THE HIGH COURT

[2006 No. 282 COS]

IN THE MATTER OF BOVALE DEVELOPMENTS LIMITED AND
IN THE MATTER OF THE COMPANIES ACTS 1963 – 2005 AND
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160(2) OF THE COMPANIES ACT, 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND
MICHAEL BAILEY AND THOMAS BAILEY

RESPONDENTS

Judgement of Ms. Justice Irvine delivered on the 1st day of November 2007

1. By formal notice delivered herein on the 29th June, 2006, the respondents, who are directors of Bovale Developments Limited ("Bovale"), were notified that the Director of Corporate Enforcement ("Director"), intended to institute proceedings seeking, *inter alia*, to disqualify them as directors pursuant to s. 160(2) of the Companies Act, 1990 (as amended by ss. 14 and 42 of the Company Law Enforcement Act, 2001).

2. The originating notice of motion was delivered on 8th August, 2006 and is grounded upon two affidavits, namely the affidavit of Mr Peter Lacy, a partner in PriceWaterhouse Coopers ("PWC"), sworn on the 30th June, 2006, and the affidavit of Mr. Dermot Madden, an officer with the Director of Corporate Enforcement sworn on the 8th August, 2006. The affidavit of Mr. Lacy relates principally to investigations carried out by his firm, ("PWC"), in relation to the affairs of Bovale at the instigation of the applicant.

3. Shortly after the issue of these proceedings, the respondents issued a notice of motion dated the 22nd November, 2006, seeking to curtail the evidence put forward by the applicant in the grounding affidavits. In simple terms the relief sought by the respondents in their notice of motion can be stated to cover three particular objections, namely:-

> (1) the admissibility of certain aspects of the evidence upon which the applicant seeks to rely.
>
> (2) an allegedly impermissible and unlawful delegation by the applicant of his functions to PWC pursuant to the Company Law Enforcement Act, 2001 and
>
> (3) the validity of a District Court production order dated the 22nd November, 2002.

4. The applicant fully contests the legal basis upon which the respondents' seek the relief set out in the notice of motion and further submit that irrespective of the legal merits of the respondents' objections, their application is premature.

5. I propose to deal with the issues raised for the Court's attention in the following order namely:

> 1. A brief summary of the objections made by the respondents to the applicant's claim.
>
> 2. Preliminary observations.
>
> 3 Whether or not the respondents' application is premature.
>
> 4. The admissibility of the evidence objected to by the respondents.
>
> 5 The lawfulness of the delegation of the applicant's functions to PWC under the Corporate Enforcement Act, 2001.
>
> 6 The validity of the District Court warrant dated the 22nd November, 2002.

1. Brief summary of the respondents' objections to the applicant's proceedings.

(A) Evidence.

6. The respondents seek to challenge the admissibility of certain aspects of the evidence put before the court in the affidavits of Mr. Lacy and Mr. Madden. The evidence which is objected to by the respondents as inadmissible is identified at paras. 1 - 5 of the notice of motion. In support of their application the respondents rely, not only upon the Court's inherent jurisdiction but also on the provisions of O. 40, rr. 4 and 12 and O. 19, r. 27 of the Rules of the Superior Courts.

7. The evidence to which the respondents object can be synopsised as follows:-

> (a) Extracts from the second interim report of the Tribunal of Inquiry established to Inquire into Certain Planning Matters and Payments ("the Tribunal Report"). Extracts from the Tribunal Report are set out in the affidavit of Mr. Madden and the entirety of the report of the Tribunal is referred to at para. 10 of Mr. Madden's affidavit "when produced".
>
> Mr. Madden refers to paras. 14-43 to 14-63 of the Tribunal Report. These paragraphs contain findings of the Chairperson of the Tribunal of significant wrongdoing on the part of the respondents and one Caroline Bailey.
>
> It is not necessary to set out in detail the contents of the aforementioned material for the purposes of this judgment. However, I will briefly refer to one paragraph from the Tribunal Report which is exhibited at exhibit "DM11" to the affidavit of Mr Madden, to demonstrate the seriousness of the wrongdoing now contended for by the applicant and which he seeks to introduce into evidence against the respondents:-.
>
> "14-63. The Tribunal is satisfied that Mrs. Caroline Bailey and the directors of Bovale, Mr. Michael Bailey and Mr. Tom Bailey had for years systematically prepared false documents including cheques, cheque payment journals and books of account when it suited their purpose to do so.

> The evidence established that the underlying methodology used was to falsely attribute an established expenditure to a heading under which the sum was not expended, for example, by entering the name of a legitimate trade creditor in the cheque journal as the payee of a cheque that was in fact lodged to the personal account of the directors."

Counsel on behalf of the applicant in the course of the hearing and further at para. 56 of his written submission has advised the Court that the findings of the Tribunal are not sought to be relied upon on their own but rather they are to supplement the evidence which is provided as a result of the Director's own investigations.

(b) Documentation emanating from the Revenue Commissioners and directed for the attention of the Director of Corporate Enforcement which documentation is exhibited at exhibit "DM6" to the affidavit of Mr. Madden.

The aforementioned documentation imparted to the applicant the views of a Mr. Aidan Nolan, Principal Officer in the Revenue Commissioners that the directors of Bovale, for the reason stated in a confidential report, may have committed offences under the Companies Acts.

(c) A H4 notice signed by McGrath & Co., Chartered Accountants, who were the auditors to Bovale and which notice is dated the 28th July, 2000. This is a notice filed pursuant to s. 194 of the Companies Act, 1990 and records the opinion of the company's auditors that Bovale failed to keep proper books of account. This was notified to the company's offices on the 28th July, 2000. The notice which is exhibited at "DM4" relates to the accounts of Bovale for the years ended 30th June, 1997, and 30th June, 1998.

(d) Two hand written memoranda prepared by a Mr. O'Toole of McGrath & Co., Chartered Accountants, copies of which were on the audit files of Bovale and allegedly record a meeting he had with the respondents on the 26th July, 2000, for the purpose of finalising accounts for the year ended 30th June, 1997. The memoranda set out certain information which it is stated by Mr. Lacy, at para. 17 of his affidavit, caused Mr O'Toole to conclude that proper books of account had not been adequately maintained by the respondents. These memoranda are exhibited at "PL5" to Mr. Lacy's affidavit.

(B) Delegation.
8. The affidavit grounding these proceedings on behalf of the Director of Corporate Enforcement avers that PWC acted as an officer on his behalf to assist him in performing his functions under s. 12(6) of the Company Law Enforcement Act, 2001. The respondents submit that PWC was not lawfully entitled to act as an officer of the Director and accordingly that PWC has acted without authority in obtaining documentation which it is alleged was used by PWC for the purpose of preparing the reports exhibited at "PL1" and "PL2" to Mr. Lacy's affidavit.

(C) Production Order.
9. The respondents contend that a production order (referred to in the written submissions to the court as a warrant) issued by the District Court pursuant to s. 63 of the Criminal Justice Act, 1994 is invalid. The Court, by agreement between the parties, has not been asked to determine what if any consequences flow from a finding that the production order was invalidly obtained.

2. Preliminary Observations.
10. Prior to embarking upon a consideration of the respondents' application it is relevant to briefly refer to exhibit "DM11", the affidavit of Mr. Madden sworn on the 8th August, 2006. This is the statutory notice that must be served in accordance with s. 160(7) of the Companies Act, 1990 prior to the institution of proceedings under s. 160(2). The extent of the applicant's potential reliance upon the wrongdoing particularised in this notice for the purposes of these proceedings is to be gleaned from para. 29 of Mr. Madden's affidavit where he deposes as follows:-

> "This notice includes inter alia the details of the grounds of the intended application to the court under s. 160 of the Act. The respondents were invited to make any representations which they wished regarding the said notice which was stated to particularise the misconduct and material breaches of law to be relied upon by the Director in the s. 160 proceedings."

