors' report to the registered office of the company that is the subject of the report;

(b) provide a copy of an inspector's report on request to any of the following:

(i) a member of the company or other body corporate that is the subject of the report;

(ii) a person whose conduct is referred to in the report;

(iii) the statutory auditors of the company or other body corporate;

(iv) if other than the Director, the person or persons who applied for the appointment of the inspectors;

(v) any other person (including an employee or creditor of the company or other body corporate) whose financial interests appear to the court to be affected by the matters dealt with in the report;

(vi) the Central Bank, if the report relates, wholly or partly, to the affairs of a credit institution.

(3) The court may provide a copy of an inspectors' report to—

(a) an appropriate authority in relation to any of the matters referred to in section 791 (a) to (j); or

(b) a competent authority as defined in section 792 (2).”

(This includes such parties as the Minister for Justice, the Registrar of Companies, the Minister for Finance, The Revenue Commissioners, the Supervisory Authority, the Central Bank or in certain cases corresponding authorities outside the State).

(4) The court may cause an inspectors' report to be published in such form and manner as it thinks fit.

(5) The court may direct that a particular part of an inspectors' report be omitted from a copy that is forwarded or provided under subsection (2) or (3) or a report that is printed and published under subsection (4).

27. Section 760 (1) *After considering a report made under section 758 , the court may make such order as it thinks fit.*

(2) An order under subsection (1) may include –

(a) an order of the court's own motion for the winding up of a body corporate; or

(b) an order for remedying any disability suffered by any person whose interests were adversely affected by the conduct of the affairs of the company that is the subject of the report, provided that in making such an order the court shall have regard to the interests of any other person who may be adversely affected by the order.”

28. I pause to mention that s.760(2)(b) clearly contemplates a direct remedy in favour of individual parties in certain circumstances and not only collective orders or remedies such as would flow from winding up proceedings.

29. "Section 761. *The Director may present a petition for the winding up of a body corporate on the ground that it is just and equitable to do so if the Director considers that such a petition should be presented having regard to –*

> *(a) a report made under section 758 by inspectors appointed under section 747 (1) or 748 (1); or*
>
> *(b) any information or document obtained by the Director by virtue of the performance by him or her of functions (whether under this Part or otherwise)."*

30. It is appropriate to note in this context that the power of the Director under s. 761 to present a petition for a winding up only arises after the making of a report under Part 13. Independently of this, s.571(4) (in Part 11 of the Act) provides that the Director may present a petition for the winding up of a company in a case falling within s.569(1)(g), namely where the court is satisfied on a petition of the Director that it is in the public interest that the company should be wound up.

Defrayal and repayment of expenses

31. "Section 762. (1) *The expenses of and incidental to an investigation by an inspector appointed under section 747 (1) or 748 (1) shall be defrayed in the first instance by the relevant authority.*

(2) The court may direct that a body corporate dealt with in the report or the applicant or applicants for the appointment of the inspector shall be liable to repay the relevant authority so much of the expenses as the court directs.

(3) Without prejudice to subsection (2) but subject to subsection (5), where a court enters a conviction or makes an order in a case set out in subsection (4), the court may in the same proceedings order the person referred to in subsection (4) to repay the relevant authority or any person fixed with liability for expenses under subsection (2) so much of the expenses of and incidental to the investigation as the court directs.

(4) The cases mentioned in subsection (3) are –

(a) the court convicts the person on indictment of an offence on a prosecution instituted as a result of the investigation;

(b) the court orders the person to pay damages or restore any property in proceedings brought as a result of the investigation; or

(c) the court awards damages to or orders the restoration of property to the person in proceedings brought as a result of the investigation."

(6) In the light of his or her investigation, an inspector may or, if the court so directs, shall recommend in his or her report what directions (if any) he or she considers to be appropriate under subsection (2)." (For this purpose the relevant authority is, in the case of s.747(1) the Minister for Justice and Equality and in the case of an appointment under s.748, the Director.)

Comparison of sections 747 and 748

32. Since there have been no previous applications under s. 747 (or s. 7 of the Act of 1990), it is informative to consider a number of the principles considered in cases concerning s. 748. Before doing so, it is important to note the following differences between the sections.

33. Firstly, an application under s. 747 can be made by a wide range of parties, including the company itself, members, directors, and importantly *"a creditor"*, as in

this case. Under s. 748, the application can be made only by the Director of Corporate Enforcement.

34. Secondly, s. 748 identifies threshold matters which must be satisfied before the discretion to make an appointment will arise. The section provides that the court must first be "satisfied that there are circumstances suggesting" that one or more of a number of things have occurred. These include such matters as fraud, conduct unfairly prejudicial to members or creditors, formation of a company for fraudulent or unlawful purpose, misfeasance or other misconduct. No threshold criteria are stated in s. 747.

35. Thirdly, s. 747 empowers the court to require the applicant to give security for payment of the costs of the investigation.

36. The provision in s. 762 that the expenses of an investigation shall be defrayed *"in the first instance"* by the *"relevant authority"*, is common to both forms of application. The relevant authority, in the case of s. 747, is the Minister for Justice and Equality and, in the case of s. 748, is the Director of Corporate Enforcement.

37. Also common to both is the provision that the court may direct certain parties, notably the company itself or the applicant for the appointment, to repay to the relevant authority so much of the investigation expenses as the court directs. The potential for such an order to be made against the "applicant" is relevant only in the context of s. 747 since the applicant in s. 748 will always be the Director himself.

38. The power of the court in each section is discretionary.

39. The power of appointment is exercisable in both cases notwithstanding that the company is in the course of being wound up. The provisions concerning the delivery of reports by the inspector, his powers to require cooperation and production of documents apply to both forms of appointment.

40. In the case law regarding s. 748 (and its predecessor s. 8 of the Act of 1990), there is extensive discussion regarding the threshold criteria and the manner in which the discretion should be exercised. A question arises, therefore, whether, in circumstances where s. 747 is entirely silent as to threshold criteria, criteria analogous to those which are stipulated in s. 748 should be applied. Is more required for the purpose of s. 747 than simply *"circumstances suggesting"* the matters described in s. 748, or could it be said that less evidence is required since no such criteria are stipulated at all? In *Director of Corporate Enforcement v. DCC Plc [2008] IEHC 260*, Kelly J. observed that the jurisdiction conferred by the then s. 7 is wider than that given under s. 8 :-

> *"Section 7* [now s. 747]*, which is in the same part of the Act of 1990 permits the court to appoint one or more competent inspectors to investigate the affairs of a company in order to enquire into matters specified by the court and to report thereon as the court directs. It is to be noted that unlike s. 8* [now s. 748]*, this section does not describe the circumstances in which the court is empowered to make such an appointment. The court is at large to exercise its discretion in determining whether there are circumstances which warrant investigation. The application has to be supported by such evidence as the court may require including such evidence as may be prescribed. No regulations have been made prescribing such evidence.* [this is a reference to a wording regarding regulations in s. 7 which was not continued in s. 747]
> *It is clear that the jurisdiction conferred on the court by s. 7 is wider than that which is given under s. 8."*

41. In that case, the application had been made by reference to s. 8 and Kelly J. then considered the criteria under that section being the various *"circumstances suggesting"* fraud, misfeasance, prejudicial conduct and the like.

