

**THE HIGH COURT**

**[2017/147 COS]**

**BETWEEN**

**MYLES KIRBY (IN HIS CAPACITY AS OFFICIAL LIQUIDATOR OF WESTMAN PLAND AND CIVILS LTD. (IN LIQUIDATION) )**

**APPLICANT**

**AND**

**KEVIN RABBITTE**

**RESPONDENT**

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 30th day of January, 2020.**

1. The reliefs originally sought in this Motion were as follows:-

- (i) A declaration pursuant to section 610 of the Companies Act 2014 that Mr. Rabbitte while an officer of the Westman was knowingly a party to the carrying on of business of the company with intent to defraud creditors of the company (including the Revenue Commissioners), and any other person.
- (ii) An order pursuant to section 610 of the 2014 Act making Mr. Rabbitte personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as this Court would direct.
- (iii) An order pursuant to section 842 of the 2014 Act that Mr. Rabbitte should be disqualified for five years or such longer period as the Court deems appropriate, for acting as a director or other officer, auditor, receiver, liquidator or examiner or be in any way, either directly or indirectly, concerned with or take part in the promotion, formation or management of any company or society, and would be subject to a disqualification order for such period as the court would deem appropriate.
- (iv) There was also an application for costs, including costs on a solicitor and client basis and the costs of the liquidator.

2. This was the application which was due to be heard on the 28th of January 2020. That was then compromised and the nature of the compromise is as follows: Critically for the purpose of the decision I have to make, Mr. Rabbitte (on the legal advice he had obtained from Dore & Company Solicitors – the fact of such advice having been recorded in the Settlement Agreement) agreed to the following:-

- (i) He consented to a declaration pursuant to section 610 of the Act that he while an officer of Westman was knowingly a party to the carrying on of business of Westman with intent to defraud creditors of the company (including the Revenue Commissioners), or any other person.
- (ii) He then consented to an order pursuant to the same section making him personally responsible for the debts or other liabilities of Westman in the sum of €1.5 million.

(iii) He agreed that he should be disqualified and he consented to an order pursuant to section 842 of the Act that he would be disqualified for a minimum of five years or such longer period as the court would determine. That is the live issue before me.

(iv) It was also agreed that the motion be struck out with no order as to costs. The fairly elaborate costs application made by Mr. Kirby as liquidator of Westman was not in fact proceeded with for reasons which I think will become obvious during the course of the balance of this ruling.

3. At (2) of the settlement it was provided for as follows:-

“It is noted by Mr. Kirby that Mr. Rabbitte’s consent to the order at paragraph 1(a)....”

And that was the paragraph accepting that he had been involved knowingly in the carrying on of the business of the company with intent to defraud:-

“[...] was stated by him to be without prejudice to any defence that Mr. Rabbitte may have to any further action taken against him by any party.”

That is of some significance because it indicates that Mr. Rabbitte wants to be free to argue the point of his participation in the fraud conceded before this Court in respect of any other form of proceedings that may be taken against him. But for the purpose of my ruling I must proceed on the basis that he has unequivocally acknowledged for the purpose of these proceedings that he was involved in the carrying out of a fraud in respect of the affairs of the company.

4. In light of this, the only question that I have to decide is the period of time for which Mr. Rabbitte is to be disqualified.

5. I note the following general points about the company and its activities. Firstly, Westman was incorporated on the 9th May 2014. It was struck off on 13th April 2016. It never made returns to the Companies Registration Office during the lifetime of the company. The Financial Statements of the company prepared by Mr. Rabbitte indicate that Westman never traded. No books or records of the company appear to have been kept, in the normal sense of that phrase, during the lifetime of the company. During the lifetime of the company VAT returns were filed on behalf of the company but consistently they showed that no VAT was chargeable or returnable to Revenue. And finally (in the light of the consent order, the declaration about Mr. Rabbitte’s involvement in the fraudulent trading of the company, and also in the light of the fact that the company never seems to have carried out any legitimate trade, certainly none that is discernible from the affidavits before me or the settlement provided to me) it appears to me that the only trade engaged in by the company has been the business of fraud.

