THE HIGH COURT

2017 No. 281 COS

BETWEEN

PATRICK O'SULLIVAN

PLAINTIFF

– AND –

CONROY GOLD AND NATURAL RESOURCES PLC

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 26th September, 2017.

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(Numbers in square brackets are paragraph numbers)

I. Background

(i) The Dispute Arising.

1. Mr O'Sullivan is a circa. 28 per cent shareholder in Conroy Gold, a public limited company incorporated in Ireland, chaired by Prof. Richard Conroy and quoted on the London Stock Exchange's AIM market (formerly the Alternative Investment Market) and the Irish Stock Exchange's Enterprise Securities Market ('ESM'). On 30th May, 2017, Mr O'Sullivan served notice, pursuant to s.146 of the Companies Act 2014, of his intention to propose nine ordinary resolutions at a general meeting of the company. Those resolutions related to the removal of six serving company directors and the appointment of three company directors, Messrs O'Sullivan, Heddle and Johnson. On 8th June, 2017, Mr O'Sullivan requisitioned the directors, pursuant to s.178 of the Companies Act 2014, to convene an extraordinary general meeting ('EGM') of Conroy Gold. That EGM convened at the Davenport Hotel in Dublin on 4th August, 2017. At the EGM, the chairman submitted the resolutions in their entirety to a vote of the assembled company members. The unanimous recommendation of the board of directors of the company was that each of the resolutions should be rejected by the members. After a show of hands, a formal poll was requested. It is now known that all of the resolutions were approved by a majority vote. There is no dispute arising concerning the validity of the six resolutions which effected the despatch of six of the then sitting directors. There is a dispute concerning the validity of the three resolutions whereby Mr O'Sullivan sought to have himself and Messrs Heddle and Johnson appointed to the Board. That dispute centres on Art.85 of the articles of association of Conroy Gold and certain related provision in s.144 of the Act of 2014.

(ii) Article 85.

2. Article 85 sits within a part of the articles of association of Conroy Gold that is entitled *"PART XIII – APPOINTMENT, RETIREMENT AND DISQUALIFICATION OF DIRECTORS"* and which provides as follows:

> *"85. Eligibility for Appointment*
>
> *No person other than a Director retiring by rotation or retiring pursuant to Article 82(b) hereof shall be appointed a Director at any general meeting unless [A] he is recommended by the Directors or [B] not less than seven nor more than forty two days before the date appointed for the meeting notice executed by a member qualified to vote at the meeting has been given to the Company of the intention to propose that person for appointment stating the particulars which would, if he were so appointed, be required to be included in the Company's register of Directors together with a notice executed by that person of his willingness to be appointed."*

3. Provisions akin to Art.85 are not uncommon in the articles of association of a public company in Ireland. Nowadays, the primary purpose of such an article is to enable a company to comply with the requirements of the Act of 2014 relevant to the appointment of directors, including ss. 144, 149, 151 and 223, and to ensure, for example, that none of the restrictions on who may be appointed a director are breached by would-be directors, *e.g.*, the limitation on the number of directorships permissible under s.142 of the Act of 2014. Notable provisions in this context include:

> (1) s.144(1) which provides that *"Any purported appointment of a director without that director's consent shall be void"*;
>
> (2) s.144(4) which provides, *inter alia*, as follows:
>
> *"[N]ot less than 3 nor more than 21 days before the day appointed for the meeting there shall have been left at the company's registered office – (a) notice in writing signed by a member of the company duly qualified to attend and vote at the meeting for which such notice is given, of his or her intention to propose the person concerned for such election; and (b) notice in writing signed by the person concerned of his or her willingness to be so elected";*
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> (3) s.149 which requires, at ss.(1), that *"A company shall keep a register…of its directors…"*, the contents of that register being amplified upon in later subsections;
>
> (4) s.149(8) which provides, inter alia, as follows
>
> *"The company shall, within the period of 14 days after the date of the happening of–(a) any change among its directors…; or (b) any change in any of the particulars contained in the register, send to the Registrar a notification in the prescribed form of the change and of the date on which it occurred."*
>
> *(Per s.223(3) of the Act of 2014: "The consent in respect of a director to accompany…(b) a statement under section 149(8), shall include a statement by the director (immediately above his or her signature on the consent) in the following terms: 'I acknowledge that, as a director, I have legal duties and obligations imposed by the Companies Act, other statutes and at common law'");*
>
> and
>
> (5) s.151 which prescribes various particulars to be shown on all business letters of a company, including, per s.151(1), *"in legible characters in relation to every director of the company the following particulars: (a) his or her present forename, or the initials thereof, and present surname; (b) any former forename and surnames of him or her; and (c) his or her nationality, if not Irish."*

4. Returning to the text of Art.85, as quoted above, item [A] is not relevant to the within application. Turning to item [B], its requirements are simply stated and clear: if it is proposed to appoint a director who is not recommended by the Board (a 'Non-Recommended Person'; and each of Messrs O'Sullivan, Heddle and Johnson was a Non-Recommended Person), the following applies:

> (1) notice executed by a member qualified to vote at the relevant general meeting must be given to the company;
>
> (2) that notice must state the intention to propose the Non-Recommended Person for appointment as director;

(3) that notice must state the particulars which would, if the Non-Recommended Person were appointed as director, be required to be included in the Company's register of directors;

(4) the notice referred to in (1)-(3) must be accompanied by a notice executed by the Non-Recommended Person of his willingness to be appointed.

5. Although Art.85 can be read as contemplating that a single formal notice would be served, the court is satisfied that more than one formal notice could be served, including a complete and curative notice in the event of a previous notice being realised to have been somehow deficient, provided all is done within the requisite timeframe and with some degree of formality. This assumes some significance in the within case because Mr O'Sullivan points to (1) his s.146 notice to propose resolutions, and (2) his s.178 notice requisitioning an EGM, as serving also the purpose of being a notice to the company of a willingness on his part to serve as a director if appointed. That is not the express purpose of s.146 or s.178 notices which, in any event, were served outside the 42-day timeframe prescribed by Art.85. Moreover, the court does not accept that it would in any event be appropriate retrospectively to endow on those notices a purpose that they were not intended to serve when served. For the court to conclude otherwise would require Conroy Gold, and any company similarly placed, to consider every document it received before an EGM and ask itself would some future court in a fit of indulgence be prepared to view that particular document in such a way that it might retrospectively be deemed to satisfy the requirements of Art. 85/s.144, even though it had not been served with the intention of satisfying such requirements. That would place companies in a notably invidious position, defeating the very certainty that, *e.g.*, Art.85 seeks to achieve.

6. The service of any of the above notices requires to be done with a degree of formality. Why so? It is easiest to explain by way of example. Thus if one looks to the notice referred to at point (4) above, s.144(1) of the Act of 2014 provides that *"Any purported appointment of a director without that director's consent shall be void."* Absent a degree of formality in the process, there is an increased risk that a director may later seek to avoid her or his obligations as director on the basis that no informed consent to act was ever given. So, for example, in the, admittedly somewhat extreme, circumstances of *Re Cem Connections Ltd* [2000] BCC 917 (see also *Kavanagh v. Kelly* [2005] IEHC 421), Mr Registrar Rawson, sitting in the Companies Court, declined to disqualify as a director a troubled, drug-addicted, sometimes suicidal young woman who simply did not appreciate that she was a director, stating, at 919:

> *"[F]or the appointment of a director of a company to be valid it is necessary that the person appointed should give informed consent to that appointment….The fact that a person signs a form of consent is, of course, strong prima facie evidence that consent was given, but it is not in my view conclusive and may be rebutted by evidence which indicates that the signature was obtained without the person signing the document appreciating what he or she was doing. I am satisfied that Miss Prowse did not realise that she was giving consent to being appointed a director….I also accept her explanation of how she came to sign the VAT registration form and bank mandate. Accordingly I consider that she was never validly appointed a director of CEM and the originating summons must therefore be dismissed as against her."*

(iii) Legal Standing of Company Articles.

7. Before proceeding further, it is useful to note the legal standing enjoyed by the articles of association of a company. A company's articles represent a statutory contract between a company and its members. The court has been referred in this regard to, inter alia, the well-known observations of Ross J. in *Clark v. Workman* [1920] 1 I.R. 107, 112, cast in the language of a bygone age but still worthy of note today, that *"[T]he articles of association…constitute a contract between every shareholder and all the others, and between the company itself and all the shareholders. It is a contract of the most sacred character, and it is on the faith of it that each shareholder advances his money"*. Leaving aside for a moment the issue of whether laic judges in what, notwithstanding Article 44 of the Bunreacht is, in practice, an increasingly secular republic, should endorse the recognition of the *"sacred character"* of a contract, suffice it for present purposes to note, in terms which evidence less religiosity of sentiment and doubtless less eloquence, that the articles of association of a company are of fundamental importance and not to be interfered with, save when duly altered by, or in accordance with, law.

8. In ascertaining the meaning of Art.85, the court must apply the well-established principles of contractual interpretation, as recently distilled by the High Court in *Re Blarney Woollen Mills* [2015] IEHC 509. The court notes, in particular, the following principles identified in Appendix C of that judgment:

> *"(3) The exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances….*
>
> *(4) The cardinal rule of construction is that the intention of the parties must prevail….*
>
> *(5) When one speaks of the intention of the parties to the contract, one is speaking objectively….*
>
> *(8) Intention is to be looked for on the face of the agreement, including any documents incorporated therewith, in the words in which the parties have themselves chosen to express their meaning….*
>
> *(9) Intention is discerned by identifying the meaning of the relevant words: in the light of the natural and ordinary meaning of those words, the overall purpose of the document, any other provisions of the document, the facts known or assumed by the parties at the time that the document was executed, and common sense….*
>
> *(37) Business people will be assumed to know what they are doing and will normally be bound by what they have signed….*
>
> *(38) If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must yield to business common-sense….*
>
> *(39) Where parties have used unambiguous language, irrespective of the question of commercial sense, the unambiguous language must be applied; there is no need to confer business efficacy on the agreement. If there is ambiguity the court is entitled to construe the contract in the more commercially sensible manner….*
>
> *(44) Like articles of association, a shareholder agreement must be the subject of constructive interpretation with a view*

to carrying out the intentions of the parties and enabling them to achieve their commercial purpose….

(45) Articles of association should be regarded as a business document and construed to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the article, in preference to a result which would or might prove unworkable." [Emphasis added]

9. If the court treats first with the underlined terms in the just-quoted text: the unvarnished text of Art.85 does not yield a result that would flout business common-sense, there is no ambiguity in that text, and there is no result flowing from the ordinary meaning of Art.85 that is or might prove unworkable. As that 'unworkability' does not present, there is no cause to bring reasonable business efficacy to bear as a tool of construction. It is when there is a logical difficulty with the ordinary meaning or sense of an article of association, as worded, that a court would try to arrive at a reading that yields reasonable business efficacy. However, a court does not have a free-wheeling discretion blithely to ignore what the members of a company have plainly and universally agreed in an article of association and to substitute a distorted reading of same which conforms with what a particular applicant and/or a (presumptuous) court considers might better have been agreed by those members. As McKechnie J. observes in *Marlan Homes Ltd v. Walsh and anor* [2012] IESC 23, paras.51-2

"51. It is important…to note that where…parties have committed their responsibilities to written form, in a particular manner, it must be assumed that they have intended to give effect to their obligations in that way. Such must be recognised as their right, both commercially and under contract law. Accordingly it is important that, when faced with a construction issue, a court should focus its mind on the language adopted by the parties being that which they have chosen to best reflect their intentions. It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned.