11. The affidavits of Mr. Lacy and Mr. Madden make it clear that the applicant invites the Court to consider the documentation exhibited in the grounding affidavits as evidence of wrongdoing for the purposes of deciding whether or not the respondents ought to be disqualified as directors pursuant to s. 160(2) of the Companies Act, 1990 and also to influence the court as to the sanction to be imposed in the event of such disqualification.

12. As a further preliminary observation, the Court notes that the two reports of PWC which are exhibited in Mr. Lacey's affidavit demonstrate that PWC confined its investigations to a thorough analysis of the financial affairs of Bovale for the two years ending the 30th June, 1997, and 30th June, 1998. Notwithstanding this fact the applicant, for the purposes of his application under s. 160(2) of the Companies Act, 1990 seeks to invoke the Court's jurisdiction in respect of wrongdoing covering the entirety of the period from 1988 to 2000 based upon much of the documentation which the respondents allege constitutes inadmissible hearsay evidence and inadmissible evidence of opinion. By way of example, Mr. Madden, at para. 32 of his affidavit, advises as follows:-

> "In accordance with the findings of the Tribunal the established period of misconduct extended from 1988 and continued up until the public hearings of the Tribunal in 2000 when the respondents gave false, deceptive and/or misleading testimony to the Tribunal."

13. Both as a matter of practicality and as a matter of law, much of the difficulty faced by the Court in deciding upon the admissibility of the evidence complained of by the respondents arises from the fact that it is presently unclear as to what role the allegedly offending affidavits will ultimately have in these proceedings. If these proceedings were to be confined to evidence submitted to the Court on affidavit, as intended by the Rules of the Superior Courts, this application would pose less difficulties for the Court than presently exist due to the uncertainty of the likely format of the ultimate hearing.

14. In the course of the oral submissions, mention was made of the possibility that these proceedings would be remitted to plenary hearing and disposed of entirely on foot of oral evidence. The applicant's written submissions refer to the possibility of the proceedings being disposed of on affidavit subject to notices to cross examine being delivered thereby permitting of what can only be described as a type of hybrid hearing partly conducted on affidavit and partly on oral evidence. The applicant also indicated that evidence may be introduced by the use interrogatories and/or notices to admit facts and that even if the proceedings are to be heard

principally on affidavit that such evidence may be supplemented with additional oral evidence with leave of the Court.

15. The Court is of the view that it must distinguish between affidavits intended to comprise the entirety of the evidence to be relied upon by the parties for the final determination of their rights in substantial proceedings, from affidavits whose principle purpose may be to determine interlocutory issues. The Court must be cautious to avoid applying the Rules of the Superior Courts which govern the former type of affidavit to those which more properly fall into the latter category.

3. Prematurity of the respondents' application.

16. The applicant urges the Court to postpone making a decision on the respondents' motion on the grounds that the application is premature. The applicant categorises this application as the trial of a preliminary issue of law and submits that in circumstances where the facts of the case are not agreed, as is usually required before a preliminary issue can be tried, that the application has no validity. The applicant further submits that the court should lean against excluding evidence at the hearing of a preliminary issue as the offending evidence may be intertwined with the rest of the facts of the case. Therefore, the applicant says it is undesirable for the Court to unhook such an evidential dispute from the trial itself unless the Court by doing so can dispose of the entire action. The Court is advised that any current evidential difficulties may potentially be overcome at a later time either by the respondents acceptance of the facts alleged against them or by the utilisation of additional court procedures such as notices to admit facts, the delivery of interrogatories or perhaps by the Director calling supplemental oral evidence.

17. The applicant has referred in his submissions to a number of decisions in support of these arguments including *BTF .v.DPP* [2005] 2 I.L.R.M. 367, *Byrne v. Grey* [1988] I.R. 31, *In re. National Irish Bank (No. 1)* [1999] 3 I.R. 145, amongst others. These decisions however offer little real guidance to the Court as they principally relate to preliminary issues brought in criminal proceedings where the court was asked to determine, in advance of the trial, matters such as the validity of search warrants or admissions made by accused persons. The present proceedings cannot be equated with the trial of such issues in criminal proceedings. Order 75B, r. 3(z) of the Rules of the Superior Courts provides that an application for a disqualification order under s. 160(2) of the Companies Act, 1990 is to be made by originating notice of motion. Order 75B, r. 7 provides that every specified application under the Companies Act, 1990 shall be grounded upon the affidavit of the party making the application and shall be heard and determined on affidavit unless the court otherwise directs. The Court has, of course, power under O. 75B, r. 9, in any case in which it considers proper to do so, to direct a plenary hearing. However, unless the Court directs a plenary hearing the within proceedings would be expected to be heard on affidavit, and the totality of the evidence to be relied upon by the applicant should be that contained in the affidavits of Mr. Madden and Mr. Lacy. Nothing new should emerge thereafter unlike the type of new factual material that may arise in the course of a full criminal trial. These facts make it difficult for the applicant to contend that the within application is premature.

18. Given the provisions of O.75B, r. 7, it must have been the applicant's intention at the time of instituting these proceedings to confine his evidence to that which is deposed to in the affidavits of Mr. Lacy and Mr. Madden. There is nothing in Mr. Madden's affidavit to advise the respondents that, for example, the opinions of those other than Mr. Lacy which are referred to in the affidavits may be supported by any evidence from the authors of those opinions at the hearing of the action.

19. Given that the Rules of the Superior Courts provide for a wide range of proceedings to be determined solely on affidavit it is not surprising that the Rules of the Superior Courts require affidavits, in general, to exclude hearsay evidence and that such rules provide a mechanism for ensuring compliance therewith. The existence of such a mechanism makes the argument that the respondents' motion is premature difficult to sustain. It is clear that the evidence supporting any alleged wrongdoing at a hearing which is dealt with on affidavit must be just as admissible as evidence which would be given to a court by a witness at an oral hearing. In this regard O.40, r. 4 of the Superior Court Rules provides as follows:-

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall not be allowed."

20. Order 40, r. 12 provides:-

> "The Court may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client."

21. Order 40, r.4 appears almost mandatory in its terminology when referring to non-interlocutory matters, and seems to be designed to ensure that there is no falling short of proper evidential proof when proceedings are to be disposed of on affidavit rather than by way of oral evidence.

22. The reasoning behind the exception to normal hearsay rules for interlocutory matters is clearly explained by Hodson L.J. in *Rossage v. Rossage* [1960] 1 W.L.R. 249. That was a case where a father applied to the Court to suspend the right of the mother to access to their child. The application was not of an interlocutory nature and the mother applied to have certain affidavits delivered by the father removed from the file on the basis that they contained both scandalous and hearsay material.