6. The type of the fraud involved is also important in terms of assessing the period of disqualification. In his affidavit grounding the current application Mr. Kirby sets out the fraud in which Mr. Rabbitte participated. I think it is important to describe this for the

purpose of this ruling. The fraud is set out in Mr. Kirby's affidavit of the 12th December, 2018. While on the face of it is slightly involved, in truth the nature of the fraud is fairly straightforward. At paragraph 47 onwards Mr. Kirby gives the following evidence:-

"For reasons which I will go on to explain, I have concluded that Westman was used as a vehicle to perpetuate a substantial fraud on the Revenue Commissioners. The Revenue have raised assessments on the basis that the amount of VAT evaded was €3.2million but the actual liability may quite possibly be higher."

7. I pause there to note that the figure put by counsel for Mr. Kirby to me as the acknowledged sum of VAT lost to Revenue is €1.2 million.

8. At paragraph 48 Mr. Kirby goes on:-

"48. My investigations have focussed on the business activities of Westman and as I will go on to show, there is evidence to support the following contentions:

1. Westman's VAT number was used to make intra-community acquisitions of goods valued at over €8 million;
2. Westman engaged in substantial sales of these goods in the State;
3. Westman issued invoices on which VAT was charged;
4. Westman filed incorrect VAT returns purporting to show zero transactions;  
and
5. Westman failed to remit the VAT due on these invoices.

49. It is my considered view that the type of fraud engaged in by Westman was that of a Missing Trader Intra-Community VAT fraud (MTIC Fraud). As the name suggests, this type of fraud contains two elements:

1. A missing trader (usually a company) and
2. An Intra-Community Supply."

9. And then he goes on to describe this form of fraud in general terms. He says at paragraph 50:-

"VAT acquisition fraud is a commodity-based fraud in which standard-rated goods or services are purchased at zero-rated for VAT purposes from a supplier based in another EU member state, they are then sold in Ireland for domestic consumption. VAT is charged on the sale in Ireland. The importer, who is known as the acquirer, subsequently fails to account for the VAT due on the standard-rated taxable supply to its Irish customer. In more complex frauds, the orchestrators are sufficiently familiar with the Irish tax system and Revenue Commissioners enforcement protocols to take the extra step of filing nil VAT returns so that no automated action is taken against the Company."

10. I pause here to note that it is common case that nil VAT returns were filed, for the entirety of the lifetime of this company on the directions of Mr. Rabbitte.

11. At paragraph 51 Mr. Kirby avers:-

"51. For illustrative purposes, I have set out how a VAT acquisition fraud transaction chain might work in practice using Westman as an example:

- (a) Goods valued at €100,000 are purchased from a UK supplier by an Irish VAT registered company (Westman)
- (b) The supply of the goods is made at 0% VAT (because it is Intra Community Supply) as the goods are being dispatched to Ireland. The 0% rating requires that a valid Irish VAT number be provided.
- (c) A VAT liability of €23,000 arises on the Intra Community Acquisition by Westman.
- (d) A simultaneous entitlement to a VAT input credit of €23,000 arises as the goods are being sold by Westman in Ireland.
- (e) The goods are sold by Westman onto a VAT registered customer in Ireland for say €108,696 + VAT of €25,000.
- (f) A VAT invoice is issued by Westman in respect of this sale to the Irish customer.
- (g) The VAT charged (€25,000) is paid by the buyer but not remitted to the Revenue and a nil VAT return or no VAT return is made to Revenue by Westman,
- (h) The Irish customer sells the goods on for €130,435 + VAT of €30,000.
- (i) The Irish customer claims a VAT input credit (€25,000) on foot of the original Irish VAT invoice received from Westman.
- (j) The Irish customer pays a Net VAT liability of €5,000 to Revenue in respect of the sale (€30,000 VAT charged on the ongoing customer less the €25,000 in VAT credit claimed).

52. In the above illustrative scenario involving €100,000 of purchases, Revenue would be at a loss of €25,000 i.e. as the VAT on the sale of the goods not paid over. As this Honourable Court will appreciate, the case now before this Honourable Court involves much larger sums and the loss to Revenue is substantially higher as a result."

12. This then, is the description of the MTIC fraud. As I said, it has its complexities but the gist of the fraud is plain. In the submissions filed on behalf of Mr. Rabbitte the following is stated, at paragraph 4 it is stated:-

"The onus of proof is on the applicant to prove on a balance of probabilities that the respondent knowingly and with intent to defraud, within between 1st July 2014 and the 20th July 2015, was involved in an MTIC, a form of carousel fraud, as a result of which the Revenue Commissioners sustained conservatively a loss to the order of 3.2 odd million in unpaid VAT, interest and penalties."