52. The boundary between what is permissible and not in this context is captured by the following quotation from Charter Reinsurance v. Fagan [1997] A.C. 313 where at p. 388 Lord Mustill stated:-

> *'There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.'*
>
> *I would respectfully agree with this passage*."

10. The ordinary meaning of Art. 85 is unambiguous: "*notices*" satisfying the prescribed conditions must be "*given to the Company*".

11. Much has been made by Mr O'Sullivan in the course of the within proceedings of the need to respect the 'democratic will' of those members who attended and voted at the EGM of 4th August. Companies are not sovereign entities; that profound difference aside, they are also not akin to true democracies in the modern sense; they are more like pre-Reform Acts democracies in which votes belong to the propertied and one person can control multiple votes. Regardless, the true 'democratic will' of all of the members of a company finds expression in the articles of association by which each of those members have agreed to be bound. It is by respecting those articles as 'basic law' that the democratic will of the members is properly respected. The court was referred in this regard to the decision of the Court of Appeal in *MacDougall v. Gardiner* (1875) 1 Ch.D.13, a case that arose from a grievance as to how a company chairman had chaired a particular general meeting of the company, with the issue that fell to be determined being whether the company or an individual shareholder should bring suit. In the course of his judgment, Mellish L.J. observes, at 25, that

"[I]f the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed?"

12. The court respectfully agrees with Mellish L.J. that litigation seems best avoided if matters can simply be amended at a fresh general meeting. Indeed the convening of such a further general meeting might perhaps not unreasonably have been contended to be as good a way as any of resolving the issues that Mr O'Sullivan perceives to present as regards having himself (and Messrs Heddle and Johnson) appointed to the board of directors of Conroy Gold. The court, however, does not understand Mellish L.J. to suggest, either in the above-quoted text or otherwise in *MacDougall*, that whenever a majority of company members, in attendance at a general meeting of their company, resolve on a course of action, that course of action should then proceed and be allowed at law to proceed notwithstanding, for example, that it is a course of action which in its substance and/or in the manner of its adoption is not permitted by the applicable articles of association of that company. There is no support in law for such a proposition; in fact, it is the very opposite of what the law contemplates and, if adopted as an approach, would quickly lead to a disordered situation in which a majority of company members could do not just what they wanted, when they wanted, but also however they wanted, regardless of what had previously been agreed to unanimously by all members in the applicable articles of association as to the proper *modus operandi* of their company. The law respects the articles of association of a company as the *Grundnorm* that all members have contractually agreed upon and within the parameters of which all of a company's doings must be done, subject to the provisions of the general law and to due amendment by members.

(iv) Section 144.

13. Section 144(4) of the Act of 2014 has been quoted above. Its requirement for nominating members' notices and nominating directors' notices has been a standard feature of a great many, perhaps the majority, of articles of association of companies incorporated in Ireland (and also in England and Wales) for many decades. (A virtually identical statutory provision appeared in the neighbouring jurisdiction's Companies Act, 1948, and in this jurisdiction's Companies Act 1963). The requirements of s.144(4) are also similar, though not identical, to those imposed by Art.85. In passing, the court notes that Conroy Gold's articles of association do not dis-apply s.144 of the Act of 2014. Instead they modify its requirements in two principal ways, viz. (1) by providing for a 7 to 42-day timeframe for delivery and not the 3 to 21-day timeframe referred to in s.144; and (2) under Art. 85 (unlike the Act of 2014) the notice by the nominating member must include particulars of the proposed director.

14. The effect of s.144 is that once the day appointed for the general meeting is notified to the members, time starts ticking as regards leaving the prescribed notices. Notably, s.144(3) of the Act of 2014 provides, *inter alia*, that:

> *"Save to the extent that the company's constitution provides otherwise…(a) subsequent directors of a company may be appointed by the members in general meeting, provided that no person other than a director retiring at the meeting shall, save where recommended by the directors, be eligible for election to the office of director at any general meeting unless the requirements of subsection (4) as to his or her eligibility for that purpose have been complied with."*

15. The Act of 2014, the court notes, does not provide that its requirements be 'practically and substantively' complied with, let alone that the purpose of those requirements may be achieved by other means.

(v) A 'Trick of the Loop'?

16. Mr O'Sullivan has sought to cast any want of compliance by him with Art.85/s.144 as but a minor matter, a pettifogging 'trick of the loop' deployed, *inter alia*, by Prof. Conroy, in a bid to deny Mr O'Sullivan (and Messrs Heddle and Johnson), of the seats on the board of directors of Conroy Gold that Mr Sullivan believes to be theirs, and to have been theirs, since Conroy Gold's EGM of 4th August. But that is to mis-cast the import of any such want of compliance. Perhaps a useful decision to mention in this regard is that of Cooke J. in *Permanent TSB plc v. Skoczylas* [2013] IEHC 42, a decision binding on this court, a decision concerned with s.160 of the Companies Act 1990, and a decision which points to the importance that the Irish courts attach to compliance with time-requirements in the corporate context. (The potential for a looser approach in this regard was identified by the majority of the Court of Appeal in *Secretary of State for Trade and Industry v. Langridge* [1991] Ch. 402, 415. However, that looser approach was expressly disavowed by Cooke J. in his consideration of s.160(7) of the Act of 1990 in *Skoczylas*).

17. Section 160 of the Act of 1990 was concerned with the disqualification of certain persons from acting as directors or auditors of, or managing, companies. Section 160(7) provided that

> *"Where it is intended to make an application under subsection (2) in respect of any person, the applicant shall give not less than ten days' notice of his intention to that person."*

18. Cooke J. observed as follows in respect of the just-quoted provision, at paras. 15-17 of his judgment:

> *"15. It is clear that this is a mandatory and indispensable precondition to the commencement and admissibility of any application under subsection (2). It is obvious that it would be a complete answer for any director served with an application purported to have been issued under the section, to demonstrate that no ten-day notice had ever been given and to have any such an application struck out on that basis. It would also follow, in the view of the Court, that if an individual had good grounds for believing that an application was about to be launched against him or her under the section when no notice had been given, an injunction might be applied for to restrain the making of the application. Every proposed respondent to an application is entitled to know what the charge is to be and to be given at least 10 days' notice in order to consider the position.*
>
> *16. Accordingly, in the judgment of the Court, the giving of not less than ten days' notice in a form which is adequate and valid for the purposes of subs. (7) is a necessary precondition to the making of any admissible application under the section. That this is so is confirmed by the judgments of the Supreme Court in Director of Corporate Enforcement v. Byrne [2010] 1 I.R. p. 222. At para. 147 of his judgment (p. 257) Fennelly J. made the point as follows:-*
>
> > *'One other procedural detail is important. Section 160(7) of the Act obliges the applicant to give at least ten days' notice to the person of his intention to apply for a disqualification order. This provides him with an opportunity to respond, as he did in the present case. This provision illustrates the general principle that any person who is to be the subject of an application under the section must be given clear notice of that fact and of the grounds on which the application is to be made. I emphasise the matter here because it has a bearing on the finding of want of commercial probity made by the trial judge in the present case. The applicant, by his notice, stated that he intended to make the application pursuant to paras b), d) and e) of subsection (2) but also stated that the application was to be brought having regard to an inspectors' report. In fact, both the draft notice of motion sent with the applicant's prior notice and the notice of motion actually sent were based exclusively on the contents of the Inspector's Report.' (Emphasis added.)*
>
> *17. It is to be noted that in the case in question, the ten day notice under subs. (7) contained several detailed particulars as to the basis upon which the intended application was to be brought. It identified the paragraphs of subsection (2) which were to be invoked and referred to the report of court appointed inspectors into the affairs of the bank in question, upon which the Director proposed to rely. That is in stark contrast to the notices quoted [earlier in the judgment of Cooke J.] No grounds are set out and no indication is given as to which of paragraphs (a), (b), (c), or (d) of subs. (2) under which a member of a company can bring an application, were to be relied upon or to form the basis of the charges against the director-plaintiffs. Having regard to the statement of Fennelly J. quoted above and to the importance attached by the Supreme Court to the serious nature of the misconduct required to justify making a disqualification order under the section, the Court is satisfied that it is strongly arguable that a notice under sub-section (2) must contain an accurate if minimal identification of the grounds of the proposed application if the mandatory precondition of ss(7) is to be fulfilled. In the judgment of the Court the different view expressed by a majority on the Court of Appeal of England and Wales is respect of an analogous provision of an English statute in Secretary of State for Trade v Langridge, [1991] Ch 402, cannot be taken as a correct approach to ss.(7) in this jurisdiction."*

19. Clearly the disqualification of directors/auditors is a matter of importance and the issue of time-limits arising in that context is, if the court might respectfully observe, naturally and properly viewed by Cooke J. as a matter of importance. But a decision as to the composition of a board is also a matter of importance, perhaps even of critical importance, when it comes to the ongoing and future commercial success of any company. So when the members of a company have unanimously agreed by way of express and clear provision in contractually binding articles of association that appointments to the board of directors of their company which are effected by way of general meeting are to be done in a particular manner and subject to the provision of particular notices in a stated timeframe, compliance with such provision (as complemented by s.144) falls naturally and properly to be viewed as a matter of weighty importance. It applies as a corollary of the foregoing that a want of compliance in this regard falls neither to be disregarded nor deprecated. The instant views of some majority are not to be preferred to continuing and un-amended obligations that were previously agreed unanimously.

II. Summary Chronology of Events

30.05.2017

20. Mr O'Sullivan serves notice pursuant to s.146 of the Companies Act 2014.
21. This notice states Mr O'Sullivan's intention to propose nine ordinary resolutions at a general meeting of Conroy Gold relating to the removal of six of its then directors from office and the appointment as directors of Messrs O'Sullivan, Heddle and Johnson.

31.05.2017

22. Letter from Prof. Conroy to Mr O'Sullivan
23. This letter, which follows a conversation between Prof. Conroy and available board members, includes the text:

> *"We note that you have given extended notice of your intention to propose a number of persons as directors of the Company including Mr Paul Johnson and Mr Gervaise Heddle….You might kindly confirm that each of these persons has been spoken to by you and have consented to acting as directors of this company if elected or co-opted."*

24. The court notes in passing that this was a prudent enquiry by Prof. Conroy. It was not, and could not be (it simply was not in his behest as chairman to give) a waiver of the requirements of Art. 85.

25. Letter from Mr O'Sullivan to the directors of Conroy Gold.
26. This letter includes the text *"I confirm that Mr Paul Johnson and Mr Gervaise Heddle have both consented to act as directors should they be elected or co-opted"*. That text has been pointed to in the within application as notice of the willingness of Messrs Johnson and Heddle to serve as directors. However, Art. 85 of the Articles provides that the notice sought in the Non-Recommended Person scenario includes "*a notice executed by that person* [i.e. executed by the Non-Recommended Person] *of his willingness to be appointed."* The letter of 31st May, 2017, is executed solely by Mr O'Sullivan.

07.06.2017

27. Mr O'Sullivan meets with the board of directors of Conroy Gold to voice his concerns regarding the operation and management of the company.

08.06.2017

28. Mr O'Sullivan requests the directors, pursuant to s.178 of the Act of 2014, to convene an EGM of Conroy Gold.

29. Conroy Gold issues a market-notice indicating (a) receipt of the requisition and (b) that the board of directors is taking advice in relation to that requisition.