42. In Mr. Conroy's *"Companies Act 2014 – Annotated and Consolidated"* (2018 Ed.) by Crowe, the author notes that there has been no applications under s. 747 or its predecessor. He continues:-

> *"It is reasonable to assume that similar criteria will be applied in considering whether to appoint an inspector as those which pertain pursuant to section 748 retains a discretion."* (sic)

43. In *"The Law of Companies"* (4th Ed.), Dr. Thomas B. Courtney considers the section and observes as follows :-

> *"These provisions, as far as records show, have never been invoked. And the question arises as to whether they are redundant*. P*ersons who are in a position to seek the appointment of an inspector under section 747 of the Act already have a more direct remedy against the company or the officers in default, such as an action under section 212 of the Act for oppression or a petition to have the company wound up under section 569 of the Act. Also the risks involved in applying to the court for an investigation may be too great to warrant invocation of the court's powers, since the court may require the applicant to put up security for the cost of the investigation.*
>
> *An application under section 747 must be made by originating notice of motion and must be grounded on an affidavit of the person making the application. As to the grounds upon which the court may make an order under section 747, in Director of Corporate Enforcement v. DCC Plc Kelly J.*

observed that 'the court is at large to exercise its discretion in determining whether there are circumstances which warrant investigation'. Presumably the court would wish to be satisfied that there was at least prima facie evidence of some irregularity in relation to the company's affairs (citing Re Miles Aircraft (No. 2) [1948] WN 178 and Sage Holdings Ltd v. UNISEC Group Ltd [1982] 1 SA 337). Indeed the court might have regard to the grounds for appointment enumerated in section 748(1) which apply where the Director is the applicant, but it is clear that the jurisdiction conferred on the court by s. 7 (now section 747 of the Act) is wider than that which is given under section 8 (now section 748 of the Act). It seems unlikely that the court would order an investigation where it is clear that no useful result is likely to be achieved but no doubt it would be difficult for the court to determine at the application stage whether a useful result is likely or not. To this end, s. 747(4) seeks to deter vexatious applications by empowering the court, if it so chooses, to require applicants to put up security for the cost of the investigation. The net effect of section 747(4) may be to deter all but the most assured of potential applicants from seeking the appointment of an inspector, an effect which rather militate against the purpose of having an investigation procedure in the first place."

44. Mindful that Kelly J. observed that the court is at large in the exercise of its discretion, in determining whether there are circumstances which warrant investigation and that the jurisdiction conferred by s.747 is wider than that given by s. 748, I agree with Dr. Courtney where he expresses the view that the court would need to be satisfied that there was *"at least prima facie evidence of some irregularity in relation to the company's affairs."*

45. In this case the originating notice of motion makes clear that the application has been made pursuant to s. 747, which is the only one of the two sections which a creditor can invoke. Illustrative of confusion on the part of the applicant, reference is made in the same notice of motion to a number of the criteria identified in s. 748 where, in paragraph 2, an order is sought directing the inspector to Report on *"inter alia, whether the affairs of the Company are being or have been conducted with intent to defraud creditors, whether the affairs of the Company are being or have been conducted for a fraudulent purpose or in a manner that is unfairly prejudicial to some or all of its creditors and whether the Company was formed for a fraudulent or unlawful purpose."* The Notice of Motion then prays for a order "*pursuant to Section 748 directing the inspector of the Company to prepare a written report for the Honourable Court on the affairs of the Company…*"

46. This confusion continues in the grounding affidavit, where the applicant says that *"I am also advised that the court may have regard to the matters set out in section 738(1)* [which I take to be a typo and a reference instead to section 748(1) of the Act] *when determining whether to appoint an inspector*" and he then refers to the various *"circumstances suggesting"* conduct identified in subs. (1) of s. 748.

47. In his replying affidavit sworn 8th March, 2022, Mr. Hands enters the same realm of confusion when he urges the court *"to dismiss the within application on the basis that there are no circumstances suggestive of the conditions outlined in section 748(1) of the Act"*.

48. Referring interchangeably to ss. 747 and 748, he continues by stating that *"I say and am advised that the applicant's claim does not satisfy the conditions outlined in section 748(1) of the Act"*.

49. Although the replying affidavit was sworn at a time when the Company and Mr. Hands had the benefit of legal advice, the Company was not legally represented at the hearing of the application. Nonetheless, it was clear from Mr. Hands replying affidavit that he has sought to meet the application, firstly, on the grounds that the criteria identified in s. 748(1) have not been met and, secondly, by addressing matters which go more to the discretion of the court such as proportionality and the availability of alternative remedies.

50. In summary, therefore, the applicant has framed his grounds largely by reference to the criteria identified in s. 748. He then submits that the requirements under s. 748 are more onerous and that the jurisdiction under s. 747 is a wider jurisdiction. Similarly, the Company and Mr. Hands have met the application largely by reference to the criteria in s. 758, and discretionary matters.

51. The Director submits that, although the jurisdictional requirement contained in s. 748 is not stated to apply to s. 747, it is appropriate that the applicant, as he has done in this case, should identify any aspects of the case that would correspond to the *"states of affairs"* set out in s. 748. He acknowledges that the existence of such circumstances would justify the appointment of an inspector. Extensive submissions are then made both by the Director and by the Minister firstly by reference to the criteria applying for s. 748, and secondly as to the manner in which the court should exercise its discretion.

52. It does not necessarily follow that the requirements in s. 748 are more onerous than for s. 747. If anything, it might be said that the use of the phrase *"circumstances suggesting"* in section 748 sets a lower threshold in terms of the evidence which would justify an appointment. Having said this, it is clear from the comments of Kelly J. in *DCE v. DCC*, and the commentary by Messrs. Conroy and Courtney, with which

I agree, that a court can at least draw assistance by reference to s. 748 and caselaw concerning it. Even applying a wider test for s.747, there must at least be evidence before the court of the existence either of a state of affairs comparable to those identified in s. 748 or other evidence of irregularity or unlawful conduct which would justify the appointment of an inspector whose task will be to ascertain the facts.

53. Before I turn to the evidence presented on this application, it is also important to emphasise that the purpose of an appointment is to find facts. In *DCE v. DCC Plc*, Kelly J. cited with approval the following passage from *Keane's Company Law* (4th Ed., 2006) where he stated:-

> *"As in the case of an investigation under the provisions of the replaced sections in the principal Act, the functions of the inspectors are to investigate and report. It is thus in essence a fact finding exercise which does not of itself affect the legal rights and obligations of any individual concerned, although the publication of the report - and even the fact of an investigation having been ordered - may affect their reputations. The court moreover may make any order it deems fit in relation to matters arising from the report, including an order made of its own motion for the winding up of a company."*

54. Therefore, when assessing the evidence, the court's task at this stage is not to make definitive findings of fact or conclusions as to the allegations which have been made by the applicant and by certain other investors supporting the application, but to determine whether there exists evidence of a state of affairs which would warrant the appointment of an inspector whose statutory function is to find facts.

Evidence of the Applicant

55. The application is grounded on affidavits sworn by the applicant on 14th January, 2022 and 12th April, 2022. In his first affidavit, the applicant says that *"the*

company conveys the impression that its activities comprise the operation of Christmas tree farms involving planting, growing, nurturing, harvesting and wholesaling/retailing of Christmas trees". The applicant exhibits brochures and pages from the company's website describing these activities.

56. The applicant says that the company claims to fund its operations by raising funds from the public in the form of loans and through what are described as *"crop production agreements"* and offering rates of return in excess of 10%.

57. The applicant says that he first became aware of the company in or about January, 2019 through its website and he made enquiries about the investment opportunities. He then made five investments in the total amount of €157,360.

58. The applicant's first investment made on 6th February, 2019 was a sum of €85,140. The terms associated with the investment were incorporated in a document referred to as a Crop Production Agreement and the applicant says that it was intended that he would receive after five years a return of €203,580. When he made the investment, he received a *"welcome letter"* and a *"Certificate"* which he says recorded his ownership of a plot of land totalling 2.7 acres at Wold Farm, Northamptonshire, UK. Clause 7 of the Crop Production Agreement, entitled *"Harvest"*, provides at (b): *"The client will receive a payable rate of €29 per tree for the entire crop of 720 trees harvested; equating to a monetary value of €203,580"*.