23. Hodson L.J. in his judgment referred to the distinction to be drawn between evidence which might be deemed admissible in proceedings designed solely to maintain the status quo but which would be inadmissible in proceedings destined to decide the ultimate rights of the parties. The learned trial judge referred to the decision of Cotton L.J. in the Court of Appeal in *Gilbert v. Endean* [1878] 9 Ch. Div. 259, who, when dealing with the equivalent English rule advised at p.268:-

> "for the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in statu[s] quo till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties. Now many of the cases which are brought before the Court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the Court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause. In my opinion, therefore, on such applications, if an affidavit on information and belief is made, the other side is not called upon to answer it under the peril of its being said to him, 'You have in fact admitted this by not denying it, and therefore the court may act upon the admission.' But I must add this: where in the Court below the evidence not being strictly admissible, not being that upon which the Court can properly act, if the person against whom it is read does not object, but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order

> on the ground that the evidence was not admissible. But in such a case the Court does not act on the statement as being evidence properly admissible, but because the party has by the course which he adopted waived proof of the facts stated on information and belief. I have said this because I think that the matter is one of very considerable importance, and that the habit of introducing into applications to decide the rights of parties evidence on information and belief has done great injury in many ways in the Chancery Division."

24. The fact that the within proceedings may ultimately be dealt with at an oral hearing does not provide a valid basis for concluding that the respondents' motion is premature. The affidavits sworn on behalf of the applicant cannot be assumed to be of an interlocutory nature within the meaning of O. 40, r. 4, so as to permit evidence to be introduced which emanates other than from the means of knowledge of the two deponents. Neither does the Court believe that the respondents should be put in the position outlined by Cotton L.J. in *Gilbert v. Endean* where their failure to address evidence which is not strictly admissible could result in the Court ultimately concluding that they had waived proof of the evidence and opinions therein stated.

25. The Court is satisfied that it ought to deal with the respondents' application at this juncture. By doing so the applicant will be in a more favourable position than he would be in if the Court dismissed this application as premature and then at the full hearing excluded either partially or entirely significant amounts of evidence in the affidavits on the basis that the same was inadmissible. Any ruling adverse to the applicant at this stage will permit him to revisit how he might seek to prove the evidence excluded as inadmissible in its present format. The applicant may decide to try to obtain additional testimony on affidavit. Alternatively, the applicant may seek to have the proceedings referred to plenary hearing subsequent to which he can decide what wrongdoing he proposes to rely upon and then call the relevant oral evidence in support of the same. The Court does not accept the applicant's submission that following the opening of the full hearing of these proceedings the Court will be better placed to decide whether the material complained of constitutes inadmissible evidence. It goes without saying that in any case an applicant should not be permitted to open facts which he will not seek to prove. Such an approach, in any event, would be to flaunt the plain meaning of O. 40, r. 4. If the Court was to accept the prematurely argument in proceedings of a complicated nature the Court would be forcing respondents to reply to vast swathes of allegations which the applicant might never be in a position to prove by affidavit or oral evidence at the hearing proper. Thereafter, the Court would be faced with trying to excise hearsay evidence from admissible evidence after the opening of the trial. This approach would result in a significant waste of the Court's time and would lead to the incursion of unwarranted legal costs.

26. The Court further rejects the applicant's submission that documents which at this point are hearsay as to the truth of their contents can at a later stage in the proceedings ever become anything other than hearsay. The applicant may well ultimately prove the truth of the content of some of the evidence presently contested as inadmissible by utilising a variety of court procedures of such as interrogatories or notices to admit facts. Alternatively the applicant may obtain supplemental oral or affidavit evidence. However, even if the applicant succeeds in this regard the material presently inadmissible remains inadmissible and the applicant merely proves the contested evidence using an alternative mechanism to the present affidavits.

27. The Court has been referred by the applicant to the decision the Court in *Sun Fat Chan .v. Osseous Ltd* [1992] 1 I.R. 425 in support of his assertion that the respondents' application is premature. That decision related to an application by a defendant to dismiss the plaintiff's claim for specific performance in relation to a contract for the purchase of certain property on the basis that, the facts not being in issue, there was no basis upon which the plaintiff could succeed.

28. The Supreme Court, in considering the circumstances in which an action might be dismissed as being frivolous or vexatious concluded that the court should be slow to dismiss an action unless it was clear that the action could not be saved even if the plaintiff was afforded an opportunity to amend his claim.

29. The issues addressed by the court in *Sun Fat Chan* were different in many respects from those which arise on the present application.

30. Firstly, these proceedings were intended by the Rules of the Superior Courts to be disposed of on affidavit evidence only. Hence, there should be little by way of additional evidence post the delivery of the grounding affidavits that should have any real bearing upon the admissibility of evidence in those affidavits. Secondly, the respondents in this application seek relief, not solely pursuant to the Court's inherent jurisdiction, but specifically by reason of the provisions of O.40, r.4. Thirdly, one can understand the reluctance to accede to the application in *Sun Fat Chan* the penalty sought to be invoked by the defendant being the dismissal of the plaintiff's entire action whereas in this case the respondents relief is confined to seeking to rule out as inadmissible a portion of the applicant's evidence. Finally, in these proceedings even if the respondents are successful in this application, the applicant is not precluded from seeking to introduce any evidence now ruled to be inadmissible by way of supplemental affidavit or oral evidence at a later time. For this reason the Court believes reliance by the applicant on this decision is misplaced.

31. The most helpful decision in relation to the prematurity argument is that of Gibson L.J. in *Savings and Investment Bank v. Gasco Investments (Netherlands) B.V. and Others* [1984] 1 All E.R. 296 ("SIB"). That case concerned an action by a plaintiff seeking repayment of a debt owed by the first named defendant. The plaintiff brought a motion seeking an injunction in an effort to restrain the defendants from disposing of their assets until the trial of the action. The plaintiff relied upon an affidavit sworn by Gerhard Weiss on behalf of the liquidator of SIB. A number of the defendants applied to the court for an order under the English equivalent of our O. 40, r. 12 of the Rules of the Superior Courts and also pursuant to the court's inherent jurisdiction to strike out a number of paragraphs from Mr. Weiss's affidavit on the ground that the contents thereof were scandalous, inadmissible, irrelevant and/or otherwise oppressive.

32. One of the documents relied upon by Mr. Weiss in his affidavit was a report of an inspector appointed by the Secretary of State for trade to the fourth named defendant, under the various provisions of the Companies Act, 1948. Mr. Weiss in his affidavit dealt in detail with the final report of the inspector and summarised some of its more important points in his affidavit. He sought to rely upon the report which expressed the concerns of the inspector that there was a danger that the shares of the fourth named defendant might be dealt with in such a way as to dilute the fourth named defendant's assets.

33. An application was made to the Court to strike out the references to the report of the inspector and this application was brought prior to the hearing of the motion for the interlocutory injunction. At the hearing the plaintiff urged the Court not to accede to the defendant's application and invited the Court to postpone an adjudication on the admissibility of the inspector's report until the hearing of the injunction proper.

34. The reasoning of Gibson L.J. at p. 301 of the report seems of particular relevance to this application:-

> "I shall deal with counsel for SIB's last point first, as, if correct it would absolve me from the task of considering this application further. Counsel for the defendants explained the reasons why he has applied to strike out as two fold. First,

the defendants need to know before the effective hearing of the motion whether they should go to the expense and trouble of putting in a large amount of additional evidence to counter what is contained in the report. He points out that a decision on this point may assist SIB as well, since SIB may wish, if the passages are struck out, to put in admissible evidence to prove what it now seeks to show by way of reference to the inspector's reports. Second, for a judge other than the judge hearing the motion to strike out passages in the affidavit would avoid the motions judge having to perform the mental gymnastics of putting out of mind the lengthy and inadmissible passages to which he would have been referred."