05.07.2017

30. Letter from Prof. Conroy, as chairman and on behalf of board of directors, advising shareholders of the unanimous board recommendation to vote against all of the proposed resolutions.
31. This letter contains, *inter alia*, the following text:

> *[1] "Resolutions 7 to 9 are seeking the appointment of three requisitioner nominated persons, including Patrick O'Sullivan himself, Paul Johnson and Gervaise Heddle to the Board of your Company".*
>
> *[2] "The Board understands that Mr O'Sullivan has been involved in the cinema business for many years….Mr Paul Johnson is a chartered accountant by background….Mr Gervaise Huddle is also a chartered accountant…" [Certain other biographical details, unnecessary for the court to recount, are also provided].*
>
> It is suggested by Mr O'Sullivan that the text at [1] and [2] points to recognition by the board of directors that Messrs Heddle and Johnson were willing to act as directors. In truth, the letter says what it says and no more, viz. 'three persons are proposed; here are their names and, in broad terms, here is what we know about them'. That is just a chairman and board being upfront with company members as to what is happening to the company owned by those members. There is no waiver in the letter of, and it is not in any event within the behest of the board to waive, the requirements of Art. 85.
>
> *[3] "No information on the Proposed Directors has been provided by Patrick O'Sullivan to the Company. Under the AIM Rules and ESM Rules, the Company's AIM nominated adviser and ESM Adviser are required to investigate and consider the suitability of each of the Proposed Directors and to consider the effect the board changes proposed by Patrick O'Sullivan would have on the efficacy of the board as a whole for the Company's needs, in each case bearing in mind that the company is admitted to trading on Irish and UK public markets.*
>
> *As no information on the Proposed Directors has been provided by Patrick O'Sullivan to the Company, it has not been possible for the Company's AIM nominated adviser, Allenby Capital Limited, or its ESM Adviser, IBI Corporate Finance Limited, to adequately investigate and consider the suitability of each of the Proposed Directors and to consider the effect the board changes proposed would have on the efficacy of the board as a whole for the Company's needs, in each case bearing in mind that the company is admitted to trading on Irish and public markets."*
>
> It was noted by Mr O'Sullivan that nowhere in this is it stated that there is concern as to the willingness of Messrs Heddle and Johnson to serve and that it would have been stated if this was so. With respect, this does not, it seems to the court, follow. The notices of willingness could be served at any time up to seven days before the EGM and it was not up to the chairman or board to provide a real-time analysis of whether to the date of the letter there had been compliance with the notice requirements of Art. 85 when there remained over three weeks for compliance with same. Compliance with

Art.85 was a matter for Mr O'Sullivan (and, respectively, Messrs Heddle and Johnson). The board and company had then to treat with matters in light of the compliance or (as happened) non-compliance by those individuals with Art. 85.

[4] at the end of the letter, and on a point of critical importance to the within application and (for Mr O'Sullivan as plaintiff) of fatal consequence when it comes to the agency arguments considered later below:

"IBI Corporate Finance is acting as ESM adviser to the Company and for no-one else in connection with the matters described in this document and accordingly will not be responsible to any person other than the Company for providing the protections afforded to customers of IBI Corporate Finance Limited, or for providing advice in relation to such matters. IBI Corporate Finance Limited's responsibilities as the Company's ESM adviser under the ESM Rules are owed solely to the Irish Stock Exchange and are not owed to the Company or to any director of the Company (existing or proposed) or to any other person.

Allenby Capital Limited, which is authorised and regulated in the United Kingdom by the Financial Conduct Authority, is acting as nominated adviser to the Company and for no-one else in connection with the matters described in this document and accordingly will not be responsible to any person other than [the] Company for providing the protections afforded to customers of Allenby Capital Limited, or for providing advice in relation to such matters. Allenby Capital Limited's responsibilities as the Company's nominated adviser under the AIM Rules are owed solely to the London Stock Exchange and are not owed to the Company or to any director of the Company (existing or proposed) or to any other person."

The just-quoted text may read like 'small-print'; it does not appear as 'small print' in the letter. It is of the same font-size as the main text of the letter. It sits in a prominent position on the last page. It clearly identifies what each of Allenby and IBI is (and is not) doing. What it imparts is that each of Allenby and IBI is not doing the company secretarial work in relation to the EGM; and to the extent that they are acting as agents of the company, and the court considers agency relationships respectively to arise between Conroy Gold and each of Allenby and IBI, it is a very constrained agency relationship. Anyone who read the above-quoted text, and there is no suggestion that Mr O'Sullivan (or indeed either of Messrs Heddle and Johnson) did not so do, could not properly believe that (1) Allenby and IBI had some wide-reaching agency arrangement in place with Conroy Gold or (2) in reliance on such purported wide-reaching agency agreement, that in providing information to IBI and/or Allenby for the stated purposes of IBI/Allenby, that information was also on notice to Conroy Gold as principal in such agency relationship.

13.07.2017

32. E-mail from Mr O'Sullivan to Allenby Capital and IBI Finance.
33. This e-mail attaches completed Allenby and IBI questionnaires, his curriculum vitae and a signed IBI declaration and the following text immediately above the signature block:

"Finally, please note, that as there is detailed personal information contained in some of the attached files I am explicitly not authorising the distribution of this information to any third party outside of Allenby Capital or IBI Corporate Finance without my express further permission." [Emphasis added].

34. As can be seen, Mr O'Sullivan, in the above e-mail, did not authorise the distribution of information even to Conroy Gold. That is a remarkably constrained distribution list in the circumstances presenting. However, Mr O'Sullivan's personal data is his, and he is entitled to limit its distribution.

14.07.2017

35. E-mail to Mr O'Sullivan, copying (inter alia) McEvoy Solicitors, from IBI.
36. This e-mail states, *inter alia*, as follows:

"In relation to third party disclosures….I can confirm on behalf of IBI that we would not propose to disclose personal information to third parties other than in contacting the references you have provided, without contacting you first.

For the avoidance of doubt, the information can and will be shared with the Company, its legal advisors and relevant regulatory authorities."

37. Reply e-mail from Mr O'Sullivan to both IBI and Allenby.
38. This e-mail states, *inter alia*, as follows:

"Finally, I note your comments on disclosure of some of the personal information I have submitted. However, please note that I demand prior sight of any information the Company is planning to make publicly available on me. I have the right to ensure that information is factually correct and presented in an unbiased manner."

39. Counsel for Conroy Gold suggested at hearing that this last-quoted text involves but a noting of something and does not entail consent to anything. The court respectfully does not agree. It seems clear to it from the just-quoted text that Mr O'Sullivan was saying 'Fine, if my personal data needs to go to Conroy Gold but I don't want any public releases from Conroy Gold concerning my personal data without my having prior sight of same.' The e-mail was addressed directly to Allenby and IBI and, the court considers, could have been relied upon by either of them as consent to the releasing of Mr O'Sullivan's personal data to Conroy Gold. Of course, Mr O'Sullivan's consent to the release by Allenby and IBI of personal data to Conroy Gold could not change the legal relationship between Conroy Gold and (respectively) Allenby and IBI. The relationship between Conroy Gold and each of those entities remained the same limited relationship so openly and comprehensively described in the letter of 5th July. If Mr O'Sullivan thought at any point that the relationship between Conroy Gold and either or both of those entities was other than the limited relationship described in the letter of 5th July, then he was wrong, unfortunately perhaps, but wrong nonetheless.

17.07.2017

40. E-mail from Allenby to Mr O'Sullivan.
41. This e-mail contains, *inter alia*, the following text:

"The only parties we would disclose information to would be the company, the company's advisors, a third party due diligence service provider (should we consider that to be necessary) or any relevant regulatory authorities. Each of these disclosures would relate to facilitating your appointment to the board of the company, ie regulatory requirements to assess your suitability as a board director/completing the necessary filings to enable you to be appointed to the board. The only public disclosures would relate to the regulatory announcement following any appointment to the board and you would be expected to approve that before its release.

42. It does not seem that there was a reply to this aspect of this e-mail. Nor did there need to be: Mr O'Sullivan had given his consent in the manner described above in the e-mail of 14th July to both Allenby and IBI. This e-mail, it seems to the court, was just a comforting e-mail from Allenby that it too would treat discreetly with Mr O'Sullivan's personal data in the manner described by IBI in its email of the 14th.

19.07.2017

43. E-mail from Mr Gervaise Heddle to Allenby Capital.
44. This e-mail contains a competed Allenby "*DD*" (due diligence) form and associated documentation. (It is not clear from the e-mail that any of the persons copied on the e-mail are IBI staff-members; however, the text of the e-mail indicates that a physical copy of the information being electronically provided will be sent that day to both Allenby and IBI). The penultimate paragraph of this e-mail reads:

"I am explicitly not authorising the release of this information beyond Allenby and IBI." [Emphasis in original].

45. As can be seen, Mr Heddle, in the above e-mail, did not authorise the distribution of information even to Conroy Gold. That is a remarkably constrained distribution list in the circumstances presenting. However, Mr Heddle's personal data is his, and he is entitled to limit its distribution.

46. E-mail from Allenby Capital to Mr Heddle.
47. This e-mail states, *inter alia*, the following:

"Noting your comment regarding us not sharing any information with any other parties, the only parties we would need to disclose information to would be the company, the company's advisors, a third party due diligence service provider (as set out above) or any relevant regulatory authorities. Each of these disclosures would only relate to facilitating your appointment to the board of the company, ie regulatory requirements to assess your suitability as a board director/completing the necessary filings to enable you to be appointed to the board. We would not propose to make any public disclosures about you or the other proposed directors other than the necessary regulatory announcement following any appointment to the board and you would be expected to approve that before release.

We ae also required to provide you with an AIM Rules briefing (I'm afraid that we are not allowed to rely on you being on the board of another AIM company)…"

48. There was never a reply to this e-mail of 'Fine, if it is only to Conroy Gold, go ahead' or something along that line. So, as regards Mr Heddle, all there is on record is a firm refusal of consent to disclose beyond Allenby/IBI, an explanation of intended use (here by Allenby), but no consequent reversal of that initial refusal of consent. This sequence of events was the subject of some discussion at hearing, with the court posing the question as to whether one could properly infer consent from the absence of a repeated refusal of consent in the face of what the Allenby staff member was saying. However, the court accepts that a non-reversal of a previous refusal of consent, in the face of a subsequently stated intended use which comes within the scope of that previous refusal, does not involve the giving of consent to such use. Otherwise, having refused the release of personal data, a person would need to be constantly alert to repeating that refusal anytime it was presented, honestly or slyly (and there is no suggestion of slyness here), with a statement of intended use that would require consent.

26.07.2017

49. E-mail from Ms Rebecca McEvoy, Solicitor, (acting for Mr Paul Johnson) to Allenby Capital and IBI.
50. This e-mail contains completed Allenby and IBI questionnaires, Mr Johnson's *curriculum vitae*, some ID documentation, and the following text immediately above the signature block:

"This information is not to be released to parties other than Allenby/IBI, without the prior written consent of Paul."