13. Of course it is the case that that figure of €3.2 million has shrunk in the light of the settlement reached between the parties. But it is plain from the submission of Mr.

Rabbitte, authored by the solicitor who advised him about the settlement, Mr. Dore, that there is now an acceptance that Mr. Rabbitte had participated knowingly in a fraud perpetrated by company and that the form of fraud involved was the MTIC fraud, so carefully set out and described by Mr. Kirby in his affidavit. I will come back to the nature of that fraud when I consider the length of the period of disqualification to be imposed on Mr. Rabbitte.

14. There is one other point of interest in Mr. Rabbitte's submissions. At paragraph 9.1 it is submitted as follows:-

"It is the Respondent's case (Mr. Rabbitte's case) that he does not know the source of the funds paid to purchase these machines/plant equipment and that he is entirely ignorant as to what happened to these machines/plant equipment post purchase. He is however certain that he did not purchase them from his own personal funds (which are to all intents and purposes now non-existent) nor were they paid for by the company."

15. That is important because one of the points of submission by Mr. Dore is that Mr. Rabbitte has accepted a liability for €1.5 million in respect of the debts of the company. But it seems from this submission that Mr. Rabbitte has, as is put by his solicitor, non-existent personal funds. Therefore, it is difficult to give much credit to Mr. Rabbitte for assuming a liability of €1.5 million which, on the basis of his own solicitor's submissions, he is not able to discharge.
16. I will now go through certain of the facts because, again, the facts of the fraud as perpetrated are of some importance. I have been provided with what is described as a "Chronological table of events admitted by Kevin Rabbitte" by counsel for Mr. Kirby. This had been circulated to Mr. Dore, I understand, and it does seem to reflect the accepted facts on Mr. Rabbitte's part. This helps to flesh out (without having to engage in any question of controversy) what happened in respect of this fraud perpetrated by Mr. Rabbitte through the company.
17. The relevant dates and events are as follows. Westman was incorporated on 9th May 2014. On 3rd June, 2014, Westman applied for VAT registration. On the 9th June, 2014, Mr. Rabbitte admitted to receiving a commission, as it is described, of €1,000 in respect of intra-company acquisitions. That commission is described by Mr. Rabbitte as having been paid by some anonymous person who features significantly in the submissions made by Mr. Dore and in the evidence provided by Mr. Rabbitte. This is apparently a person of whom Mr. Rabbitte was "petrified". I will come to the precise description of that individual in due course. But it is significant, as counsel for Mr. Kirby points out, that before any of these transactions took place, before any of the VAT frauds actually occurred monies were being paid to Mr. Rabbitte. That is not just true of the 9th June 2014. He received a further commission, by his own account, of €1,000 on 18th June 2014. He received a third commission of €1,000 on 24th June, 2014. He received a fourth commission of €1,000 on the 25th August 2014. So that has all the appearance of a carefully

coordinated and planned fraud and, as I have said, the nature of the fraud as described by Mr. Kirby, and now accepted by Mr. Rabbitte, is also consistent with that conclusion.

18. It is not until the 29th August, 2014, that Mr. Rabbitte actually commences the operation of the fraudulent scheme. He attends an auction in Leeds and purchases goods to the value of in excess of £192,000 sterling at 0% VAT using Westman's VAT number. On 10th September, 2014, two VAT returns are filed, one is for the period May/June 2014 but since there was no activity in that period a nil VAT return might appear appropriate. However, the second VAT return for the period of July/August 2014, also filed on the 10th September, as I have said, indicates no return for that period, notwithstanding the fact that there was the very significant transaction in Leeds carried out less than a fortnight before the VAT return is made, on the directions of Mr. Rabbitte, as the director of the company. This is a pattern which we see repeated.
19. On the 4th October, 2014, Mr. Rabbitte goes to Dromore (in County Down). He buys goods to the value of £21,855, and on the same day, at the same auction he buys goods to the value of just over £52,000. On 7th October, 2014, he admits attending Kerry Plant Hire, a UK company, and purchasing goods to the value of £124,000. I hardly need to labour the point that all of these purchases are made on a zero VAT rate using Westman's Irish VAT number.
20. On the 8th October, 2014, Mr. Rabbitte receives a commission of €2,000, and on the 14th October, 2014, he receives a commission of €1,000. On Halloween, 2014, he is back in Leeds and he buys two lots; one is a lot of goods for £7,440 and the other are goods to the value of £120,437. In November he goes Garvagh in Northern Ireland and acquires goods to the value of £170,000 on that date. And on the 17th December, 2014, he receives a further commission of €1,000 in respect of his services to the anonymous individual. That same day he is back in Garvagh and buys goods to the value of £2,852. He is paid a commission the day before Christmas Eve (the 23rd December, 2014) of €1,000. And then he is in Derbyshire, at EP Industries Ltd. on 13th June, 2015, buying goods to the value of over a quarter of a million pounds sterling: £264,000.
21. There are then a series of VAT returns made on the 13th January, 2015, and they cover the period September 2014 to October 2014 and the period November 2014 and December 2014. In respect of all of those periods there is a nil VAT return, notwithstanding the fact that over £750,000 sterling worth of goods which should have been returned for VAT were purchased by Mr. Rabbitte using Westman's VAT number over that period of time.
22. On 15th January, 2015, Mr. Rabbitte receives a further commission of €1,000. On the 30th January, 2015, he again attends Euro Auctions UK in Leeds and buys goods to the value of over a third of a million pounds sterling, just over £357,000 to be precise. On 24th February, 2015, he is in Derbyshire and he buys goods to the value of £499,775 sterling. On 10th March, 2015, he attends Gill Plant Services, Hertfordshire and uses Go Plant Rental Ltd., a UK company, to purchase goods to the value of £40,000 sterling. On the 27th March, 2015, he attends WH Bond in Cornwall and purchases goods to the value