35. The Court is convinced that the appropriate time for a party to object to the admissibility of evidence in an affidavit supporting proceedings brought by way of originating notice of motion is the time at which that affidavit is delivered. Applications such as the present one assist in defining the actual issues which will be pursued by the applicant and thus bring about a reduction in legal costs. In terms of natural justice and fair procedures the Court concludes that it would be unfair to permit an applicant in proceedings which carry a significant potential penalty to swear an affidavit containing a myriad of serious allegations of wrongdoing against a respondent when many of the allegations emanate from the opinion of third parties not under the deponents control, relate to matters outside the deponents own personal knowledge and when neither the deponent nor the author of the opinion can reasonably be challenged thereon. It would be unjust to require the respondents to deliver a sworn reply to such assertions thus exposing them to cross examination thereon when the party responsible for the allegations of wrongdoing is not similarly open to cross examination. Different considerations apply in proceedings of a plenary nature where it is permissible for a plaintiff in an unsworn document, such as a statement of claim, to make wide-ranging unsworn allegations to which the defendant will respond in a similarly unsworn fashion. In such circumstances, both the parties are subjected to the same rules.

36. To postpone this application until after the respondents have delivered replying affidavits, apart from the injustice previously mentioned would have significant procedural drawbacks for all concerned and these can be summarised as follows:-

(i) The respondents would have to decide whether or not to counter assertions which prima facie appear to be inadmissible. A decision made not to respond to such evidence runs the risk of the applicant contending that such failure on the part of the respondents should be treated as an acceptance of the opinions advanced in the affidavits, a tactic commented upon by Cotton L.J in *Gilbert v. Endean.*

(ii) If the respondents take the chance of ignoring the evidence in the affidavits which they believe to be inadmissible they run the risk that if the proceedings are advanced on such affidavits at trial that their application to have the evidence ruled out may fail. In such circumstances the respondents would be unlikely to be in a position to counter the evidence ruled to be admissible by the court thus leading to the likely adjournment of the action. Such an adjournment would be difficult to avoid, particularly if the applicant had successfully objected to the issue as to the admissibility of the evidence being dealt with at an interlocutory hearing on the basis that the application was premature.

(iii) Alternatively the respondents might decide that they simply cannot run the risk of not replying to the evidence they believe to be inadmissible. Thereafter, if the respondents were successful in having the evidence excluded at trial they might nonetheless end up being cross examined on affidavits they ought not to have had to file. Alternatively, on this scenario, the applicant might require an adjournment to "mend his hand" to allow him the opportunity of producing additional evidence. Once again such an occurrence would result in delay, additional legal costs and a waste of court time.

(iv) To fail to deal with matters which are claimed to be inadmissible at an interlocutory hearing places the respondents in a much more prejudicial position than they would be in if the proceedings from the outset were plenary in nature. In plenary proceedings on oral evidence a defendant can object to the introduction of inadmissible evidence and seek a ruling then and there from the court. Depending upon the ruling the defendant can then decide how to proceed in terms of his own evidence. On the applicant's submissions in this case the respondents should be forced to counter, by sworn testimony, any assertions made on his behalf once the same are not scandalous or vexatious, even if these assertions are *prima facie* inadmissible. The respondent is then expected to prepare to defend all such assertions at trial and await its commencement before he is entitled to a ruling as to the admissibility of such evidence.

(v) It will greatly increase the costs of both parties if clearly inadmissible evidence is left in the affidavits and the respondents are obliged to reply thereto and possibly prepare for trial (including an oral hearing) based on the risk that the evidence might be admitted at trial. This application is not an objection to one inadmissible assertion which, if excluded, would be unlikely to have any major impact on matters such as costs and / or court time. On the contrary this is an application to exclude evidence of opinion covering assertions of professional wrongdoing over many years which if excluded and not proved in some other fashion is likely to substantially curtail the duration of the hearing and the costs of the parties.

(vi) In the interests of justice the trial judge should not be asked to conduct the mental gymnastics referred to by Gibson L.J. in *SIB*. There is always a risk that a trial judge who proceeds to hear a case having ruled out a swathe of evidence as inadmissible after the opening may find it difficult to proceed to do justice between the parties unaffected by having been privy to such material.

37. Finally, in relation to the issue of prematurity the Court rejects the submission made by the respondents that any delay on the part of the applicant in contesting the appropriateness of the respondents' application undermines the legitimacy of the arguments raised on his behalf. The parties were clearly engaged in a significant exchange of correspondence and documentation after the issue of the proceedings. The Court draws no inferences whatsoever from the fact that many of the grounds relied upon by the applicant herein were not raised until such time as their replying affidavit was sworn on the 6th March, 2007.

38. Whilst the Court accepts that the evidence which the respondents wish to have excluded at this point cannot be described as either scandalous or vexatious such as to justify its exclusion under O. 40, r. 12, there is nothing in O. 40, r.4 which suggests that an application to be made under that section should not be made until a replying affidavit has been delivered. The intent of that rule appears to be to insure compliance with the rules of evidence in affidavits of a non-interlocutory nature, and thereby to provide an efficient and fair mechanism for the disposal of the dispute between the parties.

39. The Court concludes that having regard to above reasoning, the applicant's assertion that the respondents' motion is premature is not well founded.

4. The admissibility of evidence objected to by the respondents.

40. Prior to examining the documents which the respondents wish to have excluded from these proceedings it is worthwhile stating briefly the rule in relation to the inadmissibility of hearsay evidence and evidence of opinion.

Inadmissible hearsay evidence and inadmissible evidence of opinion.
41. Cross & Tapper on Evidence 10th Ed. (Lexis Nexis Butterworths, 2004) on evidence describes the rule against hearsay as follows:-

> "a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated."

42. The law relating to hearsay in this jurisdiction is clearly set out in *Cullen v Clarke* [1963] I.R. 368 in which Kingsmill Moore J. at p. 378 stated:-

> "there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule, subject to many exceptions, that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert the reason being that the truth of such words cannot be tested by cross-examination and have not the sanctity of an oath. This is the rule known as the rule against hearsay."

43. This is a rule which is operated to potentially exclude statements in circumstances where the maker of that statement will not testify, cannot have their demeanour observed and cannot have their credibility tested on cross examination. The rule is stated to demonstrate the confidence that can be reposed in the power of cross examination.

44. Insofar as opinion evidence is concerned the general rule is that witnesses must speak only to facts which they have observed and should not give evidence as to the inferences which they believe can be drawn from such facts. The rationale for the exclusion of opinion evidence lies in the acceptance that it is for the court and not the witness to draw conclusions from proven facts.

45. It is common case that evidence of opinion is permitted in certain exceptional circumstances such as where the court admits evidence from an expert witness. However, in order to permit of this exception the expert must establish their expert credentials before the court and their evidence must be confined to their proven area of expertise. Clearly, once an expert is permitted to give evidence as to his opinion it follows that he is open to having that opinion tested not only by the opposing party on cross examination but also by the trial judge.

46. In the present case the respondents object to opinion evidence being introduced on affidavit by persons who are not the authors of that opinion and where the respondents have no assurance that the author of the opinion will either swear an affidavit stating the truth of that opinion or give oral evidence thus opening up the possibility of that opinion being challenged by them on cross examination. The height of what has been stated on the applicants behalf is that the respondents may well not dispute many of the assertions of wrongdoing made against them and that if they do it may be possible to prove some of the assertions by the use of additional court procedures. The grounding affidavits refer to the expert opinion of Mr. Lacy, but also refer to the conclusions of wrongdoing against the respondents reached by the Chairman of the Tribunal, Mr. Nolan of the Revenue Commissioners and Mr. O'Toole of McGrath & Co., Chartered Accountants.