51. Uniquely among the three proposed directors, Mr Johnson also amended the documentation that he was asked by Allenby to sign so as to include the following text:

"I do not authorise Allenby to release any information provided herein to the current Board of Conroy Gold and Natural Resources or any related, connected or perceived related or connected party of Conroy Gold and Natural Resources without my prior consent"

52. As can be seen, Mr Johnson, (1) through his solicitor, in the above e-mail, and (2) in the above-quoted amendment to the Allenby documentation, did not authorise the distribution of information even to Conroy Gold. That is a remarkably constrained distribution list in the circumstances presenting. However, Mr Johnson's personal data is his, and he is entitled to limit its distribution.

27.07.2017

CUT-OFF DATE FOR ART.85 NOTICES

53. This is the date that falls seven days before the EGM of 4th August.

02.08.2017

54. E-mail from IBI to, inter alia, Mr Heddle and Allenby, copying, inter alia, Messrs O'Sullivan and Johnson.
55. This e-mail states, *inter alia*, *"Are we in a position to provide the conclusion of our assessment to the proposed directors today? For info neither IBI nor Allenby (as far as I know) shared dd [due diligence] info with the company, given comments received from*

Patrick early on". Unusually perhaps, this e-mail excited no response from Mr O'Sullivan (or either of Messrs Heddle and Johnson). Two possible conclusions seem to arise from this e-mail and the want of any response thereto. The first, and more likely, conclusion is that Mr O'Sullivan (and each of Messrs Heddle and Johnson) had forgotten about, if he ever appreciated the import of Art. 85, and was so concerned that Conroy Gold should not have access to his personal data that he did not realise this created complications *vis-à-vis* Art. 85. An alternative but, it seems to the court, most unlikely conclusion is that Mr O'Sullivan (and each of Messrs Heddle and Johnson) was of the view that 'It does not matter that no information has gone from IBI and Allenby to Conroy Gold; it (Conroy Gold) will be on notice of what it needs to know for the purposes of Art. 85 because of the wide-ranging principal-agent relationship which I believe to exist between Conroy Gold and each of IBI and Allenby (despite my having been expressly and prominently told of the very limited nature of the Conroy Gold-IBI-Allenby relationships in the chairman's letter of 5th July).'

03.08.2017

56. E-mail from Allenby to Messrs O'Sullivan, Heddle and Johnson

57. This e-mail commences *"With the exception of one reference check for Paul which needs to be completed tomorrow morning, I can confirm that we have now received all of the necessary documentation in relation to our due diligence procedures…"* and continues in a similar vein, e.g., mentioning the intended circulation of a draft announcement setting out the necessary regulatory disclosures. Even if Mr O'Sullivan (and Messrs Heddle and Johnson) believed that all that was necessary had now been done as regards the provision of their respective personal information to Conroy Gold, that was a mistaken belief. The author of the Allenby e-mail: (i) was writing of what Allenby had done within its constrained role, so clearly described in Prof Conroy's letter of 5th July; and (ii) was not stating that there had been compliance with Art.85 – this company secretarial dimension of matters was no part of the Allenby 'brief', which brief (again) was clearly described in Prof. Conroy's letter of 5th July. Thus the author of the Allenby e-mail could not offer, nor can she properly be construed as having offered, any view as regards compliance with Art.85.

04.08.2017

58. EGM held.

59. What transpired at the EGM is considered later below. The court pauses to deal with one trivial point at this juncture. Prior to the EGM, someone within Allenby or IBI prepared a draft notice for release to the market which states: (1) the text of each then-proposed resolution; (2) under the heading *"Result"* that "*The resolution was* [not] *carried*" (with the square bracketed text clearly to remain or be deleted depending on the votes cast at the EGM); and (3) certain details concerning Mr O'Sullivan (and each of Messrs Heddle and Johnson). The court must admit to being completely mystified as to why this document was ever thought to be of any significance, let alone to suggest some bad faith on the part of Conroy Gold. It was not, as it turns out, a Conroy Gold company document. But even if it was, what does it matter? It is patently a draft notice which someone prepared in advance of the EGM so that it would be ready for amendment, as appropriate, and then issued to the market in a timely manner after the EGM. All its preparation and existence suggests is advance-thinking and efficiency on the part of whoever drafted it, nothing more.

29.08.2017

60. The gaps brought about on the board of directors by the cull of board-members effected at the EGM of 4th August were plugged partially on 29th August by the appointment of two distinguished individuals to serve on the board. Mr O'Sullivan has pointed to the pace at which these replacement directors were installed as evidence of pre-planned and oppressive behaviour by the board against his client. There is nothing to support this allegation. Consequent upon the EGM, the board of Conroy Gold was left in a seriously depleted position thanks to the actions, *inter alia*, of Mr O'Sullivan, and the board moved quickly to plug the gaps arising at board level and without regard to Mr O'Sullivan (or either of Messrs Huddle and Johnson) whom the board (rightly) believed not to have been appointed to the board at the EGM. Mr O'Sullivan is a successful man of the world and doubtless knows of the ruthless efficiency with which capitalist enterprise can move when its self-interest so dictates; that is all the court sees here: consequent upon the EGM a serious problem had arisen as to the composition of the board of directors, this needed swiftly to be addressed, and was.

III. The Days Previous to the EGM

61. What was going on within Conroy Gold in the 'run-up' to the EGM. A dispassionate and uncontroverted account of the board's actions in that period has been provided in the affidavit of Mr Price, a solicitor acting for Conroy Gold, certain portions of which affidavit evidence are quoted below:

> *"3. Shortly after the receipt by the Company of the requisition on 8 June 2017, I drew the Company's attention to the provisions of Article 85 of the Company's Articles of Association….*
>
> *4. ...I indicated to the Company that it should expect to receive, sometime in advance of the meeting, the particulars and signed consents of the persons nominated for election as directors….*
>
> 11. In the week before the EGM…[the] Managing Director of the Company, indicated to me that the Company did not appear to have received any information in relation to the candidates for election as directors. I advised her that she should already have received those particulars and documents as Article 85 required that they be delivered at least seven days before the meeting….[The Managing Director] said she would carry out further searches in this regard."

62. There is nothing untoward in any of the foregoing. It was up to Mr O'Sullivan (and Messrs Heddle and Johnson) to make sure that the company received the documentation required under Art.85. There was no obligation on the company or on individual board members to start liaising with Mr O'Sullivan (or with either or both of Messrs Heddle and Johnson) to ascertain whether each of those gentlemen was satisfied that he had done all that fell to him to do in advance of the EGM. That was their respective business, not that of Conroy Gold or any of its officers.

IV. The Day of the EGM

63. Mr Price's affidavit evidence also provides a dispassionate and uncontroverted account of what was happening within Conroy Gold on the day of the EGM:

> *"12. I attended the EGM which was held on 4 August 2017. Immediately before the commencement of the meeting [the Managing Director]…advised me that following the checks she had carried out she was satisfied that the requirements of Article 85 of the Articles had definitely not been satisfied in respect of any of the three persons proposed for appointment as directors, as the Company had not received the required particulars or signed notice in respect of any of those persons. On that basis I advised the Board that the relevant resolutions proposing the appointment of those persons as directors would, whether passed or not, be ineffective as the provisions of Article 85 were in mandatory terms and it was not open to the Company to dispense with, vary or relax the requirements imposed by that Article in*

respect of the election of directors at a general meeting.

13. I further advised the Board that Section 178 of the Companies Act 2014 had obliged the Company to convene the meeting as requisitioned by the Applicant and that, in my view, that implied an obligation on the part of the Company to put to the meeting all the resolutions proposed in the Applicant's requisition, notwithstanding the fact that, even if passed, the three resolutions relating to the appointment of additional directors would be of no effect. I also recommended to the Chairman that after those resolutions had been submitted to the meeting, it would be best that he inform the meeting that the resolutions could not take effect. This was particularly so if the resolutions appeared to have been passed on a show of hands or a poll as otherwise there would be potential for confusion.

14. At the meeting, the first of the nine resolutions was heavily defeated on a show of hands but I believe the Applicant and another shareholder demanded a poll on that resolution. The Chairman then asked if a poll was going to be demanded on each resolution and a shareholder, whom I believe to have been the Applicant, indicated that would be the case. The Chairman then stated that all the polls would be taken at the end after all nine resolutions had been put to the meeting. The Chairman then put each of the remaining resolutions to the meeting and each was defeated on a show of hands but the Chairman acknowledged in each case that a poll had been requested.

15. The poll on each of the nine resolutions was then taken and the count was conducted in a separate room by the Company's registrars and Deloitte, Chartered Accountants, acted as scrutineers and a representative of the Applicant's solicitors attended as an observer at the count. After a couple of hours the results became available and were delivered back to the Chairman in the main meeting room. He announced that resolutions 1 to 6 (in respect of the removal of directors) had been passed. On the basis of the advice given to him, the Chairman informed the meeting that there had been non-compliance with the requirements of Article 85 in respect of the three persons proposed as directors in resolutions 7 to 9 and accordingly those resolutions could not take effect. The Chairman then declared the meeting closed as all of the business of the meeting as set out in the notice convening the meeting had been dealt with."

64. There is nothing untoward in any of the foregoing. Might it have generated less eventual difficulty if Prof. Conroy, as chairman, had mentioned the Art. 85 difficulty before proceeding to the voting and polling? Who knows? But in truth it does not matter: he proceeded as he did, with the benefit of the legal advice received, and there was nothing unlawful or otherwise improper in his proceeding as he did, nothing untoward at all.

V. The 'Newstalk' Interview

65. On 31st August, 2017, Prof. Conroy gave an interview to Mr Vincent Wall, a journalist of renown who presents the 'Breakfast Business' programme on Newstalk Radio, a popular Dublin-based radio station. In the course of a discussion regarding the appointment of the new directors following the EGM and before the within application came on for hearing, the following exchange occurred:

"Mr Wall: Nonetheless Professor, and nobody is doubting the expertise and experience these men will bring, nonetheless as you know the High Court challenge which will be heard on the 12th September, two weeks time, to your decision at the EGM not to allow a vote on Mr O'Sullivan's nominees. He says –

Prof. Conroy: It wasn't a question of not allowing a vote on them. Resolutions were valid. It's the fact that the individuals concerned had not fulfilled the necessary requirements which you must do in relation to a company, its articles of association, when you are being put forward as a director but the resolutions were actually valid themselves."

66. In the within application, some reliance is placed by Mr O'Sullivan on the reference by Prof. Conroy, in the above-quoted interaction, to the fact that the resolutions were valid. However, all the court understands Prof. Conroy to be seeking to impart in the above-quoted exchange is that the resolutions as proposed were proper in terms of what they sought to achieve and therefore the vote on them proceeded, but that there was a want of compliance by Messrs O'Sullivan, Heddle and Johnson with *"the necessary requirements which you must do in relation to a company"*, specifically Art. 85. That is no more and no less than an enunciation by Prof. Conroy of the essence of the position adopted by Conroy Gold in the within application.

VI. Reliefs Now Sought

67. By amended notice of motion of 22nd August, Mr O'Sullivan seeks a variety of reliefs, of which the court understands, from the submissions made by counsel for Mr O'Sullivan at hearing, only the following reliefs are now sought:

"8. A Declaration that the Respondent's conduct of the EGM of 04 August 2017, and in particular the failure to acknowledge and give proper effect to the vote of the members on Resolutions 7, 8 and 9 ('the Disputed Resolutions') concerning the appointment of three new directors (Paul Johnson, Gervaise Heddle and the Applicant, together the 'Nominated Directors') constituted the conduct of its affairs in a manner oppressive to the Applicant and/or the interests of its members;

9. A declaration that the Disputed Resolutions submitted to a vote of the members at the EGM of 04 August 2017 concerning the appointment of the Nominated Directors were validly passed;

10. A declaration that the Nominated Directors are entitled to be appointed as directors of the Respondent forthwith….

12. If necessary, an Order/s setting aside such actions and/or decisions of the Board from the date of the EGM until the hearing of this Application as the court shall deem fit, by reason of this Application as the Court shall deem fit, by reason of the continued wrongful exclusion of the Nominated Directors from the Board of the Respondent.

