Neutral Citation: [2016] IEHC 145

THE HIGH COURT

[Record No. 2012/277 COS]

IN THE MATTER OF MJBCH LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN:

DECLAN TAITE

Applicant

AND

ROSS CONNOLLY AND SEAN DUNNE

Respondent

JUDGMENT of Mr. Justice Binchy delivered on the 8th day of March, 2016

1. This is an application for a declaration of restriction against each of the respondents under section 150 of the Companies Act, 1990, as amended. That section has been replaced by s. 819 of the Companies Act 2014 (hereafter the "Act of 2014"), which came into effect on 1st June, 2015 pursuant to Article 3 of the Companies Act 2014 (Commencement) Order 2015 (S.I. 169 of 2015). Section 5(7) of the Act of 2014 provides that:-"Schedule 6 contains further savings and transitional provisions and shall have effect accordingly." Paragraph 8(1) of schedule 6 to the Act of 2014 states:-

> "Anything commenced under a provision of the prior Companies Acts, before the repeal, by this Act, of that provision, and not completed before that repeal, may be continued and completed under the corresponding provision of this Act."

Accordingly this application now falls to be dealt with under s. 819 of the Act of 2014 rather than under s.150 of the Act of 1990. However, insofar as the Act of 2014 may impose a higher standard on directors than that imposed under the Act of 1990, I will deal with this application in accordance with the latter standards i.e. the standards that applied at the time the application was made.

Directors of the Company

2. In his affidavit of 16th May, 2014, grounding this application, the applicant avers that the Company had two directors within a period of 12 months preceding the date of the commencement of the winding up of the Company. The first named respondent, Mr. Ross Connolly, was a director from 27th September, 2007 to the date of the winding up on the Company; he was also the Secretary of the Company. In an affidavit sworn on 12th September, 2014, the first named respondent, avers that in or around July 2008, he was appointed as operational manager for the Company. He describes his principal responsibilities in that role as being: managing trading activities of the Company; providing trading updates to the group's primary lender (Ulster Bank); carrying out weekly meetings in terms of management and finance; analysing and reviewing the Company's cash flow and managing payments due to creditors. The first named respondent avers that while he was a director of the Company for the period stated, the second named respondent was the ultimate owner and controller of the Company. The applicant received a statement of affairs from the first named respondent on 14th September, 2012, following an extension of time for the provision of same.

3. The second named respondent, Mr. Sean Dunne was a director of the Company from 29th May, 2006 to the date of the winding up of the Company. The second named respondent was adjudicated bankrupt in this jurisdiction on 29th July, 2013 and was also adjudicated bankrupt in the United States of America on 29th March, 2013, where he currently resides. No statement of affairs was received by the applicant from the second named respondent and on 8th July, 2013 an order was made by this Court dispensing with the requirement of the second named respondent to file a statement of affairs.

4. The applicant provided a report to the Director of Corporate Enforcement pursuant to section 56 of the Company Law Enforcement Act 2001, on 18th December, 2013 and brings this application not having been relieved by the Director of Corporate Enforcement of his obligation so to do. The applicant has sworn three affidavits in support of this application. A colleague of the applicant's, a Mr. Sean Kelly also swore an affidavit. The first name respondent swore a lengthy affidavit in reply to the first affidavit of the applicant, and a second affidavit in reply to the second affidavit of the applicant. The second named respondent delivered a single affidavit in opposition to the application.

5. In his affidavit, the second named respondent refers to the affidavit of the first named respondent dated 12th September, 2014 (the first affidavit sworn by the first named respondent) and confirms his agreement with the contents of that affidavit and purports to add to the contents of the same by way of clarification of certain issues. But in general terms, it may be said that he purports to adopt the first named respondent's affidavit of 12th September, 2014 in opposition to this application.

Background Facts

6. In order to understand the reasons for the Company's insolvency, a brief overview of the historic corporate ecology of the Company is necessary. On 20th October, 2005, a bank syndicate, comprising Ulster Bank Ireland Limited; ACC Bank Plc. and Kaupthing Singer & Friedlander Ltd. (together hereinafter "the bank syndicate"), advanced monies in the amount of €270,000,000 to a company, D.C.D. Builders limited (D.C.D), pursuant to a loan agreement the purpose of which was to facilitate the acquisition by D.C.D of the Ballsbridge Inn and Towers Hotel. DCD advanced the monies to a subsidiary, namely Padholme, which acquired the hotel through the purchase of shares in a company known as Jurys Doyle Property Holding Company ("JDPHC"). On 20 February, 2006, the bank

syndicate advanced further monies, pursuant to another loan agreement, this time in the sum of €100,000,000 to D.C.D to fund the purchase of another hotel, adjacent to the first, and known as the Ballsbridge Court Hotel, the purchase of which was again made through the purchase of shares in a company, in this case a company called Berkeley Court Property Holding Company ("BCPHC"). The said loan agreements are together hereinafter referred to as "the loan agreements."

7. MJBCH Limited (hereinafter "the Company"), was incorporated on 29th May, 2006 as Mountbrook Merrion Road Development Limited and, according to the applicant, is a 100% owned subsidiary of D.C.D. This is not consistent with research undertaken by the applicant in the Companies Registration Office in the Isle of Man and I deal with this in more detail below. The Company subsequently changed its name to MJBCH Limited on or about 11 October, 2007 and began trading in the same month. On or about 20th October, 2007 the Company entered into lease agreements with JDPHC and BCPHC for the purpose of managing and operating the Ballsbridge Court Hotel and the Ballsbridge Inn and Towers Hotel and (hereinafter "the hotels"). Upon entering into the leases, the bank syndicate required that the Company provide a guarantee and indemnity (hereinafter "the Guarantee") pursuant to which the Company would provide a continuing guarantee and indemnity in support of D.C.D's obligations under the loan agreements. The Guarantee indemnified the bank syndicate in respect of liabilities of D.C.D in excess of €262million. The bank syndicate further required that the Company enter into a deed of mortgage and charge over its short term leasehold interest in the hotels, which the Company did in October 2007. Clearly the Company, which had little or no assets, never had any prospect of repaying the amount guaranteed to the bank syndicate if called upon to do so. The purpose of the Guarantee and the said mortgage and charge was in order to avoid any gap arising in the security already taken by the bank syndicate over the hotels. Both respondents in their affidavits in opposition to this application aver that it was understood by the bank syndicate that the sole purpose of the Company was to manage and operate the hotels, and that the bank syndicate would not have recourse to the profits of the Company.

8. In 2009, following the collapse of the property market, the Company's borrowings were restructured. This resulted in the sale of the two hotels to two separate special purpose vehicles established and owned by the bank syndicate, Zrko Ltd. ("Zrko") and Qulpic Ltd. ("Qulpic"). Zrko took title to the Ballsbridge Inn and Towers Hotel and Qulpic took title to the Ballsbridge Court Hotel. On 10th December, 2009, Zrko and Qulpic granted the Company a short term letting of each of the hotels to enable the Company to operate and manage the hotels on behalf of the bank syndicate. These lettings were to expire on 31st December, 2011. Under the terms of these agreements, the Company was to pay Zrko an annual rent of €825,000 and Qulpic a rent of €425,000 respectively.

