Carrying on a Business with Dishonest Intent: A Review of the Law on Fraudulent Trading

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Introduction:

Although the company is a separate legal entity to its members, and consequently the members of a limited company are rewarded with limited liability, the same cannot be said of company officers. Company officers may be exposed to both criminal and civil sanctions where they fail to comply with their obligations under the Companies Act 2014, breach their statutory or fiduciary duties, or commit a corporate offence. These corporate offences include insider dealing, money laundering, bribery and corruption, reckless trading and fraudulent trading. It is the latter offence that is the focus on this Article. This article seeks to explore the nature of this offence and the sanctions applicable where this offence is proven.

Elements of the Offence:

Section 722 CA 2014 defines fraudulent trading as arising where:

> *"… any person is knowingly a party to the carrying on of the business of a company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose …"*

An important facet of this definition is that the offence can committed by *any person*, and therefore liability is not exclusively imposed upon company officers, but can extend to employees or third-party contractors, agents or clients, creditors, shareholders, auditors or any party to a contract that is considered fraudulent. The requirement here is that the person exercises some type of control or management function in relation to the running of the company.

A closer inspection of this definition highlights that there are two separate components to this offence, namely: (1) being *knowingly* a party to the fraudulent *carrying on of the company's business*, and (2) doing so with an *intent to defraud*.

A. **Knowingly a party to the fraudulent carrying on of the company's business:** There are two main issues that that need to be addressed here, namely, the meaning of (1) knowledge, and (2) carrying on a business.

Acting with Knowledge

The first issue to be dealt with here is the concept of *knowingly*. In this regard the Courts have clarified that knowledge can be actual knowledge or constructive knowledge[1]. In *Morris & Ors v Bank of India (2004)*[2] Justice Patton stated that:

> *"… knowledge, for these purposes, includes so-called blind-eye knowledge, which exists when the party in question shuts its eyes to the obvious because of a conscious fear that to enquire further will confirm a suspicion of wrongdoing which already exists."*[3]

In *Re Bank of Credit and Commerce International SA & Ors Morris & Ors v State Bank of India (2003)*[4] Justice Patton similarly clarified that:

> *"It is well established that it is no defence to say that one declined to ask questions, when the only reason for not doing so was an actual appreciation that the answers to those questions would be likely to disclose the existence of a fraud."*[5]

Carrying on a Business

Carrying on the company's business implicitly involves the operations necessary for the functioning of the company, and in particular its day-to-day transactions. In effect it revolves around the transactions necessary to ensure that it can continue to trade[6], but also extends to the collection and distribution of a company's assets after it has ceased trading[7]. Therefore, the action of fraudulent carrying on the business of the company is not solely synonymous with trading activity, and can also include the collection and distribution of assets in payment of company debts[8] to ensure the effective winding-up of the company.

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[1] This is knowledge that a person is imputed to have if they exercised reasonable care.
[2] [2004] B.C.C. 404.
[3] Ibid at p. 419.
[4] [2003] B.C.C. 735.
[5] Ibid at p. 740.
[6] In *R v Philippou* (1989) 5 BCC 665, the fraudulent act involved the withdrawal by two directors of funds from a company account, that they then used to purchase properties in Spain, which they then transferred to another company which they controlled. In this case, one of the issues that was raised on appeal was whether the companies' obtaining, maintaining and/or renewing their Air Travel Organiser's Licences from the Civil Aviation Authority constituted *carrying on any business of the company* for the purpose of the offence of fraudulent trading. The Court concluded that as it was an integral part of the companies' business to provide air travel for their customers, they could not do so without Air Travel Organiser's Licences. Consequently, it was part of carrying on the business to apply for, maintain and renew these licences.
[7] As per *Arlidge and Parry on Fraud*, Fisher, Milne, Bewsey and Herd, (2020), 6th edition, Sweet and Maxwell, at 22-022.
[8] *Re Sarflax Ltd* [1979] Ch 592, at 589H to 599C.

Furthermore, the fraudulent act may involve a range of different behaviours, but may also involve a single incident, therefore, the concept of fraudulently carrying on the business does not necessitate that the impugned act is continuous.