13. Such further or other orders [as seem meet to the court]".

VII. Some Conclusions

68. The court pauses to note a few points that seem to it to be of especial importance as regards the determination of the within application.

(i) No giving of notices, nor particulars or information required to be contained in same.

69. Neither the required notices nor the particulars and information required to be contained therein have ever been given to Conroy

Gold, either within time or at all. No document purporting to be a nominating member's notice or a director's consent notice was ever sent by Mr O'Sullivan, or anybody else, to Conroy Gold or anybody else in respect of any of the three nominated directors. None of the communications relied on by Mr O'Sullivan make any reference to the requirements of Art. 85/s.144(4). Never, within the prescribed timeframe or at all, did Conroy Gold receive a signed consent to act from any of the nominated directors; the evidence of Prof. Conroy to this effect is unequivocal and uncontroverted, viz:

> *"Neither the notices required by Article 85, nor the information required to be contained in those notices, were received by the Company. It appears that the Applicant and his nominated directors, for whatever reason, failed to give the Company the documents and information required by Article 85 of the Articles within the time prescribed or, indeed, at all.*
>
> *…*
>
> *[T]he Company itself did not receive any information at all in relation to the three proposed directors from IBI or Allenby, or indeed from the Applicant or any other person."*

70. In truth, all the evidence in the case suggests that Mr O'Sullivan (and each of Messrs Heddle and Johnson) just overlooked the requirements of Art. 85/s.144, and consequently did not seek to comply with same, with Mr O'Sullivan now seeking to make out that he did so comply or should be construed as having so complied, even though in point of fact he did not.

(ii) E-mails of May, 2017 and meeting of June, 2017 do not satisfy notice requirements.

71. Neither the emails of May, 2017 nor the meeting with the board of directors in June, 2017 satisfy the notice requirements arising under Art. 85/s.144. Never in those e-mails or at the meeting of 7th June, or at any other time, was the company given the particulars of each director as required by Art.85. The e-mail of 31st May and the meeting of 7th June sit outside the 42-day timeframe referred to in Art. 85. Moreover, for the reasons stated previously above, the court does not accept that it would be appropriate retrospectively to endow on such communications a purpose that they were not intended to serve when served.

72. In passing, though it is really an irrelevance in light of the foregoing, the court notes that Mr O'Sullivan's email of 31st May was not in any event "*executed*" by either of Messrs Heddle or Johnson (or even copied to them). It will be recalled that Article 1(d) of the articles of association provides that *"Expressions in these Articles referring to execution of any document shall include any mode of execution whether under seal or under hand."* The court is not persuaded, when one has regard to the articles of association or the Act of 2014, that a third party may generally submit a consent to act on a nominated director's behalf; by way of *obiter* observation the court notes that exceptional circumstances might conceivably arise in any one case in which, by reference to those exceptional circumstances, such a third-party submission might be considered permissible but they would need to be truly exceptional circumstances and nothing of the like presents here. As to the oral conversations at the meeting of 7th June, these cannot constitute a notice in writing (Art.118 of Conroy Gold's articles of association making this expressly clear).

(iii) Allenby and IBI.

73. Conroy Gold engaged Allenby and IBI to act for a specific, limited purpose, being to ensure compliance with the rules of the AIM and ESM stock exchange sub-markets. Neither Allenby nor IBI had any role in ensuring compliance with the articles of association or the Act of 2014. They were not performing a company secretarial role. The plaintiff, Mr O'Sullivan, was either aware, or on notice, of the foregoing for the following reasons:

> (1) Conroy Gold's contract of March, 2016 with Allenby, of which Mr O'Sullivan may have been on notice (certainly he had it to hand to exhibit it to his own affidavit evidence), makes clear that Allenby was engaged by Conroy Gold to give advice relating to its AIM listing. Thus Recital A to the said contract provides that *"The Company has appointed Allenby Capital as Nominated Adviser to the Company, for the purposes of the AIM Rules."* Clause 2.3 of the said contract provides that *"As Nominated Adviser, Allenby Capital will be responsible solely to the London Stock Exchange for fulfilling its responsibilities set out in [the] AIM Rules for Nominated Advisers."* Schedule 3 to the said contract includes, it is true, under the heading *"Services to be delivered by Allenby Capital as Nominated Adviser"* the following text: *"advising the Company on any proposed changes to the board of directors of the Company (including investigating the suitability of proposed new directors and considering the effect of any changes on the efficacy of the board)".* However, no-one could properly read that text as endowing upon Allenby a roving responsibility for ensuring compliance by Conroy Gold with its articles of association and/or with Irish company law generally.
>
> (2) Neither Allenby nor IBI ever suggested to Mr O'Sullivan (or either of Messrs Heddle and Johnson) that the information in the stock exchange suitability questionnaires would or could be treated as the required notices for the purposes of Art.85 or s.144.
>
> (3) There was no logical reason for any of Messrs O'Sullivan, Heddle or Johnson to assume that either of Allenby or IBI was authorised to receive formal notices for the purposes of Conroy Gold's articles or Irish company law. A legally advised, commercially experienced person would know that formal notices required to be given to a company would typically (though, as will be seen later below, not invariably) be served on the company at its registered office.
>
> (4) As to the repeated suggestion that Allenby and IBI were respectively functioning as Conroy Gold's agents (which respective agency arrangements are accepted by the court to have presented), the documentation in evidence, most especially the letter of 5th July, makes it abundantly clear that the scope of the agency presenting as regards Allenby and IBI was limited to their each performing specific functions relating to Conroy Gold's AIM and ESM listings. Neither Allenby nor IBI had any role in relation to Art. 85/s.144, and neither had authority to receive nominating members' notices or consent notices for these purposes. In fact, so restricted is the agency of each of Allenby and IBI that even if notices good for the purposes of Art. 85 and s.144 had been served on Allenby and IBI (and they were not) "[a] *notification given to an agent is effective as such if the agent receives it within the scope of his actual or apparent authority" (Bowstead and Reynolds on Agency,* 19th ed., 510) and it was not in the scope of the actual or apparent authority of either of Allenby or IBI to receive any notice for the purposes of Art.85 and/or s.144. That is a great and wide crevasse separating agent from principal in this case which Mr O'Sullivan, despite his many contentions, has never managed successfully to traverse. It also suffices to render the decision of Erle C.J. in *Marsden v. The City and County Assurance Company* (1865-66) L.R. 1 C.P. 232 (a case to which the court was referred by counsel for Mr O'Sullivan, and where an insurance agent's authority was withdrawn unbeknown to an insured seeking to make a claim) of no relevance to the within application, for in that case the evidence was, in effect, 'X was an agent, then ceased to be an agent and no-one told

me'; there is no evidence along those lines in the within proceedings nor is anything of a like manner alleged to have occurred. A case that does seem to the court to be of some note in this regard is the decision of the Court of Appeal of England and Wales in *JL Builders & Son v. Naylor & Naylor* [2009] EWCA Civ 1621, a case arising from a payment dispute in a building-works context. In his judgment in that case, Lord Neuberger observed, *inter alia*, as follows:

> "[by way of account of certain of the background facts] 7. *Having found that the defendants' refusal to pay was not a repudiatory breach, and that the claimant walking off the site, while it may have been a repudiatory breach, was not accepted by the defendants, the [trial] judge reached his conclusion in paragraph 37-39 of his judgment:*
>
> > *'37. As at 28 June, both the claimant and the defendants were expressly stating their desire to continue with their contract as soon as the immediate difficulties could be resolved, and they were sensibly seeking to find a mutually acceptable machinery to that end. Neither was suggesting or accepting any repudiatory breach by the other. Indeed, to the contrary. That in due course led to the discussions on 2 August when it was agreed that the figures could be resolved by the respective quantity surveyors, whereupon the defendants would pay immediately what was found to be due and the claimant would resume work.*
> >
> > *38. It was at that point that the most unfortunate failure occurred on the part of the claimant's quantity surveyor, Lithgoe [I [Lord Neuberger] interpose for the purposes of the judgment that it subsequently transpired that Mr Lithgoe was mentally unwell and indeed had suffered a nervous breakdown although it is not entirely clear whether that nervous breakdown had occurred at that time]. The time for the provision of information by Mr Lithgoe to Mr Mountford had not been made of the essence. Mr Mountford's fax to Lithgoe was not sufficient to make it so. Notice should have been given to the claimant himself clearly stating what was required of him, the date by which it was reasonably required and that, in default, it might be considered to be evidence of an intention on his part no longer to perform the contract and then, in those circumstances, the contract might be terminated by the defendants...'",*
>
> and then continued, *inter alia*, as follows
>
> > *"12. As I see it, this appeal…turns on whether or not the fact the fax of 9 August was sent to Mr Lithgoe rather than to the claimant, prevent it from operating as a notice making time of the essence given the judge's finding in clear terms that it was never passed on by Mr Lithgoe to the claimant and that the claimant did not know about it until sometime after the claimant received Mr Mountford's fax of 18 August.*
> >
> > *13. The question therefore is whether Mr Lithgoe had authority to receive on behalf of his client, or to be served with on behalf of his client, contracted any notice and in particular the notice of 9 August 2004. In that connection his role was, as described in paragraphs 23 and 24 of the judgment, namely that he would be provided by the defendant with all "necessary materials" to support the July 3 schedule. Upon that happening, Mr Lithgoe would, in his capacity as quantity surveyor, review and advise on the figures (and possibly the works in the schedule) and would communicate his views to Mr Mountford together with any necessary materials provided to him by the claimant, and that thereafter he and Mr Mountford would seek to agree a figure.*
> >
> > *14. On the face of it that is potentially quite a wide instruction, quite a wide authority, as Mr Ramsden says, because it gave Mr Lithgoe on behalf of the claimant, and indeed Mr Mountford on behalf of the defendants, power to agree a figure which could amount to nothing or a very substantial sum which the respective parties would then be bound by. The defendants would have to pay any sum which was so agreed and the claimant would have to come back on site once a sum was agreed, even if that sum was nil.*
> >
> > *15. However, whether one characterises that authority as wide or not, it does not seem to me that it extends to receiving notices under the contract or notices which have contractual effect. The parties had agreed what the authority of their respective quantity surveyors was, namely to try and agree — and if possible to agree —certain figures: a classic role, one might have thought, for a quantity surveyor. But that is quite a different thing from being entitled to receive notices. Mr Ramsden accepted, quite rightly in my view, that the necessary consequence of his submission that the notice of 9 August was validly served on the claimant was that the notice of 18 August, actually determining the contract served by Mr Mountford on specific instructions from his clients the defendants, could have been served on Mr Lithgoe alone."*
> >
> > In the end the appeal in JL Builders failed because while the agents had authority to agree amounts, they did not have authority to receive notices. That, it seems to the court, is a case that presented with what, to borrow a colloquialism, might be described as a much closer 'call' than that which presents in the within case where Allenby and IBI had no role as regards Art.85/s.144, were never given such a role, never held themselves out to have such a role, and could not properly or reasonably be construed, certainly on the facts as known to Mr O'Sullivan (and, for that matter, each of Messrs Heddle and Johnson), and perhaps even more generally, to have such a role. JL Builders is also, if the court might respectfully note, a good example of a case which highlights the need for precision and attentiveness to detail in arguing that, and analysing whether, an agency arrangement presents in a particular matrix of fact, and what type of agency arrangement (if any) so presents.