9. The first named respondent avers that in negotiating the short term letting agreements, he, at all times, made clear to the bank syndicate that given the vulnerable financial position of the Company (presumably this is a reference to the Guarantee , as it is not otherwise explained) it was of paramount importance that the Company was permitted to meet its financial obligations to its creditors and employees, and that no steps would be taken to wind up the Company until all of those obligations were met. Particularly, the first named respondent avers:

> "… the SPVs have reneged on the agreed rent rebate arrangement and have prematurely petitioned to have the Company wound up without affording the directors of the Company an opportunity to discharge all liabilities arising in connection with the planning application. Furthermore, the Company has been frustrated from settling its accounts with its trade creditors and as a consequence a number of local businesses have been left unpaid. This is a matter of some regret for me."

10. Simultaneous to the Company entering into the short term letting agreements referred to above, Zrko and Qulpic each entered into a deed of agreement for project management services with the second named respondent (hereinafter the "project management agreements") in relation to the provision of certain services by the second named respondent in connection with each of the hotels. The services to be provided under each of the agreements related to the progression of a planning application (which had already been submitted to the planning authority) for the development of 568 residential units, a 136 bed hotel and associated infrastructure on the sites on which the hotels stood (and still do stand). The agreements made provision for discharge of expenditure incurred by the project manager (i.e. by the second named respondent) in progressing said planning applications, in one case up to a maximum of €816,750.00 in any twelve month period, (but in any event not to exceed €1,633,500.00 up to 31st December, 2011), and in the other case up to a maximum of €420,750.00 in any twelve month period, (but in any event not to exceed €841,500.00 up to 31st December, 2011). Each of the agreements expressly stated that under no circumstances would a fee be payable for the project manager's time (i.e. that of the second named respondent) in connection with the provision of the services.

11. On the same date, i.e. 10th December, 2009 each Zrko and Qulpic Ltd. sent the second named respondent a letter which stated that as soon as possible after he had fulfilled his obligations under the project management agreements, i.e. as soon as he had secured planning permission as described above, Zrko and Qulpic would remit to the Company by way of a rent rebate any rent received from the Company under the short term letting agreements which had not been used to discharge the expenditure incurred by the second named respondent (as project manager) in providing the services as described above (any such rent is hereinafter referred to as the "rent rebate") These agreements were preceded by correspondence between the second named respondent and the bank syndicate. On the 1st October, 2009 the bank syndicate (as distinct from ZRKO and Qulpic) had written to the second named respondent and had stated as follows:-

> "You will be obliged to apply the operating profit from the hotels over the next two years firstly to fund a successful planning application and secondly to fund a minimum Capex spend of €500,000.00 per year. We agree with the mechanism suggested by you in your email for planning fees to be paid however the syndicate require €1.25 m per annum to be paid monthly (i.e. rent of €104k). This will be held in Escrow and upon receipt of final planning in line with the OMP Scheme, the Syndicate will refund any surplus amount to you which has not been spent on planning fees. You will have access to all surplus funds after payment of these amounts."

In the event, the bank syndicate did not refund this surplus to the Company. It appears the bank syndicate, in reliance upon the Guarantee and mortgage and charge provided by the Company retained these funds (through ZRKO and Qulpic) in part discharge of the amount due by the Company to the bank syndicate under the Guarantee.

12. According to the statement of affairs filed by the first named respondent, the amount of rent that should have been refunded to the Company by way of rent rebate is €1,115,000. The respondents both aver that they placed great reliance upon the commitment of the loan syndicate to refund these monies to the Company, and the first named respondent says that had the bank syndicate refunded same, the Company would have been able to discharge its liabilities to all other trade creditors. Moreover, the first named respondent makes the point that, at the time the Company made payments to other companies with which the respondents were connected and about which the applicant expresses concern in this application, namely Mavior and Amrakbo, the respondents were not aware that the bank syndicate was going to renege on its commitment to refund these monies.

13. In addition to not refunding rent to the Company, the bank syndicate, in the words of the first named respondent "swept" a sum

of €75,933.54 from the account of the Company with Ulster Bank. This occurred in or around May 2012, and the first named respondent says that he had intended that these monies would be applied towards the payment of outstanding trade creditors of the Company.

14. On 1st March, 2010, the Company entered into a consultancy service agreement with a company then known as Mount Brook Homes (which subsequently changed its name to Mavior, and which I refer to in more detail below) pursuant to which Mount Brook Homes agreed to provide the Company with consultancy services as follows:-

(i) Services in relation to the "successful granting of DCD Planning Application Ref.: 4325/09 main location D4 hotel site." This is the same planning application which the second named respondent agreed to advance and progress on behalf of Zrko and Qulpic under the project management agreements.

(ii) Services in relation to the management of D4 hotels during the short term letting agreements, which services extended to the full range of services involved in the operation of a hotel.

Under the terms of this consultancy agreement, the Company was to pay Mount Brook Homes a fixed fee of €990,000.00 in relation to services provided in connection with the planning application, and a fee of 3% per annum of D4 hotels revenues in relation to the hotel management services. The agreement stated that it was only valid in the event that "DCC Planning Application Ref: 4015/09 be granted". The agreement was signed by the second named respondent on behalf of the Company, and by the first named respondent on behalf of Mount Brook Homes. As mentioned above, Mount Brook Homes subsequently changed its name to Mavior. According to the respondents, it is a company owned by the wife of the second named respondent. However, the applicant does not agree that this is so for the reason given below. In any event, the first named respondent was, at all material times for the purposes of this application, a director of Mavior, and the second named respondent had been a director of that company up until 29th March 2011.

15. According to the applicant, and by reference to searches that he carried out in the companies' registration office in the Isle of Man, the issued share capital of the Company is held by Padholme and another company called Amrakbo, of which the first named respondent was a director until 30th January 2014. In turn, the shareholding in Amrakbo is held by the second named respondent and Mavior. The first named respondent says that Padholme is a 100% subsidiary of DCD, the sole shareholder of which is the second named respondent. If all of that is correct, it means that the ultimate shareholders in the Company are the second named respondent and Mavior, which also own the entire of the issued share capital in Amrakbo.