59. The second investment made in May, 2019 was for a sum of €18,720. This investment was made pursuant to what was referred to as a *"Crop Production Loan Agreement"* and the term of the loan in this case was seven years. The interest payable on this loan was to be at the flat rate of 10% per annum. The applicant says that the amount of the anticipated interest was, therefore, €13,104 bringing the total amount repayable at maturity to €31,824.

60. Again, the applicant received what was referred to as a Certificate recording ownership of a plot totalling 0.5 acres of our Irish plantations"

61. The maturity dates in respect of these first two investments have not yet arisen, namely 2024 and 2026 respectively. Further loans, which I refer to below, have become overdue for repayment in amounts totalling €72,760. The applicant says that after the Company failed to repay the indebtedness in respect of the further loans, he became suspicious of the Company and took steps to enquire about the existence or otherwise of the trees which the Company had contracted to grow and manage on his behalf pursuant to the Crop Production Agreement and the Crop Production Loan Agreement.

62. In respect of the lands at Wold Farm, the applicant says that his solicitor, Mr. Boyle, contacted the registered owner of the lands mentioned a Mr. Ian Litchfield. Mr. Litchfield informed Mr. Boyle that certain trees had been planted on his property but that Mr. Hands had not paid for his services and had not paid local workers to trim the trees.

63. Affidavits were sworn on behalf of the applicant by Mr. Glynn Thomas, who is a process server employed by an agency retained by the plaintiff. Mr. Thomas says that, on 10th September, 2021, he visited Wold Farm and saw no evidence of a crop of Christmas trees having been planted. He exhibits photographs.

64. In a replying affidavit of 8th March, 2022, Mr. Hands says that the visit and inspection by Mr. Roberts was flawed. He says that, being a process server, Mr. Roberts did not understand the topography of the lands which he was inspecting. He exhibits his own photographs and says that Mr. Roberts has no understanding of the maturity rate of the relevant variety of trees.

65. Mr. Hands also refers to the expenditure incurred by the company in respect of maintenance of the lands and the trees and exhibits invoices from Cadeby Tree Sales Limited.

66. Mr. Hands exhibits a lease of the lands at Wold Farm which he says was granted by Mr. Litchfield. The lease is noteworthy for a number of reasons (a) it carries no execution date and states "DO NOT DATE", (b) it is apparently granted in favour not of the Company but of a company called "Walker Forestry Services Ltd", a company incorporated in England, (c) the lease exhibited appears to have been executed on behalf of Walker Forestry Services Ltd but there is no evidence of execution by the Mr. Litchfield.

67. It is also clear from the exchanges of affidavits that Mr. Hands is asserting that trees have been planted and are growing on lands at a different location, namely Crick Lodge.

68. There is controversy in the exchanges of affidavits as to whether, on a closer inspection at Wold Farm, Mr. Glynn ought to have been able to see that certain Christmas trees had been planted. There are allegations and counter allegations as to the precise location of the trees, and whether the farming lands were so overgrown that the trees were not visible.

69. In relation to the second investment which was for Christmas trees to be grown *"on 0.5 acres of our Irish plantations"*, the affidavits disclose a significant dispute as to whether the company held an interest in lands anywhere in Ireland. In the exchanges of affidavits, references are made to lands at Waterford and Offaly.

70. In para. 46 of Mr. Hands' replying affidavit, he confirms that the Company held no interest in lands at Waterford. In respect of Offaly, he says that the Company was in negotiations to lease 75 acres of land in County Offaly but ultimately those

negotiations ceased as the landowner agreed to a deal with a wind turbine company. He continues by stating that although he did not secure agreement for the lease of the lands, the company has sufficient acreage in the plantations in England to make returns to investors.

71. It is not the function or within the scope of this Court's capacity on this application to determine the veracity or otherwise of the allegations and counter allegations regarding ownership of land, leases or other interests in lands. Nonetheless, it is clear that different and contradictory explanations have been given from time to time by Mr. Hands following inspection of lands and this of itself is a matter which warrants investigation.

Loans for the online retail platform called "Jingletree"

72. The applicant made a third investment by way of a loan in the amount of €40,000 on 22nd November, 2019. The stated purpose of this loan was to fund an online retail platform for the sale of Christmas trees referred to as "Jingletree". The applicant states that he was approached by the Company and invited to advance this loan. This was for a term of 18 months at an interest rate of 36%. The intended repayment amount to be paid on 22nd May, 2021 was €54,400.

73. Two further similar loans were made, on 30th January, 2020 for €8,000, again at a rate of 36%, and on 14th May, 2020 for an amount of €5,500 also at a rate of 36%. The loan for €8,000 was to be repaid on 11th August, 2021 and the final loan of €5,500 for the amount of €5,500 was repayable on 2nd September, 2021.

74. The applicant says that none of these three loans, due for repayment respectively on 22nd May, 2021, 11th August, 2021 and 2nd September, 2021, in a total amount of €72,760 have been repaid.

75. The applicant exhibits exchanges of correspondence with Mr. Hands in relation to these loans. It is acknowledged in each case that the loans had fallen due for repayment. In this email correspondence, Mr. Hands confirms that the repayments are late and seeks to propose late payment interest plans. He uses such phrases as follows:-

(a) By an email of 24th June, 2021 *"Unfortunately at this stage, I am still unable to give you a clear indication of when your return will be made and therefore I would like to propose a late payment interest plan as set below"*. He continues:-

> *"Please be assured that I will continue to strive towards resolving this unprecedented situation and working towards a satisfactory solution for all parties."*

(b) By an email of 29th July, 2021, Mr. Hands stated:-

> *"Would you please accept our apologies for the delay of your weekly updates. Below is the updated interest on your investment to 29 July 2021."*

(c) On 5th August, 2021, Mr. Hands states:-

> *"The situation remains the same and whilst interest continues to accrue on your return of €54,400 please be reassured that it is also in my own best interest to ensure the delay is minimal."*

(d) By an email of 17th August, 2021, Mr. Hands stated to the applicant:- *"I am still unable to give you a clear indication of when your return will be made and therefore have updated the accrued interest"*; similar language is used in a series of further emails.

76. The applicant did not agree to any extensions.

77. By an email of 16th August, 2021, Mr Hands stated:-

> *"It is with regret that we are unable to give you a clear indication of when you will receive your payment of €10,880 which was due in August 2021.*
> *Unfortunately this has been a direct result of the impact that COVID-19 has had on our own available means, which realistically is likely to continue for the short term.*
> *However, that said, we have been unremittingly aiming our attention on resolving this issue and foresee a slow but steady improvement towards the second half of this year, with a forecast to be back on track for the end of 2021.*
> *Our obvious priority is to make return dates as close to and we could at realistic delay of up to 90 days.*
> *As CEO of WFS Forestry Services I respectfully appreciate your patience and understanding of this exceptional situation and would like to reassure you that I will personally keep you informed of any unforeseen delay should it arise.*
> *Please be assured that we will continue to strive forward and overcome the obstacles faced by this current pandemic, and that it is our utmost priority to reduce the impact it has on our customer returns.*
> *To conclude your reviewed return date is now 16 November 2021. We will send a written confirmation five working days in advance of the payment."*

78. The applicant states that he has never received repayment of any of the amounts overdue, and that the company has been engaged in a fraudulent scheme soliciting loans and other investments for the purpose of undertaking fictitious forestry projects to defraud creditors.

79. The applicant refers also to the last financial statements filed by the Company in the Company's Registration Office which he says are made up to 31 March 2019 and are in abridged form.

80. The balance sheet shows current assets comprising debtors in the amount of €970,099, and cash at bank and in hand €9,269, making a total of €979,268. Creditors are stated to amount in total to €2,081,631 resulting in a net deficit on the balance sheet of €1,102,263. That estimated deficit assumes full recovery of the debtors and no details of the identity of the debtors are disclosed.