As per Elleray in *The Matter of TMC Transport (UK) Limited (2001)*[9]

> *"the defrauding of a single creditor by a single transaction can properly be described as the carrying on of a business to defraud creditors."*[10]

This position was given supported in *Re Hunting Lodges Ltd (In Liquidation) (1985)*[11] wherein Justice Carroll stated:

> *"In my opinion it is not necessary that all of the company's business should be carried on with fraudulent intent, nor is it necessary that there should be a course of dealing or a series of transactions before the section can be called into operation."*[12]

However, to fall under this definition the single incident must be reflective of how the business of the company is generally conducted. Therefore, not every individual fraud or fraudulent misrepresentation perpetrated by a company amounts to fraudulent trading. As per Mr Justice Oliver in *Re Murray-Watson Ltd (1987)*[13]:

> *"[The section] is aimed at the carrying on of a business . . . and not at the execution of individual transactions in the course of carrying on that business. I do not think that the words 'carried on' can be treated as synonymous with 'carried out', nor can I read the words 'any business' as synonymous with 'any transaction or dealing'. The director of a company dealing in second-hand motor cars who wilfully misrepresents the age and capabilities of a vehicle is, no doubt, a fraudulent rascal, but I do not think he can be said to be carrying on the company's business for a fraudulent purpose, although no doubt he carries out a particular business transaction in a fraudulent manner."*

In effect, fraud on an individual customer is not necessarily fraud on a creditor and does not necessarily demonstrate the concept of fraudulently carrying on the business of the company. This is because there is a distinction between the carrying on of a business and the execution of individual transactions in the course of carrying on that business. As per Justice Templeman in *Re Gerard Cooper Chemicals (1978)*[14]:

> *"the section is contemplating a state of facts in which the intent of the person carrying on the business is that the consequence of carrying it on (whether because of the way it is carried on or for any other reason) will be that creditors will be defrauded, "intent",*

[9] [2001] WL 825267.
[10] At para 86.
[11] [1984] IEHC 3.
[12] Ibid at para 41.
[13] Unreported, April 6.
[14] [1978] Ch 262.

of course, being used in the sense that a man must be taken to intend the natural or foreseen consequences of his act."[15]

B. **Intent to Defraud:** The essence of the meaning of an intent to defraud for the purpose of the commission of the offence of fraudulent trading appears to be that the person has acted with dishonest intent, and consequently, at its core actual dishonesty is a necessary ingredient of fraudulent finding. According to Justice Maugham in *Re Patrick and Lyon Ltd (1933)*[16]*:*

> *"I will express the opinion that the words 'defraud' and 'fraudulent purpose' where they appear in the section in question, are words which denote actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame. No judge, I think, has ever been willing to define fraud' and I am attempting no definition. I am merely stating what, in my opinion, must be one of the elements of the word as used in this section."*[17]

Similarly, in *R v Sinclair (1968)*[18] Justice James directed the jury that:

> *""It is fraud if it is proved that there was the taking of a risk which there was no right to take [and] which would cause detriment or prejudice to another. You have to be sure that it was deliberate dishonesty"*[19]*.*

The action of engaging in deliberate dishonesty is invariably associated with conduct that impacts the rights of another. In Sinclair it was noted that to cheat and defraud is to act with deliberate dishonesty to the prejudice of another person's proprietary right[20]. According to Lord Radcliffe in *Welham v DPP (1961)*[21]*:*

> *"Now I think that there are one or two things that can be said with confidence about the meaning of the word 'defraud'. It requires a person as his object; that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage of the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning".*[22]

However, the provision is broad enough not to be confined to defrauding creditors but extends to any persons who are victim of the fraudulent behaviour, and in this regard the concept is not confined to fraudulently obtaining credit. As per Lord Justice Chadwick:

> *"It is not, in my judgment, a pre-condition of finding the relevant intent to defraud creditors or other fraudulent purpose, that there has been an incurring of credit. The*

[15] Ibid at 267d-268d.
[16] (1933) Ch 786.
[17] Ibid at p.790.
[18] [1968] 1 WLR 1246.
[19] Ibid at p. 1247.
[20] Ibid at p. 1250.
[21] [1961] AC 103.
[22] Ibid at p. 123.