16. However the first named respondent avers that this is not correct. He says that Padholme owns the entire of the issued share capital in the Company and that in turn, Padholme is owned by D.C.D., and that the sole shareholder in D.C.D. is the second named respondent. He says that Mavior owns 100% of the issued share capital of Amrakbo and that the ultimate shareholder of Amrakbo, through two other companies namely Zabingo Ltd and Shareford Ltd is Mrs. Gayle Dunne, wife of the second named respondent. Accordingly, the first named respondent avers that the Mavior group of Companies, including Amrakbo, is entirely separate from the Company. Neither the applicant nor the respondents exhibit any documents to prove which version of these matters is correct. It is possible of course, that the ownership structure was as stated by the Applicant, but was then changed, in which case the filings in the companies registration office in the Isle of Man are not up to date. If the first named respondent is correct, it means that the second named respondent is the ultimate beneficial owner of the Company, and that the ultimate beneficial owner of Mavior and Amrakbo is the wife of the second named respondent.

17. On 15th September, 2011, Dublin City Council granted planning permission pursuant to the application lodged by the second named respondent. On 16th September, 2011, Mavior issued the Company with an invoice for €999,000.00 for services provided by Mavior in connection with the planning application and also requested details of the hotel revenues for the period 10th December, 2009 to 31st August, 2011, for the purposes of calculating the amount due to it under the consultancy service agreement in relation to hotel services.

18. On 24th October, 2011, a flood occurred causing extensive damage to the hotels. The hotels were, as a result, closed for a period of six weeks. It appears that there were two insurance policies under which claims were made in relation to this flood. The first was a claim upon the policy held in the name of Zrko, which related to building reinstatement works and the second was a policy of the Company for losses sustained owing to business interruption. By agreement with Zrko the Company agreed to process with Zrko's insurers its claim in connection with the damage caused to the hotels. According to the first named respondent, a settlement of this claim was agreed between insurers and the Company in the sum of €2,830,690.00. There was however an additional settlement under the same claim in respect of water damage in the Towers hotel in the sum of €114,464.61. Those settlements related only to the carrying out of reinstatement works to repair the damage caused to the hotels, and did not relate to losses sustained by the Company as a result of business interruption. The Company further undertook responsibility on behalf of Zrko and Qulpic to carry out the reinstatement works and for that purpose entered into a building contract with Mavior on 26th November, 2011 for works having a value of €2,396,575.00. A dispute subsequently ensued between Mavior and Zrko relating to payments due under this contract and Mavior instituted proceedings against Zrko to recover monies for work done by Mavior (under the building contract between Mavior, and the Company, but at the behest or agreement of Zrko) and those proceedings eventually settled. The terms of this settlement were not disclosed to the Court and nor was the Court informed as to how payments flowed following that settlement.

19. Between November, 2011 and January, 2012, the Company made payments both to Mavior and Amrakbo in connection with the reinstatement works, apparently following upon receipt of the proceeds of the insurance claim. According to the first named respondent, it was necessary to make payments which were due by the Company to Mavior, in respect of the flood reinstatement works through Amrakbo because at the time the payments were made, Amrakbo's account was incorrectly frozen by reason of certain of its assets having been placed in receivership. A letter to prove this receivership from the solicitors acting on behalf of the receiver, namely Messrs Ronan Daly Jermyn was exhibited by the first named respondent. In that letter, which is dated 14th June, 2012 they confirmed that Mavior's bank account had been frozen in error. However, the payments to Amrakbo had been made in January, 2012, and the Applicant avers that it would be unusual for the accounts of a company to frozen for such a duration.

20. By letter dated 5th January, 2012, Ulster Bank Ireland Ltd. (in its capacity as trustee on behalf of the bank syndicate) demanded immediate repayment by D.C.D. of its liabilities under the loan agreements. D.C.D. failed to make repayment of the amount demanded and by letter of 11th May, 2012, Ulster Bank Ireland Ltd. made a formal demand of the Company for payment of the sum of €262,103,077.10, being the sum due by the Company to the bank syndicate under the terms of the Guarantee. Unsurprisingly, the Company did not repay the amount demanded, leading to the presentation of a petition to wind up the Company on 24th May, 2012. The applicant was appointed as official liquidator of the Company by order of this Court made on 25th June, 2012. The Company had ceased trading long before this and had vacated the hotels on 20th January, 2012.

Cause of Company's Insolvency

21. It is clear that the insolvency of the Company was triggered by the demand for payment of its liabilities under the Guarantee. However, at the date of liquidation of the Company it also had separate and unrelated liabilities to other creditors in the amount of €1,185,570.00. These are ordinary trade creditors of the Company and it is unclear from the information furnished over what period these liabilities accumulated. The applicant identifies three other factors, which in his opinion are relevant to the insolvency of the Company:

> "(i) The expiration of the short term letting agreements resulting in the Company being unable to generate income to satisfy its ordinary trade creditors;
>
> (ii) The payment of €808,000.00 by the Company, from the insurance proceeds, to Amrakbo rather than to the trade creditors of the Company; and
>
> (iii) Payments made by the Company under the consultancy services agreement with Mavior rather than to the ordinary trade creditors of the Company."

The respondents dispute that items (ii) and (iii) above had any relevance to the insolvency of the Company or that there was anything improper in the payments made to Mavior and Amrakbo. It should be noted that the applicant expressly states that he does not allege any dishonesty on the part of the respondents but he states that he is not satisfied that they acted responsibly in relation to the conduct of the affairs of the Company.

Issues of Concern
22. The applicant expresses concern under three headings in relation to the conduct of the respondents in their capacity as directors of the Company which are:

> (a) Maintenance of books and records;
>
> (b) Transactions with other companies;
>
> (c) Other factors.

I will summarise the concerns expressed by the applicant under each heading, and the responses given by the respondents immediately thereafter. In this regard it should be noted that the affidavit of the second respondent is quite brief and he purports to adopt all of the arguments made by the first respondent in opposition to this application.

A. Maintenance of Books and Records-Affidavit of Applicant
23. In general terms, the applicant complains that the books and records that were made available to him upon his appointment were completely inadequate. He says that following his appointment, a Mr. Paul Brady, from his office, attended at the Company's "records room" (which was a room in one of the hotels) with a view to retrieving the books and records of the Company. The applicant avers in his first affidavit sworn 16th May, 2014, that a number of important books and records of the Company were missing and expresses the view that the records available to him at that point did not constitute the proper books and records of the Company. Following correspondence between the applicant and the first named respondent, the applicant received further books and records on 9th October, 2012 but expresses dissatisfaction with the volume and quality of books and records received on that date for a number of reasons:

> "(i) The most recent audit of the Company's financial statements was for the year ended 31st July 2009, despite the Company being wound up in May 2012.
>
> (ii) The last annual return filed by the Company was made up to 30th April 2010, despite the Company being wound up in May 2012.
>
> (iii) The Directors have failed to provide me with the Company's statutory books and records, including the Company's share register, minute book, and company seal.
>
> (iv) The Directors have failed to provide me with the Company's correspondence files with its legal advisers.
>
> (v) The Directors have failed to provide me with the Company's correspondence files with its auditors.
>
> (vi) The Directors have failed to provide me with the Company's correspondence files with the Revenue Commissioners.
>
> (vii) The Directors have failed to provide me with the Company's correspondence files with its bankers.
>
> (viii) I received a back-up of the Company's financial accounting system which included the prime books of entry for the year ended 31 July 2011 and the period up to the date of liquidation (25 June 2012). However, the last transactions recorded on the accounting system were dated 30 January 2012, despite there being substantial bank transactions recorded between this date and the date of liquidation of the Company (lodgements: €1.141m, payments €1.372m)."