81. The applicant observes that in his view the absence of any stock or other assets save for debtors indicates that the Company is not engaged in the Christmas tree planting activities which it claims to be, but instead has applied any loans it received to making loans to other unknown entities.

82. The applicant refers to two breaches which he alleges have occurred of the provisions of the Companies Act 2014 as follows.

83. S. 343 of the Act obliges the Company to file an annual report with financial statements and the applicant says that none have been filed since the report and financial statements to 31 March 2019. He says that in consequence of this failure it is impossible to ascertain the company's most recent financial circumstances and activities.

84. S. 137 of the Act provides that every company shall have at least one director who is resident in an EEA State, in default of which a bond in a prescribed form must

be lodged with the Registrar of Companies. The applicant says that the company has failed to comply with this requirement.

85. In relation to the alleged breaches of s. 343 and 137, Mr. Hands states that he is endeavouring to rectify the position regarding audited accounts and that he is arranging to lodge a bond with the Central Bank of Ireland to satisfy its requirement. He says that while this is not in itself an excuse, it is not evidence of fraud or reckless trading.

86. Mr. Hands says that the circumstances raised by the applicant are merely allegations of indebtedness and that any suspicious conduct is based on "sparsely particularised allegations and inaccurate evidence regarding the company's forestry plantations".

87. In relation to debts, he does not deny that the company has encountered difficulties. He says that he does not deny that investors were "having difficulties obtaining returns on their short term loans to the company for the period 2020 – 2021". He continues by saying as follows: -

> "This is indicative of an inability to pay certain debts rather than being indicative of unlawful conduct. These accounts appear to have merely piqued the applicant's interest in investigating the allegations resulting in the engagement of Glynn Roberts and the investigations that followed".

88. He continues by saying that the company has conducted itself genuinely and for the furtherance of realising returns for investors. He says that the investments are maturing "at a normal rate, and when harvested, and sold, will provide the returns to investors".

89. Mr. Hands exhibits certain business plans and says that at all times the conduct of the company and his conduct has been in good faith.

90. Mr. Hands refers to the negotiations which were entered into with an entity called Optirevenus II Foret "Optirevenus". He says that Optirevenus is an institution which issues bonds to finance investments by means of shareholder loans to companies engaged in forestry. He said that Optirevenus purchased one ordinary share in the Company indicative of its intent to invest and that in February 2021 a loan of €25,000 was received from Optirevenus. He says that the purpose of the loans is to fund the purchase or lease of new lands and the planting of forestry plantations. He says that the negotiations between the company and Optirevenus were intended to secure funding of €5 million by way of a shareholder loan. He says that Optirevenus has had difficulty raising loan capital from its investors arising from the Covid – 19 pandemic and as a consequence has not been in a position to advance the envisaged €5 million. He says that Optirevenus intends to continue its relationship with the Company and is in negotiations to fund plantations once loan capital increases.

91. Mr. Hands says that the company's inability to pay the applicant's loan agreements as they matured in 2021 was because of the inability of Optirevenus to provide the envisaged loan of €5 million. He insists that there is no question over the legitimacy or purpose of the various investments made in the company and continues: -

> "On the contrary there is evidence there of use of the investments to maintain the plantations, create Jingle Tree and develop the retail branch of the business"

92. Mr. Hands says that in circumstances where the facts relating to the ability of the company to pay its debts are known, the appointment of an inspector is not warranted.

93. In essence, the position adopted by Mr. Hands is that while the company has been unable to repay debts on their maturity date, this is not evidence of wrongdoing or illegality, let alone fraud such as would warrant the appointment of an inspector. He says that the allegations are predominantly allegations of indebtedness and no more.

94. I now turn to the evidence adduced by investors other than the applicant.

Lorna Morrow

95. Ms. Morrow swore an affidavit on 16th February, 2022 in which she refers to contact between the company and Mr. Hands and herself and her late husband. She says that, following initial contact, Mr. Hands visited her and her late husband at their home in County Meath on a number of occasions. They placed trust in the advice of Mr. Hands and that, as her husband suffered from poor health, he was vulnerable to manipulation. She says that he was manipulated by Mr. Hands.

96. Ms. Morrow says that the company is indebted to her in a total amount of €396,620.

97. The first three investments made by the Morrows were in January, 2017, May, 2017 and August, 2018, for sums respectively of €30,000, €38,400 and €35,883

98. Ms. Morrow says that, in April, 2019, the Morrows were advised by Mr. Hands to "void" their previous investments in projects being undertaken by the Company and in lieu of repayments to accept a more advantageous investment in a project in Wales.

99. The initial three investments related to projects at Canterbury in Kent, Leicestershire and Northamptonshire. The new project was said to be in Knighton Development in Wales. This investment was intended to replace the three original agreements and provided for a return in April, 2021 of €341,620.

100. Ms. Morrow says that on later examination of the documents relating to the replacement investment, it transpired that the counterparty was not the company but another company, WFS Ireland Property Services Limited, which had common directors and shareholders with the Company. Ms. Morrow says that she has not received any return in respect of this investment. Reference is then made by Ms. Morrow to a further investment of €50,000 made in December, 2020 for a term of seven years, with interest payable annually at the rate of 10% per annum.

101. Ms. Morrow says that the amount of €341,620 which fell due in April, 2021 remains outstanding and that the company has failed to pay the first annual interest payment of €5,000 in respect of the December, 2020 loan, bringing the total debt due to €396,620.

102. Ms. Morrow states that she has spoken on a number of occasions with Mr. Hands, who has informed her that the delay in payment was due to COVID and Brexit and that he would propose a repayment plan. Ms. Morrow says that no such plan has been forthcoming.

103. Ms. Morrow says that she made a complaint to An Garda Síochána at Ashbourne Garda Station on 10th January, 2020 but was subsequently advised by An Garda Síochána that the matters of which she complained were civil matters and not within the remit of An Garda Síochána to investigate.

104. Mr Hands denies Ms. Morrow's description of events. He says that Mr. Morrow was not a vulnerable person and that he had full capacity and control over his affairs. He believes, from his first meeting with Mr. Morrow in 2018, that Mr. Morrow had thoroughly researched the industry and questioned Mr. Hands about the company.

105. Mr. Hands also states that, when the replacement investments arrangements were made to substitute the plantation in Wales for the three plantations in England, the company ultimately became unable to make the monthly payments due arising from the COVID-19 pandemic. He says that the company then *"transferred Lorna Morrow's farm tenancy to the lands at Crick Lodge"*. It is said that no consent to any such transfer was ever given and, accordingly, this was a unilateral act on behalf of Mr Hands to substitute one land interest for another.

106. I pause at this point to note the reference to a related company, WFS Ireland Property Services Limited. References have been made on a number of occasions to that company and to another company, Walker Forestry Services. The application before this court relates only to the Company, namely WFS Forestry Ireland Limited. If at any point an inspector considers it appropriate and necessary for the purpose of the investigation to investigate the affairs of a related company, then he may apply for power to do so.

Brendan Leonard

107. Mr. Leonard, of Claremorris, County Mayo, swore an affidavit on 16th February, 2022. He claims that he made investments totalling €168,000 on a series of dates from January, 2018 onwards and that the company has admitted indebted to him, in a total sum of €441,500.

108. The first three investments were made in on 23rd January, 2018 (for €60,000), 13th March, 2018 (for €30,000) and July, 2018 (for €40,000).

109. The third of these investments was made on the basis that, if Mr. Leonard advanced a further €40,000 in respect to one of the projects, the project at Little Heath Farm, his total investments of €130,000 would then be consolidated into a single contract with an initial value of €150,000 and a maturity date of January, 2021 upon

which date he would receive a total sum of €435,000. He exhibits the relevant "crop production agreements" and invoices.