of £186,000 sterling. On the 17th April, 2015, he attends again the auction house in Leeds and purchases goods to the value of £394,000 sterling.

23. He is in Leeds for a further transaction on 5th June, 2015, and buys goods to the value of £144,000 sterling. A fortnight later, on 19th June, 2015, he is in Garvagh and purchases goods to the value of £15,000. He is in Garvagh again on the 29th June, 2015, and buys £32,500 worth of goods. There follows a series of VAT returns made on 2nd July, 2015, for the period January/February 2015, March /April 2015 and May/June 2015. Those returns made on the 2nd July 2015 show a nil return notwithstanding the fact that there had been an acquisition of goods to a value in excess of £1.6million sterling over the period for which these returns were made.
24. On the 2nd July 2015, ironically the same day as these returns, Revenue in Ireland become aware of the intra-community acquisitions by the Westman totalling at that point in time approximately €5.18 million. Not all of those are conceded to have been ones for which Mr. Rabbitte has a responsibility. But Revenue write on 3rd July, 2015, to Mr. Rabbitte indicating their concern about these transactions. On that same day, 3rd July, 2015, Mr. Rabbitte is in Lisburn and buys goods to the value of £411,000 sterling at a zero rate as he is able to use the Westman VAT number.
25. On 21st July, 2015, Westman's VAT number is cancelled by Revenue. The case made by Mr. Rabbitte is that after that he did not become involved in any further transactions. Notices of Assessment for VAT are issued by the Revenue Commissioners against Westman. The value of the notice of assessment is €3,278,638.
26. In December 2015, Westman notifies the Revenue Commissioners that Grimes & Co. are its new tax agents. There is then an amended nil VAT return for all periods filed on 27th January, 2016 with the exception of the period May/June 2014.
27. Westman is struck off the Register of Companies on 13th April 2016. The applications by Revenue to restore Westman to the Register of Companies and to have Mr. Kirby appointed as official liquidator are heard and decided on 15th May 2017.
28. In the intermediate period of time there is communication between Revenue and Dr. Grimes of Grimes & Co.
29. There are two things to note about Dr. Grimes. Firstly, it is pointed out in the affidavit sworn on behalf of Mr. Kirby that Dr. Grimes himself was convicted of offences under the VAT Act subsequent to this period of time. I pay no heed to that. But what I do pay heed to is the correspondence from Dr. Grimes which, to put it mildly, makes significant efforts to try to dissuade Revenue from reinstating the company to the register or from then liquidating the company. The position taken by Dr. Grimes is that no good or sensible purpose would be served by such actions. In fact, there has been a sensible purpose served by such actions as the outcome of this motion shows.