(iv) Questionnaires not delivered to Conroy Gold.

74. None of the information sent by Messrs O'Sullivan, Heddle and Johnson to Allenby and/or IBI was ever disclosed by either of those entities to Conroy Gold. Thus Prof. Conroy avers that

> *"Neither the notices required by Article 85, nor the information required to be contained in those notices, were received by the Company",*

and

> *"[T]he Company itself did not receive any information at all in relation to the three proposed directors from IBI or Allenby, or indeed from the Applicant or any other person."*

75. Likewise, Mr Price avers as follows:

> *"Neither the notices required by Article 85, nor the information required to be contained in those notices, were received by the Company."*

76. The just-quoted averments of Prof. Conroy and Mr Price have been the subject of sharp criticism by Mr O'Sullivan. However, neither averment has been contradicted. It follows that the requisite information was not "*given to the Company*", within the meaning of Art.85 or "*left at the company's registered office*" within the meaning of s.144. Moreover, neither Allenby nor IBI: had any role in relation to Art.85 or s.144; had any authority to accept service of the notices; or was told by any of Messrs O'Sullivan, Heddle or Johnson that he was purporting to serve notices on either of them for the purposes of Art. 85/s.144.

77. Service of proceedings and documentation on a company is governed by s.51(1) of the Act of 2014 which provides, *inter alia*, that: *"A document may be served on a company–(a) by leaving it at or sending it by post to the registered office of the company".* Section 50(4) of the Act of 2014 contemplates that a company's registered office may be care of a specified agent. The decision in *O'Shea v. DPP* [2000] IEHC 86 recognises that service on a body corporate may be effected through service on an officer of that body corporate. But otherwise, as a matter of basic principle, a document cannot be validly served on a company by delivering it to the company's agent (except on a solicitor authorised by the company to accept service (*Re Denver United Breweries Ltd* (1890) 63 LT 96)). This basic principle applies *a fortiori* in circumstances where (as here) each of Allenby and IBI (i) had no authority to accept service, (ii) never confirmed that they (or either of them) accepted service of notice (which would be hard in any event to do when no notice was served), (iii) was never told that the information supplied to it purported to be notice, and (iv) was repeatedly told not to share the information with Conroy Gold (and even after such consent was given by Mr O'Sullivan in respect of his personal data, he was later expressly advised that there had been no such disclosure and took no action in response).

(v) Non-consent to Disclosure.

78. The information provided by each of Messrs O'Sullivan, Heddle and Johnson to each of Allenby and IBI was not, to borrow from the wording of Art.85, "*given to the Company*". So the issue of whether Mr O'Sullivan (or, for that matter, Messrs Heddle and Johnson) believed, or reasonably believed, that the information would be given to Conroy Gold is of no real legal consequence.

79. The court has considered the e-mail evidence available to it in some detail in the above chronology. That evidence indicates that there was no reasonable basis on which Messrs Heddle or Johnson could have believed – in the face of their insistence that the information pertaining to them should not be disclosed outside Allenby or IBI – that it was in fact being disclosed to Conroy Gold. The position of Mr O'Sullivan (the plaintiff in these proceedings) is different. In his e-mail of 14th July, the court considers that he did consent to the disclosure of his personal data to Conroy Gold. But IBI's e-mail of 2nd August made clear to him that neither Allenby nor IBI had disclosed to Conroy Gold any of the information received and Mr O'Sullivan took no consequent action. The court's abiding impression is that the reason he took no action is because he did not, until late in the course of the EGM of 4th August, appreciate the import or significance of Art.85/s.144.

(vi) Deficiency in Questionnaires.

80. Apart from the fact that the information provided by Mr O'Sullivan (and each of Messrs Heddle and Johnson) was never, to borrow from the text of Art.85, "*given to the Company*", those questionnaires and the completion of them did not constitute notices within the meaning of Art.85 or s.144 for several reasons: (1) at no point in his correspondence with IBI and/or Allenby did Mr O'Sullivan (or either of Messrs Heddle or Johnson) refer to, or purport to comply with, Art.85/s.144(4) (and the questionnaires were not stated to be supplied for the purpose of compliance with same); (2) the questionnaires of Messrs Heddle and Johnson (neither of whom were members of Conroy Gold) could not, on any version of events, constitute (to quote again from Art.85) a *"notice executed by a member qualified to vote at the meeting has been given to the Company of the intention to propose that person for appointment stating the particulars which would, if he were so appointed, be required to be included in the Company's register of Directors"*; and (3) none of the questionnaires contained a statement by a member of the just-mentioned "*intention to propose*".

81. It is informative to contrast the Allenby/IBI questionnaires with the 'Requisition of Extraordinary General Meeting' of 8th June, as executed by Mr O'Sullivan. That requisition repeatedly highlights that the recipient is to take notice of certain matters. It is addressed to the directors of Conroy Gold. It was sent to the registered office of Conroy Gold. It states that it is being provided *"in accordance with the provisions of Section 178 of the Companies Act 2014 and the articles of association of the Company".* It was signed by Mr O'Sullivan. It is the type of formal document that one would expect to be served when an EGM is being requisitioned; and it is the type of formal document that Mr O'Sullivan (and each of Mr Heddle and Johnson) would almost certainly have sought to serve on Conroy Gold had he ever addressed his mind to the requirements of Art.85/s.144.

VIII. Failure to Comply with Article 85/Section 144

82. Three general points arise as regards a failure to comply with Art.85/s.144.

83. First, where a person is purportedly appointed by resolution of a company's members to be a director of the company of which they are members and a defect in the process of appointment later becomes manifest, that purported appointment is invalid. The person purportedly appointed as director may act as a director and may even be treated at law as a *de facto* director; however, the appointment is still invalid. So, for example, in *Moylan v. Irish Whiting Manufacturers Ltd* (High Court, unreported, 14th April, 1980), Hamilton J., as he then was, held that the plaintiff's appointment as a director was void because the resolutions electing him together with other directors were in breach of a statutory prohibition on moving the appointment of two or more directors by single resolution. In *Re Canadian Land Reclaiming and Colonizing Co* (1880) 14 Ch.D. 660, 664, Jessel M.R. said of two persons who had been appointed as directors, and who had acted as such, but who lacked the share qualification required by their company's articles of association, *"No doubt they were not properly elected…"*; so as early as 1880 there was *"[n]o doubt"* arising in this regard. (In passing, the court notes that the general proposition that a purported appointment of a director who is ineligible is void or ineffective is expressly recognised by a number of provisions in the Act of 2014. Thus, under s.130(2) *"Any purported appointment of a body corporate or an unincorporated body of persons as a director of a company shall be void."* Under s.131(2) *"Any purported appointment of a minor as a director of a company shall be void."* Under s.136, which is perhaps the provision of the greatest relevance to the within application and which, per s.136(1) *"applies where the constitution of a company requires a director of the company to hold a specified share qualification"*, the office of director is vacated if the director (per s.136(2)) *"ceases at any time, after the expiration of that period or shorter time so fixed, as the case may be, to hold the specified qualification".* Also of note is the provision in s.146(4), applicable

to the analogous context of the removal of a director by the members of a company *"Any…resolution that is passed that does not comply with the foregoing provisions shall, subject to subsection (5), not be effective.").*

84. Second, a resolution that contravenes the articles of association of a company or the Act of 2014 is a nullity, even if passed by a majority of the members. In *Automatic Self-Cleansing Filter Syndicate Co. Ltd v. Cuninghame* [1906] 2 Ch.34, the directors of a company were held not to be bound to comply with an ordinary resolution passed at a general meeting was contrary to the articles of association because it usurped powers reserved to the directors. In his judgment, Warrington J., at 38-9, points to the illogic that would result from a contrary conclusion:

> *"It seems to me that if a majority of the shareholders can, on a matter which is vested in the directors, overrule the discretion of the directors, there might just as well be no provision at all in the articles as to the removal of the directors by special resolution. Moreover, pressed to its logical conclusion, the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not able to remove the directors, overrule every act which the board might otherwise do. It seems to me on the true construction of these articles that the management of the business and the control of the company are vested in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration of the articles, such alteration, of course, requiring a special resolution."*

85. In *Quin & Axtens v. Salmon* [1909] A.C. 442, a decision of the House of Lords that is notable for its brevity, Lord Chancellor Loreburn observed, at 444, that "[I]*t seems to me that the regulations or resolutions which have been passed are of themselves inconsistent with the provisions of these articles, and therefore this appeal fails"*. So the decision of the Court of Appeal in that case that the relevant company ought to be restrained from acting on same stood. In *Scott v. Scott* [1943] 1 All ER 582, a company's members in general meeting passed ordinary resolutions providing, *inter alia*, for a regular payment to preference shareholders and for the investigation of a company's financial affairs. The High Court held that these resolutions were contrary to the company's articles, which reserved to the directors the power to declare interim dividends and manage the company's financial affairs. Per Lord Clauson, at 584, "[T]*his resolution is nothing more nor less than an attempt to declare an interim dividend. As such, the company had nothing whatever to do with that, and the resolution is wholly inoperative*." Both *Automatic Self-Cleansing* and *Scott* were applied by McGovern J. in *Ryanair Ltd v. Aer Lingus Group plc* [2011] 3 I.R. 69.

86. Third, though not argued extensively at the hearing of the within application, there has been some suggestion by Mr O'Sullivan that even if Art.85 was not complied with, the appointments purportedly made at the EGM were nonetheless valid and effective because a majority of the votes cast at that meeting were cast in favour of the resolutions appointing those persons as directors. Reliance is placed in this regard on Art.61(a) of the articles of association and the provision therein that where a poll is taken "*The result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.*" But the effect of that provision is not to make the ineffective effective. The members in general meeting are bound to observe the rules laid down in the articles of association; and the articles of association (and the Act of 2014) make clear that the members in general meeting do not have the power to elect a person as a director where such person is not eligible for appointment. That a majority of the members may vote in favour of the contrary does not suffice to effect what cannot be effected. Were matters otherwise, the members in general meeting could derogate from the articles of association and indeed from the Act of 2014 by a simple majority vote: that is not the law. Article 61(a), a standard provision that has been a feature of the articles of association of many companies since at least the time of the Joint Stock Companies Act 1862, does no more than state the obvious proposition that a resolution that receives a certain number of votes is deemed to have been passed: it does not have the result that any resolution passed by such a vote is valid and effective.

IX. Waiver and Estoppel

(i) Waiver.

87. It is not possible for a statement by a company chairman or a company's stock exchange broker to dispense with the mandatory requirements of a company's articles of association (unless the articles grant such a power and here they do not) or statute. A company's articles of association bind the members *vis-à-vis* each other, bind the members *vis-à-vis* the directors, and bind the directors *vis-à-vis* the members. A chairman is bound by the articles of association. Unless the articles of association provide otherwise (and here they do not so provide), a chairman has no discretion or authority to excuse or overlook, on behalf of a company, a failure to comply with the articles of association of that company.