110. Mr. Leonard says that the amount of €435,000 was not paid following its maturity in January, 2021, and that he received an intermittent series of payments between February and April, 2021 totalling €29,500. He refers to emails from Mr. Hands confirming that he is unable to give a clear indication of when the returns will be made and that he has added accrued interest to counter this.

111. Mr. Leonard refers also to the affidavits of Mr. Glynn Roberts concerning his inspection of lands at Little Heath and at Crick. Mr. Roberts, in his affidavit of 16th February, 2022, states that he saw a crop of Christmas trees in one field at Crick, but no crop on the remainder of those lands and no Christmas trees at the Little Heath lands. Mr. Leonard says that he was *"duped"* into making the investments.

112. Mr. Leonard refers also to an additional advance of €22,800 which would carry a total return of €36,000 in February, 2020. He made this investment on 1st February, 2019 but has received no repayment in respect of it.

113. Finally, Mr. Leonard refers to an investment which he made on 31st May, 2019 in respect of a forestry project in County Waterford which would mature over a period of five years.

114. In his replying affidavit, Mr. Hands states that the initial investment amounts of €60,000, €30,000 and €40,000 are not yet due. The evidence of Mr. Leonard is that, although there were longer term maturity dates on the first two of these investments, when he agreed to the revision of the investment arrangements in August, 2018, a new maturity date of January, 2021 was stipulated and has not been honoured.

115. In his replying affidavit, Mr. Hands states that the investment of €22,800 made in February, 2019 was stated to be a *"distressed sale investment"* by way of loan for

an asset development service. He says that the returns on the investment were to be provided from the sale of a pre-matured crop of trees from a farm in Wales, which was not on land owned by the Company. He refers then to a contract which the Company had entered into with a company referred to as Cadeby who would undertake the maintenance of the crop and its harvesting for Christmas, 2021. It appears that the Company became unable to maintain its payments to Cadeby. Mr. Hands then says that the tenancy which had first been stated to relate to the project in Wales was then "transferred" to the lands at Crick Lodge, again a unilateral act of substitution for which no evidence of any agreement has been put forward. In this context, Mr. Hands refers again to Optirevenus and its failure to deliver on its investment into the company which would have facilitated repayments to Mr. Leonard.

116. Ultimately, Mr. Hands says that, while the plantations referred to in certain of these investments may not have existed on the particular lands referred to in the crop purchase agreements, the company *"has sufficient acreage in the plantations at Wold Farm and Crick Lodge to realise Brendan Leonard's investments and loans"*. Again, there is no evidence that there was any agreement on the part of the investor that the returns would be sourced from plantations at different locations.

Maurice Donoghue

117. Mr. Donoghue swore an affidavit on 9th March, 2022. He describes the circumstances in which he made advances to the company in sums totalling €10,000.

118. Mr. Donoghue says that the amounts due pursuant to these advances have not been repaid and the company has fallen into arrears in respect of interest payments. He then refers to his communications with the company in which he was given

repeated *"excuses"* for the delay following which he demanded that the company terminate his contracts and return all monies due to him.

119. Mr. Donoghue says that the company agreed to repay the amounts he had invested by two transfers of €5,000 each on 4th February, 2022 and 11th February, 2022. He says that no transfers were received by him.

120. In a replying affidavit sworn on 25th March, 2022, Mr. Hands confirms that he agreed to repay Mr. Donoghue's money *"as soon as possible"*. He confirms that two bank transfers were set up in February, 2022 and that *"due to insufficient funds available these payments were declined"*.

121. Mr. Donoghue refers to further enquiries which he made in relation to the affairs of the company and forestry investments offered by the company. He gives details of certain contact which he made using a pseudonym, arising from which he says that representatives of the company encouraged him to make investments in companies referred to as The New Hibernian Whiskey Advisory Limited, Kinsale Spirit Company and Great Northern Distillery Limited. Mr. Donoghue says that, having made a number of enquiries in relation to this potential investment and contacts, he believes that representatives of the company are now attempting to divert potential new victims of the apparent forestry fraud into a new fraud involving the sale of non-existent new spirits whiskey.

122. In his affidavit of 25th March, 2022, Mr. Hands denies any knowledge of or affiliation with the New Hibernian Whiskey Advisory Limited the Kinsale Spirit Company or of Great Northern Distillery Limited. He refers to an allegation made by Mr. Donoghue that a similar telephone number was used in relation to these contacts as attached to the company and he says that this was because it was the phone number of an agent who no longer works for the company. Mr. Hands says that, in the absence

of any evidence of fraudulent activity, Mr. Donoghue's averments are no more than conjectures and he says that they are false and based purely on assumption and surmise.

David Roome

123. Mr. Roome says that he has made advances to companies associated with Mr. Hands in amounts totalling €317,000, of which €290,000 is overdue for repayment.

124. The evidence of Mr. Roome appears principally to relate to investments made to WFS Ireland Property Services Limited, which is a company related to the company. Mr. Roome's invitations he received from the company to invest an additional €400,000 in a plantation in Offaly which Mr. Roome says is non-existent.

125. He refers to promises of repayment which have not been honoured.

126. For the most part, the complaints of Mr. Roome appear to relate to monies advanced to the related company. Since that company is not the subject of this application, it could only be the subject of an investigation after an appropriate application is made by a duly appointed inspector. Nonetheless, there is at least a measure of confusion in that Mr. Roome appears to believe that he was transacting with Mr. Hands on behalf of the Company. To the extent that this has substance, it would require investigation.

Further Affidavit of the Applicant

127. The affidavit of Mr. Kearney sworn on 12th April, 2022 contains a number of additional allegations and averments which have not been controverted by any evidence from the company or from Mr. Hands. It is not necessary to recite all of those in this judgment, but the following are relevant.

128. Firstly, the applicant refers to evidence which Mr. Hands has proferred as to the investments in the company having been transmitted by way of loan to a related

company, Walker Forestry Services Limited, a UK company. The applicant says that there was nothing contained in the Crop Production Agreements or other facilities which would permit the investment to be applied in this fashion. He observes also that the advances to the "Walker" company constitute a breach of s. 239(1) of the Act, which is the prohibition of loans to directors and connected persons.

129. Secondly, the applicant refers to evidence that Walker Forestry Services Ltd trades as *"Jingletree"* whereas the investors were initially informed that Jingletree was an activity of the Company into which they were making their investment.

130. Thirdly, the applicant says that he has conducted certain searches in relation to the entity Optirevenus Foret II which Mr. Hands stated was intending to make an investment of €5 million in the company. The applicant says that company searches conducted in relation to that entity reveal that it had been established for the purpose of issuing loan notes or bonds up to amounts of €500,000. That being the case, he says that a loan or advance of €5 million to the company would have been contrary to the corporate powers of Optirevenus.

131. Fourthly, the applicant refers to fourteen further investors and says the following:-

> *"All 18 named investors including me have invested a total of €1,486,153 in the company. This also does not include the returns we were promised. The only person to receive any money back at all was Mr. Leonard who received €29,500. None of the other investors have received any payment back. The total acreage of our proportionate holdings is 41.902 acres, far in excess of the combined total of 22.22 acres at Crick Lodge and Wold Farm that Mr. Hands claims he can "transfer" investors holding to."*

Mediation Clause

132. Mr. Hands refers to clause 14 of the form of Crop Production Agreement which provides as follows:-

> *"Dispute resolution*
>
> *(a) In the event of a dispute arises out of or in connection with this agreement, the parties will attempt to resolve the dispute through courteous and considerate consultation.*
>
> *(b) If the dispute is not resolved within a six-week period, then any or all outstanding issues may be submitted to mediation in accordance with any statutory rules of mediation."*

133. The applicant says that this is not a binding clause requiring a reference to a mediation or other form of alternative dispute resolution. He also says that his efforts to resolve matters with the company through "courteous and considerate consultation" and engagement have come to nothing.

