Neutral Citation Number: [2009] IEHC 580

THE HIGH COURT

2000 2 COS

IN THE MATTER OF HOCROFT DEVELOPMENTS LIMITED

(IN LIQUIDATION)

AND

IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990

AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

LIAM DOWALL

APPLICANT

AND

STEPHEN CULLEN, PAUL ROCLIFFE AND DAVID CULLEN

RESPONDENTS

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 9th day of December, 2009

1. The above company, Hocroft Developments Limited, was incorporated on the 9th November 1995 and for the reasons later explained in this judgment went into liquidation on the 14th April 2000. The applicant, Mr. Liam Dowall, was duly appointed Official Liquidator and has continued to occupy that role to the date hereof. Arising out of this liquidation the applicant has instituted these proceedings seeking a restriction order against all respondents pursuant to s. 150 of the Companies Act 1990 ("CA 1990"). During the currency of such proceedings it has been agreed by the parties that two matters should be resolved by way of preliminary issue, firstly whether Mr. David Cullen (the "third respondent") "was either (i) a *de facto* director, or (ii) a shadow director" of the Company, and secondly whether the Official Liquidator is entitled to proceed with the substantive application, notwithstanding the delay in bringing those proceedings.

2. Before deciding upon these two issues, in respect of which Mr. Paul Rocliffe play no active part, it is useful to firstly outline, in a brief manner, the background of the Company and the history to date of these proceedings.

Background

3. Hocroft Developments Limited ("Hocroft" or "the Company") was incorporated on 9th November 1995 and shortly afterwards converted to a single member company, with Mr. Stephen Cullen, the first respondent, being the sole shareholder thereof. It had a nominal share capital of IR£1,000,000 with a paid-up share capital of IR£2. The current directors are Stephen Cullen, who was so registered on 1st August 1996, and Paul Rocliffe, the second respondent, who was appointed on 1st April 1998. The Company, which was established to carry on the business of builders and property developers, was involved in two property transactions, Beechfield House, Clontarf, Dublin 3 and the Village Inn and associated lands at Bettystown, Co. Meath, and in one building project, at the Paramount Hotel, Parliament Street, Dublin 2. The applicant contends that it was as a direct result of this project, the only ever undertaken by the Company, that its insolvency arose.

4. Mr. David Cullen, at all relevant times, was the owner of the Paramount Hotel, Dublin 2. In or around early 1998 discussions took place between him and his brother Stephen, relating to the planned development of that hotel. It was agreed that Hocroft would be awarded the contract for its development on a fixed price basis, the sum being IR£4,540,221 plus VAT. A contract was drawn up between the parties reflecting this fact, although it is unsigned and undated. The construction work itself was tendered for by J.J. Rattigan & Company Limited ("JJR") in the sum of IR£3,084,863.50 plus VAT. It would appear that no contract was ever executed in this regard.

5. On 4th August 1998 JJR took possession of the site and commenced work on the hotel. Disputes arose between the builder and the Company's representatives arising out of delays in the works programme. Both sides accused the other of being the cause; however it is not relevant for our purposes to examine this in any detail. Eventually, agreed variations resulted in the original completion date being extended by twenty-seven days to the 28th April 1999.

6. The project, however, was not completed on this date and works continued for some time thereafter. The architect also continued to issue interim certificates in this intervening period. On 13th August 1999 Hocroft failed to discharge the sum due on foot of one such certificate; this lead to JJR serving a Notice of Suspension of Works on 17th September 1999. Some three days later Notice of Default was served on the Company. Eventually, following negotiations between the parties, it was agreed on foot of a Supplemental Agreement that payment of interim certificates would be suspended until practical completion had been reached and so certified. This occurred on 4th November 1999. It was as a result of the non-payment by Hocroft of monies due after this date that lead JJR to petition for the winding up of the Company.

7. This petition issued on 11th January 2000. By Notice of Motion dated 21st January 2000, grounded upon the affidavit of Stephen Cullen, the Company sought an injunction to restrain the advertising of the petition. Following an exchange of affidavits, Kelly J. gave judgment on 18th February 2000 dismissing the application.

8. The petition came on for hearing on 13th and 14th March 2000 and having considered the issues, Kinlan J. on 14th April 2000 ordered that the Company be wound up. By the same Order Mr. Liam Dowell of BDO Simpson Xavier was appointed as the Official Liquidator. Following investigations by the Liquidator, McCracken J. on 21st October 2002 made an Order in proceedings brought by him under s. 245 of the Companies Act 1963 ("CA 1963"), directing each of the respondents to attend before the Master to be examined on oath in relation to the promotion, formation, trade, dealings, affairs and property of the Company. On 26th February 2003 and 5th March 2003, Paul Rocliffe and Stephen Cullen, respectively, were so examined.

9. In February 2003 Mr. David Cullen sought to set aside the Order of McCracken J. Affidavits were exchanged and Mr. Cullen received liberty to cross-examine the Liquidator on his affidavit at the hearing of the application. The matter went into a List to Fix Dates, but when a date was eventually assigned, no judge was available to hear the application. Ultimately, in April 2005 the dispute between the parties was settled, with Mr. Cullen agreeing to respond to the Liquidator's questions on terms.

10. Under s. 56 of the Company Law Enforcement Act 2001 ("CLE Act 2001") every liquidator of an insolvent company must report to the Director of Corporate Enforcement ("DCE") within six months of either his appointment, the date of commencement of the section, as was the case here. The format of the report is a mixture of questions and answers, which can be supplemented by the giving of further information. The form itself can be found in the Schedule to the Company Law Enforcement Act 2001 (Section 56) Regulations 2002 (S.I. 324/2002). As it has never been suggested that this section does not apply to this liquidation, I proceed on the basis that it does. Therefore the Liquidator's first section 56 Report was due on 30th November 2003, but was not sent on time. He belatedly received an extension from the Office of the Director of Corporate Enforcement ("ODCE") on 4th March 2004, giving until 31st March 2004 for the filing of that Report: it was submitted on 29th March 2004.

11. The Report posed a number of relevant questions for the Liquidator, who answered in the manner following:

> *Question*
>
> *"21. Have you any information which may lead you to believe that there was a person acting as a shadow director of the Company?(Please note that the expression 'shadow director' may include an individual or a body corporate):*
>
> *Yes: □ No:*
>
> *If yes, please provide the following details for the individual/body corporate in question:*
>
> *a. Full Name:*
>
> *David Cullen*
>
> *b. …*
>
> *c. …*
>
> *d. Has the Person demonstrated to you that s/he has acted honestly and responsibly in relation to the conduct of the Company's affairs?*
>
> *Yes: No:"*

No answer was given in relation to question 21(d), which in context related only to David Cullen.

12. In relation to the first and second respondents, question 22(g) asked:

> *"has the person demonstrated to you that s/he has acted honestly and responsibly in relation to the conduct of the Company's affairs?"*

The Liquidator ticked "no" in respect of both of them.

13. Having submitted such a report, the DCE must address the requirement of s. 56(2) of the CLE Act 2001 which provides:

> *"A liquidator of an insolvent company shall, not earlier than 3 months nor later than 5 months (or such later time as the court may allow and advises the Director) after the date on which he or she has provided to the Director a report under subsection (1), apply to the court for the restriction under section 150 of the Act of 1990 of each of the directors of the company, unless the Director has relieved the liquidator of the obligation to make such an application."*

14. He did so by letter of 13th August 2004 indicating that:

> *"in respect of <u>this report</u> I wish to inform you that you are hereby <u>not relieved</u>…"*

Following receipt of this letter the Liquidator, whilst acknowledging his duty to issue such proceedings pursuant to s. 150 of the 1990 Act, felt that such an application would have been premature at that time. This view, he states in his affidavit sworn 3rd September 2006, was:

"reinforced by receipt of a letter of 2nd December 2004 from the ODCE [seeking an update on the s. 150 application] and the absence of any response to my letter to the ODCE of 14th December 2004 in which I set out reasons why the Section 150 application had not yet been brought."

15. The Liquidator submitted a second s. 56 Report on 11th August 2005 and on the 4th November 2005 he received a response from the ODCE stating:

"In respect of this report I wish to inform you, you are hereby relived…"

The Liquidator acknowledges however that there was an error in the letter accompanying this report which stated that the proposed examination of David Cullen under s. 245 of the CA 1963 was still ongoing, whereas in fact it had been concluded months earlier. Nonetheless, he says, other investigations into Mr. Cullen's involvement were continuing at that time.

16. Sometime after November 2005, and following advices from his solicitors in relation to his s. 56 obligations, the Liquidator discussed the matter with the ODCE who confirmed to him that in their view the s. 150 application should have been brought following their letter of 13th August 2004. He explains that his failure to apply in time was not an attempt to avoid such an obligation, but was due to his desire to be in a better position of knowledge. Ultimately he instituted the s. 150 applications against all three respondents by Notice of Motion returnable for 9th October 2006.

17. In the context of this timeline, one must now consider in more detail the circumstances relevant to the director issue and also to the delay issue.

The Director Issue:
18. In relation to the first issue, namely whether David Cullen is either a *de facto* director or shadow director, the applicant contends that there may be some overlap between these two potential positions and therefore has submitted arguments in relation to both. However, his main argument is that David Cullen is a shadow director.

The Case for:
19. In the most general terms a *de facto* director is one who is held out as and who acts as a true director would; whereas a shadow director does not. Rather he is one at whose behest the true directors act (see paras. 55 *et seq. infra*.). For s. 150 of the CA 1990 to apply it must be established as a matter of probability that this respondent was at the date of the commencement of the winding up or within twelve months prior to it a director of Hocroft (s. 149(2) CA 1990). For the purpose of this provision a shadow director shall be regarded as a director (s. 149(5) of CA 1990). The applicant must therefore establish that Mr. David Cullen was a director of Hocroft to cover the period from 14th April 1999 to 14th April 2000. Nothing turns on the other pre-condition of the section's application as the Company's insolvency is not in issue.