24. In his second affidavit, sworn 20th October, 2014, the applicant avers that his colleague, Mr. Sean Kelly, was granted access to the records room by a director of Amrakbo (Mr. James Ryan) on 10th September, 2012. The applicant avers in this affidavit that both of his colleagues who accessed the records room informed him that the room was in "complete disarray" and that documents were accumulated in no order; the contents were not collated, catalogued or organised in any manner. The applicant avers that upon an examination of the documents by his colleagues, it transpired that there were no prime books of entry. The applicant avers:

> "The vast majority of records related to daily cash sheets, purchase invoices and payroll records. The only records retrieved … were some bank statements and cheque stubs, purchase invoices, creditor statements and payroll records."

This is confirmed by Mr. Sean Kelly (a colleague of the applicant) in an affidavit, sworn by him on 2nd February, 2015; who also stated:-

> "The records room appeared to be a dumping ground and contained only a fraction of what I would consider to be books and records of the Company. It contained nothing remotely close to constituting the proper books and records of the Company."

25. The applicant goes on to say that it was not until October, 2012, that he received any meaningful information from the first named respondent that assisted him in his investigation into the affairs of the Company. Further additional documentation, which was not contained in the books and records of the Company already supplied, was not provided by the first named respondent to the applicant until 24th January, 2014. The applicant avers that this piecemeal release of documentation hindered him in his investigation into the affairs of the Company as official liquidator and he also avers that he has yet to be provided with certain documentation referred to by the first named respondent. The applicant says that a number of the exhibits to the first named respondent's affidavits were not included in the Company's books and records as supplied to him. He questions the source of these "highly relevant Company documents" and expresses the concern that the first named respondent may have access to certain records of the Company that have not been made available to him. In this regard, he points to the affidavit of the first named respondent, where he makes a number of averments where, in his (the applicant's) submission, no supporting documentation exists. In particular, the applicant says the first named respondent refers to a number of tasks that he conducted in his capacity as director and operational manager of the Company. However, the applicant complains that the vast majority of these actions are not documented in the books and records made available to him.

26. The applicant avers that no reconciliation was provided for transactions concerning bank lodgements of €1.141million and payments out of €1.372million that occurred between January, 2012 and 25th June, 2012. Furthermore, no management accounts were furnished with the statement of affairs, which was provided by the first named respondent to the applicant on 14th September, 2012. The applicant in his second affidavit again lists documentation which was either, not delivered to him, or was delivered to him in a piecemeal basis, as follows:

> "(i) Minutes of directors/management meetings;
>
> (ii) Copies of all legal correspondence;
>
> (iii) Copies of all legal documentation/contracts/agreements;
>
> (iv) Copies of correspondence with PwC/auditors;
>
> (v) Email correspondence with the bank syndicate;
>
> (vi) Correspondence regarding insurance claims and the flood damage;
>
> (vii) Statutory books and records of the company."

27. Mr. Kelly confirms on affidavit that the majority of these documents were not contained in the records room and also avers that there was no correspondence between the Company and its debtors or creditors in the records room.

28. While the first named respondent relies heavily on the fact that the Company made use of the accountancy software package known as Sage and supplied the financial information stored on that software to the applicant, the applicant states that the information provided on the Sage software constituted only a fraction of what should be maintained as part of the Company's books and records. He points out that the Sage software does not contain any record of the transactions after 31st January, 2012 nor any of the other records and documentation described above. He states that:-

> *"In short, it is my view that while significant sums where paid out of the Company's bank account, the Company's books and records do not contain a proper explanation of the basis for these payments."*

Response of the First Named Respondent

29. The first named respondent avers that the bank syndicate appointed PwC to act on its behalf and to conduct monthly audits of the Company's accounts. The first named respondent says that on the 12th day of each month he provided PwC with such accounts information and he further states that PwC reviewed the Company's books and records and drew attention to any deficiencies. He also said that at no stage did PwC raise any fundamental issues regarding the accounts information furnished, nor did they raise any issues in relation to the stock, commercial probity or competency of the Company or any of its Directors. He says that any minor issues that did arise were dealt with to the satisfaction of PwC. The first named respondent directed the applicant to PwC to verify what he said in this regard.

30. The first named respondent says in his affidavit that when the applicant's representatives inspected the documents in the records room in September/October, 2012, a substantial number of boxes were not retrieved by the applicant. He says that on 9th October, 2012 he provided the applicant with an electronic copy of the Company's complete financial records and this electronic copy contained a complete picture of all individual transactions of the Company up until 30th January, 2012. The first named respondent avers that the Company was not engaged in any new trading activity post 30th January, 2012, and accordingly he says that a full financial picture of the Company was provided to the applicant.

31. It is also averred by the first named respondent that the applicant was afforded the opportunity to obtain copies of the management accounts for the year ended 31st July, 2010 and for the period ended 25th June, 2012 and that these documents were in the records room. The first named respondent further avers that since he was no longer in control of the hotels, he did not have access to the records room. The second named respondent also states that the applicant was provided with a set of management accounts for the period ending 30th June, 2012, by way of his statement of affairs.

32. According to the first named respondent, the preparatory work for the Company's most recent audit was carried out by KPMG in July, 2010. However, he says that complications arose in completing the audit due to the "large uncertainty" which existed over D.C.D group's finances as a result of the economic downturn, the transfer of a number of its loans to NAMA and the consideration by NAMA of a business plan submitted by the second named respondent and the D.C.D. group in September, 2010. The first named respondent also avers that matters were further complicated by the appointment of receivers by NAMA over certain D.C.D. entities; this in his view, prevented the signing off and filing of the 2010 accounts. The first named respondent in that regard states as follows:

> *"I say that it had always been my intention to file the Company's accounts and maintain them up to date and in this regard I at all times made myself available to KPMG, the DCD Group auditors. However I say that these issues, which were wholly outside of my control, impeded the proper filing."*

The first named respondent also attributes the non-filing of subsequent annual returns to the financial difficulties of the D.C.D. Group

and again avers that such was out of his control.

33. The first named respondent says that the share register and the minute book were misplaced and that same was brought to the attention of the applicant by way of email dated 9th January, 2013.In this email, the first named respondent also advises the applicant that the minutes of all meetings, as well as the financial and operating packs of these meetings, were available from the records room. In respect of legal correspondence, the first named respondent avers that the only such correspondence, related to the recovery of the rent rebate, and that copies of same were provided to the applicant. He further states that details of the Company's insurers were provided to the applicant in order to facilitate him in investigating insurance matters.