relevant detriment … may not involve the incurring of credit and indeed the relevant intent may not, in a given case, succeed. The obtaining of credit can be relevant intent to defraud or relevant fraudulent purpose but it would be wrong to elevate the obtaining of credit to a requirement of liability …"[23]

Examples of actions that have been deemed to amount to an intent to defraud include:

(1) *Siphoning Off Company Funds*: This can arise where an individual director lodges monies owing to the company from debtors, into his own personal account, for the purpose of depriving the shareholders or creditors of these funds. A permutation of this action arose in *Re Hunting Lodges Ltd (in liquidation) (1985)*[24] wherein the company owed money to the Revenue and were warned against the disposal of any company assets without paying this Revenue debt. Nonetheless the only asset of the company was sold, and an agreement was made with the purchaser that half of the sale price would be fraudulently diverted to a building society account with fictitious names, for the benefit of certain directors of the company. This secret extraction of funds was found to amount to fraudulent trading and personal liability without liability for the debts of the company was imposed on the relevant offending company directors.

(2) *False/Double Accounting*: The act is also committed where a person authorises the maintenance of false company accounts, for the purpose of defrauding the Revenue or any other creditors of the company. In *Re Aluminium Fabricators Limited (1984)*[25] the liquidator discovered that the company maintained two sets of financial accounts, that the real accounts were maintained in an irregular manner and that there were very large sums of money which were unaccounted for in the real company accounts, under the headings of both income and expenditure. The intention and effect of this was to allow the directors of the company to siphon off company assets for their own benefit and consequently amounted to fraudulent trading. According to Justice O'Hanlon:

> *"… a complete set of books of account appeared to exist from which figures could be derived to establish the income and expenditure and the profit or loss of the company in each accounting year, but in fact a huge number of cash transactions were never being disclosed, and a completely distorted picture was being presented in each financial year as to the company's turnover, and as to its financial affairs in general."*[26]

In *Re Kelly's Carpetdrome Ltd (In Liquidation) (1983)*[27] the company also operated a double accounting system and a huge proportion of the cash transactions conducted

[23] Taken from Fraudulent Trading: The Four Principles https://www.consumercrime.co.uk/site.aspx?i=ar3638
[24] See footnote 11.
[25] [1984] ILRM 399.
[26] Ibid at para 26. When the liquidators arrived at the business premises they found that although the company was still trading, virtually all of its assets were gone. Enquiries revealed that these assets were removed between the date the petition for liquidation was presented to the Court and the date the liquidator arrived at the business premises.
[27] [1983] IEHC 61.

by the company with its customers never found their way into the ordinary books of account of the company but were recorded secretly in a different set of books. Consequently, the accounting system of the company was conducted to conceal from the Revenue Commissioners and anyone else charged with investigating the affairs of the company, sales transactions of up to IR£30,000 per week or IR£1.5m per annum. Prior to liquidation, the assets of the company had also been transferred to a connected company to avoid the payment of revenue debts. Accordingly, the Court imposed personal liability upon the company's officers for the debts of the business[28].

(3) *Fraudulent Obtaining Credit*: Taking orders and accepting deposits based on these orders when the person knows that the company will not be in a position to fulfill them[29] is evidence of dishonest intent and satisfies the requirements of an intention to defraud for the purpose of the offence of fraudulent trading. In *The People* (*DPP) v Synnott (1996)*, the defendant who operated an insurance and investment brokerage business, Mark Synnott (Life and Pensions) Brokers Limited, was deemed to have acted with an intent to defraud where he falsely represented that he was engaged in the *bona fide* business of investing monies entrusted to him, when in fact he used these investments to finance a combination of high living[30] and to reimburse some of the investors, who had been lured in his investment schemes by his promises of excessively high yielding returns. This fraud only became evident when the company collapsed owing debts of in excess of IR£2m, and an action was subsequently taken by the liquidator against him for fraudulent trading. Judge Kelly noted in the case that Synnott had perpetrated a nasty and callous deceit with a clear intention to defraud[31].