134. Clause 14 is a provision of one of the documents in a suite of agreements, invoices, and "certificates" issued by the company. Having regard to the evidence I cannot find that clause 14 precludes a creditor or the applicant from bringing this application.

Evidence of the Director of Corporate Enforcement

135. The Director and the Minister each say that they have no direct knowledge or evidence of the matters referred to in the affidavits summarised above. The Director has delivered an affidavit sworn by Sharon Sterritt, principal officer of the Office of the Director of Corporate Enforcement, sworn on 5th May, 2022, for the purpose of appraising the court of three particular complaints received by the Director.

136. Ms. Sterritt refers to a complaint received on 24th January, 2022 from Mr. Maurice Donoghue. On 7th February, 2002, the Director replied to Mr. Donoghue

stating that *"the Director has no role in relation to contractual arrangements and that any evidence of fraud should be brought to the attention of the Gardaí who are the appropriate authority"*.

137. Ms. Sterritt exhibits also references to two further complaints; one by a Mr. Dermot Lynch and one by a Mr. Anton Karpat. Mr. Lynch's complaint appears to relate to the affairs of Walker Forestry Services and Mr. Karpat's complaint refers to WFS Ireland Property Services Limited.

Summary as regards evidence

138. There are numerous matters in dispute which are not capable of being determined by reference to the affidavits on this application. The affidavits raise such questions as:

(1) what promises exactly were made by the Company and Mr. Hands to the applicant and others,

(2) how were the moneys advanced by the applicant and others applied,

(3) whether, and to what extent, Christmas trees were planted on lands described in the Crop Purchase Agreements and other documents,

(4) whether the lands referred to in those documents were owned or leased by the Company or what interest if any did the Company enjoy in such lands.

(5) whether the Company had assets, income or access to funding with which to repay the amounts committed pursuant to the agreements exhibited, whether from Optirevenus or otherwise.

139. None of these questions are capable of determination on this application and that is not the function of the court on this application. I am required to consider whether matters of sufficient substance as regards potential breaches of company and other laws arise which would warrant the appointment of an inspector.

140. At a minimum, the affidavits disclose the following:-

(1) That advances were made to the Company referable to certain "Crop Production Agreements", "Certificats" and other documents, and the Company's interest in the lands referred to in such documents is questionable.

(2) That repayment dates in relation to a number of the loans and other investments have passed without repayments having been made.

(3) That the company had relationships and transactions with a number of other companies which have impacted its ability to honour its debts.

(4) The last available reported financial statements disclose the company as being insolvent on a balance sheet basis.

(5) There is evidence of breaches of the following provisions of the Act:-

(a) Section 137 regarding the requirement for a bond in the absence of a resident director,

(b) Section 239, prohibition on loans to connected parties, and

(c) Section 343, the obligation to file annual returns and financial statements at the Company Registration Office.

(6) Investments were solicited by reference to crops of Christmas trees being planted on lands which either did not exist, or in which the Company has no interest, and the explanation which is offered in respect of a number of these is that the relevant lands were *"switched"* for lands at other locations without the agreement of the investors.

The threshold criteria

141. All parties submit that the court should be at least informed by the threshold criteria identified in s. 748. The jurisdiction for s. 747 is clearly wider, and I have no

hesitation in finding that there is prima facie evidence of wrongdoing, unlawfulness or other irregularity. The allegations are vigorously denied by Mr. Hands on behalf of the Company. Nonetheless I am satisfied that the threshold is met and that the appointment of an inspector will serve the purpose intended by Part 13 of the Act, namely that of uncovering facts not already known (see *Director of Corporate Enforcement v. DCC Plc* [2009] IR p. 464).

Discretion

142. In *DCE v. DCC Plc*, Kelly J. identified as relevant factors in the context of the exercise of the court's discretion such matters as the public interest and proportionality. He emphasised that it was not possible to set out an exhaustive list of relevant factors when he stated:-

> *"It would be unwise to attempt to set out an exhaustive list of the factors which the court would be justified in taking into account in exercising the discretion conferred upon it by s. 8 of the Act of 1990. It is not possible to anticipate particular facts or circumstances which may present themselves in future cases. However I am of the view that the following matters are appropriate to be taken into account in the exercise of the courts discretion. Needless to say these only arise for consideration in circumstances where the two conditions identified in the immediately preceding paragraph of this judgment have been met."*

He continues by referring to and discussing the matter of the public interest and proportionality.

143. In this case, the court's attention has been drawn to additional factors which the parties submit should inform the exercise of the court's discretion. I have been referred to such considerations as the following:-

(a) The public interest, noting that the Director submits that this case is essentially a private dispute pursued by disappointed investors.

(b) Proportionality.

(c) The relevance of other possible investigations into the affairs of the company.

(d) The relevance of the insolvency of the company, which leads to a submission to the effect that liquidation would be a more appropriate remedy in this case.

(e) The adequacy and extent and respective powers of an inspector by contrast with the powers which would be available to a liquidator.

144. There is a significant overlap in the significance of these factors. It is, however, important to note again that neither the Director or the Minister opposes the application. They invite the court to take account of the considerations discussed below in the exercise of discretion.

145. The essence of the Director's submissions is as follows:-

(1) That the company is insolvent, whether viewed from the perspective of the cash flow test or the balance sheet test and that there is no evidence of any prospect of survival or rescue such that insolvent liquidation can be avoided.

(2) That, the more appropriate remedy in this matter is an order for the winding up of the company.

(3) That having regard to the evidence of insolvency, a winding up is inevitable and that the expenses of a winding up will be incurred and, accordingly, that it would be an inappropriate waste of resources to first incur the cost of an investigation pursuant to s. 747. This point is

made with particular force in the context that, by virtue of s. 762, the expenses of investigation must be borne in the first instance by the Minister and will, therefore, fall on the public purse.

(4) That a liquidator has power to perform an investigation to ascertain the application of monies advanced by the investors and other assets and monies of the company and, therefore, in circumstances where it is submitted that a liquidation is inevitable, it will be disproportionate to first appoint an inspector and impose that additional cost on the public purse.

(5) That in truth, the objective of the applicant is not to pursue the public interest purpose which underpins Chapter 13 of the Act, but the recovery of his money. That this should be pursued by the traditional method of an action for recovery of the debt and enforcement of any judgment obtained or a petition for the winding up of the company.

(6) That the applicant has chosen this route because he is not able or willing to fund the costs of liquidation. It is submitted that this is not an appropriate justification for imposing on the public purse the costs of an inspectorship. It is a submitted that if an order is made the effect would be to transfer to the Minister the cost of an investigation into the affairs of the company from the creditors, who should bear those costs in a case where the company is insolvent, and where a winding up is more appropriate.

146. The Minister supports these submissions and adds the following:-

(a) That s. 747 is more appropriate for the investigation or inspection of solvent companies and is not a substitute for the investigations which a liquidator would perform.

(b) That the complaints made are more appropriately made to law enforcement agencies such as An Garda Síochána.

(c) That the provisions of Chapter 13 are intended for application to large commercial and sophisticated undertakings typically where there may be hundreds or thousands of shareholders and employees and a clear public dimension. Extensive reference is made to the cases of *Independent News and Media Plc*, *DCC Plc* and *National Irish Bank*. That submission can be disposed of by noting that Section 747 (6) envisages the appointment of inspectors to small or medium sized companies (as defined in the Act), albeit by the Circuit Court.

(d) The Minister submits that the appointment of an inspector in this case would open a potential floodgate, in that aggrieved creditors of companies such as this may prefer to seek the appointment of an inspector, where the cost would fall in the first instance on the Minister, instead of petitioning for a winding up or pursuing other traditional routes.

147. At the hearing I invited counsel for each of the Director and the Minister to state if they were objecting to the appointment of an inspector. Each confirmed that they were not objecting, but were drawing the above considerations to my attention in the context of the exercise of the discretion conferred by the Act.