88. In this case, even if Prof. Conroy had informed Mr O'Sullivan that Art.85 need not be complied with (and he did not say that or anything like it) that statement would not and could not confer on the general meeting a power that it did and does not possess under the articles of association of the company. The chairman cannot, whether by a wave of his gavel or otherwise, render an ineligible person eligible to act as a director. *A fortiori*, a company chairman cannot waive the eligibility requirements laid down by statute, here s.144 of the Act of 2014. For the same reasons, a staff member of an agent of a company is not capable of waiving or estopping the company to which it is advisor from being bound by the requirements of that company's articles of association, let alone statute. So even if Allenby or IBI had ever told Mr O'Sullivan (and/or either or both of Messrs Heddle and Johnson) that Art. 85 had been complied with (and there is nothing in the evidence to suggest that anyone within Allenby and/or IBI said that or anything like that) such a statement would not bind Conroy Gold.

89. The foregoing sits aside altogether from the separate hurdle which falls to be (and in this case has not been) vaulted by a party seeking to establish such a waiver or estoppel, *viz*. that a principal is generally not bound by things done by an agent acting in excess of its authority. Here, as has been seen previously above, each of Allenby and IBI had very constrained authority, the applicable constraints were known to Mr O'Sullivan (and each of Messrs Heddle and Johnson) and the court sees nothing in the evidence to indicate that either of Allenby or IBI strayed beyond what each was respectively authorised to do as agent; had either Allenby or IBI acted in the expansive manner contended for by Mr O'Sullivan, it would have strayed well outside the narrow ambits of what it was authorised to do.

(ii) *Estoppel*.

a. Application of *Doran*.

90. One of the most frequently quoted descriptions of the circumstances in which estoppel may arise is the following extract from the judgment of Griffin J. in *Doran v. Thompson* [1978] I.R. 223, 230:

> *"Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance."*

91. The court has also been referred in this regard to the not altogether dissimilar observation of Denning L.J., as he then was, in the penultimate paragraph of his judgment in *Plasticmoda Societa per Azioni v. Davisons (M/C) Ltd* [1952] 1 Lloyd's Rep. 527, to the effect that:

> *"If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him to do so."*

92. The decision in *Doran* is binding on the court and is, in any event, to be preferred as an Irish authority. However, even if there were no *Doran* (and succeeding line of authorities), recourse to *Plasticmoda* alone would not be of any avail to Mr O'Sullivan: no-one ever intimated to him in any way that Art.85 would be dis-applied, no-one outside the members has the power to dis-apply Art.85 and there are no "*strict rights*" being insisted upon, merely the plain operation of an article of association which ought to have been complied with by Mr O'Sullivan (and each of Messrs Heddle and Johnson) but was not.

93. Turning to the decision in *Doran*:

> (1) neither Allenby nor IBI either by "*words or conduct*" made to any of Messrs O'Sullivan, Heddle or Johnson any promise or assurance, never mind "*a clear and unambiguous promise or assurance*" about the requirements of Art.85/s.144; that really is an end of matters so far as any argument as to estoppel arising on the facts of the within application is concerned;
>
> (2) when it comes to the e-mail correspondence to and from Allenby/IBI and Mr O'Sullivan (and each or both of Messrs Heddle and Johnson), no proper reading of that correspondence supports the contention that there has been a "*clear and unambiguous assurance*" emanating from Allenby/IBI which could have been "*reasonably understood*" by Mr O'Sullivan (or either of Messrs Heddle or Johnson) that information sufficient for the purposes of Art.85 would be disclosed to Conroy Gold and/or that Conroy Gold would accept such indirect communication of information as adequate notification for the purposes of Art.85;
>
> (3) the statement by Allenby in its e-mail of 3rd August that "*our due diligence procedures*" had almost been concluded could not properly or reasonably be construed as a reference to the separate requirements of Art. 85; and
>
> (4) even if the court is wrong as to (3), and it does not consider that it is, none of Messrs O'Sullivan, Heddle or Johnson could meaningfully act on the statement in the e-mail of 3rd August "*by altering his position*" because that date was the day before the EGM and by then the timeframe for action prescribed in Art.85 had expired: no matter what steps the would-be directors took at that time they were and would, by virtue of their respective non-observation of the requirements of Art.85, remain ineligible for appointment to the board of directors at the EGM of 4th August;
>
> (5) nothing said by either Allenby or IBI and on which Mr O'Sullivan seeks in the within application to rely "*was intended to effect the legal relations*" arising.

b. Changing One's Position to One's Detriment.

94. As Griffin J. observes in *Doran*, an equitable estoppel will only arise where the representee "*has acted on it* [i.e. the *"clear and unambiguous promise or assurance which was intended to affect…legal relations"*] *by altering his position to his detriment*". (In Daly v. Minister for the Marine [2001] 3 I.R. 513, 530, Fennelly J. appears to view the applicable alteration as being a more extreme "*material*" alteration of position (though the court must admit to a sense that poring over the runes of previous judgments as though every word was carefully chiselled in stone can sometimes yield differences of emphasis and meaning that are more apparent in the reading than the writing, and less substantive in reality). In addition, the person seeking to establish a purported equitable estoppel must establish sufficient causal connection between the representation and the subsequent change in position. As Wilken S. and K. Ghaly observe in *The Law of Waiver, Variation and Estoppel*, 3rd ed., para. 9-82, *"What is essential is that the representee has been led to act differently from the way in which it would have done had the representation never been made."* Again, neither Allenby nor IBI either by "words or conduct" towards Mr O'Sullivan (or either of Messrs Heddle or Johnson) gave any promise or assurance, never mind *"a clear and unambiguous promise or assurance"* about the requirements of Art.85/s.144. That really is an end of matters so far as any argument as to estoppel arising on the facts of the within application is concerned. However, the court additionally notes that any purported reliance by Mr O'Sullivan on some representation that information good for the purposes of Art.85 was being relayed to Conroy Gold in a manner good for the purposes of Art.85, falls to be viewed in the context of the fact that when he was expressly told in IBI's email of 2nd August that *"For info neither IBI nor Allenby (as far as I know) shared dd* [due diligence] *info with the company, given comments received from Patrick early on"* he gave no response and took no consequent action. That is not the behaviour of a man who realised or understood the import of Art.85; it is the behaviour of a man who never understood, or else forgot, the import of Art.85.

X. Director Duties

(i) General.

95. Notwithstanding the direction that the submissions took at hearing, the court notes that there is no pleading in the within application as to breach of fiduciary duty, and that there was no allegation in the case as originally formulated of any abuse of power on the part of Prof. Conroy. But given the time spent on this aspect of matters at hearing, and the desire expressed on the part of Conroy Gold at hearing to see the complaints raised comprehensively addressed, the court turns to address this aspect of matters.

(ii) A Director Occupies a Fiduciary Position.

96. It is trite law that a director occupies a fiduciary position towards the company of which s/he is director. This means that s/he must always act in the good faith in the interests of the company as a whole. (*Percival v. Wright* [1902] 2 Ch. 421). Writing of this requirement as to good faith, Prof. Hutchinson, in *Keane on Company Law*, 5th ed., 246, observes:

> *"The test is subjective: if the directors genuinely believe that what they are doing is in the interests of the company as a whole, the court will not interfere with their decisions even though they might appear objectively to be detrimental to the company [Re Greshem Life Assurance Soc [1872 LR 8 Ch. 446, 449]. The court will be unlikely to accept that the directors' opinion was genuinely held, however, if there are no possible reasonable grounds for it. [Bloxham (in liq.) v. Irish Stock Exchange Ltd [2014] IEHC 93]".*

(iii) Section 228 of the Act of 2014.

97. Section 228 of the Act of 2014 identifies a variety of fiduciary duties that arise on the part of company directors. Per s.228(1):

> *"A director of a company shall–*
>
> *(a) act in good faith in what the director considers to be the interests of the company;*
>
> *(b) act honestly and responsibly in relation to the conduct of the affairs of the company;*
>
> *(c) act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;*
>
> *(d) not use the company's property, information or opportunities for his or her own or anyone else's benefit unless –*
>
> > *(i) this is expressly permitted by the company's constitution; or*
> >
> > *(ii) the use has been approved by a resolution of the company in general meeting;*
>
> *(e) not agree to restrict the director's power to exercise an independent judgment unless –*
>
> > *(i) this is expressly permitted by the company's constitution;*
> >
> > *(ii) the case concerned falls within subsection (2);*
> >
> > *(iii) the director's agreeing to such has been approved by a resolution of the company in general meeting;*
>
> *(f) avoid any conflict between the director's duties to the company and the director's other (including personal) interests unless the director is released from his or her duty to the company in relation to the matter concerned, whether in accordance with provisions of the company's constitution in that behalf or by a resolution of it in general meeting;*
>
> *(g) exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both–*
>
> > *(i) the knowledge and experience that may reasonably be expected of a person in the same position as the director; and*
> >
> > *(ii) the knowledge and experience which the director has;*
>
> *and*
>
> > *(h) in addition to the duty under section 224 (duty to have regard to the interests of its employees in general), have regard to the interests of its members."*

98. In their written submissions, counsel for Mr O'Sullivan have placed especial reliance on the duties referred to at ss.(a), (c), (f), (g) and (h). As to s.228(1)(a), this reflects the rule in *Percival v. Wright*, op. cit., and retains the subjective test as to how those interests are perceived to lie. As to s.228(1)(c), the court turns to address the legal or proper purpose aspect of matters in greater detail later below. As to s.228(1)(f), this reflects, e.g., *Regal (Hastings) Ltd v. Gulliver* [1967] 2 A.C. 134 (and *Gabbett v. Lowder* (1883) 11 LR (Ir.) 295). As to s.228(1)(h), this reflects s.52(1) of the Act of 2014 but, for the reasons stated hereafter is a right enforceable by the company or by derivative action; it does not fall properly to be construed as conferring a direct right of enforcement on employees.

99. A trio of points might usefully be made as regards s.228(1):

> (1) it does not appear that the list contained therein is intended to be exhaustive. Otherwise, for example, the effect of s.228 would be to obviate the duty that arises for directors pursuant to *Nash v. Lancegaye Safety Glass (Ireland) Ltd* (1958) 92 ILTR 11 to act fairly between members. There is no reason to believe that the Oireachtas intended through the medium of s.228, or the Act of 2014 more generally (an enactment that is focused in part on the attainment of better corporate governance standards) to get rid of so long-recognised and sensible a duty, nor any good reason to believe that the Oireachtas considered that it wished to see that duty enforced post- the Act of 2014 by way of the law relating to oppression. That being so, it follows that that duty should be recognised as subsisting and this can only be so if s.228 is not exhaustive.

(2) it does not appear that the various fiduciary duties as identified in s.228(1) are free-standing and separate; in truth, they appear considerably to overlap.

(3) although s.228 is headed "*Statement of principal fiduciary duties of directors*", not all of the duties listed fall properly to be considered as fiduciary duties. So, for example, the duty of "*care, skill and diligence*" referred to at ss.(g) is a duty that arises from the contract/tort realm. Although s.227(3) provides that "*The relevant duties* [i.e. those set out in s.228] *shall be enforced in the same way as any other fiduciary duty owed to a company by its directors*", the court understands this merely to be mean that they can be enforced by the company or by derivative action, not that there is now a novel remedy against a director for breach of such duty.

(iv) Duty to Ensure Shareholders do what is Contractually Agreed?