47. A stark approach to the respondents' motion might be to consider what evidence would be admissible at the instigation of the applicant if the respondents did not appear to the proceedings at all. In such a case the court would only be permitted to take into account evidence received in compliance with Order 40, r.4. The Court is of the opinion that much of the documentation relied upon by the applicant in the affidavits and exhibits to these proceedings could never be considered as admissible evidence even if the respondents chose not defend the present proceedings. As matters stand there is no certainty that there will be an application for a plenary hearing and the Court should therefore at least consider the possibility that the applicant's evidence at trial will be as it is now.

48. There are exceptions to the hearsay rule, but it is now common case that most of these exceptions are specifically provided for by enabling legislation. A number of examples of such legislative provisions have been referred to by the respondents in their submissions including:-

> 1. Section 22 of the Companies Act, 1990 which renders admissible the report of an inspector as evidence of (a) the facts set out therein without further proof unless the contrary is shown and (b) of the opinion of the inspector in relation to any matter contained in the report for the purposes of seeking to have a person disqualified under s.160 (2) of the Companies Act, 1990.
>
> 2. Section 23 of the Children Act, 1997 which permits, in limited circumstances, a statement made by a child to be admitted into evidence where in the normal course of events the same would not be admissible if the child was not in a position to personally give oral evidence. The court under s.24 of that Act is given discretion as to the weight which it should apply to that evidence given that it is technically hearsay.

49. It is noteworthy that the Company Law Enforcement Act, 2001 makes no provision for the right of the applicant to rely, for example, on the findings of a Tribunal of Inquiry or a report from a revenue inspector without further proof of the opinions therein contained. In the light of the provisions of s.22 of the Companies Act, 1990 set out above it is difficult to infer any departure from the normal rules of evidence in these proceedings.

50. It may well be the case that at the time the Company Law Enforcement, Act 2001 was enacted the need for any provision permitting the Director, in limited circumstances, to depart from the rules of evidence was not seen as necessary where undoubtedly it must have appeared likely that most disqualification proceedings would follow upon the appointment of a court liquidator, examiner or inspector all of whom would be likely from their own investigations to have the evidence required to support any proceedings deemed necessary under s. 160 of the Companies Act, 1990. The difficulties that have arisen in the instant proceedings stem from the fact that the applicant must prove the wrongdoing on the part of the company's directors through evidence obtained from witnesses other than a liquidator, examiner or inspector.

(a) Evidence from interim report of the Tribunal of Inquiry into Certain Planning Matters ("the Tribunal report") dated 26th September, 2002.
51. It is clear from the affidavits of Mr. Lacy and Mr. Madden that the report of the Tribunal is not being produced for the purposes of proving that such a report was brought into being by the Chairperson of the Tribunal in September, 2002. The reason the applicant

seeks to have the report and extracts therefrom introduced into evidence is for the purpose of asking the Court to attach weight to the opinion of the Chairman of the Tribunal regarding wrongdoing on the part of the respondents over many years when deciding the outcome of these proceedings. As was stated in the written submissions the applicant seeks to rely upon the report to corroborate or otherwise bolster the opinions presented on foot of the Director's own investigations.

52. Having regard to the potential penalty that may be imposed as a result of the within proceedings, it is important to reflect upon the rules of evidence as they apply to a tribunal of inquiry and also to review how findings of such a tribunal have been treated in the context of subsequent civil litigation.

53. Costello J. in *Goodman International .v. Hamilton* [1992] 2 I.R. 532 in dealing with the rules of evidence as they apply to hearings before a tribunal of inquiry stated:-

> "There is no rule of law which requires the Tribunal of Inquiry to apply the rules of evidence applicable in a court of law".

54. This brief but succinct statement highlights the potential danger of admitting findings of a Tribunal in subsequent proceedings. The party seeking to rely upon such evidence in an affidavit cannot be challenged in any way as the person who made the finding is not the deponent of the affidavit which introduces the finding into evidence. Not only can the respondent not cross examine the author on their findings which are often in any event made on the basis of hearsay evidence, but the court is also denied the opportunity of testing for itself the opinion or facts so deposed to.

55. The significance to be attached to findings of a tribunal of inquiry in the context of subsequent litigation is a matter which has been ventilated at length in a series of decisions over the last fifteen years.

56. The starting point of these decisions is that of Finlay C.J. in *Goodman v. Hamilton (No. 1)* [1992] 2 I.R. 542. The matters enquired into by that Tribunal included allegations which were at the time the subject of pending civil proceedings, allegations relating to crimes already adjudicated upon by the courts and also criminal conduct in general.

57. In that case it was argued that the report of the Tribunal could amount to a usurpation of the activities of the courts in cases where either civil cases were pending or were yet to be instituted. Finlay C.J. stated that such a submission arose from what he described as:-

> "a total misunderstanding of the function of the Tribunal. A finding of this Tribunal, either of the truth or the falsity of any particular allegation which may be the subject matter of existing or potential litigation, forms no part of the material which a court which has to decide that litigation could rely upon. It cannot either be used as a weapon of attack or defence by a litigant who, in relation to the same matter is disputing with another party rights arising from some allegation of breach of contract or illegal contract or malpractice."

58. The aforementioned statement by Finlay C.J. is a clear indication that any party coming to civil or criminal proceedings following upon or indeed consequent upon the report of a tribunal inquiry, still bears the onus of establishing that claim to precisely the same level of proof as would have been required absent the tribunal finding. It is not open to the applicant to use findings of the chairperson as a weapon of attack against the respondents in these proceedings.

59. The applicant in the within proceedings submits that the Tribunal report is in fact admissible because it is a public document. The applicant relies upon the Law Reform Commission's Consultation Paper on Public Inquiries including Tribunals of Inquiry (LRC CP 22/2003) which concluded that even at common law the final report of an inquiry was admissible in subsequent civil proceedings as an exception to the hearsay rule. The Law Reform Commission advised that this was so as such a document concerned a matter of public importance, was made by a public officer acting under a duty to enquire into the matters concerned and was intended to be retained for public reference or inspection. The position adopted by the Law Reform Commission appears to this Court to fly in the face of what was stated by Finlay C.J., referred to above, and is at odds with a significant body of case law referable to legal challenges brought by those being scrutinised by various tribunals in the recent past.

60. In *Lawlor v. Flood* [1999] 3 I.R. 107, Murphy J. at p. 142 of his judgment described the nature of the work of a tribunal of Inquiry and its reporting function in the following manner:-

> "It must be remembered that the report of the tribunal whilst it may be critical and highly critical of the conduct of a person or persons who give evidence before it is not determinative of their rights. The report is not even a stage in a process by which such rights are determined. The conclusions of the tribunal will not be evidence either conclusive or prima facie of the facts found by the tribunal."

61. In his judgment Murphy J. placed significant weight upon the fact that such an inquiry did not constitute legal proceedings "whether civil or criminal" against any person. Murphy J. concluded that a tribunal was an investigative body engaged in an enquiry process and for such purpose was required to examine witnesses.

62. In relation to the admissibility of reports of a tribunal as evidence of the truth of their contents the respondents rely upon the decision of Gibson L.J. in the case of *Savings and Investment Bank Limited v. Gascoe Investments (Netherlands) B.V. and Others* [1984] 1 All. E.R. 296 ("SIB"), already referred to above in relation to the prematurity argument.

63. As already stated, an inspector had been appointed under the provisions of ss. 165 and 172 of the Companies Act, 1948 to investigate the affairs and ownership of a company known as St. Perrin. The inspector produced a final report critical of certain aspects of the way that the affairs of St. Perrin had been conducted.