20. The Liquidator advances a number of grounds which he says convincingly point to David Cullen being either a shadow or *de facto* director. These are:-

i) Three "core events":
   a) The cheque signatory authorisation of Mr. David Cullen, which occurred in 1996;
   b) The property transactions which took place on 14th April 1997;
   c) Discussions between the Company and Mr. David Cullen which occurred in early 1998 in relation to the Paramount Hotel project.

ii) That the main contractor and various sub-contractors on the project appear to have regarded him as the controlling force behind the Company.

iii) That he received a number of requests for direct payment of invoices due, in relation to the hotel project, and received copies of minutes, and/or attended at, project meetings – in respect thereof where he made contributions which more properly should have been made by the Company. And,

iv) That at the time of the Liquidation the hotel project was the sole source of the Company's funding.

21. These matters must now be outlined more fully: in 1996 Mr. Cullen was listed in the Bank Mandate of the Company as a cheque signatory; this continued until 14th December 1999, just four months prior to the appointment of the Liquidator. These facts are not in dispute.

22. Secondly, the Company was involved in two property transactions where lands were sold by it to David Cullen, who shortly afterwards sold them on by way of subsale at a profit. The first transaction related to lands at Bettystown, comprised in Folio 16405F and in Folio 18329F (part of), both in Co. Meath. An Agreement for Sale between the Company and David Cullen was entered into on 14th April 1997, and shortly afterwards on 10th May 1997 a Sale-on-Agreement was made between Mr. Cullen and a John O'Connor (in trust). The Company received IR£130,000 for the lands, but the resale price was IR£339,000, realising a profit of IR£209,000. The second set of lands, which were the residue of those comprised in Folio 18329F Co. Meath, were also sold to Mr. Cullen on 14th April 1997 for IR£205,000, and were disposed of by him on 14th August 1997 for a profit of IR£295,000. Given the proximity of purchase and disposal, and the amount of profit made, the Liquidator submits that it can be inferred from these two transactions that Stephen Cullen, the Company and David Cullen were acting in concert for David Cullen's benefit. In the alternative even if David Cullen was not in sole

control of the Company he was at least clearly involved in its management.

23. Next is the agreement for the hotel project, where provision was made that the Company would pay David Cullen the sum of IR£30,000 per week as liquidated damages for every week after 1st April 1999 in which practical completion was not achieved. When defending the winding up petition, the first respondent contended that this liability had arisen due to construction delays caused by JJR, which had resulted in a 36 week overrun and a resulting liability of IR£1,080,000 to David Cullen. It is commented by the Liquidator that, despite the Company having entered into this penalty agreement with David Cullen, no comparable clause was ever imposed on JJR; it having refused to accept a corresponding provision to the one agreed to by Hocroft.

24. The Liquidator further argues that the Architects (O'Brien & Kaye, "OBK"), the Quantity Surveyors (Patterson, Kempster & Shortall, "PKS") and the main contractor (JJR) all appeared to have regarded him as the controlling force behind the Company. All correspondence from them was directed to David Cullen in relation to the hotel project. In particular Mr. Patrick Rattigan of JJR, the petitioning creditor, averred in an affidavit filed in the winding up proceedings, that he had never heard of Stephen Cullen or Hocroft until his firm had taken possession of the site; further all negotiations in respect of liquidated damages were held with David Cullen. In addition, his company's notification of suspending the works was, whilst sent to Hocroft, addressed for the attention of "Dave Cullen". As a result of these matters, the applicant rejects as implausible the contention of "mere confusion" on the part of the contractors, a view which he says is supported by Mr. David Cullen's failure to offer any credible explanation as to how Mr. Rattigan held the view that he was the principal behind the project. These matters, it is said, are evidenced through certain exhibits in the Liquidator's affidavit of 3rd September 2006, including a letter sent by PKS on 26th January 2000, after the petition had been presented, to JJR, copied to "David Cullen, Hocroft Developments" but not to either of the other two respondents.

25. The Liquidator draws specific attention, *inter alia*, to three items of correspondence which he says further show the extent of David Cullen's involvement in the Company's affairs. These are:

> i) A fax dated 24th November 1999 from PJ Clonan & Company Limited, mechanical services engineers, seeking direct payment from David Cullen for work done on the hotel project. The fax includes a statement that Homan O'Brien, the mechanical and electrical contractors, would have no problem in Mr. Cullen paying that company directly;
>
> ii) A letter dated 16th July 1999 from PKS to David Cullen enclosing updated Cost Report number 5. The applicant posits that if Mr. Cullen was in fact engaged only at "arms length", why would PKS consider him as the appropriate person to address such information to; and,
>
> iii) A letter dated 18th May 1999 from JJR to David Cullen setting out the details of a meeting which had taken place on the previous Friday at the hotel site and Patrick Rattigan's understanding of the points discussed. The applicant contends that these matters all relate to the detailed building process and as such should only have been relevant to the Company.

26. The Liquidator reiterates that the draft Supplemental Agreement (see para. 6 *supra*.) prepared in September 1999 was copied to David Cullen by OBK. This indicates that OBK viewed David Cullen as the individual taking responsibility for the project on behalf of the Company. Further he refers to minutes of a Project/Contract Meeting of 6th May 1999 prepared by OBK which was attended by Mr. Cullen, Stephen Cullen and Tom Byrne, all listed as representatives of "Hocroft Development Ltd (client)". It is clear from this note that David Cullen was an active participant in the meeting; asking questions and making statements which would have been the prerogative of the Company. It is also clear that Stephen Cullen made no contribution.

27. Finally in this context, the applicant argues that prior to his appointment, the hotel project was the Company's sole source of funding. The Company raised 15 invoices to David Cullen from June 1998 to January 2000 in the total amount of IR£4,540,221, the alleged contract price. The Liquidator notes that no variations or extras appear to have been included in these invoices, and they bear no relationship to the sums certified as due to JJR by OBK. David Cullen paid these invoices with the exception of the final invoice for IR£845,016.12 (including VAT) which remains outstanding. The Liquidator has instigated proceedings for the recovery of those monies. OBK issued 14 certificates to JJR from August 1998 to December 1999. The first ten, amounting to IR£2,478,054.80, were paid in full. The final four, amounting to IR£949,912.21 (including VAT) were not discharged by the Company, and no sums were paid to JJR after 30th September 1999; the date of the settlement mentioned at para. 6 *supra*.

28. In the Liquidator's opinion, it can be seen from the transactions surrounding the hotel project that David Cullen had a hotel built for him, which was still trading six years later, for a total cost of IR£4,162,732.52 (including VAT), whereas the company that built it on his behalf, JJR, incurred costs of IR£4,548,375.25 (including VAT) of which IR£2,070,320.19 is still outstanding. The only beneficiary of the hotel project was therefore David Cullen.

29. The Liquidator, in addition to the above, also outlines the financial condition of the Company. He states that the reconciled bank balance for the Company as of 30th September 1999 was IR£20,503.24. Following this date the Company received: payments totalling IR£544,295.61 from David Cullen; a VAT refund of IR£204,369; and the proceeds of sale of a jeep for IR£17,400. Thus the Company had at least IR£766,064.61 at its disposal. These funds were used both immediately prior to and after the issue of the Petition to pay off almost all creditors of the Company, with the exception of JJR and Truwood. The Liquidator states that the cash at bank on his appointment was IR£3,020.50. He also states that he has agreed a final account with JJR in the sum of IR£2,070,320.19, and the final deficit in the liquidation is in excess of IR£2,500,000, excluding the costs of winding up and the petitioner's costs.

30. The Liquidator complains that the records which he took possession of were inadequate; with key documents missing. He could find no basis for calculating the alleged contract fee of IR£4,540,221.01, nor for the invoices sent to David Cullen by the Company in connection with the project. Nor were there any records relating to the property transactions. Further, although the Company did file annual returns for periods to 31st March 1997 and to 31st March 1998, both of which were filed on 23rd December 1999, it never filed a further set of accounts to 31st March 1999, although apparently prepared. On inquiry, the firm listed as the Company's auditors, Deignan Webb, deny having had any involvement in the auditing of the Company's accounts.

The Case against:
31. In response to these allegations the third respondent submits that the Liquidator is precluded from relying on any event prior to 14th April 1999 and that any document created outside the relevant 12 month period should be disregarded. In particular he highlights the following:

> i) The hotel contract made between the Company and the third respondent, apparently in early 1998;
>
> ii) Letters relied upon by the Liquidator in his Affidavit of 3rd September 2006 and referred to at paragraphs, 38, 39, 40, 41, 42, 43,46, 48, 49, 50 and 51; and,
>
> iii) Letters (and meetings) relied upon by the Liquidator in his Affidavit of 15th January 2007 and referred to at paragraphs 19, 20, 21 and 22 thereof.

The third respondent further claims that all correspondence which is not evidence specific to these proceedings should be excluded, in particular those referred to or exhibited in the winding up proceedings, but not in the within proceedings.

32. It is admitted that Mr. David Cullen was listed in the Bank Mandate of the Company as a cheque signatory until 14th December 1999, but according to the first respondent, who instigated this, he was chosen because of family connection and in any event the arrangement was intended for emergency cover only. Moreover, there is no evidence that David Cullen actually signed any cheques.