148. The applicant points to the fact that the section expressly provides that an appointment can be made, notwithstanding that a company may be in the course of

being wound up. His submission is that *a fortiori* there is no reason why such an appointment would be precluded in a case where the company is not in the course of being wound up, whether or not a winding up is inevitable. The applicant also says that a winding up is not inevitable.

149. Comparison is made between the powers conferred on an inspector by contrast with those which are conferred on a liquidator. The applicant submits that the investigative powers of a liquidator are more limited and that the purpose of a liquidation is to serve the interests of creditors of the company, coupled with a limited form of report to the Director of Corporate Enforcement pursuant to s. 682 of the Act.

150. At the hearing Mr. Hands submitted that the appointment of an inspector is not appropriate or necessary. He said that he is willing to communicate and to co-operate with the applicant and others to progress matters so that their money can be returned.

151. The applicant submits that the Company and Mr. Hands have not co-operated and have been evasive, and that an inspector should be appointed who will have the powers required to find facts about the investments and the affairs of the Company.

Discussion and Conclusions

152. The threshold requirements for an appointment pursuant to s. 747 are wider than those applicable to s. 748 (see *Director of Corporate Enforcement v. DCC Plc*).

153. The criteria identified in s. 748 are informative and I agree with the observation of Mr. Conroy that similar criteria may be applied.

154. There is in this case evidence of engagement with investors and transactions which warrant investigation by an inspector appointed pursuant to s. 747. Those matters include such questions as the following:-

(a) The manner in which loans and advances made to the Company have been applied;

(b) Whether the crops of Christmas trees referred to in the brochures, websites and other communications leading to investments exist, either at the locations represented in the company's communications or elsewhere;

(c) Whether the company held a valid interest in the lands referred to in the Crop Purchase Agreements and loan agreements and the various Certificates issued by the company to investors;

(d) The status of the loan capital investments said to be sourced by the company from Optirevenus or others.

155. The appointment of an inspector who will have the functions and powers conferred by Part 13, Chapter 2 of the Act will serve the purpose intended by the Act, namely to enable facts not already known to be found.

156. As regards the exercise of the court's discretion, the essence of the submissions of the Director and the Minister are stated to extend to a range of matters from public interest to proportionality. When distilled, the fundamental points of the submission are as follows:-

(a) That a winding up of the company is a more appropriate remedy.

(b) That a liquidator has all the necessary powers to investigate the affairs of the company.

(c) That although the Minister can apply for repayment of the costs and expenses of the investigation (s. 762), where the company is insolvent the likely outcome is that an order for reimbursement of such costs would not be met (I later consider the question of whether and in what circumstances an order might be made against an applicant).

(d) That the applicant has pursued this route because it is unwilling or unable to fund a liquidation. The effect of this submission is that this route is a method of transferring to the State the expenses of an investigation which, in the case of an insolvent company, should be borne, whether directly or indirectly, by the creditors.

(e) That making such an appointment would open a floodgate whereby disappointed creditors and investors would, by preference, pursue this route at a cost to the State in the first instance.

157. It has not been alleged that this application is frivolous or vexatious, but only that it is inappropriate to transfer the risk or cost of the investigation to the State.

158. I shall not embark on a comparison of the relative costs of a petition pursuant to s. 569 of the Act for a winding up of the company against an application pursuant to s. 747. Nonetheless I consider it appropriate to make the following observation. A petition on foot of a statutory demand (see ss. 569(1)(d) and 570(a)) is, at least in the first instance, a more straightforward form of proceeding than an application pursuant to s. 747. It relies only on the basic proof by a creditor that a demand for repayment has been duly made and evidence that the debt, if undisputed, remains unpaid for a period of in excess of 21 days.

159. The proofs required for an application under s. 747 are more substantial even if one applies the lower threshold of *"circumstances suggesting"* or even *"prima facie"* evidence. There is, therefore, no reason to believe that applications pursuant to s. 747 are likely to be more cost effective and therefore become more popular for aggrieved creditors generally, at least in the first instance.

160. This having been said, the difficulty with a petition for a winding up is that a petitioner may be faced with the prospect that a nominated liquidator will only

consent to act if there are identifiable assets in the company to meet his costs, expenses and remuneration or if a party, whether it be the petitioner or any other party, is willing to underwrite those costs. Such arrangements are permissible subject to certain disclosures and constraints (see *DR Developments (Youghal) Ltd and the Companies Acts* [2011] IEHC 307).

161. The applicant cannot be faulted for not pursuing the route of liquidation, even to the first stage of a petition or a statutory demand. He is under no obligation to do so.

162. If I were persuaded that the only motive of the applicant is to avoid the cost of liquidation, I would consider exercising my discretion to refuse the application. The applicant has fairly acknowledged that the cost of a liquidation is one which his client is either unwilling or unable to bear. He says, however, that this is not a one dimensional application relating only to his debt.

163. I am not persuaded that the principal objective of the applicant is not the return of his own money. However, the applicant has provided evidence relating to the investment by at least seventeen others in addition to himself. Evidence has been provided concerning the manner of solicitation of investments through a website and brochure, albeit that Mr. Hands has said on affidavit that the company is currently not in the process of soliciting investments.

164. Even if this application were motivated initially by a desire to secure the return of the applicant's money, is not devoid of a public or multiparty dimension. At least 18 investors are said to be affected and the evidence is that they have made investments exceeding €1.4 million, of which the applicant's investment is only a small portion. Therefore, it cannot be said that there is no wider public interest or public dimension to the case.

165. The usual and "natural" remedy for a creditor would be an action for the recovery of its debt and enforcement of any judgment obtained or a statutory demand followed by a petition for liquidation pursuant to s. 569. A liquidator's powers of investigation are not as limited as the applicant submits. While a liquidator has certain duties to examine the affairs of a company and to report to the Director pursuant to s. 682, his core obligation is to ascertain and find assets for the benefit of the creditors of the company. This, of itself, will necessitate in every case investigation of the whereabouts of assets, of pre-liquidation transactions and where appropriate the invocation of "asset swelling" measures for the return of assets improperly or fraudulently transferred (Chapter 6 of Part II of the Act). In certain cases, the remedies will include proceedings against directors or officers to hold them personally liable for debts of the company. To describe a liquidator's function as limited in terms of its investigation or so limited as to be of less use than those available to an inspector is to misunderstand the fundamentals of a liquidator's functions under the Act.

166. Having noted all of the above, it is also clear that however more appropriate the Director, the Minister, or even this Court may consider liquidation as a remedy on the facts of this case, the applicant has no obligation to pursue this route. I do not find that he is acting vexatiously or frivolously or, more importantly, for an improper motive, even where he has openly acknowledged that his decision not to petition for a winding up is informed by unwillingness or inability to bear the cost associated with liquidation.

167. No other creditor has presented a petition for liquidation.

168. This court has no power on this application to make an order for the winding up of the Company. Pursuant to s. 760, the court has power to make such an order after considering the report delivered by an appointed inspector.

169. The Director has power to petition for liquidation (see ss. 569(1)(g) and 571(4)). He has elected not to do so. I do not criticise the Director for this decision. It is entirely his decision and I do not doubt that he has made it following his own assessment of the case based on his own judgment regarding the application of resources. But when the Director was served with the application and evidence he came into possession of significant information in relation to the affairs of the company. In considering the weight I attach to his submission that liquidation is a more appropriate remedy for this case, I must take into account that he decided not to pursue liquidation.

170. The Oireachtas chose to enact Chapter 13 in its current form including the provision at s. 762 to the effect that the Minister should, in the first instance, discharge the costs.