100. Counsel for Mr O'Sullivan have contended, *inter alia*, that:

> *"[I]n preparing for an extraordinary general meeting, which the directors had convened, the directors had a duty to enfranchise the members. The duty to act in the best interests of the Company entailed a duty to take necessary preparatory steps to ensure that the members would be properly enfranchised and that the majority will at that meeting could be properly respected and given effect",*

and

> "[I]f certain formal consents or particulars were deemed to be required, it was incumbent upon the Board to request those for the purposes of giving proper effect to the members' franchise at general meeting."

101. No case-law has been cited in support of these contentions and the court, respectfully, does not accept them to be correct as a matter of law. As a matter of practicality, why would each of the members and the company agree in Art.85 that notice should be served on the company, if a concomitant duty immediately then arose at law whereby the directors became responsible to remind affected shareholders that they needed to do what they had agreed to do *vis-à-vis* the company? If that were the position that arose at law, then the more practical approach would be for the articles of association to place a duty on the board to source such details as are presently required to be notified to the company, and no more. Of course, freedom of contract carries with it the freedom to agree anything that is lawful and thus to agree something that may seem less than optimally practical to a third party such as the court. But, leaving practicality aside and recognising the full ambit of the freedom to contract, when it comes to the fiduciary duties of directors, Irish law has never recognised the concomitant obligation contended for. There is no fiduciary duty extant at law whereby company directors are obliged to 'nudge' shareholders who are minded not to conform with (or who forget or overlook that they have to comply with) contractual obligations arising in the relevant company's articles of association (by which those shareholders have previously freely agreed to be bound) so that those shareholders instead place themselves in a position where they do or will so comply. And it is contractual obligations, and compliance or want of compliance with contractual obligations, that are in play: Conroy Gold is a company, not a sovereign entity, and the 'franchise' that its members enjoy (as members) flows from the contract constituted by the articles of association, not from some separate civil rights precept.

(v) Improper Motive?

a. The Evidence.

102. When it comes to Prof. Conroy's conduct of the EGM, he took informed professional legal advice as to how he should act and he elected to act in accordance with that advice. That is what one would instinctively expect a reputable and sensible company chairman to do. As to the suggestion that Prof. Conroy has shown himself to be primarily motivated by his private desire to retain control of Conroy Gold, the court notes that Prof. Conroy has sworn as follows in his affidavit evidence, and that this averment has not been contradicted or challenged in the since-sworn affidavit evidence:

> *"The Applicant [Mr O'Sullivan] is now claiming through his solicitor that my conduct of the EGM and my observance of the rules set out in the Company's Articles demonstrates that I am 'primarily motivated by [my] private desire to retain control of the Company. Since that date I have been only a minority shareholder in the Company, and until the 4 August EGM I was only one of nine directors. During that time, I have not exhibited any desire to 'control' the Company."*

103. A legal difficulty arises, however, with the court engaging in any assessment now of Prof. Conroy's motivation for his actions, which difficulty will become apparent in light of the court's consideration hereafter of the decision of the United Kingdom Supreme Court in *Eclairs Group Ltd v. JKX Oil and Gas plc* [2015] UKSC 71.

b. *Gwyer* and *Eclairs*.

104. The court has been referred to the decision of: the High Court of England and Wales in *Colin Gwyer & Associates Ltd v. London Wharf Limehouse Ltd* [2003] 2 BCLC 153; and the United Kingdom Supreme Court in Eclairs. Gwyer is a case concerned with the situation where the duty owed by the directors to a company has effectively been transposed into a duty to act in the interests of an insolvent company's creditor's (a transposition of duty recognised in this jurisdiction in *Re Frederick Inns Ltd* [1991] ILRM 582, [1994] ILRM 387). Such a situation, and hence such a transposition, does not pertain here and the court turns therefore to the decision in *Eclairs* and the consideration therein of the so-called 'proper purpose' rule.

105. In *Eclairs*, JKX Oil and Gas plc suspected that it was the target of a hostile takeover by two shareholders, Eclairs and Glengary. JKX, through its directors had the power to require individual shareholders to disclose those with interests in the relevant shareholding and temporarily to 'disenfranchise' shareholders whose response was perceived to be inadequate. JKX engaged in such a process of disenfranchisement with both Eclairs and Glengary. A legal dispute focused on the legal validity of the disenfranchisement ensued (with the future control of JKX turning on the outcome). In the United Kingdom, s171(b) of the Companies Act 2006 requires that directors must "*only exercise powers for the purposes for which they are conferred*", s.170(4) of the Act of 2006 adding that this rule is to be interpreted and applied with regard to corresponding common law rules and equitable principles. This is often referred to as the 'proper purposes' rule (and sometimes described as the doctrine of a fraud on a power). As can be seen: the duty arising under s.171(b) of the Act of 2006 is akin to the duty incumbent on a director under s.228(1)(c) of the Act of 2014, *inter alia*, to "*exercise his or her powers only for the purposes allowed by law*"; and the provisions as to interpretation in s.170(4) of the Act of 2006 are likewise akin to those in s.227(5) of the Act of 2014 (whereby the duties set out, *inter alia*, in s.228(1)(c) shall, *inter alia,* "*be interpreted, and…applied, in the same way as common law rules or equitable principles*").

106. In proper purposes cases, three successive issues arise for resolution: (1) where is the boundary between the proper and improper exercise of the power in issue? (2) as a matter of fact, for what purpose or mixed purposes was the power in issue in an individual case exercised as it was in that case? (3) what consequences must follow? When the Court of Appeal came to adjudge on the *Eclairs* dispute, Briggs L.J. (dissenting) held that the directors' use of the information/disenfranchisement powers had not been used for their proper purpose of securing information but to disenfranchise certain shareholders at a key point in a takeover battle. The majority in the Court of Appeal held (surprisingly perhaps) that the proper purposes rule did not actually apply to the directors' powers there. They (the majority) were, however, unanimously reversed by the United Kingdom Supreme Court. That court only had to consider issue (1). However, Lord Sumption, in a judgment which, if the court might respectfully observe, is logically compelling and bears careful reading, also went on to consider how the courts of the neighbouring jurisdiction should approach the application of the proper purpose rule where mixed purposes present (as in real-life they so often do). But for the purposes of the within judgment it suffices to note the following observations of Lord Sumption, at 648-9:

> *"THE PROPER PURPOSE RULE*
>
> *…Part 10, Chap 2 of the 2006 Act [the United Kingdom's Companies Act 2006] codified for the first time the general duties of directors. The proper purpose rule is stated in s.171(b) of the 2006 Act, which provides that a director of a company must 'only exercise powers for the purposes for which they are conferred'. The rule thus stated substantially corresponds to the equitable rule which had for many years been applied to the exercise of discretionary powers by trustees.*
>
> *…*
>
> *The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. 'Where the question is one of abuse of powers,' said Viscount Finlay in Hindle v. John Cotton Ltd 1919 56 SLR 625 at 630, 'the state of mind of those who acted, and the motive on which they acted, are all important'".*

107. Clear from the foregoing is that for the 'proper purpose' rule to apply, the court would need to be satisfied as to the subjective intention of Prof. Conroy. There are two, perhaps three ways in which such subjective intention can be identified. First, if Prof. Conroy was to aver as to his subjective intention. Second, if he were challenged by way of cross-examination on his affidavit. Third, depending on such other averments as were before the court, if he did not comment on it at all. However, as can be seen from the above-quoted extract from Prof. Conroy's affidavit evidence, he deals expressly with the notion that his actions were motivated by some improper desire to enjoy control of Conroy Gold. That evidence has not been contradicted on affidavit. And here the decision of the Supreme Court in *Boliden v. Cosgrove and ors* [2010] IESC 62 comes into play, specifically in the observation of Hardiman J., who gave judgment for the court, at 17, that:

> *"It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a Notice of Intention to Cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between conflicting versions of facts which may have been deposed to."*

108. In short, in the face of Prof. Conroy's affidavit evidence, the notion that he was improperly motivated could only be brought home by Mr O'Sullivan by way of cross-examination, and there has been no such cross-examination. The court is being asked to make a subjective decision as regards the mind-frame of Prof. Conroy without any challenge to the evidence he has given in this regard. (In passing, the court notes that the import of the judgment of Hardiman J. in *Boliden* seems to it sometimes, perhaps even oftentimes to be under-relied upon by defendants to applications for summary debt relief).

(vi) Oppression.

109. The test for oppression is objective (*Re Irish Visiting Motorists Bureau Ltd* (Unreported, High Court (Kenny J.), 7th February, 1972). The court does not see in the actions of Prof. Conroy (or the wider board of Conroy Gold) an exercise of his or their powers in a manner that is oppressive (burdensome, harsh, and wrongful) to Mr O'Sullivan or any of the members of Conroy Gold or in disregard of his interests as a member of Conroy Gold. Indeed, though it may seem otherwise to Mr O'Sullivan in the pursuit of his present self-interest, it is, in truth, in the general interest of all shareholders, Mr O'Sullivan included, that Prof. Conroy, as company chairman, would seek to comply with the articles of association and act on legal advice as to how this might best be achieved. It follows from the foregoing that there can be no question of any order issuing from the court at this time under s.212 of the Act of 2014. (Section 212(1), the court notes, provides that *"Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors are being exercised – (a) in a manner oppressive to him or her or any of the members (including himself or herself), or (b) in disregard of his or her or their interests as members, may apply to the court for an order under this section."* The court understands that the oppressive conduct suggested to arise in this case relates to how the powers of the directors or being exercised. However, for the sake of good form it notes that it does not, on the evidence before it, see that the affairs of the company are being conducted in a manner that would justify the making of an order under s.212).

XI. Operation of Conroy Gold

110. A variety of corporate-governance based and other criticisms, some quite scathing, have been made by Mr O'Sullivan as regards the past and ongoing operation of Conroy Gold. The perceptions on the part of Mr O'Sullivan which informed those criticisms also informed his actions as regards requisitioning and tabling the motions at the EGM of 4th August last. This application is not concerned with determining the veracity or otherwise of those perceptions and/or criticisms and the court makes no comment, and has no view, regarding same.

XII. Conclusion

111. Mr O'Sullivan, having failed to comply with the particular notification requirements to which he was subject under Art.85 of Conroy Gold's articles of association, comes now to court claiming: that there was "*practical and substantive*" compliance with those requirements on his part; and that the court, by giving business efficacy to the said articles of association, should deem that to be compliance enough. But there is no such thing as "*practical and substantive*" compliance when it comes to the applicable notification requirements: there is either compliance or there is not, and here there was not. As to giving business efficacy to the reading of articles of association, that is a task that arises for a court when there is some doubt as to the meaning or sense of the articles of association, literally construed. But here there is no such doubt presenting. The notification requirements are simple and clearly worded, there is good reason why they exist and fall to be satisfied, and they were not satisfied. A commercially sophisticated, legally advised shareholder, such as Mr O'Sullivan, who is attempting to place a number of directors on the board of a public company can reasonably and properly be taken to be familiar with the rules applicable to such attempt, be those rules prescribed in the relevant

company's articles of association and/or applicable statute. Regardless, there was no obligation on Conroy Gold to remind Mr O'Sullivan of the notification obligations incumbent upon him in order that he might discharge those obligations in a timely manner. For these reasons, and for the reasons stated elsewhere in the court's judgment, the within application must fail. All of the reliefs sought by Mr O'Sullivan at this time are respectfully refused by the court.