34. The first named respondent refutes the averments of the applicant to the effect that he was not provided with the Company's correspondence files with its auditors and the Company's correspondence files with the Revenue Commissioners. Further it is averred that both the audit files and the revenue correspondence were kept in the records room. In respect of the Company's correspondence with its bankers, the first named respondent avers that Company had only periodic correspondence with its bankers, in the form of bank statements, and that all of same had previously been furnished to the applicant.

Response of second Named Respondent
35. The second named respondent also relies upon the fact that the bank syndicate had appointed PwC to conduct in depth monthly reviews of the business of the Company, and that (according to the second named respondent) no issue was ever brought to his attention in respect of the financial affairs of the Company. He also states that the Company at all times maintained full and detailed accounts and records, and that he as a Director and shareholder in the Company always acted in accordance with his legal duties.

B. Transactions with other Companies

Affidavit of Applicant
36. The second ground relied upon by the applicant in support of this application is nature of and the manner of implementation of the Company's transactions with other companies, namely Mavior and Amrakbo. The applicant identifies a number of transactions involving payments by the Company to those companies, in the pre-liquidation period, which for him, are a cause for concern. These are as follows:

- 1st November, 2011: €200,000 to Mountbrook Homes (now Mavior);
- 28th November, 2011: €388,000 to Mountbrook Homes;
- 15th December, 2011: €500,000 to Mountbrook Homes;
- 31st January, 2012: € 250,000 to Amrakbo;
- 31st January, 2012: €250,000 to Amrakbo;
- 1st February, 2012: €96,440 to Amrakbo;
- 1st February, 2012: €250,000 to Amrakbo.

The applicant points out that a number of these payments were made after 20th January, 2012 (the date upon which the Company vacated the hotels and from which time it was clear that it would , according to the applicant, be unable to trade out of its financial difficulties). The applicant avers that the payments of the amounts of €388,000 and €500,000 remitted by the Company to Mavior on 28th November, 2011 and 15th December, 2011 were immediately preceded by the receipt by the Company of interim proceeds of the insurance claim in the amount of €500,000 on 9th November, 2011 and 13th December, 2011 and notes that no adequate explanations or supporting evidence was furnished to him in regard to the payments out by the Company.

37. In respect of the four payments by the Company to Amrakbo amounting to €846,440, the applicant avers that these payments were immediately preceded by the receipt of the final insurance proceeds of the insurance claim in the amount of €808,000 on 30th January 2012. The applicant avers that he has not been provided with adequate explanations and supporting documentation in respect of these payments. To the extent that such documentation has been provided, the applicant avers that it does not account for all of the amounts paid to Amrakbo, although this is disputed by the first named respondent. The applicant in his second affidavit expresses concern about such large sums of money being transferred to Mavior and Amrakbo, without any supporting documentation, shortly before the Company ceased to trade and went into liquidation. He also complains that the information concerning these transactions was only provided after protracted correspondence with the first named respondent (and his solicitors), and some thirteen months after his appointment as liquidator of the company, and that the explanations given for the payments to Mavior and Amrakbo was not apparent from the books and records of the Company.

38. The applicant notes also that the consultancy services agreement does not appear to contemplate the carrying out of works such as the flood reinstatement works and states that in any event, it is unclear if entering into the consultancy services agreement or the contract with Mavior for the carrying out of the flood reinstatement works, and the making of payments by the Company to Mavior and Amrakbo under those agreements could be considered as arms length transactions.

39. The applicant states as being his understanding that €1.3million of the insurance proceeds relates to a business interruption claim made by the Company, and he states that this amount should therefore, have been set aside for the general body of creditors. The source of this figure is not clear from the affidavits of the applicant.

40. The applicant further expresses concern that on 2nd November, 2011, the Company granted a deed of mortgage and charge to Mavior over the proceeds of the insurance claim as security for the amounts owing by the Company to Mavior for carrying out flood reinstatement works. By this deed the Company charged its right, title and interest in and to the insurance proceeds account in favour of Mavior. On 7th November, 2011 the Company entered into a supplemental deed of mortgage and charge and again charged its right, title and interest in and to the proceeds of the insurance claim from the flood, in favour of Mavior.

Response of First Named Respondent
41. The first named respondent avers that all of the payments made by the Company to Amrakbo on 31st January, 2012 and on 1st February, 2012, amounting in total to €846,440 related to the flood reinstatement work and exhibits correspondence in support of this averment. He further avers that these payments were made by the Company to Amrakbo (instead of to Mavior) in settlement of its obligations to Mavior under the flood reinstatement contract and that these monies were subsequently distributed to Mavior's

subcontractors. Payment was made in this way because, according to the first named respondent, Mavior's bank account had been frozen in error. The first named respondent avers that while he was involved in certain financial matters relating to the flood remediation work, he relied on the second named respondent's professional knowledge to ensure that Mavior carried out the job competently. The first named respondent further avers:

> *"I also relied on the Bruce Shaw Partners certification process to satisfy myself that the reinstatement works were properly costed and that all sums paid to Mavior and its sub-contractors were properly due and owing and represented fair value for the works that had been completed."*

42. In respect of the payments to Mavior, in particular the payments of €200,000 on 1st November, 2011; the payment of €388,000 on 28th November, 2011 and the payment of €500,000 on 15th December, 2011, the first named respondent avers that these monies were paid to Mavior from the profits generated by the hotels, in part settlement of the amounts due by the Company to Mavior under the consultancy services agreement, both in respect of the management fee and the fee payable by the company to Mavior in respect of the planning application. He says that the Company did not pay all amounts owing to Mavior in full. He says that the sum of €1,768,000.00 was due by the Company to Mavior under the consultancy services agreement, of which €1,088,000.00 was paid. These are the first three payments referred to in paragraph 36 above.

43. The first named respondent avers that at the time the Company made these payments, he was fully satisfied that the Company had monies available to it; that there had been no call on the Guarantee; and that he believed that no trade creditors were prejudiced by the making of payments to Mavior. The first named respondent makes the averment that: *"My sole role in the making of these payments was an administrative one."* The first named respondent says that he was satisfied that the Company was in a solvent trading position when it made payments to Mavior.

44. In relation to the flooding of the hotels and the damage caused thereby, the first named respondent avers that the settlement amount that was ultimately agreed between the insurers and the Company was €2,830,690. He says the Company obtained a quote for the reinstatement works from Bennett Construction Limited, which was substantially in excess of the insurance settlement amount. As a result, the Company entered into an agreement with Mavior, on 26th November, 2011, whereby Mavior would act as a general building contractor, and undertake the reinstatement works. Of the monies received in settlement of the insurance claim pertaining to the flood , the first named respondent says that €606,000 was directly attributable to the reinstatement works being carried out by Mavior. Of that €606,000, the first named respondent says that €249,792 was spent on tenant improvements to the hotels; €225,000 related to the replacement of fixtures and fittings; and €131,000 was spent on labour overtime in order to ensure that the reinstatement works would be completed on time.