33. With regards to both transactions involving the lands at Bettystown, Mr. Stephen Cullen states that around the time of the Company's formation, Mr. John NcNulty, a founding director, identified such lands, which the Company purchased in late 1995 for IR£140,000. The plan, originally, was to construct holiday homes thereon and to increase the unit density by seeking a variation to the existing planning permission. However, following a feasibility study it was decided that since no added benefit could be gained from this exercise, the lands should be disposed of. After more than a year, with no immediate prospect of selling the lands and with insufficient funds to properly develop them, the Company, when approached by David Cullen, sold them for a total of IR£305,000. This realised a profit of IR£180,000, which was then invested for the benefit of the Company. A property known as Beechfield House, Clontarf, was acquired and subsequently sold, making a profit of IR£65,000. In those circumstances it is wrong to conclude that only David Cullen benefited from the transactions. It would also be wrong to conclude that the hotel project was the sole source of the Company's funding.

34. The existence of the penalty clause is not denied but at no point did David Cullen ask the Company for the amount in question, or indeed for any part of it. Because of this and the belief that the overrun was entirely the responsibility of JJR, the Company decided, that rather than challenge Mr. Cullen on this clause, it would seek the amount due by way of counter-claim against the contractor. The figure involved was IR£1,080,000, just exceeding the debt giving rise to the petition, namely IR£949,912.21.

35. The third respondent points out that initially the Liquidator gave the impression that there were only two professional advisers involved, namely OBK, the Architects, and PKS, the Quantity Surveyors; whereas in fact there were many others who were also engaged in the project. With regards to OBK, in particular, they knew of and had previously worked with David Cullen and had at one stage operated from offices owned by him, as he himself did: in fact these premises are now known as the Paramount Hotel. In any event, David Cullen did not negotiate with any advisers; the Company negotiated with and engaged such advisers.

36. The third respondent also makes the point that of the many documents in the Liquidator's possession only a few were in fact copied to him. It is out of this very small cross section of documents relating to the hotel project, which the Liquidator seeks to support his shadow director claim. He never was a director, and neither he nor the Company ever held him out as being such. Nor did he have access to its books or records. Simply put, he was never part of the corporate structure of the Company. Further, in support of this position, the Mr. Stephen Cullen says that there was extensive correspondence between the professional contractors and the Company, and that all professional services were invoiced to and paid for by the Company.

37. Mr. David Cullen represents his practice as being that of "hands on" in all business ventures, and it was via this involvement that correspondence passed between him and the professional team retained by the Company. His brother, Stephen, who agrees with this, points to the obvious, namely that any developer/owner is bound to be heavily concerned with the underlying development, and therefore his involvement with the project does not show that he controlled the Company or that he was a director thereof.

38. With regard to the hotel development David Cullen admits that he was the prime mover in respect of it, but this should not be confused with being the prime mover in the Company. He draws attention to para. 4.10 of his Contract with the Company, headed "Employer to be kept appraised", which states:

> *"The contractor shall ensure that the employer is kept fully appraised of the progress of the building works and any material problems or delays incurred in connection with the premises and is notified in advance of the date and time of all site meetings and all meetings concerning the progress and the financial and technical aspects of the premises and is sent copy minutes relating thereto after those meetings and is invited to attend and participate on all such meetings."*

He alleges that the Liquidator has therefore failed to take this arrangement into account when considering why correspondence was forwarded to him, and why he attended meetings.

39. In the above circumstances it is claimed that there is insufficient admissible evidence before the court to establish that the third respondent acted as a *de facto* or shadow director of the Company. The case should therefore be dismissed as against him.

The Delay Issue:

40. Whilst the date and event timeframe of the Company's liquidation and related proceedings have already been set out at paras. 7 – 16 *supra*., it would, I think, be helpful to again briefly summarise the more important steps.

Part 1 – Liquidation Proceedings:
11/01/00 Petition to wind up issues

14/04/00 Winding up order made and applicant appointed Official Liquidator

08/07/02 Application under s. 245 of CA 1963 seeking to have the respondents examined on oath regarding the Company's affairs.

21/10/02 McCracken J. orders the three respondents to attend before the Master for such examination.

18/02/03 David Cullen seeks to set aside the Order of McCracken J. as it applies to him.

26/02/03 Paul Rocliffe is so examined.

05/03/03 Stephen Cullen is so examined.

22/03/04 David Cullen obtains liberty to cross-examine the Liquidator on his affidavit on the hearing of this application.

03/04 – 04/05 Application listed twice but no judge available on either occasion.

08/04/05 Application compromised on terms, with David Cullen agreeing to answer questions from the Liquidator.

Part 2 – Section 150 Proceedings:
30/11/03 Due date for first s. 56 Report

04/03/04 ODCE extends due date until 31/03/04

29/03/04 First s. 56 Report submitted

13/08/04 DCE declines to relieve the Liquidator of his obligation to move an application under s. 150 of CA 1990 against all of the respondents in respect of the first s. 56 Report.

02/12/04 ODCE seeks an update on the progress of the s. 150 application.

14/12/04 Liquidator responds by stating that when the examination under s. 245 CA 1963 is concluded, which he expects in the Hilary Term, the s. 150 application will be moved.

11/08/05 Second s. 56 Report submitted.

04/11/05 DCE relives the Liquidator of any obligation to move a s. 150 application arising out of this second s. 56 Report.

05/09/06 The within Notice of Motion issues seeking relief under s. 150 of CA 1990 against all Respondents in respect of the first s. 56 Report.

09/10/06 Return date for this Motion.

41. Under s. 56(2) CLE Act 2001, a Liquidator "*shall not earlier than 3 months nor later than 5 months*" after the date of submitting a s. 56 Report, apply for a restriction order under s. 150 CA 1990, unless relieved by the DCE from so doing. As applied to this case, time therefore began to run from the 29th March 2004. It is clear therefore that the current application is about 2 years late. As a result, the applicant, who accepts this is the case, also seeks leave under that sub-section for an extension of this time limit.

The Case for:
42. Mr. Stephen Cullen contends that there has been inordinate and inexcusable delay on the part of the Liquidator in bringing this application under s. 150 of CA 1990. He also asserts the existence of prejudice, which he claims is highly relevant to the balance of justice argument. In his affidavit of the 4th December 2006, he puts the matter thus, where at para. 8, he states that:

> *"By reason of the inordinate and inexcusable delay on the part of the Applicant, I am now being asked to defend serious allegations made against me that are stale and relate to transactions that occurred more that 9 years ago in respect of the sale of certain lands at Bettystown, County Meath and 7 to 9 years ago in respect of the construction of the Paramount Hotel."*

This said respondent goes on to particularise the prejudice as including:

i) The inevitable difficulty in having specific recollection of events, particularly in circumstances where reliance has been placed on the absence of contractual documents, thereby placing a premium on accurate recall of agreements reached orally and of meetings and discussions had and undertaken;

ii) Mr. Tom Byrne, a former employee who was engaged by the Company in relation to the hotel project, has emigrated and is unavailable to give evidence to corroborate his version of events;

iii) Uncertainty as to whether the books and records of the Company in the possession of the Liquidator

are complete, and thus whether documents supportive of his case are missing;

Finally, he claims that where the onus of proof is shifted to the respondents to show, *inter alia*, that they acted honestly and responsibly it would be particularly unfair in such circumstances to allow the action to proceed after such a lapse of time.

43. In addition to outlining similar arguments as those described, Mr. David Cullen, who also argues specific prejudice, states that:

> *"… if the case were allowed to proceed the Court would be dealing with matters that took place a considerable period of time removed from the Court hearing. In that eventuality … the Court must presume that there is prejudice even in the absence of any specific identified prejudice." (para. 24 of the third respondent's legal submissions of 26th February 2007)*

With regards to his own particular circumstances, he alleges that from 4th April 2000 until 3rd September 2006 the Liquidator never claimed or even suggested that he was a director of the Company. In fact in the s. 245 application he merely alleged that this respondent had "*an active role*" in the Company. He therefore had no prior warning that he would have to meet this claim, the first indication of which was made more than six years after the appointment of the Liquidator. In fact he was only first contacted by the Liquidator close on two years after his appointment, when general information was requested. There was also a delay of over 2 years before the s. 245 application was made. Furthermore, despite settlement of these proceedings in April 2005 no further steps were taken to pursue the s. 150 application until another period of almost 18 months had elapsed; despite the fact that virtually immediately upon or at least very soon after his appointment, the Liquidator had in his possession all relevant information.

44. In relation to the specific events which the Liquidator seeks to rely on, vis-à-vis Mr. David Cullen, the following should be noted:

> *"Bettystown land sale Over ten years*
>
> *Sale of lands at the Village Hotel Bettystown Over ten years*
>
> *The construction of the Paramount Hotel Nine years*
>
> *Bank Mandates Over ten years"*

Thus it is clear that a large amount of time has elapsed in relation to events which substantially ground the Liquidator's application.

The Case against:

45. In reply to these allegations, the applicant contends that whilst the delay may have been longer than was desirable, it was not inordinate. Secondly, since the s. 245 proceedings were necessary, and since Mr. Paul Rocliffe was examined only on the 26th February and Mr. Stephen Cullen on the 5th March 2003, there cannot be any question of delay in respect of the former prior to these dates. Nor may David Cullen complain of any delay from February 2003 to April 2005 as this period coincided with his application to set aside the Order of McCracken J. It is also unrealistic for Stephen Cullen to argue that the Liquidator could have proceeded prior to the resolution of the s. 245 proceedings against David Cullen. It is common practice that s. 150 proceedings be brought against all directors of a company at the same time. The costs of such proceedings alone would recommend against the bringing of multiple applications where one would suffice.

46. The only period in respect of which there could legitimately be complaint is the period from April 2005 to 5th September 2006, when the within proceedings were instituted. However, this period of one year and five months could not be considered "inordinate" as a matter of law.