In the same vein, allowing a company to run up debt, when there is knowledge that it will not be in a position to repay those creditors, constitutes fraud on those creditors[32]. Therefore, any action of incurring company debts by those in charge when they either know that they will not be repaid or there is a substantial and unreasonable risk that they will not be paid amounts to an intent to defraud. As per Justice Maugham in *Re William C Leitch Brother Ltd (No.1)* (*1932)*[33]:

> *"[I]f a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors*

[28] The Court ordered Kelly is to pay the Revenue €3.6 million arising from the fraudulent trading scheme operated by the company.
[29] As arose in *Re Gerard Cooper Chemicals* [1978] Ch 262.
[30] Including the purchase of Cruicerath House and Stud near Kill, Co Kildare. According to Mr Peter Charleton SC, representing the defence: *"[Synnott] was a man completely wrapped up in a fantasy world he had created inside his own head"*.
[31] Synnott was found guilty of the offence of fraudulent trading and sentenced to a term of imprisonment of four years and three months. He was also disqualified from acting as a company director, auditor or manager for a period of 10 years.
[32] This arose in *Re A Company* (No 001418 of 1988) [1990] BCC 526, wherein the defendant director of the company in liquidation during a relevant period of 22 months before the liquidation, when he had no reason for thinking the company could pay its debts as they fell due or shortly thereafter, had caused the company to incur credit with trade creditors and the Revenue.
[33] [1932] 2 Ch. 71.

ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud."[34]

In *Morphitis v Bernasconi (2003)*[35] fraudulent trading was found to have occurred where a creditor of the company (who was owed money in respect of rent due under a lease agreement) was deceived into believing that the rent would be paid in due time, following agreed rescheduling, whereas the relevant directors knew that the creditor would not be paid after a specific date, as they had created a device to transfer the business of the company to a new corporate entity.

Intent to Defraud and Collective Responsibility

There is no presumption of collective responsibility where a charge of fraudulent trading is raised, a case has to be proven against each separate director. The actions of each person will be viewed individually to ascertain whether they were knowingly a party to carrying on the business with the intent to defraud. This was evident in the case of *Re PSK Construction Ltd (2009)*[36], a case in which the company intentionally under-declared and underpaid PAYE and other tax liabilities to the Revenue by more than €1.6 million in 2005, as they were in financial difficulty. The company was placed into liquidation in 2006, owing debts of more than €3.18m, and at which point Revenue was owed €2.36 million. Justice Finlay Geoghegan had to determine whether both directors were liable for the losses of the company arising from fraudulent or reckless trading and concluded that one of the directors Peter Killeen had committed this offence[37], whereas the other director, Lorraine Higgins[38], was not guilty of this offence. The Justice concluded that she had acted under the direction of Killeen, and therefore she was not satisfied she had sufficient knowledge about the company in March 2005, when the under-declaration was made, to have acted with knowledge and an intention to defraud[39]. According to Justice Finlay Geoghegan:

"I am not satisfied that the applicant has established, as a matter of probability, that Ms. Higgins had sufficient knowledge about the financial position of the Company in March 2005, such that I should conclude that she then knew that a decision to continue trading, notwithstanding the cash-flow problems of which she was aware, by under-declaring and under-paying to the Revenue Commissioners, constituted a serious risk of loss or damage to the Revenue Commissioners or other creditors."[40]

Proving the Mens Rea of Intent to Defraud

[34] Ibid at p. 77.
[35] [2003] EWCA Civ 289.
[36] [2009] I.E.H.C. 538.
[37] He was made personally liable for €1.6m of the company's outstanding debt as of the date of liquidation.
[38] Who was both an employee and non-executive director of the company.
[39] Higgins told the Court that she accepted Killen's explanation that the under-declaration to the Revenue was a temporary measure and that the arrears would be paid in full when the cash-flow problem was straightened out.
[40] See Footnote 36, at para 32.