30. There are then a series of activities in the liquidation. I will summarise those as follows. Firstly, there is a motion for contempt of Court issued against Mr. Rabbitte on the 27th March 2018. That Motion results in an Order of Mr. Justice McDonald noting there was sufficient evidence to enable a finding of contempt to be made against Mr. Rabbitte. The contempt alleged was that Mr. Rabbitte had failed to comply with an order of Mr. Justice White to provide a statement of affairs and to deliver up the books of records of the company.
31. A motion issued then against Mr. Rabbitte on 23rd July, 2019 (in these proceedings) for failure to comply with order for discovery. The discovery was eventually provided three days after the motion is issued, on 26th July 2019.
32. There is a final motion against Mr. Rabbitte (again in these proceedings) requiring him to deliver replies to interrogatories. That motion is issued on the 15th October, 2019. A supplemental affidavit of discovery and replies to interrogatories are received on 31st October of that year.
33. It is plain from this account that the activities of Mr. Rabbitte are among the most serious and worrying set of facts to come before the Courts in disqualification applications. It is accepted, as I have said, that Mr. Rabbitte should be disqualified. The loss to Revenue accepted for the purpose of this ruling is in the region of €1.2 million. And against all of those facts a submission is made by Mr. Dore on Tuesday which I want to record in the ruling. The submission made by Mr. Dore is as follows (at page 27 of the transcript line 23):-

“Now, Judge, my client has conceded all along that he did use the company’s VAT number to purchase machines and plant and equipment and he made the case that he did so for the commission and he made no secret of this. Judge, he is now accepting personal liability, capped at 1.5 million, in relation to the machinery he bid for, and no other machinery is set out in the applicant’s case, and I say that by any stretch of the imagination that is a very draconian relief against him, Judge. He did use the company’s VAT number, but the company never paid for anything, nor did it ever benefit from the proceeds of sale of anything.”
34. There are two things about that part of the submission. Firstly, that compensatory order, so to speak, that he would accept liability for certain of the debts of the company is a different issue to whether or not he should be disqualified, and if so, the period of disqualification. Secondly, as I have already observed, this may well be a hollow victory for the liquidator in that Mr. Rabbitte appears to have no assets to satisfy that particular part of the Order against him.
35. Secondly, while it is stated that the company never benefitted from “the proceeds of sale of anything”, we know that Mr. Rabbitte, on his own case, benefitted to the extent of something in the region of €7,000 over a period for assisting the commission of these frauds.

36. The second point being made by Mr. Dore is as follows at page 28 line 7:-

“Judge, he is consenting to a disqualification order being made against him and I say that is yet another draconian relief that he is consenting to.”

37. That in itself may give some small level of remission (but no significant level of discount) from the period of disqualification to be ordered. I will come back to that at the end of the ruling.

38. The third point is made at line 11 of page 28 of Tuesday’s transcript:-

“Judge, he has comprised these proceedings prior to the three day hearing commencing and he ought to be given credit for this.”

I think that this is the same as the second point; there was a compromise entered into at the last minute by Mr. Rabbitte and as counsel for Mr. Kirby accepts, some small reduction in the disqualification period should be applied.

39. The final point made by Mr. Dore, and by far the most unusual in terms of these disqualification hearings, is as follows. He said:-

“Judge, there is a particular background to this case which I would ask you to take on board.”

40. The particular background to the case is the suggestion that there is an anonymous individual who put Mr. Rabbitte and his wife in fear in respect of this matter. I think it worthwhile to see exactly what is said by Mr. Rabbitte about this individual and the fear he is said to have inspired in Mr. Rabbitte. I therefore want to consider briefly what is said in the affidavit Mr. Rabbitte swore in the contempt application, the application ultimately heard by Mr. Justice McDonald. That is the affidavit of 11th June, 2018; what Mr. Rabbitte says is as follows (at paragraph 12 onwards):-

“12. Previously I have become acquainted with a third party. He had purchased machinery from a company I had owned, Kevin Rabbitte Sand and Gravel Limited, when it ceased to trade due to the downturn in the economy in and around 2009. He also purchased a car for me. Since then we kept in touch intermittently.

13. In and around late 2014/early 2015, while I was still working in the United Kingdom, he telephoned me and asked me would I attend a machinery auction at “Euro Auctions”, who are based in Leeds in the United Kingdom. He told me to bid for machinery on his behalf and, as an incentive he told me that he would look after me in the event that he succeeded in purchasing any machinery for which I bid on his behalf.”