47. Even if it was so, the Liquidator argues that such delay was "excusable"; this was a complex liquidation where there was a substantial absence of books and records, the affairs of the Company were complicated, there were a large number of parties involved and he received conflicting information from these parties. This all took considerable time to investigate properly, which was his duty to so do. In those circumstances it would have been improper to bring a s. 150 application in 2002, and would have remained so whilst the s. 245 proceedings were outstanding. Further, the delays caused by the s. 245 proceedings were exacerbated by the actions of the third respondent, who failed to file affidavits within time, and who sought in February 2003, a year after the original application, to have the Liquidator cross-examined on his affidavits in the proceedings. He does admit that there was delay from January 2006 until September 2006, but this resulted from the preparation of the lengthy and detailed application, and in any event, such delay was minimal in the context of what is complained of by the respondents.

48. In concluding that his delay was neither inordinate nor inexcusable the applicant also seeks to contrast the facts of this case with those in *Re Supreme Oil Co. Ltd* (In Liquidation), Hughes v. Duffy [2005] 1 IR 571 and *Re Knocklofty House Hotel Ltd. (In Liquidation)* [2005] 4 IR 497. These cases will be considered in more detail below (see paras. 86 *et seq. infra*.).

49. If the Court nonetheless finds that the delay herein is both inordinate and inexcusable, the Liquidator suggests that the balance of justice lies in favour of allowing the s. 150 application to proceed. He argues that the submissions of the respondents in this regard are "*bland and generalised*", and although reference is made to "*patent unfairness*" and "*putting justice to hazard*", as enunciated by Finlay Geoghegan J. in Manning v. Benson and Hedges Limited [2004] 3 IR 556, no credible case is presented as to why such conclusions would result if the s. 150 application should proceed. Nor do the arguments of the respondents establish a "*real and serious risk of an unfair trial*" (*ibid*. at p. 568).

50. Although the third respondent contends that because he was not a *de jure* director, he was taken by surprise at being joined in the s. 150 proceedings, it was clear from affidavits submitted in the winding up petition in 2000 that in substance it was being alleged that he was a director of the Company. Further, he was involved in the s. 245 proceedings substantially from 2002 to 2005. It is therefore difficult to understand how the respondent can credibly say that he had "*no prior warning that he would have to meet*" the s. 150 proceedings when brought.

51. The nature of the proceedings under s. 150 CA 1990 should also be taken into account by the Court. This is not normal *inter partes* litigation. The Liquidator is acting in furtherance of a statutory obligation to bring such proceedings in the circumstances of an insolvent liquidation (save for any relief granted under s. 56(2) of CLEA 2001). Thus the role of the applicant in these proceedings is more formal than would otherwise be in normal litigation. He is not acting in self-interest, but is fulfilling a statutory role designed to protect the public. Thus the balance of justice lies in allowing the continuation of proceedings.

52. With regards to the specific question of prejudice, the Liquidator disputes that there is any evidence of such. He says, quoting from *Duignan v. Carway* [2001] 4 IR 550 at 563, that assertions of general prejudice will not ordinarily be sufficient to merit the dismissal of an action. In this case the respondents make only general assertions as to prejudice due to the lapse of time, save for their reference to the unavailability of Mr. Tom Byrne. Further, in circumstances where there were only two discrete transactions and one construction project this would weigh against dismissal on the grounds of prejudice. This "*was not a sprawling company with many different and wide-ranging projects*", so stated the applicant; it was in his words narrow and self-contained, engaged in limited activities all of which, it is claimed, benefited the third respondent. Also, the respondents have been actively engaged with the investigations of the Liquidator since his appointment, and there has been no evidence to date of any memory lapse in relation to the Company's history or affairs. The prejudice claimed by the respondents is therefore illusory and thus insufficient to tip the scales of justice in favour of dismissing the s. 150 application.

53. In relation to delay there is just one more area which should be mentioned. The third respondent in his submissions places particular reliance upon Article 6(1) of the European Convention of Human Rights ("ECHR") and the jurisprudence thereon. He relies on the case of *Davies v. U.K.* [2002] 35 EHRR 720 (delivered on 16th July 2002) where the European Court of Human Rights (ECtHR) found that a period of 5 ½ years breached Article 6(1) and awarded damages against the State. The third respondent notes that this case was applied in a further case involving a director of the same company in *Eastway v. U.K*. [2006] 2 BCLC 361.

54. In direct response to this point, the applicant draws attention to *Dyer v. Watson* [2002] WLR 1488 where the court recognised that more time may be required in more complex cases. The applicant further notes that the application of Article 6(1) would not affect the test laid down in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459 unless it could be said to be incompatible with the State's obligations under the ECHR. Finally, no complaint can be made in relation to any delay caused by the litigation; the Courts are expressly excluded from the definition of "organ of the State" contained in s. 1 of the European Convention on Human Rights Act 2003. Therefore s. 3(1) does not impose an obligation on the Courts to perform their functions in a manner compatible with the State's obligations under Article 6(1) of the ECHR.

Conclusion:

The Director Issue:
55. As above outlined, this issue arises out of a submission by the applicant that Mr. David Cullen was either a shadow or a *de facto* director of the Company, and accordingly should be treated as a "director" for the purposes of s. 150 CA 1990. A *de facto* director has been defined as a person "*occupying the position of director*", by whatever name, (s. 2(1) CA 1963). An example of a *de facto* director would be a person, who although not properly appointed, (*e.g.* lacking the requisite share qualification), nonetheless continued to act in the capacity of a director. His position is different from a *de jure* director only because his status as a director is technically invalid. O'Neill J. in *Re Lynrowan Enterprises Ltd*. [2002] IEHC 90 at para. 18, held that a person could be a *de facto* director in the following circumstances:

> *"1. Where there is clear evidence that that person has been either the sole person directing the affairs of the company, or*
>
> *2. Is directing the affairs of the company with other equally lacking valid appointment, or*
>
> *3. Where there were other validly appointed directors that he was acting on an equal or more influential footing with the true directors in directing the affairs of the company."*

This view of the learned trial Judge was considerably influenced by the decision in *Re Richborough Furniture Ltd.* (1996) 1 BCLC 507, which he followed.

56. On one reading of *In Re Lynrowan* it might be thought that a positive finding could only be made if one or more of the three set of circumstances mentioned were met, but if not, no such finding could result. Courtney, in "*The Law of Private Companies (2nd Ed.)*" (2002) comments on this: he doubts the existence of any requirement to satisfy either the first or second of these conditions, before a person may be a *de facto* director ([8.054]). Whilst acknowledging the value of highlighting certain evidential factors, which *Lynrowan* did, the author nonetheless specifies as his preferred test the following:-

> *"–– Although the person was not, in fact, a formally appointed director, he 'occupied the position of director'; and*
>
> *–– The company held him out as a director and he acquiesced in this or, in the alternative, he held himself out as a director and the company acquiesced in this.*

It is thought that in order to be a de facto director, it is essential to show that a person was held out as such. …" (ibid. at [8.056])

57. This general description of such a director reflects the decision of Millett J. in *Re Hydrodam (Corby) Ltd.* [1994] BCC 161 at 163 where he said:

> *"A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned with the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level."*

58. It seems to me on this point that a comparative assessment, as to power and influence between a true and *de facto* director, is not required in any formal sense; although evidently a *de facto* director must be a person of considerable influence so as to exercise similar power and authority as a true director. It is more likely I think that no one test is decisive but that all relevant factors must be considered, as Jacob J. did in *Secretary of State for Industry v. Tjolle* [1998] BCC 282, later endorsed by Walker LJ in *Re Kaytech International plc., Portier v. Secretary of State for Trade and Industry* [1999] BCC 390. Undoubtedly one such factor, always of considerable weight, is whether the person in question, with the approval of the true directors or a majority of them, held himself out as a director or was allowed by the company to do so. But there are others. In the final analysis I would respectfully share the view of Finlay Geoghegan J., who in *Gray v. McLoughlin, McLoughlin & Tuohy* (ex tempore delivered on 9th July 2004) described as the critical issue whether the person has assumed the status and function of a director.

59. Before leaving *In Re Lynrowan*, there is a further passage that should be referred to, which is:

> *"4. In the absence of clear evidence of the foregoing [see para. 55 supra.] and when there is evidence that the role of the person in question is explicable by the exercise of a role other than director, the person in question should not be made amenable to the section 150 restriction." (para. 18)*

Even though this statement was said in the context of a *de facto* director, it must likewise apply to a shadow director as both are equally exposed, *inter alia*, to the restriction provision. See *La Moselle Clothing Ltd v. Soualhi* [1998] 2 ILRM 345 at 350 (Shanley J.). So if uncertainty remains about whether the acts alleged are referable to an assumed directorship or to some other interest or role, whether within or outside the company, the onus will not be discharged and the provisions of s. 150 CA will not apply.

60. A *de facto* director should be contrasted with a shadow director, who has been statutorily described, if not defined, as:

> *"…a person in accordance with whose directions or instructions the directors of a company are accustomed to act (in this Act referred to as 'a shadow director') shall be treated for the purposes of this Part as a director of the company unless the directors are accustomed so to act by reason only that they do so on advice given by him in a professional capacity." (s. 27(1) CA 1990)*

The *proviso* within the section is not relevant to these proceedings. To be such therefore, the true directors must at least regularly, if not habitually, take decisions on company matters, though not all, which effectively have previously been made by the shadow director.