The issue of whether actions amount to an intent to defraud will be raised based on the facts known to that person at the relevant times, and in determining the existence of fraud the Court must be in possession of cogent evidence and a degree of probability which is commensurate with the seriousness of the allegation. According to *R v Ghosh (1982)*[41]:

> *"... a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest."* [42]

As per Lord Hughes in *Ivey v Genting Casinos (2017)*[43]:

> *"When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."*[44]

Therefore, the act of dishonesty is assessed from the perspective of society's standards rather than the defendant's understanding of those standards. According to Lord Nicholls of Birkenhead in *Royal Brunei Airlines v Tan (1995)*[45]:

> *"[A]cting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated … However, these subjective characteristics of honesty do not mean that individuals are free to set their own standard of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values accordingly to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour."*[46]

He went on the say:

> *".... when called upon to decide whether a person was acting honestly a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did."*[47]

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[41] [1982] EWCA Crim 2.
[42] Ibid at 1064D.
[43] [2017] UKSC 67.
[44] Ibid at para 74.
[45] [1995] 2 AC 378.
[46] Ibid at p. 389.
[47] Ibid at p.391.

> In looking at the evidence, a single fact viewed in isolation may have no apparent significance whatsoever. However, a collection of facts, when viewed together and placed one against the other, may establish that each of those facts, viewed both collectively and individually, acquire a very different significance. This derives from the cumulative force of the proved facts and circumstances, where each individual fact or circumstance would not be sufficient to prove the fact in issue[48].

Liability for Fraudulent Trading

Pursuant to the provisions of the Companies Act 2014, the sanctions for fraudulent trading are both civil (Section 610) and criminal (Section 722).

Criminal Liability

Fraudulent trading is classed as a Category 1 offence, and where prosecuted summarily it can result in a Class A fine or a term of imprisonment not exceeding 12 months or both. Where prosecuted on indictment it can result in a term of imprisonment of up to 10 years or a fine of up to €500,000 or both. However, the criminal burden of proof applies and each element must be proven beyond reasonable doubt. In addition, it is not a requirement that the company is insolvent or in liquidation for criminal liability to apply. In *O'Keeffe v Ferris (1997)*[49], Justice O'Flaherty commented that any sanction would have to be proportionate to the wrongdoing. The application of the concept of proportionality can be seen in the case of the *DPP v Garret Hevey (2020)*[50]. In this case, the accused pleading guilty to a charge of fraudulent trading and deception and he was sentenced to five years' imprisonment on the fraudulent trading count, and three years' imprisonment on the deception counts, with both sentences to run concurrently. The final year of the five-year sentence was suspended. The DPP appealed this sentence based on its leniency in the Court of Appeal and the Court agreed that the sentence imposed on the applicant was unduly lenient and substituted a sentence of six years' imprisonment[51] on the count of fraudulent trading, taking a variety of factors into consideration. According to Justice McCarthy:

> *"The maximum penalty in respect of the Companies Act offence is one of ten years' imprisonment. When one asks oneself where on the scale a given offence falls, one does not cast about so to speak, for what might be theoretically the most serious offence of the class in question but one draws upon the experience of the courts and common sense, it seems to us that in the Irish context, fraudulent conduct of the present kind must fall into the most serious category of this type of offence, that is to say that the headline sentence should be fixed at between seven and ten years. A judgment must be made by a court on a case-by-case basis as to where on that scale of seriousness an offence falls and, in this case, we think that the appropriate headline*

[48] As per Justice Hunt in *Powers v Greymountain Management Ltd (In Liquidation) & Ors* [2021] IEHC 243, at para 15.
[49] [1997] 3 IR 463.
[50] [2020] IECA 223.
[51] Taking a variety of factors into consideration.

sentence should have been in or about nine years' imprisonment; the trial judge felling into error in this regard."[52]

Civil Liability

In relation to civil liability, a person may be held personally liable without any limitation of liability, for all or any part of the debts or other liabilities of the company, as the court may direct[53]. This liability only arises where the company is in liquidation. This section is not restricted to directors or officers but applies to any person who is a party to fraudulent activities. In *O'Keeffe v Ferris (1993)*[54] Justice Murphy noted that:

> *"… the subsection and its predecessors were designed to remedy an injustice which was identified nearly a hundred years ago in the famous case of Salamon and Salamon (1897) …"*[55]