41. As I said, it is some months before that auction attended by Mr. Rabbitte that this contact took place and there was plenty of time for Mr. Rabbitte to reflect on this and reconsider his decision so to bid. At paragraph fourteen he says:-

"I agreed to attend and bid for him and he gave me limits to bid on three or four machines. I was known to the auctioneers of Euro Auctions who readily gave me a bidding number and I accepted the bidding number in the name of the company. I could not accept the bidding number in my own name as I did not have a VAT number. To the best of my recollection three or four machines were purchased. I was asked to organise a low loader to collect these machines and I asked Daytona Heavy Haulage, based in Donegal, to collect the machines some days later. I had nothing further to do with these machines and, to the best of my recollection, I was paid €500 in cash by way of commission. Subsequent to the auction I would receive an invoice from Euro Auctions by way of e-mail which I forwarded on to this third party. As a result he became aware of the company's VAT number."

42. He goes on to say:-

"Thereafter I would have attended upwards of 10 auctions when the same modus operandi was followed."

43. It is of interest to note that, notwithstanding the fact that the anonymous person became aware of the VAT number of Westman Mr. Rabbitte continued to attend and to present that VAT number in order to justify the nil charge to VAT on these acquisitions in the United Kingdom. He goes on to say at 17:-

"17. To the best of my recollection, during the course of 2015 I received a letter from Revenue concerning the activities of the company which took me completely by surprise and I immediately ceased attending any further action. When I was contacted by this third party to do any further auctions I declined to do so. In any event, the VAT number had been withdrawn by the Revenue Commissioners."

44. That is a striking piece of evidence because it is plain that, on Mr. Rabbitte's own account, after he was contacted by Revenue he declined to attend any further auctions. He was free from any intimidation by the anonymous person when he refused to do so. So he was not compelled by the anonymous person, on his own account, to attend auctions after July of 2015 when Revenue contact him.

45. That in itself speaks volumes for the contention which is inherent in a lot of what is said by Mr. Dore, on behalf of Mr. Rabbitte, and by Mr. Rabbitte himself that in some way he was compelled to do all this. He plainly was not intimidated into the first transaction in Leeds, he was not intimidated into the subsequent transactions he acknowledges, and when he refused to attend any further auctions he found able to do so and no action was taken against him by the anonymous person.

46. At paragraph 18 Mr. Rabbitte goes on:-

"As it now transpires, completely unbeknownst to me this third party had use the company's VAT number for numerous further transactions at machinery items in the United Kingdom for his own purposes."

47. He estimates that he received about €7,000 by way of commission. Then he says (and the next two paragraphs are significant):-

"I stupidly committed myself/the company to be the front for the purchase of machines by this third party, which were never paid for by the company and for which I received a very modest commission payment. Both myself and my wife were petrified of this third party, who has threatened me in no uncertain terms and it is no coincidence that my wife was driven off the road recently."

48. I emphasise the word "recently".

"I have been threatened with extremely serious consequences for both myself and my family in the event that I disclose this third party's name."

49. This evidence is significant because what is said by Mr. Rabbitte is that it is the disclosure of the identity of the anonymous third party that has led to the threat of violence or the threat of "extremely serious consequences", not that the decision to participate in the fraud was inspired by terror.

50. I would again stress the averment, which is repeated by Mr. Rabbitte on a number of occasions, that he had no hand, act or part in this fraudulent activity and it was done in circumstances where it was unknown to him. In light of Mr. Rabbitte's concession this evidence must now be treated as untruthful.

51. So in relation to the anonymous third person, as a matter of principle, I do not think that the Court in considering the length of disqualification for the purpose of the section should or can take into account a suggestion that an individual was coerced into behaving in the way in which Mr. Rabbitte behaved. But more specifically, for the purpose of the current application, the evidence is as follows. Firstly, he was not intimidated into the first transaction; no statement to that effect is contained in any affidavit. Secondly, he was not intimidated into any of the subsequent transactions. He neither suggests nor states that. Thirdly, he is now "petrified". However that is in respect of keeping the name of the anonymous person secret and that is a different issue. Mr. Rabbitte kept on continually to be involved in the fraud without intimidation or fear. Fourthly, it is likely that Mr. Rabbitte knew the sort of person he was dealing with but he agreed to do so when he was told he would be "looked after". Fifthly, he has not reported the matter to the Gardaí, notwithstanding the fact that if his allegations are true that is the appropriate step for a citizen to take.

52. I will now set out the relevant authorities which either direct or guide me as to how I should approach the task of fixing the appropriate period of disqualification.

53. The judgment of O'Donnell J. in *Re Kentford Securities Ltd.* [2011] 1 I.R. 585 sets out the two-stage test for the making of an order of disqualification. Firstly, for such an order to be made it must be established as a matter of fact that conduct falling within the relevant

statutory categories has been established. Secondly, the Court must decide whether, in the exercise of its discretion, it should proceed to disqualify.