61. As previously stated, the Liquidator in this case has alleged that David Cullen was either a *de facto* director or in the alternative a shadow director. Millett J. in *Hydrodam* had some strong words to say about assimilating the two concepts; expressing them as follows:

> *"[A]n allegation that a defendant acted as a de facto or shadow director, without distinguishing between the two, is embarrassing. It suggests … that the liquidator takes the view that de facto or shadow directors are very similar, that their roles overlap, and that it may not be possible to determine in any given case whether a particular person was a de facto or a shadow director. I do not accept that at all. The terms do not overlap. They are alternatives, and in most and perhaps all cases are mutually exclusive." ([1994] BCC 161 at 163)*

When discussing both types of director, conceptually or theoretically, the firmness of this view may be justified, but in the context of a given case, it may have to soften, as a finding under both heads may potentially be justified. Laffoy J. in *Fyffes* [2005] IEHC 477 (at p. 85 of the unreported decision of 21st December 2005) also doubted that both were mutually exclusive. However, whilst a finding under either head is sufficient to come within s. 150 CA 1990, the distinction may be a matter of significant importance for a defendant, who is entitled to know precisely what case he has to meet so as to answer it. Therefore a Liquidator should always particularise his claim and on many occasions may be compelled to do so.

62. In this case, it is not necessary to further discuss the position of a *de facto* director as, regardless of the documentation filed, it is clear from the submissions of the parties that in reality the allegation against David Cullen is that of being a shadow director and not a *de facto* director. Such an approach is entirely justified as this Court, on the evidence, would undoubtedly have reached a similar conclusion.

63. The case of *Hydrodam* must again be referred to as Millett J., having considered s. 251 Insolvency Act 1986, which defined a shadow director in the same way as s. 27(1) CA 1990, sets out the test as follows:

> *"A shadow director … does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company*

to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove:

(1) who are the directors of the company, whether de facto or de jure;

(2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so;
(3) that those directors acted in accordance with such directions; and

(4) that they were accustomed so to act.

What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others." ([1994] BCC 161 at 163)

64. In considering that case and later decisions given in the intervening period, the Court of Appeal in *Secretary of State for Trade and Industry v. Deverell* [2000] 2 BCLC 133, per Morritt LJ., stated at para. 35:

"(1) The definition of a shadow director is to be construed in the normal way … [and] … should not be strictly construed …

(2) The purpose of the legislation is to identify those … with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities.

(3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in light of all the evidence. In that connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or expectation may be relevant but it cannot be conclusive. Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction.

(4) Non-professional advice may come within the statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover, the concepts of 'direction' and 'instruction' do not exclude the concept of 'advice' for all three share the common feature of 'guidance'.

(5) It will, no doubt, be sufficient to show that in the face of 'directions or instructions' from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered to their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are 'accustomed to act in accordance with' such directions or instructions. It appears to me that [such a requirement imposes]… a qualification beyond that justified by the statutory language."

That case related to the correct interpretation of s. 22(5) of the Company Directors Disqualification Act 1986, which is substantially similar to the terms of s. 27 of the CA 1990.

65. The above decision in *Deverell* was considered fully by Laffoy J. in *Fyffes Plc. v. DCC Plc. & Ors.* [2005] IEHC 477 where, after examining *inter alia* certain criticisms made by Courtney of that decision, the learned Judge stated:

"First, it seems to me that it is implicit in s. 27 that the directions or instructions emanating from the alleged shadow director must have an imperative quality. It may be that advice, in a given factual context, will have an imperative quality. If that is the case, it would explain the apparent oddity to which counsel for the plaintiff pointed: why the legislature thought it necessary to exclude advice given in a professional capacity, if advice does not come within the expression "directions or instructions". Therefore, for a communication of any type to constitute a direction or instruction, it must have an imperative quality. Secondly, just because there is consideration by the board interposed between the direction, instruction or imperative advice does not mean that the act of the board is not to be taken into account in applying s. 27, if the board acts in accordance with the direction, instruction or imperative advice. … Thirdly, s. 27 does not require that the board should always act on the directions and instructions if a shadow directorship is to exist. That is indicated by a requirement that the board should be accustomed so to act."

66. The use within the section of the phrase "directions or instructions" and of the word "advice" raises an issue as to what the nature or character of a communication should be, so as to bring it within the section. *Deverell* held that non-professional advice is included: whereas Laffoy J. in *Fyffes* was of the view that, for advice to be included, it had to carry the same "imperative quality" as any other communication. *Deverell* justified its view, firstly by suggesting that the *proviso* would be unnecessary if advice generally was not included and secondly, by pointing out that each of the words used shared the common feature of "guidance".

67. As normally understood, "advice" or "the giving of advice" means to recommend, to propose, or to suggest. A "direction or instruction" is materially more compelling than simply a proposal or a suggestion. Therefore, again as normally understood, there is a distinction between both. It could never have been intended that the section should posit varying thresholds. Accordingly, one only should apply and the other, if possible, differentiated, but if not, at least explained. If the lower standard of "guidance" was intended as the qualifying level, why use the more demanding threshold, which is

should be noted, is included as part of the rule, whereas advice is part of the exception. To accept guidance as the entry point would, in my view, significantly undermine one of the two key aspects of the section, namely the communication aspect; it would promote the lesser meaning and relegate the greater. In addition it would expand the scope and applicability of the section in a way that was never intended. It would undermine the well-structured proportionality within the section between upholding the public interest and recognising the far reaching consequences, on both the civil and criminal side, which a defaulting director may have to face. I, therefore, cannot accept that a communication which cannot be properly described as a "direction or instruction" comes within the section.

68. There is another reason for this view, which becomes clear if the *proviso* is given its ordinary and natural meaning as applied in the context of company and corporate affairs. Advice given by a professional in that capacity, or "professional advice" so described, is readily and notoriously recognised for what it is by those who have recourse to it. A professional consulted as such, may have many services to offer, one of which is the giving of advice; but I doubt very much if another is the giving of directions or instructions. This *proviso* in my opinion, whilst inserted for the avoidance of doubt and therefore not strictly necessary, was designed to exclude from the section advices, as commonly understood, given by a professional person in that capacity. Such a person, even if the board was accustomed to act upon his advice, should not, by reason of that only, be designated as a shadow director. The phrase in my view was intended to apply in this way. If it was otherwise the relationship between business and professions would have to be re-appraised. It was never intended to affect the rule: it was to deal with the *proviso* only. As understood there is no conflict between the rule and the exception. If however, notwithstanding this view, it still becomes necessary to render the *proviso* compatible with the rule, I would unhesitatingly support the approach of Laffoy J. in *Fyffes*, in that regard.

69. Finally, in this contest the only Irish authority which I can find is the case of *In Re Vehicle Imports Ltd (in liquidation)* [2000] IEHC 90. In that case it was alleged that the company's accountant, a Mr. Delaney, was a shadow director since: he was the company's landlord; he had completed blank cheques, signed by a director who was the only authorised signatory; he had advised one of the *de jure* directors to take out a mortgage on his family home and he had been paid over a short period IR£105,000 by the company for his services. In addition it was claimed that he had controlled 75% of the business of the company and that he had been substantially in control of all its financial affairs, including the preparation of accounts, filing of Revenue returns, keeping books up to date, corresponding with the bank and receiving bank statements, making lodgements, filling in blank but signed cheques and directing which cheques should be written, to whom and in what amount. Further Mr. Delaney did not deny that he was a shadow director. Despite these matters and in particular this strong element of control, the court found that such facts in themselves, even taken cumulatively, fell short of constituting him as a shadow director. It did observe however that, *inter alia*, the filing in of blank cheques on behalf of the company did sit within the definition of a shadow, although there may have been other plausible explanations for this and indeed his entire involvement. However it also held that the absence of any denial by Mr. Delaney was ominous, so therefore the *prima facie* evidence had not been rebutted. Even in those circumstances, whilst the court made a restriction order in respect of him, it put a stay of 21 days on it so as to enable him to make an application should he so wish.

70. Thus it can be seen that even where a person is in control of the majority of the business of a company the court, where that person is a professional adviser, has shown great willingness to explore other explanations, so that his actions can be excluded from those of a shadow director.

71. There is one other observation on shadow directors, made by Millett J. in *Hydrodam* and recited by O'Neill J. in *Lynrowan* at para. 20, which should be noted. It is that:

> *"[I]t would appear that an invariable characteristic of a shadow director is that his role is hidden behind that of the validly appointed or indeed de facto directors, through whom, in a concealed way, the shadow director directs the affairs of the company."*

In that case he found that the defendant, James V. Mealy, was not a shadow director since, *inter alia, "his role was not hidden or concealed in any way"*; instead he was found to be a de facto director.

72. From the above it seems to me that the following can be stated:-

1. The question of whether a person is a "shadow director" is purely a question of statutory interpretation with the normal applicable rules of construction applying:
2. The interpretation of the phrase will be influenced by:-
   (i) The purpose of the relevant provisions of the Companies Act 1990, where that definition is to be found (s. 27(1)), and

   (ii) The fact that a shadow director so found is identified with a duly appointed director for company act purposes, which include:-

   (a) Transactions involving directors where conflicts of interest arises,

   (b) The restriction/disqualification provisions of ss. 150 and 160 of the Companies Act 1990, as amended,

   (c) Insider trading formerly under Part V of the Companies Act 1990, now covered by market abuse under Part 4 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, and

   (d) Fraudulent and reckless trading under ss. 297 and 297A of the Companies Act 1963, as inserted by ss. 137 and 138 of the Companies Act 1990 and under ss. 33 and 34 of the Companies (Amendment) Act 1990.

3. For a finding to be made there must be directors of a company, either *de jure* or *de facto* and, in addition, two further requirements must be met,

   (i) Firstly that directions/instructions were given by the person in question, and

(ii) Secondly, that the true directors (or majority) were accustomed to act upon such instructions or directions.

4. These conditions, in addition to being conjunctive are interlinked by cause and effect: the implementation must be causatively connected to the communication.