45. In regard to the statement by the applicant that €1.3 million of the insurance proceeds relates to the business interruption claim of the Company, this is not denied by the first named respondent, but nor is it expressly confirmed. He states that a portion of the business interruption insurance claim was used to fund the reinstatement works in the hotels, specifically the sums mentioned in the preceding paragraph. Somewhat confusingly, the second named respondent states in his affidavit that the bank syndicate "took steps in January 2012 to ensure that MJBCH was unable to continue with a substantial insurance claim for business interruption which arose as result of the flood".

46. The first named respondent rejects any assertion that the consultancy services agreement, the project management agreements or any payments made thereunder were not made at arms length. The first named respondent says that the bank syndicate was at all times aware of the consultancy services agreement and that it was considered both by the bank syndicate and by the Company to be commercially appropriate and mutually desirable. The first named respondent also rejects the criticism made by the applicant that the consultancy services agreement did not specifically encompass works such as the flood relief works and says that the failure to refer to such works specifically, does not mean that they were not embraced by the general advisory services referred to in the agreement.

47. In regard to the concern expressed by the applicant in relation to the charges granted by the Company to Mavior over the proceeds of the insurance claim, the first named respondent says that this security was provided in order to give comfort to Mavior that it could proceed to carry out the reinstatement works with the speed that the project required, and so that Mavior would have the security that the proceeds of the insurance claim would be available to make payment to Mavior for work done under the building contract entered into with the Company. The first named respondent says that this security was provided at a time when the Company owed significant sums of money to Mavior. The first named respondent rejects any suggestion that the Company was not entitled to provide such security to Mavior and says that the provision of such security was subsequently justified in circumstances where the bank syndicate "later took every step possible to ensure that Mavior would not be paid".

Response of Second Named Respondent

48. He second named respondent states the Company was solvent when it made payments to Mavior and all of its other trade creditors and he avers that the Company was not trading when insolvent. Furthermore, he avers that the bank syndicate insisted that both he and the first named respondent, manage the hotels and the planning process. In particular the second named respondent expresses the view that *"it was my absolute concern to work to reduce such debts as best I possibly could and maximize the value of the Bank Syndicate asset."*

49. The second respondent further avers that at all times that he cooperated with the bank syndicate to maximise the potential return to be obtained from the hotels, whether as trading entities or through the potential for redevelopment. He says that at all material times the bank syndicate were aware that the Company had entered into certain agreements with Mavior in respect of the management of the hotels and the planning permission and no concern was ever expressed was by the bank syndicate as regards these arrangements.

C. Other Factors

50. The other factors which the applicant submits in support of this application are:

> (i) The delay of the first named respondent in co-operating with the applicant, in particular the late receipt of his statement of affairs;
>
> (ii) The lack of engagement by the second named respondent with the applicant and his failure to submit a statement of affairs;
>
> (iii) The failure of either of the respondents to complete a directors' questionnaire (although a short response, in the form of a letter was received from the first named respondent on 9th January, 2013).

Affidavit of the Applicant
51. The applicant says that there was an initial delay on the part of the first named respondent in cooperating with the applicant and his office. The first named respondent required an extension of time to enable him to file a statement of affairs and the applicant was not satisfied with the volume, or quality, of books and records delivered to the applicant nor with the evidence, or lack of evidence, supporting the assertions of the first named respondent in relation to the payments made to Mavior and Amrakbo.

52. The applicant says that he sent a directors' questionnaire to both respondents and that he never received a completed questionnaire from either of them. The applicant also states that while the respondents rely upon the supervisory role of PwC on behalf of the bank syndicate, they do not exhibit any documentation to substantiate that supervision. The applicant acknowledges that it may have been difficult for the first named respondent to respond to the applicant's queries by reason of the fact that the first named respondent was working abroad, nonetheless, the protracted and piecemeal nature of the manner in which the first named respondent addressed the queries and correspondence of the applicant greatly delayed and hampered his ability to investigate the affairs of the Company. The second named respondent did not respond at all to the applicant.

Response of first named Respondent
53. The first named respondent avers that he comprehensively addressed all of the liquidator's questions and queries as they arose, and provided him with all requested documentation to the best of his ability. He says that he responded to the applicant's letter of 27th June, 2012 (the applicant's first letter to him) by way of letter dated 9th August, 2012. He says that with that letter, he provided a statement of affairs of the Company which was prepared as at 30th June, 2012, the date on which the Company ceased trading. He says that on 13th August and again on 20th August, 2012, the applicant requested the first named respondent to furnish a statement of affairs in the statutory format and that he did so on 14th September, 2012. While this was acknowledged by the applicant, the first named respondent does not appear to dispute that he did not send a completed directors' questionnaire to the applicant.

Affidavit of the second named respondent
54. The second named respondent offers no explanation for his failure to engage with the Applicant or his failure to furnish a statement of affairs.

Respondents' complaints
55. It is averred by the first named respondent that at all times, he fully and properly discharged his duties as director of the Company and at all times had regard to the best interests of the bank syndicate, the Company's main creditor. The first named respondent believes he was frustrated from settling all trade creditors by:

(i) the bank syndicate reneging the rent rebate arrangement;

(ii) the bank syndicate's "sweeping" of the Company's bank accounts; and

(iii) the premature winding up of the Company.

56. The first named respondent states that it was his understanding that the bank syndicate had no right of set off in relation to the rent rebate monies. He takes issue with the fact that there has been no attempt on the part of the applicant to recover the rent rebate monies from the bank syndicate.

57. The second named respondent makes the same complaints and he claims that the rent rebate monies would have satisfied all trade creditors. The view of the second named respondent is that the attitude of the bank syndicate shifted markedly upon both his emigration to the US in August, 2010 and the grant of planning permission in September, 2011 and states that the bank syndicate at that point, had:

"a thriving hotel operation and a 10 year planning permission which would allow them trade out of the property downturn with the short term letting agreements coming to an end with MJBCH on 31st December, 2011."

58. In response to these complaints,, the applicant says that he took legal advice and was advised that there was no basis upon which the Company would be entitled to recover rent rebate monies because the rent rebate was captured by a security assignment dated 10th December, 2009 made between the Company and the bank syndicate.

59. The respondents also complain that an agreement had been reached with the bank syndicate on 9th January, 2012 that the bank syndicate would withdraw the demand for repayment of the loans made on 5th January, 2012, and that the parties entered into a "standstill agreement" to ensure that upon its exist from the hotels, the Company would be given sufficient time to work out its creditor position. The respondents claim that in making a demand of the Company for payment of the amount due under the Guarantee on 11th May, 2012, the bank syndicate acted in breach of the standstill agreement. However, the respondents did not advance any evidence of any kind in relation to the existence of that agreement with the bank syndicate.