This position was supported by Justice O'Hanlon in *Re Aluminium Fabricators Limited (1984)*[56] who expressed the view that:

> *"[t]he privilege of limitation of liability which is afforded by the Companies Act in relation to companies incorporated under the Act with limited liability, cannot be afforded to those who use a limited company as a cloak or shield beneath which they seek to operate a fraudulent system of carrying on business for their own personal enrichment and advantage."*[57]

In ascertaining whether to impose civil liability Justice Murphy in *O'Keeffe* reflected on the fact that burden of proof is liability based on the balance of probabilities, and that the civil liability test is sufficiently distinct from the criminal liability test, due to the absence of the distinguishing characteristics of a crime.

However, in imposing civil liability, there must be a link between the loss caused and the fraudulent act. This was highlighted by Lord Justice Chadwick noted in *Morphites v Bernasconi (2003)*[58] wherein he stated that:

> *"[t]here must be a causal connection between the fraud and the loss, and some nexus between (i) the loss which has been caused to the company's creditors generally by the carrying on of the business in the manner which gives rise to the exercise of the power and (ii) the contribution which those knowingly party to the carrying on of the business*

[52] See Footnote 50, at para 41. He clarified that the trial judge fell into error by attaching too much weight to the mitigating factors, and that the appropriate discount or reduction on that headline sentence by virtue of the plea of guilty should be one year, as it was in the nature of the case a relatively late plea.
[53] Section 610(2).
[54] [1993] 3 IR 165.
[55] Ibid at para 30.
[56] See footnote 25.
[57] Ibid at para 47.
[58] [2003] Ch. 552

in that manner should be ordered to make to the assets in which the company's creditors will share in the liquidation."[59]

Relief afforded by the section is not confined to the particular creditor who was defrauded nor is that creditor the only person who would gain from successful proceedings under the subsection – the liability extends to all the debts of the company arising from the fraudulent action. In that regard an award of compensation payable may be compensatory, or it may be punitive, in order to deter others from engaging in similar future actions. As per Lord Denning in *Re Cyona Distributors Ltd (1967)*[60]*:*

"The sum may be compensatory. Or it may be punitive. The court has full power to direct its destination. The words are quite general: "all or any of the debts or other liabilities of the company as the court shall direct." By virtue of these words the court can order the sum to go in discharge of the debt of any particular creditor; or that it shall go to a particular class of creditors; or to the liquidator so as to go into the general assets of the company, so long as it does not exceed the total of the debts or liabilities."[61]

Similarly, in *Re William C. Leitch Ltd (No. 1) (1932)*[62] Justice Maugham stated that:

"I am inclined to the view that [this section] is in the nature of a punitive provision, and that where the Court makes such a declaration in relation to "all or any of the debts or other liabilities of the company," it is in the discretion of the Court to make an order without limiting the order to the amount of the debts of those creditors proved to have been defrauded by the acts of the director in question, though no doubt the order would in general be so limited."[63]

In *Re Contract Packaging Limited (1992)*[64] a director of a company who was involved in the siphoning off of company funds to third party accounts, in an attempt to prevent the company's creditors from accessing these funds, was ordered by Justice Flood to give up the home that he and his common law partner shared to the liquidator, as well as his interest in his vehicle, two boats and funds held by him on deposit in various financial institutions.

In *Re Hunting Lodges (1985)*[65] Justice Carroll noted that those who relinquishes their responsibilities and duties under the Companies Act 2014, may not thereafter escape civil liability for fraudulent trading. However, to impose such liability real moral blame must attach to their action. In this case the liquidator of the company applied to have its two directors, Mr and Mrs Porrit, declared personally responsible for the debts of the company arising from acts of fraudulent trading. These acts included the sale of a company asset (at the time the company owed a substantial Revenue debt) and thereafter lodging part of the proceeds of

[59] Ibid at para 53.
[60] [1967] CH 889.
[61] Ibid at p. 920.
[62] See footnote 33.
[63] Ibid at p.79-80.
[64] Unreported, High Court, 16th January, 1992.
[65] See footnote 11.