5. The making of such communication and the reliance thereon must be by force of habit, that is habitual: they must be repetitive, customary and recurring: they must be part of the usual course of things. Or, as said, they must constitute "*a well established practice or pattern*" of behaviour. (Forde & Kennedy "*Company Law (4th Ed.)*" para. 613). On the other hand if either the communication, reliance or both are infrequent, rare or occasional they will not come within the section.

6. The nature or character of the communication, however so labelled, couched or phrased, must, by objective assessment, be such as to equate with the ordinary meaning of the words direction or instruction. It must have an obligatory or imposing force or command behind it. This may be self evident or may be deducible from the habitual responses of the directors.

7. Any communication falling short of this standard is excluded, including advices "*per se*".

8. Advices given by a person in a professional capacity ("professional advice"), including those upon which directors are accustomed to act, are for the avoidance of doubt, expressly excluded: professional advice is to be understood in context.

9. The nature of the affected business must be of a type in respect of which the directors would as a matter of course act executively. The scope of the affected business, must be such as to demonstrate a real influence over a wide ranging area of the company's affairs; although not its total affairs.

10. The above analysis is to be judged by the entire circumstances as presented. Factors such as motive, intention, expectation etc., are all useful to consider but not decisive. Neither is the ability to show, in all cases, an abdication of independence greater than that envisaged above, or that the company or the subject person took steps to conceal his true role. The weight of each admissible and material factor is relative and degree based. Finally,

11. Where the involvement of the person in question is explicable, or at least equally explicable, by the exercise of a role other than that of director, a positive finding should not be made.

73. There is one other issue that should be dealt with at this point. As stated at para. 19 *supra*. the applicant must establish for the purposes of the s. 150 CA 1990 application that the third respondent was at the date of the commencement of the winding up, or within twelve months prior to it, a director of the company (s. 149(2) CA 1990). As a result, Mr. David Cullen submits that this Court should have cognisance only of matters occurring within this period and should disregard all other matters. I cannot agree with this submission as so phrased.

74. There is no doubt, but that whatever evidence is considered, over whatever period, the court, if it is to apply the provisions of s. 150, must conclude, on and from such evidence, that at the relevant time the person in question was a director, in this case, a shadow director of the company. It is, therefore, critical that the evidence enables such a finding to be made referable to this time period, as otherwise the section does not apply.

75. In *Gasco Limited* (2001) 8(3) CLP 72, McCracken J., when relating the evidence to this requirement, found on the facts before him that the most relevant conduct was that which occurred within the twelve month period. In *Re Squash (Ireland) Limited* [2001] 3 IR 55, the Supreme Court, however, in laying out more general principles stressed that "*the court should look at the entire tenure of the director and not simply at the few months in the run up to the liquidation*". This would seem to follow, as under s. 150(2) of the CA 1990 a defendant must show, not only that he has acted "honestly and responsibly" but also that there are no other reasons why it would be just and equitable to have the restriction applied to him. For this purpose it has been long since held that even a person's conduct post-liquidation can be considered. See *La Moselle Clothing Ltd* [1998] 2 ILRM 345. As there is no statutory restriction on this point, I cannot see any reason in principle why the period preceding the 12 month period cannot also be looked at. I believe therefore that evidence, outside the twelve month period, is admissible when considering this issue.

76. I should say, however, that the more proximate the events relied upon are to the company's critical path which lead to its insolvency, the more weight the court is likely to give to them. This will ultimately depend on the circumstances of each case and is an issue of valuation and not admissibility.

77. Apart perhaps from his attendance at meetings in respect of the hotel project, there is no evidence of any express type of direction or instruction given by David Cullen to the directors of Hocroft. The case therefore being made is that from his involvement in the transactions and events above outlined, together with the benefits accruing to him, this Court should conclude that he was in a position of and in fact exercised real influence over the affairs of the company. Accordingly, he should be regarded as a shadow director.

78. Having considered the evidence adduced on this issue, I have come to the conclusion that on the balance of probabilities, he was not so. I accept that taken at face value there were a number of facts which, had they been left uncontested, may well have lead me to the conclusion that he was in fact such a director; these include, *inter alia*, the land transactions, the fact that he was for many years an authorised signatory to the company accounts, the fact that he was heavily involved in the hotel project, and the allegation that this project was the only one ever undertaken by the Company. However, I find that the explanations forthcoming from the respondents have satisfied me that he should not in fact be regarded as a shadow director of the company.

79. The details of the land transactions are extensively set out at paras. 22 and 33 *supra.* and in light of the explanations given I could not conclude that in agreeing to enter into them the Company must be taken to have been directed by David Cullen to so do. The mere involvement of Mr. Cullen in these transactions, even as purchaser, is not evidence of Company Acts impropriety on his part. These lands were on the market for a considerable period without attracting any

concrete interest: a point was reached, following a feasibility study, that without the necessary finance to further develop them, it was in the Company's best interest to dispose of them. It did so and in the process did not make a loss on them: that is not contested. Further it is quite possible that the third respondent was in a better position than the Company to find purchasers for these properties. It seems to me somewhat hypocritical to allege that these transactions, carried out by the third respondent as an independent legal person and not as a director of the Company, should have, in some way, benefited the company. In circumstances where he owed no duty to the Company to act in its interests, that he sought to profit from his dealings could not be said to be improper. Such is the prerogative of the businessman, as notorious examples demonstrate daily. Further, it was shown that there was at least one other property deal involving the Company, in which David Cullen had no involvement whatsoever. These factors, in my opinion, are sufficient to refute the allegations of the applicant in this regard.

80. With regards to the fact that the third respondent was an authorised signature to the company's accounts, I accept that such could be considered damning evidence. However I am satisfied that as a brother of one its directors there may have been some justification behind him having such authority in case of emergencies. In this regard it is also telling that no evidence was produced, nor was it alleged by the applicant, that David Cullen ever utilised this power, despite having had it for several years. Whatever the quality of the Company's books and records may be, it must surely have been possible for the applicant to obtain evidence of such use from the bank(s) if that had occurred. None was so produced. These facts, in my opinion, put in great doubt any adverse inference which could otherwise be drawn from his being an authorised signatory.

81. Perhaps the greatest emphasis has been placed by the Liquidator on Mr. Cullen's involvement in the hotel project. He claims that as he received much correspondence and information from sub-contractors, as he attended project meetings, and received requests for direct payment, these showed that he was, in effect, directing the works, when such should have been done so by the Company. Whilst some of these allegations are challenged and more alleged to be overstated, there is undoubtedly much evidence to show that Mr. Cullen was heavily involved in this project. Notwithstanding this however, the context must be considered. I note, as a general proposition, that the Company had the contract for the job. It employed and directed the main and many sub-contractors: Mr. David Cullen was the employer in this contract with the Company: he was not only the property owner, but also the developer in the sense that he intended to carry on the business of hotelier from these premises. It is very common for such an employer to have one or more representative(s) of his, assigned on a full time, even exclusive basis, to a project of this nature. Whilst the Company would have overall control, it would be in its interest to accommodate the ongoing views and requirements of the project owner. In fact this is expressly evidenced by the nature of the Project Contract, and in particular para. 4.10 headed "Employer to be kept appraised". Therein it was specifically stated that he would be kept appraised of the progress, problems or delays involved in the project, would be notified of and permitted to attend at meetings relating to the project, and would be sent minutes of such meetings. I therefore see nothing improper or in any way deceitful or concealed in the actions of David Cullen in this regard.

82. Furthermore, even if the explanations given, which I have accepted, fall short of fully satisfying the applicant's concern, the circumstances are at least equally explicable by his role as a property owner and developer as they are by his being a shadow director. Applying what O'Neill said in *Lynrowa*n (see para. 59 *supra.*) it must follow that Mr. Cullen be given the benefit of such explanation and therefore no adverse finding should be made in that regard. In addition his ongoing participation in this project, even if intense, may not of itself be sufficient to render him a shadow director. A more expansive and broad-based involvement may be necessary: see that aspect of the decision of Laffoy J. in *Fyffes*, where having found that Mr. J.F. totally controlled the actions of the board of Lotus Green in the specific transactions in issue, the learned judge nevertheless held that the evidence did not establish ongoing reliance by the board <u>on the instructions or directions</u> of Mr. J.F. He was not therefore a shadow director of that company. For the above reasons I would likewise reach a similar conclusion regarding Mr. Cullen.

83. Lastly, reference has also been made to a number of other points, including the penalty clause, the way in which invoices sent to Mr. Cullen were calculated and certain letters sent to him by some of the Contractors. None of these are persuasive in establishing him as a shadow director. The evidence shows that an attempt was made to have JJR also accept a similar type of clause: this was unsuccessful. Its inclusion in one contract (although not enforced) and its exclusion from another may have several explanations entirely consistent with or arising out of arms length commercial bargaining, and nothing more. It would therefore be purely speculative to ascribe a more sinister purpose to this matter. Likewise with regard to the invoices. Even if the calculations were incorrect or incomplete, there is no evidence that Mr. Cullen had any involvement in their compilation. Finally, the existence of correspondence naming Mr. Cullen with Hocroft, is if anything more relevant to a *de facto* director, rather than a shadow one. In any event there could be many reasons, be it mistake on the part of the authors or even mere convenience on their part. In any event his involvement with the project and his style of participation, i.e. hands on, offers in my view a credible explanation for such matters. The situation would be entirely different but for this involvement which in my view entirely distinguishes Mr. Cullen from any of the defendants in the relevant case law. Accordingly I am satisfied as to the conclusion reached on this issue.