54. While Mr. Rabbitte has consented to an order of disqualification, I should record that I have found facts (as set out earlier in this ruling) which establish that Mr. Rabbitte has conducted himself in a way that falls within section 842 (a), (b) and (d). I also decide that the nature of the conduct of Mr. Rabbitte is such that (in exercising my discretion) a disqualification order should be made in this case.
55. In *Re Bovale Developments Ltd.* [2013] IEHC 561, Finlay Geoghegan J. reformulated the principles she had set out in *Re Ansbacher* [2007] 1 I.R. 580. This reformulation was thought appropriate in order to align the Ansbacher principles with the decision in *Kentford*. The resultant approach to the question of the length of any disqualification was set out as follows: -
- “(i) A primary but not the only purpose of an order of disqualification is to protect the public against future conduct of companies by persons whose past record has shown them to be a danger to creditors and others.
  - (ii) It is also a purpose of an order of disqualification to improve corporate governance (*Re Kentford*, O’Donnell J. para. 27 and *Re Wood Products Ltd.: Director of Corporate Enforcement v. McGowan* [2008] IESC 28, [2008] 4 I.R. 498 per Fennelly J. at para. 46).
  - (iii) A further purpose of an order of disqualification is that it act as a deterrent, both in respect of the respondent director and other directors of companies (*Re Kentford*, O’Donnell J. at para. 27, quoting with approval Lord Woolf M.R. in *Re Westmid Packing Ltd.* [1998] 2 All E.R. 124 at pp. 131 to 132). Hence, the period of disqualification should contain deterrent elements.
  - (iv) The period of disqualification should reflect the gravity of the conduct or wrongdoing as found by the Court in relation to the relevant sub-paragraphs of s. 160(2) in respect of which the order of disqualification is being made;
  - (v) a period of disqualification in excess of ten years should be reserved for particularly serious cases;
  - (vi) *the Court should firstly assess the correct period in accordance with the foregoing and then take into account mitigating factors prior to fixing the actual period of disqualification.*”
56. Applying these principles, Finlay Geoghegan J. decided that the respondents should be disqualified for a period of fourteen years. She identified two particular elements of the respondents’ behaviour which justified such a lengthy period. These were the “systematic falsification of the books of account” and the magnitude and scale of “the understatement of the respondents’ gross remuneration [...]”

57. I am also assisted by the judgment of Keane J. in *Re Custom House Capital Ltd.* [2016] IEHC 689. In that case, it was decided that the appropriate period of disqualification was fifteen years; at paragraph 73 of the judgment, the following factors are identified as justifying that order:-
- “The conduct of the respondents [...] was deeply dishonest; continued over a protracted period of time until, for a variety of reasons, it could no longer be concealed; and was devastating on those innocent persons who had the grave misfortune to entrust the company with their pensions or savings. This is, undoubtedly, a particularly serious case.”
58. While there are inevitably differences between the facts of this case and the facts of *Re Bovale* and *Re Custom House Capital*, there are similarities which confirm that (as in those cases) the conduct of Mr. Rabbitte requires a period of disqualification at the top of the scale. In this case, Mr. Rabbitte participated in a systematic fraud sustained over a period of time. The fraud only stopped when Revenue became concerned about the transactions, and cancelled Westman's VAT number thereby making the continuation of the fraud impossible. The activities of Mr. Rabbitte were deeply dishonest, as I have described them. It should be noted that, not only did Mr. Rabbitte dishonestly make nil VAT returns on behalf of Westman, he also made Financial Statements for 2015 and 2016 in respect of Westman which wrongly stated that the company had no turnover, expenses, assets or liabilities in those periods. While it is the case that the benefit to Mr. Rabbitte appears modest (being payments to him variously described as €7,000 and €10,000), if anything this heightens the need for a lengthy period of disqualification; the public needs proper protection from someone prepared to allow his company to be used as a vehicle for fraud in return for such inconsequential amounts. In addition, it is important that the only trade carried on by Westman as described to me was the unlawful use of its VAT number to defraud Revenue. In other words, the business of Westman was the business of fraud. Mr. Rabbitte has not identified a single legitimate trade by the company in its lifetime and, indeed, has asserted in his evidence that Westman never traded and never utilised the bank account which it had opened. While the loss caused by the fraud was not directly to pensioners or savers, I do not believe that this assists Mr. Rabbitte. The loss to the public purse is a significant one, and inevitably restricts the Exchequer's ability to provide for public services. The harm caused by the fraud was not in the same order as the loss to Revenue in *Re Bovale*, but again that appears to be because Revenue cancelled the VAT number. Certainly, Mr. Rabbitte has given no evidence that the fraud would have stopped but for Revenue's actions.
59. I therefore believe that the appropriate period of disqualification, before taking mitigating factors into account, is fifteen years.
60. In *Re Bovale*, the mitigating factors included the fact that the impugned conduct took place over a two year period some fifteen years before the judgment, that the respondents had made 'voluntary disclosure' to Revenue (though in fact this may not have been truly voluntary), that for over a decade before the judgment the respondents