64. The decision in *SIB* is supportive of the respondents' submission that the applicant is not entitled to rely, as evidence of wrongdoing against the respondents, upon the conclusions reached by the Tribunal. The Court in *SIB* roundly rejected the argument made by counsel for the plaintiff in that case that such a report was admissible as to the truth of its contents by reason of the fact that the report was a record compiled by a person under a duty to compile the same, such as would save the content of the report from the rule against hearsay evidence and would permit of its introduction into evidence under s. 4 of the Civil Evidence Act, 1968.

65. Gibson L.J. at p. 307 of his judgment concluded that the inspector's report could not be considered to be a record within the meaning of s. 4 of the Civil Evidence Act, 1968 and in so doing he relied upon the decision of Bingham J. in *.H. v. Schering Chemicals Limited* [1983] 1 All. E.R. 849. In that case Bingham J. described what could be considered to be a record within the meaning of s. 4 of the Civil Evidence Act, 1968 when he stated as follows:-

> "The intention of that section was, I believe to admit in evidence records which a historian would regard as original or primary sources, that is documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts."

66. Gibson J. stated as follows regarding the inspectors report:-

> "To my mind it is obvious that a report by inspectors, containing as it does a selection of evidence put before the inspectors and their comments and conclusions thereon, is not a record in any ordinary sense of the word. It falls short of simply compiling the information supplied to them in the sense that some information will not be included in the report, and it goes beyond such a compilation in that it expresses opinions thereon."

67. The applicant has argued that the findings of the Tribunal should be admitted and submits that there are no absolute rules regarding the admissibility of evidence and that the Court, in general, must carry out a balancing test when deciding whether or not particular evidence is admissible. A number of cases have been sighted in support of this argument. These cases are *O'C v T. C.* (Unreported, High Court, McMahon J., 9th December, 1981), *P.McG v A.F*. (Unreported, High Court, Budd J., 28th January, 2000), *Kennedy v The Law Society of Ireland (No.3)* [2002] 2 I.R. 458 and *Curtin v Dáil Éireann* [2006] 2 I.R. 556. All of these cases focused upon the issue as to whether or not certain evidence was admissible having regard to the circumstances in which such material had come into the possession of the party who wished to rely upon the same. The Court concludes that it cannot engage in the type of balancing test propounded in the above cases which simply are not apposite in the circumstances of the respondents' objection to reliance being placed on the findings of the Tribunal.

68. The Court attaches great weight to the fact that, as has been adverted to by the respondents, there has been almost annual amendment of the Companies Code. Notwithstanding this fact the Oireachtas has not seen fit to include within any such amendment a provision entitling the applicant to rely upon any findings made by a tribunal of inquiry in subsequent civil proceedings. In particular the respondents refer to the substantial powers conferred upon the applicant to obtain information and to search premises in support of his statutory remit. No provision however, has been made for permitting the use of findings contained in a tribunal report in subsequent legal proceedings. Similarly the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 understandably makes no provision for the use of any reports in such proceedings perhaps due to the basis upon which findings can be made by a tribunal and the need to obtain the cooperation of potential witnesses.

69. An example of such a provision was considered by Laffoy J. in *Countyglen plc v. Carway* [1998] 2 I.R. 540, Laffoy J. That case dealt with the reliance of parties in civil litigation upon the report of an inspector appointed pursuant to s.8 of the Companies Act, 1990 to investigate a company known as Countyglen plc. An interim and final report were received by the Court, forwarded to the Minister for Enterprise and Employment and widely published.

70. Section 22 of the Companies Act of 1990 provides as follows:-

> "A document purporting to be a copy of a report of an inspector appointed under the provisions of this Part shall be admissible in any civil Proceedings as evidence –
>
> (a) of the facts set out therein without further proof unless the contrary is shown, and
>
> (b) of the opinion of the inspector in relation to any matter contained in the report."

71. In the statement of claim delivered in the main action the plaintiff in that case pleaded that it would seek to rely on the facts and opinions contained in the interim report and also the final report of the inspector. In response, the defendant brought a motion to determine as a preliminary point of law the proper construction of s. 22 of the Act of 1990.

72. It is noteworthy that at p.545 of that judgment, Laffoy J. noted that counsel for the plaintiff intimated to the Court that the plaintiff did not intend to place any reliance on the opinion of the inspector in relation to any matter and that as a result of this concession she was concerned solely with the proper interpretation of the following portion of s.22:-

> "a copy of a report of an inspector shall be admissible in any civil proceedings as evidence of the facts set out therein without further proof unless the contrary is shown".

73. In her judgment, Laffoy J. held that on a true construction of s.22 the interim report and the final report were admissible in the civil proceedings,

> "to give all findings of primary fact clearly expressed as such therein the status of proven fact unless disproved."

74. Whilst the applicant may be correct that the hearsay rule and its exceptions are not set in stone, the Court is driven to conclude that if the legislature intended that findings made by tribunals of inquiry could be admitted as evidence of the truth of the facts supporting those findings in subsequent proceedings, either civil or criminal, or that any evidential weight could be attached thereto, that the legislature would have so provided.

75. One of the most recent decision of the courts in relation to the possibility of findings of a tribunal being admissible as evidence in subsequent civil proceedings is the decision of Gilligan J. in *Comcast International Holdings Inc. & Ors v Minister for Public Enterprise & Ors* [2007] I.E.H.C. 297

76. In that case the defendant brought a motion to dismiss the plaintiff's claim for want of prosecution due to delay. In response the plaintiff's solicitor, in seeking to justify the delay complained of, averred that the Report of the Moriarty Tribunal, when finally available, would allow the plaintiff to particularise in its statement of claim more fully the extent of the defendant's alleged wrongdoing.

77. Gilligan J. in dismissing the plaintiff's claim on the basis of delay stated as follows:-

> "The inquisitorial inquiry before the Moriarty Tribunal can have no bearing on the outcome of these proceedings in the High Court and accordingly the several years of inquiry, the taking of evidence from a large numbers of interested parties, the consideration of the voluminous documentation that necessarily must be involved and the final report are not relevant and play no role in the context of these proceedings which are adversarial before a court of law, whereas the Moriarty Tribunal involves in essence an expression of opinion in relation to matters considered by the Chairman of the Tribunal."

78. The learned trial judge further adopted the reasoning of Murphy J. in *Lawlor v Flood* [1999] 3 I.R. 107 as already referred to in this judgment.

79. The position adopted by the Irish Courts is consistent with established case law in other common law jurisdictions. The respondents rely upon the decision of the House of Lords in *Three Rivers District Council & Ors. v. Governor & Company of the Bank of England* [2003] 2 A.C. 1. That case involved complicated legal proceedings following the collapse of the Bank of Credit & Commerce International ("BCCI") with huge financial losses in 1991. An official report following the collapse showed that the Bank of England, the party responsible for supervising banking activities in the U.K., had been unaware that BCCI was heading for collapse. The plaintiffs and many depositors sued the defendant on the basis that the Bank was liable to them for misfeasance in public office in that it had either wrongly granted a licence to BCCI or had failed to revoke their licence when they suspected BCCI might collapse.

80. A number of the preliminary legal issues were considered at length both by the Court of Appeal and the House of Lords. One of the matters with which both courts were concerned was the potential ability of the plaintiff to prove the requirements of the tort of misfeasance in public office which had two essential requirements. The first requirement was that there had to be an unlawful act or omission made by the offending party in the exercise by them of their power as a public officer. Secondly, it was necessary to prove that such an officer abused the power conferred upon them and that the act or omission had to have been done deliberately and in bad faith.