Delay:

84. It is generally accepted that the criteria by which claims may be dismissed for delay were laid down by the Supreme Court in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459, which for the purpose of this action may be summarised as follows:-

> (a) The onus is on he who seeks to dismiss, with the standard being that of probability;
>
> (b) it must be established that the delay was <u>inordinate and inexcusable</u>, if not so found, the application cannot succeed;
>
> (c) if so found, it must be determined whether the balance of justice is in favour of or against the case proceeding;
>
> (d) In considering this balance of justice requirement, the court takes into account all material circumstances specific to the case, including:
>
> > i) any delay on the part of the defendant, as litigation is a two party process,

ii) any acquiescence by the defendant to the plaintiff's delay, or to the plaintiff incurring expense in further pursuing the action,

iii) whether the delay gives rise to a substantial risk of an unfair trial or is likely to have caused serious prejudice to the defendant.

85. This test has subsequently been applied in several cases, including *Duignan v. Carway* [2001] 4 IR 550, a case of particular interest, in that the delay occurred in the bringing of a s. 150 application. At pp. 561-562 of the report, Fennelly J., speaking for the court, stated:

> *"It is right firstly, to point to the mandatory character of the court's jurisdiction (see Business Communications Ltd. v. Baxter (Unreported, High Court, Murphy J., 21st July, 1995). The use of the word shall connotes an obligation to make the declaration in the ordinary case, though the relieving provision of s. 150(2) significantly qualifies that. It was fairly and properly accepted on behalf of the respondents at the hearing of the appeal that the section gives effect to a public interest in seeing that persons should no longer enjoy the unqualified right to become involved in the formation of companies where they have been directors of companies which have failed due to insolvency. That public interest diminishes, it was said, when there is excessive delay such as in the present case. That proposition was rejected on behalf of the applicant. Ultimately, it was accepted that the public interest in question may be outweighed if there is such delay as to put a just hearing at risk. Whichever way it is put, I think the result is the same. There is a public interest represented by the section. However, excessive delay may render it unjust to permit a liquidator to proceed with his application.*
>
> *It cannot be contested that the respondents have had at all material times a right to a fair and speedy trial of the issue as to whether their normal rights to become directors and promote and take part in the formation of companies should be restricted or taken away. It is unnecessary, in order to establish the existence of this right, to resort to the European Convention, however undisputed the value of the rights guaranteed by that instrument at international level may be. It is inherent in the notions of fair procedures guaranteed by the Constitution and identified in a long line of cases (see, for example, in the field of criminal justice, S.F. v. Director of Public Prosecutions [1999] 3 I.R. 235)."*

86. In *Re Knocklofty House Hotel Ltd. (in Liquidation)* [2005] 4 IR 497 at 500, although that case relates to delay in the commencement of an application under s. 150, and not afterwards, similar principles apply. Finlay Geoghegan J. noted with regards to applications to dismiss for delay specifically in proceedings relating to s. 150 CA 1990 that:*"if anything those principles may be slightly more generous in favour of persons seeking to stay proceedings".*

87. As stated, in order for the Court to dismiss for delay, it must first be established that there was such delay and that it was both inordinate and inexcusable. The Court in *Hughes v. Duffy* [2005] 1 IR 571 and *Re Knocklofty House Hotel Ltd. (In Liquidation)* [2005] 4 IR 497 considered whether delay in those cases had been inordinate. In *Hughes* there had been a delay of over 12 years between the appointment of the liquidator in November 1991 and the motion under s. 150 CA 1990, brought in December 2003. It was also accepted that communications had ceased between the liquidator and the first respondent in October 1995, and that as between the liquidator and the second respondent, since shortly after the winding up. Thus not only had there been extreme delay, there had been no communication between the parties for a period of 8 years before the motion was brought. No explanation was offered for this delay. In those circumstances Finlay Geoghegan J. concluded that the application should not be allowed to proceed, since to do so would have been in breach of their constitutional rights to fair procedures as identified by Fennelly J. in *Duignan v. Carway*.

88. In *Knocklofty* the liquidator had been appointed in late 1992 and early 1993 to Knocklofty House Hotel Limited and Eccleshall Limited respectively. The notice of motion seeking relief under s. 150 CA 1990 was not filed until February 2004. There had thus been a delay of eleven years. Finlay Geoghegan J. was of the opinion that the delay in that case had been both inordinate and inexcusable, and whilst there had been certain difficulties arising in the liquidation, they did not excuse a very significant portion of the eleven years.

89. There could hardly be any doubt but that the delay periods in these cases were manifestly inordinate and inexcusable, with the only issue being where the balance of justice lay.

90. Finlay Geoghegan J. in *Knocklofty* also undertook a useful analysis of factors relevant to the balance of justice issue. She felt that, *inter alia*, the following should be taken into account:

> i) The legislative intent of s. 150, in particular:
>
> *"the public interest in seeing that persons who have been directors of insolvent companies should no longer enjoy the unqualified right to become involved in the formation of companies. That public interest includes an element of protection for third parties dealing with companies." ([2005] 4 IR 497 at 501)*
>
> ii) The constitutional rights of the respondents to fair procedures, including the right to a fair and speedy trial.
>
> iii) The special features of s. 150, namely:
>
> a) the onus on the respondents to establish that they acted honestly and responsibly in relation to the conduct of the affairs of the company;
>
> b) the absence of any discretion in the court as to the period for which the declaration of restriction must be made.

May I add two other matters: firstly, the second mandatory element of the section, namely the obligation to make the order unless the respondent can show that he acted honestly and responsibly in relation to the conduct of the company's affairs, and secondly that such a respondent must not only establish honesty and responsibility, but also must show by reference to his entire tenure as director, however long that might be, that there are no just and equitable reasons to

restrict him.

91. On the facts of *Knocklofty*, s. 150(2)(a) CA 1990 would have required the respondents to prove that they had acted responsibly in relation to events, in some cases, as far back as 15 years before the application. Although the respondents could prove no actual prejudice with regards to specific facts, Finlay Geoghegan J. accepted that "*there is inevitably an added difficulty in dealing with the detail of facts that took place between eleven and fifteen years ago…" (ibid*. at 502). She further noted that, apart from the constitutional rights to fair procedures, regard should be had to the right to earn a livelihood, and in that context that "*there does or should come a time when directors may be able to put behind them the consequences of an insolvent liquidation*". In those circumstances she held that the balance of justice lay with dismissing the s. 150 application.

92. It would thus appear that in the context of s. 150 CA 1990 certain specific factors should be taken into account which render it particularly unjust to allow an application to proceed where there has been a large lapse of time, notwithstanding that no actual prejudice can be identified. I would respectfully agree with Finlay Geoghegan J. that in a s. 150 application the mere inordinate passage of time, due to the special features of the section, in particular the burden on a respondent to show that he has acted honestly and responsibly in relation to the affairs of the company, and that there are no just and equitable reasons for restricting him, would render it particularly iniquitous to allow such an application to continue where a large period of time has elapsed. In those circumstances, the passage of time would severely hamper a respondent's ability to properly defend himself, and thus tend to tip the scales of justice in favour of the respondent even in the absence of any specifically identifiable prejudice.

93. It is worth also briefly mentioning the case law of the ECtHR, although I do not feel that reliance upon it is strictly necessary in this context. In the case of *Davies v. U.K*. [2002] 35 EHRR 720 the European Court of Human Rights (ECtHR) stated at para. 26:

> *"The Court recalls that the reasonableness of the length of proceedings is to be assessed in the light of the circumstances of the case, having regard in particular to its complexity and the conduct of the parties to the dispute and of the relevant authorities (see, among many other authorities, the Robins v. the United Kingdom judgment of 23 September 1997, Reports of Judgments and Decisions 1997-V, § 33). In the present case, the Court must also bear in mind that, given that the applicant was a company director and that disqualification proceedings would have had a considerable impact on his reputation and his ability to practise his profession, special diligence was called for in bringing the proceedings to an end expeditiously (see the above-mentioned E.D.C. Report)."*

In that case the ECtHR found that a period of 5 ½ years breached Article 6(1) and awarded damages against the State. The ECtHR in that case also referred to EDC v. U.K. (1998) BCC 307 where "*the Commission expressed the opinion that proceedings under Section 6 of the CDDA [the Company Directors Disqualification Act 1986] lasting four years and five months were too long to be compatible with Article 6(1)" (ibid*. at para. 27).

94. This case was applied in a further case involving a director of the same company in *Eastway v. U.K.* [2006] 2 BCLC 361. In the latter case there had been a nine year delay, of which a large period was made up of unmeritorious judicial review applications and appeals under the Human Rights Act by the applicant. However, the Court said that he could not be criticised for this. Notwithstanding that a substantial part of the delay was due to his actions, given that the first 5 ½ years of delay were mostly due to the State, the Court did not consider that the proceedings had been pursued with the due diligence required by Article 6(1).

95. Nonetheless, the ECtHR has accepted that "*the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing*." (*Dyer v. Watson* [2002] WLR 1488 at 1508). I would agree with that statement; but the reverse may equally apply: where a case is not attended with these difficulties, there is much less room to justify delay. The time taken to bring the s. 150 proceedings could be seen in that light, although there is no oral evidence in these proceedings.

96. In this case, on the issue of delay, I would firstly say that, in view of my findings on the Director issue, it is unnecessary to consider whether the delay relating to Mr. David Cullen was such that his prosecution should be dismissed. However, lest I should be incorrect in this regard, I shall address the issue as it affects all the respondents.

97. As is common case, the applicant was appointed Official Liquidator on the 14th April 2000 and therefore at any time thereafter he could have moved a s. 150 application. There is nothing in the section which prevents him from doing so. There is no "not before" period and no "not within" period. Whilst the section does not oblige a liquidator to seek relief under its provision, likewise however, it carries no impediment in so doing.

98. This can be contrasted with s. 56 of CLE Act 2001. Although the nature of the section has already been dealt with, it is worthwhile emphasising that a liquidator must make the application unless relived from so doing. It is his duty to do so. It does not depend on any instruction from the ODCE: in fact the office need never respond to a s. 56 Report. Therefore presumptively he must prepare.