The Law
60. The relevant parts of s.819 of the Act of 2014 for the purposes of s.819 is as follows:-

" 819. (1) On the application of a person referred to in section 820(1) and subject to subsection (2), the court shall declare that a person who was a director of an insolvent company shall not, for a period of 5 years, be appointed or act in any way, directly or indirectly, as a director or secretary of a company, or be concerned in or take part in the formation or promotion of a company, unless the company meets the requirements set out in subsection (3).

(2) The court shall make a declaration under subsection (1) unless it is satisfied that—

(a) the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,

(b) he or she has, when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and

(c) there is no other reason why it would be just and equitable that he or she should be subject to the restrictions

imposed by an order under subsection (1)."

While the authorities referred to above concerned applications pursuant to section 150 of the Act of 1990, but needless to say they remain germaine to an application under section 819 of the Act of 2014.

61. The first point to be observed is that a restriction order under s.150 of the 1990 Act, and now under s.819 of the Act of 2014 is mandatory unless a director can satisfy the Court that he/she has acted honestly and responsibly and that there is no other reason why it would be just and equitable that he/she should be subject to the restrictions imposed by an order under the section. In the Act of 2014, the additional requirement of cooperating with the liquidator has been added, i.e. it is now a statutory requirement for a director, on applications such as this, to satisfy the court that he has cooperated, as far as could reasonably be expected with the liquidator. This was of course a factor that the courts have previously held may taken into account when dealing with a s.150 application under the Act of 1990, but for the purpose of this application, which pre-dates the coming into effect of the act of 2014, I will not treat it as having the elevated status of a statutory imperative, as it will have henceforth, for applications made under the Act of 2014.

62. Many authorities were opened to the Court by counsel on behalf of each of the respondents, but the most expedient statement of the law in recent jurisprudence is that of Finlay-Geoghegan J. in the case of Re Abington Garage Doors Ltd.(In Voluntary Liquidation), James Clancy v. Con O'Callaghan and Bridie O'Callaghan [2014] IEHC 227 in which she repeated an earlier summary of the applicable case law that she herself had set out in the case of Derbar Developments Limited (In Liquidation) [2012] IEHC 144 as follows:-

> "13. The case law relating to s. 150 was reviewed in some detail by Fennelly J. in delivering the judgment in Mitek Holdings Ltd. and the Companies Act [2010] IESC 31, with which Hardiman J. and Finnegan J. concurred. In doing so, he cites with approval passages from the well-known judgments of Murphy J., in the High Court in Business Communications v. Baxter and Parsons (Unreported, High Court, 21st July, 1995) and Shanley J. in La Moselle Clothing Ltd. v. Soualhi [1998] 2 I.L.R.M., 345. In the latter, Shanley J. interpreted s. 150 in the following way:
>
> "Thus it seems to me that in determining the 'responsibility' of a director for the purposes of s. 150 (2)(a) the court should have regard to:
>
> (a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Act 1963-1990.
>
> (b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.
>
> (c) The extent of the director's responsibility for the insolvency of the company.
>
> (d) The extent of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.
>
> (e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards."

Fennelly J., at para. 74, summarises the proper approach of the Court to an application under s. 150 in the following terms:

> "It is always appropriate to keep in the forefront of one's mind the terms of the applicable statutory provision. The question to be considered, in a case such as the present, where no question of honesty arises, is whether the director against whom an application for a restriction order is made "has acted responsibly in relation to the conduct of the affairs of the company ". The context is, of necessity, a company which is unable to pay its debts. The court should, in the words of Shanley J. [in La Moselle] "look at the entire tenure of the director and not simply at the few months in the run up to the liquidation".
>
> 14. The above conclusion must be considered in the context of two earlier passages cited by Fennelly J. with approval. The first is from the judgment of McGuinness (sic) in Re Squash Ireland Ltd. [2001] 3 I.R. 31 at p. 40, where she stated:
>
> "The question before the court is whether they acted responsibly and this, as was correctly stated by counsel on behalf of the respondent must be judged by an objective standard. In the cases of all companies which have become insolvent it is likely that some criticisms of the directors may be made; but to categorise conduct as irresponsible I feel that one must go further."

And, secondly, the caution expressed by Murphy J. in Baxter that:

> "Of course, one must be careful not to be wise after the event. There must be no single "witch hunt" because the business failed as businesses will."

15. Fennelly J. also cited with approval from Clarke J. in the High Court in the matter of Swanpool Ltd. McLaughlin v. Lannen [2006] 2 ILRM 217, and in particular, his emphasis on the need for the Court, in each application under s. 150, to take account of the context in which the relevant acts or omissions of the directors need to be considered. In Swanpool Ltd., at issue was a repayment of funds to BES Investors at a time when the directors knew the company was insolvent or facing insolvency. In that decision, Clarke J., at p. 8, having considered certain of the earlier decisions already referred to, stated:

> "It does, however, seem to me that the differences in approach identified in those authorities are more apparent than real. The approach of the court in any case under s.150 will necessarily differ depending on the type of acts or omissions which are under scrutiny. In broad terms there would seem to me to be three types of situation which the court is typically required to consider in such applications. They are:
>
> (i) Issues involving compliance by the company with its formal obligations under the Companies Acts including keeping books and records, making returns, holding meetings and the like;
>
> (ii) The commercial management of the company most particularly at the period when the company was insolvent or heading in that direction; and

(iii) Compliance by the directors with the obligations identified in Frederick Inns to ensure that once the company was facing insolvency its assets were dealt with in a manner designed to ensure the proper distribution of those assets in accordance with insolvency law.'

Fennelly J expressed the view that the above is 'a particularly useful classification of the principal settings for consideration of the responsibility of directors in a modern business'."

Conclusions

63. The applicant has proven to my satisfaction a number of the issues that he has raised on this application. These include:

(i) That the Company failed to maintain its statutory books and records including its share register and minute book;

(ii) That there has been no annual return filed by the Company since 30th April, 2010 even though the Company continued trading up to 20th January, 2012 and was wound up in May 2012;

(iii) That the most recent audit of the Company's financial statements was for the year ended 31st July, 2009;

(iv) That while the books of the company were maintained up to the date on which it ceased trading, significant receipts and payments were made and not recorded after that date. This included four lodgements made between 31st January, 2012 and 1st February, 2012 amounting in total to €808,278.00 and four payments out by the company to Amrakbo on the same dates as the receipts, which payments came to a total of €846,440.00. No explanation was given as to why these significant payments were not recorded in the books of the company.

64. There are other issues. The Company ceased trading on 20th January, 2012 and vacated the hotels. It appears to have left some of its books and records on the hotel premises, in a haphazard state and taken away other books and records which were produced in a piecemeal manner to the applicant. This raises two concerns: firstly that the books and records of the Company should have been abandoned at the premises of the Company's landlord in the manner that they were, and secondly that other records were removed and only delivered in a piecemeal manner to the applicant when he made enquiries.