171. The argument as to the potential floodgate which would open whereby such applications would become commonplace instead of petitions for a winding up is speculative. The court will critically appraise any application, as in this case, made pursuant to s. 747. If it is shown that an application is vexatious or frivolous or an abuse of the process, then, of course, the court would exercise its discretion to refuse such an application. It seems to me also that it is unlikely that, as a general rule, applications of this nature, not being less costly than a winding up petition grounded on a simple statutory demand, would become the norm.

172. If I am incorrect about this, the court's scrutiny of such applications will have its own effect.

173. For all these reasons, I have concluded that this is an appropriate case in which to exercise the discretion to appoint an inspector.

Inspector's Expenses – Section 762

174. Section 762(1) provides that the expenses of and incidental to the investigation shall be defrayed in the first instance, in the case of a s. 747 investigation, by the Minister for Justice.

175. S. 762(2) provides that the court may direct that a body corporate dealt with in the report or the applicant for the appointment of an inspector shall be liable to repay the relevant authority so much of the expenses as the court directs. The section does not say when in time a repayment order could be made but it is difficult to envisage an application under s. 762(2) being made before the inspector has made his report and before the costs of the inspector have been defrayed. I draw this from the use of the word *"liable to repay"* in subs. (2).

176. This provision is, of course, not an *"open chequebook"*. One would expect an inspector once appointed to engage immediately with the Minister as to the expected quantum of expenses. Clearly, it will not be possible for an inspector to definitively predict the quantum of the expenses. But it should, in every case, be possible to engage at least as to the basis of calculation of such expenses and, potentially, to provide estimates, recognising that estimates may require review as the investigation progresses.

177. Section 762 does not provide for the mechanics of measuring expenses or for resolving any dispute as to quantum. Should any disagreement arise between an inspector and the Minister as to quantum and should the quantum fall to be adjudicated either by this court or any other forum, the court would in determining

any such dispute be informed by the substance of any initial engagement between an inspector and the Minister regarding quantum of expenses.

178. Relevant also to this matter is s. 749 which empowers the court when appointing an inspector to give directions *"with a view to ensuring that the investigation is carried out as quickly and inexpensively as possible"*, and s. 758 which provides for the making not only of a final report but also of such interim reports as the court may direct. I shall hear the parties as to a realistic time by which the inspector would be required to report in this case, whether finally or by way of interim reports.

179. If at any point in time in the course of the performance of his functions, the inspector should form the view that the statutory purpose of his appointment cannot be achieved, he should report forthwith and the court may then consider what form of order might be made pursuant to s. 760 which governs the powers of the court after considering a report.

Security for Costs: Section 747(4)

180. Section 747(4) provides that the court may require the applicant to give security for payment of the costs of the investigation.

181. On 28th March, 2022, after this application was first mentioned before the court and more than four weeks before the first day of the hearing, the Chief State Solicitor wrote to the applicant's solicitor concerning costs. In that letter, the Minister notified the applicant that she intended to argue that, if the court were minded to direct the appointment, the Minister would argue that the court should exercise its discretion pursuant to s. 747(4) to require the applicant to give security for the payment of the cost of the investigation. The letter continued:-

> *"In the absence of further information on the purpose of the proposed investigation, it appears that the applicant and other investors are the individuals who are most likely to benefit from the appointment of an inspector and the publication of a report. It further appears that the Minister is unlikely to recover the costs of the investigation from the company which seems to be insolvent. Since there are other appropriate avenues available for the investigation of the company's affairs through law enforcement agencies and the winding up of the company, it is not clear to the Minister why the applicant should be entitled to benefit from an investigation of the company under section 747 at the expense of the taxpayer. In those circumstances the Minister is of the view that the applicant ought to give security for the cost of the investigation that he seeks if the court is minded to direct the appointment of an inspector."*

182. The Minister, in her submissions, says that this may be an appropriate case in which it appears that an applicant is the party most likely to gain from the appointment of an inspector.

183. The applicant is one of eighteen investors affected by the conduct of the affairs of the company. It is, therefore, not correct to say that the applicant is the only party most likely to benefit, although the Minister recognises that it is the applicant *"and other investors"* who are affected.

184. I have already considered the submissions made regarding the alternative remedy of liquidation. The essence of that submission is that liquidation is a more appropriate remedy. I do not have jurisdiction to make an order for the winding up of the company and I have concluded that the existence of this potential alternative

remedy, not availed of by any interested party or by the Director, is not in the circumstances of this case a ground to refuse the appointment.

185. The concept of security for costs is that security be given by a party potentially liable for those costs. In the scheme of this Act, the potential liability of the applicant arises under s. 762(2), i.e. a potential liability to repay the Minister the expenses (I note that the word *"expenses"* is used in s. 762, whereas the word *"costs",* which may be more limited than expenses, is the phrase used in s. 747 (4)).

186. I am reluctant to speculate on the circumstances or conditions in which an order may be made against the applicant pursuant to s. 762(2) should the Minister ever make such an application. It has not been said that the application of this case is frivolous or vexatious. The height of the criticisms made in the course of submissions was that the applicant, and perhaps other investors, advanced money and credit without undertaking due diligence. No evidence has been advanced to support that submission.

187. It has fairly been said that, based on the evidence of insolvency before the court, there is a high risk that any order for reimbursement made against the company would not lead to recovery of the expenses. There is force in that assertion, but I am not persuaded that in this case that factor would of itself justify ordering the applicant now to provide security for costs.

188. I shall, therefore, not make any order pursuant to s. 747(4).

Originating Notice of Motion

189. By reference to paragraphs 1 and 2 of the notice of motion, I shall make the following orders:-

(1) An order pursuant to O. 74(B), Rule 3 of the Rules of the Superior Courts and s. 747 of the Companies Act, 2014 appointing Declan

DeLacey of Century House, Harold's Cross Road, Dublin 6W inspector of WFS Forestry Ireland Limited to investigate the affairs of the company.

(2) An order pursuant to s. 747 of the Companies Act, 2014 directing the inspector of the Company to enquire into and to report on the affairs of the Company, including:-

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

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

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

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

190. Drawing by analogy from Section 748 I consider it appropriate that the inspector enquire also into and report as to whether the affairs of the company are being or have been conducted in an unlawful manner.

191. There will also be an order in terms of para. 3 of the notice of motion, namely an order pursuant to s. 758 of the Act directing the inspector to prepare a written report to the court on the matters aforesaid.

192. I shall hear the parties as to any further or other orders which may be appropriate in light of this judgment, including an order if necessary for delivery of an interim report.

193. I shall grant to the inspector liberty to apply for further and other orders and/or directions as may be required prior to the conclusion of these proceedings.

Section 753

194. The notice of motion seeks orders pursuant to s. 753 of the Act requiring Mr. Hands to produce to the inspector books or documents of the Company, to attend before the inspector when required to do so and to give to the inspector all assistance in connection with the Company that can reasonably be given. I decline to make such an order on this application.

195. Section 753 imposes an obligation on every officer or agent of the company under investigation to produce to the inspector all books or documents of or relating to the company, to attend before the inspector when required to do so and to cooperate with the inspector and give him all such assistance as he requires.

196. Section 757 confers on the court the power to make orders and to give directions as appropriate where an officer or agent of the company refuses or fails within a reasonable time to produce relevant documents and cooperate with the inspectors. That power arises after the following has occurred. The inspector must first certify the relevant refusal or failure in a certificate signed by him pursuant to s. 757(1)(b) and, secondly, the court must have undertaken an inquiry into the case and heard any witnesses and any statement made by the person against whom an order is to be sought (s. 752, subs. 2).

197. Therefore, orders to compel such cooperation and production can only be made after the procedure followed in s. 757 has been followed. In the meantime, of course, every director and officer of the company is under the basic obligation to comply with the provisions as to co-operation, attendance and the production of documents contained in s. 753.

198. I shall hear submissions as to the final form of the order and any other relevant matters before the order is perfected. For that purpose, the matter will be listed before this Court one week after the electronic delivery of this judgment.