81. Amongst the considerations raised for the Court's attention was the potential realistic possibility of the plaintiffs putting forward an arguable case having regard to the requirements of the tort of misfeasance in public office.

82. The Court of Appeal on the basis of the evidence available to it and having regard to the statement of claim decided that there was no realistic possibility of the plaintiffs being in a position to put forward an arguable case.

83. The plaintiffs appealed to the House of Lords who had to deal with the potential admissibility of findings in what was described as the "Bingham report". Bingham L.J. had been invited to conduct an inquiry into the supervision of BCCI and had been asked to consider whether the action taken by the U.K. authorities was timely and to make recommendations. His report was announced in July, 1991 and submitted to the Chancellor of the Exchequer and The Governor of the Bank in July, 1992. Amongst his terms of reference was the following issue:-

> "What did the United Kingdom authorities know about BCCI at the relevant times? Should they have known more? And should they have acted differently?"

84. The House of Lords referred to the report as a masterly and eminently readable account of the events prior to the Bank's closure in 1991. It appears that Bingham L.J. took evidence from a large number of witnesses and he had access to many documents. In his report he advised that he had relied heavily on contemporary notes and minutes of meetings and conversations he had with the Bank and Price Waterhouse. His report was stated to contain numerous findings of fact and expressions of opinion relevant to the questions in his terms of reference.

85. In considering whether the plaintiffs should be permitted to amend their statement of claim, Hope L.J. pointed to the fact that the statement of claim had been based on material taken from the Bingham report. He also concluded that he could assume that the narrative in the report would be capable of being established by evidence once the claimants had access to relevant documents. Hope L.J. went on to consider what limitations there were upon the use of this document and in the course of his judgment stated as follows at paras. 31 – 32:-

> "31 The first point that has to be borne in mind is that neither the report itself nor any of its findings or conclusions will be admissible at any trial in this case."
>
> "32 It can, as I have said, be assumed that if the claim is not struck out the claimants will in due course have access to the evidence which provides the source material for that narrative, and that evidence will be capable of being led by them at the trial. But, as Bingham L.J.'s findings and conclusions based on that narrative are inadmissible, they must be held to be incapable either of being led in evidence at the trial or of being used by either side in any other way in support of the competing arguments."

86. Hope L.J. went on to note that the Bingham report was the result of an investigation that lacked the benefit of statutory powers and was conducted behind closed doors. The claimants were not present nor were they represented. Hope. L.J. also observed that the Bingham report did not benefit from the provisions of s. 441 of the Companies Act, 1985 (the equivalent of the s.22 inspector's report in this jurisdiction).

87. The decision in *Three Rivers District Counsel and Others* supports the respondents' contention that in the absence of a statutory provision which allows the Court to rely upon such findings that one should not infer any departure from the normal hearsay rules.

88. The applicant asks the Court to imply that there is an exception to the hearsay rule in the within proceedings notwithstanding the lack of a statutory provision to this effect and in that regard reliance is placed upon the decision in *Re. Rex Williams Leisure plc* [1994] Ch. 1. In that case, Nicholls V.C. held that it would be absurd to expect the Secretary of State to construct a case for the disqualification of directors based exclusively on evidence within his personal knowledge. In addition, he stated that there were sound reasons of procedure and economy that justified the Secretary of State's reliance upon hearsay evidence. In reply the respondents contend that the statutory scheme for investigation of a company's affairs under the Companies Act, 1985 and the Company Directors Disqualification Act, 1986 in the U.K. displace the normal rule relating to hearsay evidence.

89. The *Re. Rex Williams Leisure plc* case involved an application by the Secretary of State for Trade & Industry to have company directors disqualified. Two issues were of importance; the first being whether a respondent to such an application had to file his evidence in opposition before the hearing or whether he could wait until then and give or call oral evidence. The other question was whether the Secretary of State as applicant could rely upon statements taken from third parties in the course of an official investigation into the affairs of the company.

90. Section 432(2) of the Companies Act, 1985 empowers the Secretary of State to appoint inspectors to investigate the affairs of a company and report if it appears to him that there are circumstances suggesting various kinds of misconduct, including misfeasance, by the persons concerned in its management.

91. Section 447 authorises an officer to require a company to produce any documents which he may specify and to provide him with

explanations regarding the same. It is also provided by this section that a statement made by a person in compliance with such a requirement may be used in evidence against him. The person who conducts an investigation under s. 447 is simply gathering information and does not write a report expressing an opinion unlike an inspector appointed under ss. 431 or 432.

92. The Secretary of State can, from information or documents obtained under s. 447, decide that it is expedient and in the public interest that a disqualification order should be made and may apply to court for an order to be made against that person. The procedure under s. 8 of the Company Directors Disqualification Act, 1986, is by way of application to the High Court by originating summons and at the time the summons is issued there is to be filed in court evidence in support of the application. This is to be by way of affidavit except where the applicant is the official receiver in which case it may be in the form of a written report (with or without affidavits by other persons) which shall be treated as if it had been verified on affidavit by him and shall be prima facie evidence of any matters contained in it.

93. The Secretary of State applied for a disqualification order. Three affidavits were filed. Included in these exhibits were statements made to him by third parties. The Secretary for State, under English law, was permitted to take into account, in deciding whether it was expedient or in the public interest to bring disqualification proceedings, material which had come to his attention under the inspection and investigation powers of Part XIV of the Companies Act, 1985 and in particular s. 447.

94. The respondents argue that the *Re. Rex Williams Leisure plc.* decision involved a statute specific exception to the hearsay rule and seek to distinguish that decision on the basis that the applicant herein is not required by any statutory provision to take into account or have regard to reports of tribunals, notices from the Revenue Commissioners under s. 18 or other irregularities that may have come to his attention for the purposes of deciding to institute proceedings. In this respect the Court agrees that the facts in the *Re. Rex Williams Leisure plc.* decision are not comparable to the facts in the present case due to the different statutory regime under consideration in each case.

95. In the circumstances in the present proceedings the applicant is clearly entitled to receive all information which may be relevant to the discharge by him of his functions under the Company Law Enforcement Act, 2001. In this respect he may receive and consider the report of any tribunal of inquiry or information furnished to him by the Revenue Commissioners. However, there is no statutory mandate which would bring any of the documents concerned into a category to which the normal rules of evidence would not apply.

96. Following the line of the aforementioned authorities, it is clear that the applicant may well decide to use the Tribunal report as a source to assist him in finding admissible evidence to put before the Court in these proceedings. What the applicant is not entitled to do is to produce to this Court the report of the Tribunal as proof of any facts allegedly found therein. Neither can the Court take into account the opinion of the Chairperson of the Tribunal regarding any wrongdoing on the part of the respondents for the purposes of these s. 160 proceedings. Further, the Court is not entitled to admit the findings of the tribunal into evidence as corroboration of any wrongdoing allegedly put before the Court by Mr. Lacy from his own investigations. Finally, the Court cannot attach any weight to any findings of the Tribunal when reaching its conclusions in this action.

B. Revenue Documentation.

97. The respondents seek to exclude from the applicant's affidavit and exhibits two letters addressed to the Office of the Director of Corporate Enforcement from the Revenue Commissioners dated the 26th September, 2003, and the 3rd,October, 2003. Similarly, the respondents seek to exclude a document which is stamped "confidential" and is described as a disclosure of information pursuant to s. 18 of the Company Law Enforcement Act, 2001. These documents are exhibited at Exhibit "DM6" to Mr. Madden's affidavit of the 8th August, 2006, and are purportedly relied upon by the applicant as evidence in the proceedings by inclusion at para.13 of that affidavit.