65. The respondents place reliance upon the fact that the Company was required to provide information on a monthly basis to PWC, upon the direction of the bank syndicate, and say that at no stage did PWC criticise or query the manner in which the Company was being operated. Notwithstanding this however, no correspondence to or from PWC was produced to the applicant. Given the oversight role ascribed by the respondents to PwC, such communications would have formed a very important element of the books and records of the Company, and almost certainly would have been very helpful to the applicant. Not only was this material not in the books and records of the Company or in the materials provided by the respondents to the applicant, it appears that the respondents expected the applicant to chase down PwC and to obtain the same from that firm, but in my view it was the respondents' responsibility to provide all such documentation to the applicant, and this is not discharged by simply referring him to PwC. That is an abrogation by the respondents of their responsibilities.

66. The Company failed to keep adequate records in relation to the insurance claim, or if it did it did not make such records available to the applicant. Instead the first named respondent simply referred the applicant to the Company's insurers to obtain information in relation to the claim. And there remain unanswered questions in relation to this claim, which might have been answered if the Company had kept proper books and records. In particular, it is entirely unclear as to how much the Company received in respect of its claim for business interruption. On the one hand the first named respondent says that the Company received €1.3 million in respect of the business interruption claim, and on the other the second named respondent says that *"the bank syndicate took steps in January 2012 to ensure that MJBCH was unable to continue with the substantial insurance claim for business interruption which arose as a result of the flood".* If the Company did receive a payment of €1.3 million, it is unclear what happened to those proceeds, because what is clear is that the insurance proceeds that where received all related to the flood reinstatement works. .

67. Another issue that arises in the context of the insurance claim is why the Company expended almost €250,000.00 on carrying out tenant improvements at a time when its tenancy agreement was coming to an end and it was certain that the Company would be vacating the hotels shortly thereafter?

68. A further unusual feature to the arrangements between the Company and Mavior is the consultancy services agreement. While it was not at all unusual as regards the contracting out of what might be described as operational services relating to the running of the hotel, the part of that agreement whereby the Company agreed to pay Mavior €990,000.00 in connection with the planning application is, on the face of it, hard to understand from a commercial perspective. While this is explained on the basis that the Company was anxious to help the bank syndicate maximise the value of the hotels in favour of the bank syndicate, the Company was not at this point going to receive any benefit from any increase in value that might result from the issue of a planning permission, because DCD's loan had been restructured prior to the Company entering into the consultancy agreement with Mavior in 2010, and ownership of both hotels had already been transferred to Zrko and Qulpic in 2009. It is difficult therefore to see what benefit would accrue to the Company from paying such a substantial fee (€990,000.00) in connection with its work in advancing the planning application. While no dishonesty has been alleged against the directors, nonetheless this is arguably an expense which should not have been incurred by the Company at all and certainly the Company should have available adequate records to explain the transaction.

69. Furthermore, it is noteworthy that generous provision was made in the project management agreements for payment of third party expenses incurred in connection with the planning application, and the bank syndicate made it very plain that it was not agreeing to making any payment at all to the second named respondent in connection with time spent by him upon the planning application. While both respondents repeatedly asserted that the bank syndicate was aware of the consultancy services agreement (and by implication had agreed to the same), there was nothing to indicate that the bank syndicate was aware of the precise terms of the consultancy services agreement or the making of such a payment by the company to Mavior in connection with the planning application.

70. It is clear that the cause of the insolvency of the company was the calling in of the Guarantee by the bank syndicate. The respondents cannot be held in any way responsible for this development. It also appears to be the case that the bank syndicate did indeed renege on a commitment to refund monies paid by way of rental to Zrko and Qulpic, and while it may well indeed have been the entitlement of the bank syndicate to do so (and I make no finding at all in this regard) it is nonetheless highly regrettable that the bank syndicate did not honour an express commitment which, if honoured, would have very significantly lessened the impact of the liquidation of the Company on other creditors, but for whom, presumably, the Company could not have traded at all ,with the result that the bank syndicate would not have received whatever benefit accrued as a result of the continued trading of the hotels, not to

mention the benefit of the planning permission.

71. However, the extent of the directors' responsibility for the insolvency of the company is but one of the factors to be taken into account on an application of this kind. The failure to keep proper books and records made it extremely difficult for the applicant to establish the true state of affairs of the company, and more particularly, to satisfy himself that the affairs of the company had been properly conducted. Notwithstanding the extensive investigations of the applicant and the submission of three affidavits on behalf of the respondents, there are still unanswered questions in relation to matters of some significance. These include:-

> (i) Did the company receive a separate payment of €1.3 million in respect of the business interruption claim, over and above the settlement of €2.8 million in respect of building reinstatement works?
>
> (ii) If so, how was that money accounted for?
>
> (iii) If not, what did the company receive under this heading and how where the funds actually received spent?
>
> (iv) Why did the company spend almost €250,000.00 on tenant improvements at the expiration of its lease?
>
> (v) What commercial benefit did the company obtain in agreeing to pay almost €1 million to assist in the pursuit of a planning application in connection with a property in which the interest of the company was confined to a tenancy agreement of two years duration?

72. The second named respondent offered no cooperation or assistance at all to the liquidator. Nor did he offer any credible explanation for his failure to do so. His departure to the United States to engage in a bankruptcy process in that jurisdiction does not relieve him of his obligations under Irish law.

73. The first named respondent did make himself available to the applicant and did correspond extensively with the applicant and provide the applicant with a significant amount of documentation. No doubt he was doing so in difficult circumstances, having had to leave Ireland in order to obtain employment abroad. However, he would undoubtedly have made matters easier on the applicant and upon himself by meeting with the applicant either prior to his departure or on some subsequent agreed date and providing all documentation in his possession (to the extent required by the applicant) at the same time or as nearly as possible thereto. The piecemeal manner in which documentation was furnished to the applicant was unsatisfactory and has also contributed to a suspicion that not all documentation has been delivered to the applicant. The first named respondent averred that in a number of important respects he relied heavily upon the second named respondent, one of the ultimate owners of the Company and a highly experienced businessman, and I am sure this is true. Nonetheless, the first named respondent had duties and obligations of his own as director.

74. It will be clear from the above that the failure by the directors to maintain proper books and records of the Company in this case goes far beyond the failure to comply with technical statutory requirements. The absence of adequate books and records made it almost impossible for the applicant to satisfy himself that there was a proper basis for significant payments made by the Company to Mavior and Amrakbo, some of which payments were recorded in the books and records of the Company and others of which were not. It has not been possible for the Court to reach any firm conclusions on these matters either, and nor is it necessary for the Court to do so on this application. However, the applicant has made it clear he is not alleging any dishonesty on the part of the respondents. The questions that I have raised above regarding the commercial management of the Company also remain unanswered for the same reason i.e. on account of the dearth of proper records. For these reasons therefore I have no doubt at all that the conduct of the respondents in this important respect could not be regarded as responsible and accordingly I believe that it is appropriate to make an order against each of respondents pursuant to section 819(1) of the Act of 2014.