that sale into a building society account under a false name for the benefit of Mr Porrit. However, the mandate documents were signed by both Mr and Mrs Porrit, and Mrs Porrit had also been present during the closing of the sale. Nonetheless Mrs Porrit argued that she should not be made personally liable as she played no active part in the running of the company. This argument was rejected by Justice Carroll who commented that:

> *"The day has long since passed since married women were classified with infants and persons of unsound mind as suffering from a disability so far as responsibility for their acts was concerned, or since a married woman could escape criminal responsibility on the grounds that she acted under the influence of her husband. Mrs. Porrit cannot evade liability by claiming that she was only concerned with minding her house and looking after her children. If that was the limit of the responsibilities she wanted, she should not have become a director of the company or having become one she should have resigned.*
>
> *Any person who becomes a director takes on the responsibilities and duties, particularly where there are only two … A director who continues as director but abdicates all responsibility is not lightly to be excused. If she had reasonably endeavoured to keep abreast of company affairs and had been deceived (and there is no such evidence) it might be possible to excuse her."*[66]

Disqualification

Furthermore, where a person is found liable for fraudulent trading, the court *may* also make a disqualification order against them[67], disqualifying them from being appointed or acting as a director or other officer, receiver, statutory auditor, liquidator or examiner or being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of a company[68], friendly society[69] or industrial and provident society[70]. This disqualification is automatic where the offence is prosecuted upon indictment, and discretionary where the offence is prosecuted summarily.

[66] Ibid at para 89-90.
[67] Section 842(a) Companies Act 2014.
[68] Within the meaning of the Companies Act 2014, as amended.
[69] Within the meaning of the Friendly Societies Acts 1896 to 2014.
[70] Within the meaning of the Industrial and Provident Societies Acts 1893 to 2014.

The Distinction Between Fraudulent and Reckless Trading

Arising from the inherent difficulty in proving knowledge and intent to defraud, often a case for reckless trading (as opposed to fraudulent trading) may also be levied against a corporate wrongdoer, in the hope that if they fail in proving fraudulent trading, they may be able to prove reckless trading instead. Although these offences are similar, there are a variety of distinct differences between them, that can be summarised as follows:

Distinction	Fraudulent Trading	Reckless Trading
A. Elements	This requires that the wrongdoer was knowingly carrying on the business of the company with the intention to defraud	This requires that the wrongdoer was knowingly a party to the carrying on of any of the company's business in a reckless manner
B. Who Can Commit	Anyone can be liable for fraudulent trading	Only company officers[71] are liable for reckless trading
C. Examples	(1) Siphoning off company funds, (2) double accounting, (3) obtaining credit when you know that the company will not be in a position to repay it etc …	(1) Carrying on the business below the standard of their general knowledge, skill and experience, (2) contracting a company debt where it is foreseeable to a high degree of certainty[72] that the company will be able to repay it, (3) allowing the company to trade while insolvent etc …
D. Liability	Both civil and criminal liability arises	This is a civil offence, and only civil remedies apply

Conclusion:

Although fraudulent trading is difficult to prove, the facts of the case often indicate that the business of the company was conducted in a manner with an intention to defraud. It may arise in a variety of different situations and is not limited to the examples highlighted in this Article[73]. However, each case will be reviewed on its own merits, in order to determine whether criminal or civil sanctions are appropriate.

[71] These include directors (*de jure*, *shadow* and *de facto*), secretaries, auditors, liquidators, receivers etc …

[72] As per *Re Appleyard Motors Ltd; Toomey Leasing Group Ltd v Sedgwick* [2016] IECA 280, Court of Appeal, Hogan J, 13 October 2016.

[73] For example, in July/August 2021 two separate companies (LV Distributions Ltd and SIO Traders Ltd) were found guilty of fraud in the UK arising from the submission of false documents to at least 41 local authorities and the Government's Bounce Back Loan scheme, in order to secure ST£230,000 worth of grants, put in place to support businesses during the COVID-19 pandemic. Similarly, questions may be asked of Irish companies if there is a suspicion that they fraudulent appropriated Irish Government support schemes during the pandemic.