99. The second obligatory element of the section is time: he cannot move earlier than 3 months after the report is submitted, but must move not later than 5 months after that date. The first period presumably is to allow the Director to consider the report: the second period is to ensure a speedy but orderly recourse to law. Some have said that the start date being the submission of the report is peculiar, and that its deferral until the ODCE had replied would be more preferable. With respect, I feel that this misses the significance of the change brought about by the section. Under the previous regime the liquidator had an almost untrammelled discretion whether to move, if at all: not anymore. He now has a duty to do so and that duty is not dependent on the ODCE. This structure underpins the imperative nature of a liquidator's responsibility.

100. It is of course true that a liquidator can be exempt from the implementation of this responsibility, but that has no affect or impact on the binding nature of the duty <u>until</u> it is communicated. Only if the ODCE says a liquidator is relieved of this requirement can he be satisfied that the compulsory nature of the provision is nullified. Of course he can still bring a s. 150 application if he so decides. When the decision of the ODCE is not to relieve, this has no bearing whatsoever on

the duty: it bears upon the exemption or the dispensation: but not the obligation.

101. There is therefore a great risk in waiting for the ODCE to respond before putting in place all the required steps to bring such an application: once the section otherwise applies, the necessary preparatory work should be advanced so that if no decision or a negative one is reached by the ODCE, the application can still be moved on time. That this is so is quite clear from the section itself and in fact is support by a criminal sanction if breached (s. 56(3) CLE Act 2001). It therefore behoves a liquidator to ensure that he is in a position to make the application on time, and he should not be found remiss if he has to do so. Whilst cost saving is always desirable, it cannot excuse the performance of this clear cut and specified duty.

102. As I have previously said, it could be argued that technically time commenced once the winding up order was. That however would not be correct, as any liquidator, having taken possession of the assets, requires time to examine the books and records, to assess the available information, to identify shortcomings in the documentation, and to deal with problems regarding the business, such as the staff, third party contracts, financial institutions etc. He must also engage with the directors and then evaluate the state of the company's affairs. The period required to complete this task will be company/problem specific: in this case Hocroft was a very small company with only one significant project to investigate. It was involved in a few property transactions, in respect of which no complaint is made about the availability of documents, I have no doubt the Company had some other matters, none of which, however, could be described as complex. It was not, to use the Liquidator's words, "*a sprawling company with many different and wide-ranging projects*": instead it was narrow and self-contained, engaged in limited activities (see para. 52 *supra*.). Therefore the necessary assessment time should be measured against this background.

103. When assessing whether the delay was inordinate and inexcusable, I propose to assume for the moment that the time requirement was breached as and from the 30th August 2004 and not earlier. This is an indulgence to the applicant, as if s. 56(1) CLE Act 2001 had been complied with, the first report should have been submitted by the 30th November 2003, and therefore the period of default should have started from after that date. However, I will take the report's date as the actual date despite the clear wording of the provision as it applies to the first report. Given the compulsory nature of the section, the shifting onus of proof and the burden thereby imposed on the respondent and the appropriate principles of law as set out above, I am satisfied that to have allowed a period of over 2 years to elapse before issuing the required motion must in the circumstances be construed as being inordinate.

104. The reasons advanced by the Liquidator for this delay can broadly be related to his view that prior to April 2005, when the s. 245 proceedings were settled, he did not have sufficient information to pursue a s. 150 application: or as he puts it, he wanted better or more evidence. It would, he says, have been premature before then. In any event he claims that, because of the challenge to the Order of McCracken J., Mr. David Cullen is responsible for any delay up to April 2005, or at least he cannot rely on any such period. He further says that there should only be one s. 150 application, in which both Stephen Cullen and David Cullen would be cited. Whilst at all times acknowledging his duty to comply with s. 56 CLE Act 2001, the applicant submits that he was justified in not issuing before he did. I cannot accept any of these reasons.

105. In the relevant s. 56 Report, the first report, the Liquidator informed the DCE that he had information suggesting that David Cullen was a shadow director of the Company. He gave no answer to the question whether Mr. Cullen had acted honestly and responsibly. In respect of Stephen Cullen he told the DCE that this director had not acted honestly and responsibly in conducting the affairs of the Company. As this report has not been exhibited I do not know its full contents, but I must assume that it contained supporting information which enabled the Liquidator to express the views which he did.

106. Accompanying the report was the covering letter of 29th March 2004, in which, despite the above, the Liquidator told the DCE that he was not yet able to form an opinion as to whether David Cullen was a shadow director. He referred in that regard to the s. 245 proceedings being extant. He expressed the same reservation about Stephen Cullen and sought a postponement of his responsibility pending a resolution of the s. 245 application. Therefore when the DCE expressly informed him on the 13th August 2004 that he was <u>not being relieved</u> under s. 56(2) CLE Act 2001 and that he was "*obliged to made an application pursuant to s. 150 of the Companies Act 1990 for the restriction of all of the directors*" within 5 months of the date of receipt of the report (28th March 2004), he, the DCE, was fully appraised of all the available evidence and of the applicant's representations about moving at that time. Consequently I cannot accept as justified the continued deferral of the s. 150 application. He was not within his rights or entitlement to do so. He had no choice in this matter. He had to issue the application with what information he had and then pursue, if he saw fit, under court supervision, the s. 245 application. He could not wait and then pursue. He must or ought to have been aware of this: in fact he so acknowledges he was. I cannot therefore see how the Liquidator could have received comfort from the absence of a reply to his letter of the 12th December 2004 to the ODCE, as he stated. Once the Director had communicated his decision he was *functus officio*. I know of no provision whereby he could alter his decision, much less reverse it. Consequently his delay cannot be justified on this ground. It equally cannot be justified on the other grounds advanced, which are discussed in the succeeding paragraph, much of which applies whatever the due start date might be.

107. If instead of assuming that the default date was the 30th August 2004, and instead if I looked at the history of the liquidation from the Winding Up Order of 14th April 2000, it would evidently and obviously follow that a similar conclusion would even be more justified. Given the narrow scope of the Company's affairs and not withstanding any deficit with the documentation, it is very difficult to understand why it took over 2 years to decide that an examination of the directors would be useful. Having obtained the order from McCracken J. on 21st October 2002, there was no delay in having both Messrs. Stephen Cullen and Paul Rocliffe examined. Undoubtedly there was with regards to David Cullen, but his application to discharge the Order of McCracken J. ceased to have a determining influence once s. 56 CLE Act 2001 became operative. Even, however, if I disregard that section for a moment, the s. 245 proceedings were concluded by 8th April 2005. Another 17 months passed before the Motion issued. The explanation given, of complexity and difficulty, is unacceptable. Moreover, I reject the suggestion that to apply for a restriction order against Stephen Cullen should have awaited the outcome of the s. 245 dispute with his brother. Whatever questions the Liquidator wished to raise, and whatever information he desired to obtain from Stephen Cullen, could and should have been achieved at his examination on 5th March 2003. That was in fact the entire purpose of it. I simply cannot accept, in the case of Stephen Cullen, as a justification for deferring the s. 150 application, the desire, cost driven or otherwise, of having one application only. Where rights are at risk such considerations, although in many cases practical and cost effective, must yield. Moreover, the Liquidator seems to rely on documentation available to him shortly after his appointment or at latest following the

examination of March 2003. To wait for a further 3½ years was not justified. Therefore in my view the delay is both inordinate and inexcusable. Further it should be noted that many of the above comments apply equally to the matter dealt with in the preceding paragraph.

108. The final question on this aspect of the case is where does the balance of justice lie: should the application be allowed to proceed or not? As against the public right to ensure that access to the office of directorship should not be unconditionally available to those who, in that capacity, have presided over the liquidation of an insolvent company, is the individual right of those under scrutiny to have a fair and speedy trial and one that is not at risk of causing injustice. Frailty of memory, imperfect or poor records, unavailability of witnesses etc. are all well recognised concerns in this regard. Time is also one of them. These are general in nature, but they are also matters specific to each case, some legal some factual. The legal ones in this case are highlighted above (see paras. 84 – 86, 90 *supra*.) and include:

1) The character of the courts' jurisdiction under s. 150 CA 1990;
2) The character of the section vis-à-vis the onus of proving honestly and responsibility and the absence of other reasons which might justify a restriction;
3) The public interest element of the section;
4) The right of a respondent to fair procedures, including the right to a fair and speedy trial;
5) The right of a respondent to earn a livelihood.

109. On the factual side (which is more fully outline above) at the date of the Motion:

1) The bank mandate had been put in place 10 years previously;

2) The property transactions had occurred over 9½ years previously;

3) The hotel project had been commenced over 8 – 5 years previously;

4) The winding up Order had been made 6½ years previously.

In addition, if the Liquidator is correct about the absence of documents, there is a pressure on recollection and memory recall of events, involving negotiations, dates and places of meetings, the names of those present, what was discussed etc. Moreover a period of about 2 years lapsed before the Liquidator first made contact with Mr. David Cullen and prior to the Motion it had never been asserted that he was a director.

110. Furthermore, the absence of Mr. Tom Byrne may be particularly significant, given the extent and scope of the verbal communications between the parties. In conclusion therefore, I feel that the length of time in this case, in and of itself, and as compounded by the matters outlined, could be said to be prejudicial to both the respondents' ability to defend themselves and therefore it would be unjust to allow the application to proceed.

111. I would therefore answer the first question raised by stating that Mr. David Cullen is not to be regarded as a shadow director of Hocroft, and the second question by granting the respondents' motion for dismissal, and in the proceedings by prohibiting any s. 150 CA 1990 prosecution against them. In these circumstances I do not find it necessary to specifically address the application to extend time.