had been Revenue compliant and had kept proper books and records in respect of *Bovale*, and that the respondents had sworn that they acknowledged their wrongdoing, had learnt from their mistakes and intended "to set matters right". Nonetheless, orders disqualifying the respondents for seven years were made.

61. None of these factors apply here. In *Custom House Capital*, Keane J. identified mitigating factors such as co-operation with inspectors appointed to the company, and an unblemished record in business as justifying a reduction of one year in the term of disqualification; I have not been urged to reduce the term of Mr. Rabbitte's disqualification on similar grounds, and in any event his attitude to Revenue and to Mr. Kirby represents the Polar opposite of co-operation. It is also notable that the reduction of one year was granted to a director (Mr. Cassidy) who took no part in the disqualification application; here, Mr. Rabbitte has hotly contested the application from the outset. The circumstances of the other directors, and the reasons for the reduction in their periods of disqualification, are in the main even further removed from the circumstances of Mr. Rabbitte and I will not dwell on them here.
62. I conclude that he presided over a company which appears to have done nothing but defraud revenue; That Mr. Rabbitte has engaged in a conscious, calculated and continuous fraud; that the consequence has been a loss of about €1.2 million to the Taxpayer; that when the jig was up, in July and October of 2015, he allowed the company, Westman, to be struck off the register. He then tried to persuade Revenue not to restore the company or to liquidate it through his agent, Dr. Grimes. To an utterly egregious extent he has failed to cooperate with the liquidator. He has failed to comply with court orders as to the provision of documents and information. In evidence we now know to be dishonest, he has denied any knowledge of or participation in the fraud. He has never acknowledged on affidavit his wrong doing, nor stated he would not repeat it. He has never – unlike the situation in *Bovale* – indicated that he has learned from what he has done. And if his account of the fearsome anonymous person is true – as I must assume it to be for the purpose of this ruling – Mr. Rabbitte has shown himself to be the sort of person who would facilitate the use of a company of which he was a director by a ruthless individual for the purpose of defrauding the taxpayer. And in all of those circumstances, taking into account not just the fraud but the possibly less charged allegations made by the liquidator and established in the evidence of a failure to keep proper books and records of the company, I think the appropriate disqualification is, as was the case in *Custom House Capital*, a period of fifteen years.
63. In terms of the discount, Mr. Rabbitte has, almost literally at the door of the court, settled his dispute with Mr. Kirby and accepted that he perpetrated a fraud, has accepted liability for €1.5 million in debts in the company and accepted in principle the disqualification sought before this Court. As I said earlier in this ruling, it has been accepted by counsel for Mr. Kirby that that must involve some form of discount. However, the discount is modest indeed given the nature of the way in which Mr. Rabbitte has behaved in these proceedings alone and in the liquidation as a whole. I cannot ignore the likelihood that in reaching this accommodation there must have been an element of self interest on the

part of Mr. Rabbitte. As I pointed out to counsel for Mr. Kirby, Mr. Kirby and the other witnesses for the applicant have been saved the tedium and the difficulties of giving evidence, the liquidator has been saved a three-day trial and the liquidator has been saved the possibility of an appeal to the Court of Appeal. But by the same token Mr. Rabbitte has been saved all of those things himself. There may have been a reluctance on his part to be cross-examined on his affidavits, particularly given that we now know that the truth of the situation was that he was actually participating in the fraud, as he now acknowledges. So for that reason, the discount that I will provide on the fifteen years is a period of nine months, which is 5% of the period for which he would otherwise be disqualified.

64. So for those reasons, I will disqualify Mr. Rabbitte, in the terms of the Notice of Motion, for a period of fourteen years and three months.