98. The letter dated the 26th September, 2003, is from Mr. Aidan Nolan, Principal Officer, in the Revenue Commissioners addressed to the Commissioner of Corporate Enforcement. That letter advises the Commissioner that from his examination of "the documentation supplied by agents for the Directors and the company" that he formed the view that offences under the Companies Acts may have been committed by Bovale.

99. The second letter dated the 3rd October, 2003, is from Mr. Laurence Murtagh, Principal Officer in the Revenue Commissioners to Mr. Madden and encloses a copy submission received from the Inspector of Taxes regarding Bovale in accordance with s. 18 of the Company Law Enforcement Act, 2001.

100. The final document is the disclosure of information. This is an eight page document which reaches a number of adverse conclusions regarding the books and records of Bovale based upon an examination of the seven categories of documents set out therein and which cover the period from the 1st January, 1989, to the 30th June, 1999, as appears from p. 8 of that report.

101. For the purposes of determining whether the documentation exhibited at "DM6" to Mr. Madden's affidavit offends the rule against hearsay evidence, and/or should be excluded as inadmissible evidence of opinion, it is important to establish precisely the basis upon which the documents concerned are put before the Court.

102. The statutory notice served by the applicant on the respondents pursuant to s.160 (7) of the Companies Act, 1990 prior to the issue of the proceedings is relevant in this regard. This notice is exhibited at exhibit "DM11" to the affidavit of Mr. Madden. At para. 3 of that notice the applicant advised the respondents as follows:-

> "3. The Director intends that his application will have regard in particular to findings contained in the second and third interim reports of the Tribunal of Inquiry into certain planning matters and payments (hereinafter "the Tribunal") established on the 4th of November 1997, the opinion of the company's auditor that proper books of account had not been kept at the company in respect of the financial years ended 30th of June 1997 and 30th of June 1998, the information disclosed to the Director by the Revenue Commissioners, the recently announced tax settlement of over €22,000,000.00 involving the company and its directors and to the facts and opinions contained in two recent reports prepared for the Director by Price Waterhouse Coopers (hereinafter "P.W.C.") in respect of the company's financial years ended the 30th of June 1997 and the 30th of June 1998."

103. At para. 4 of the same notice the applicant advised the respondents that the grounds for his application were set out in the first schedule to the notice wherein at para. 5 the respondents were notified as follows:-

> "5. In 2003, the Director was informed pursuant to Section 18 of the Company Law Enforcement Act 2001 that an Officer of the Revenue Commissioners had formed an opinion that information in his possession may relate to the commission of an offence under the Companies Act. Relevant documents were provided to the Director for examination. It is now a

matter of public record that a settlement of over €22,000,000.00 involving the company and the directors has been made with the Revenue Commissioners in respect of understated income tax, corporation tax, V.A.T. and P.A.Y.E./P.R.S.I. over a number of years".

104. In the same annexe, at para. 15, the applicant advised the respondents as follows:-

> "15. In summary therefore, the indicated misconduct represents very material breaches of law and of the duties of company directors at common law. It is also clear that the established period of misconduct extended from 1988 to 2000 inclusive. In consequence, it is the Director's opinion that by the directors' actions and omissions over a prolonged period, their conduct makes them unfit to be concerned in the management of a company or an industrial and provident society".

105. Paragraph 14 and paras. 20 – 39 inclusive of the affidavit of Mr. Lacy, sworn on the 30th June, 2006, demonstrate that PWC confined their own expert conclusions to the financial years ending on the 30th June, 1997, and the 30th June, 1998. However, Mr. Madden in his affidavit dated the 8th August, 2006, at para. 8 contends that these proceedings "deal primarily with the conduct of the respondents in the period 1988 – 2000 inclusive".

106. It is clear to the Court from para. 13 of the affidavit of Mr. Madden sworn on the 8th August, 2006, that insofar as he refers to the documentation emanating from the Revenue Commissioners set forth above that he does so for the purposes of asking the Court to take into account the damaging conclusions of Mr. Nolan when deciding upon whether or not the applicant should be granted the relief sought in these proceedings and further for the purposes of the Court's consideration of any sanction that it may see fit to impose upon the respondents covering a period much more extensive than that investigated by PWC. The Court is therefore being asked to accept as truth the content of the prejudicial material set out in those documents. Mr. Madden gives no assurance that Mr. Nolan is prepared to swear an affidavit in support of any adverse conclusions he has reached in relation to the respondents' behaviour as directors if the proceedings are to be disposed of on affidavit. Neither has Mr. Madden given any assurance that Mr. Nolan will be called as a witness at the trial of the action if the hearing is to be determined on oral evidence so that the Court may exercise its own judgment as to the validity of his conclusions. Further, the respondents are to be denied any opportunity of challenging the said opinion irrespective of whether the proceedings are heard on affidavit or on oral evidence or perhaps a hybrid of the two.

107. Section 18 of the Company Law Enforcement Act, 2001 provides a legal mechanism whereby the Revenue Commissioners may relay to the Director of Corporate Enforcement information regarding potential corporate wrongdoing which it believes the Director may have a legitimate interest in receiving. Thereafter, it is up to the Director to decide whether he wishes to investigate the matters referred to him further for the purposes of pursuing his statutory remit. There is no supplemental provision in the legislation which affords any particular evidential status to information so conveyed to the Director by the Revenue Commissioners nor is there any provision enabling such information to be introduced into evidence as *prima facie* proof of its contents. If it had been the intention of the legislature to permit information conveyed to the Director pursuant to s. 18 to be admitted as prima facie proof of the truth thereof a provision to this effect could have been included in either the Company Law Enforcement Act, 2001 or in any one of the many amendments to the Companies Acts.

108. In such circumstances the Court concludes that it would be a radical departure from the rules of evidence to permit the Director to introduce prejudicial hearsay evidence of wrongdoing against the respondents in circumstances where the author of the opinion has not sworn to the truth of that opinion and is consequently not in a position to be challenged in relation to the same.

109. As matters stand, if the applicant chooses to do so he may ask Mr. Nolan to swear an affidavit supporting his opinion in which case the respondents will have to deal with such alleged wrongdoing on affidavit. Alternatively, if the proceedings are referred to a plenary hearing the Director may choose to call Mr. Nolan to advise the Court upon the result of his investigations either in support of the opinions of PWC or for such other purpose as may appear valuable from the applicant's perspective.

110. Where proceedings are designed, such as the present s. 160 application, to be tried on affidavit alone this Court concludes that in the absence of some enabling statutory provisions or well established exception to the hearsay rule that the rules of evidence must be strictly applied particularly taking into account the provisions of O.40, r. 4 of the Rules of the Superior Courts. The affidavit supporting an application under s. 160 of the Companies Act, 1990 must be afforded the status of affidavits destined to determine the final rights of the parties. Even though the proceedings may ultimately be referred to plenary hearing the Court does not accept that it can treat the affidavits delivered on behalf of the applicant as being akin to those which might be used to support an interlocutory application such as would permit the deponents to rely upon hearsay evidence.

H4 Notice.

111. A notice pursuant to s. 194 of the Companies Act, 1990 was on the face of it signed by Mr. O'Toole of McGrath & Co., Chartered Accountants, on the 28th July, 2000. This notice, which advised that in the opinion of the company's auditors Bovale had failed to keep proper books of account, was filed in the company's office on the 28th July, 2000. As a result of its investigations PWC conclude that this notice relates to the books of Bovale for the years ended the 30th June, 1997, and the 30th June, 1998.

112. The nature of the statutory duty under s. 194 of the 1990 Act is such as to place a mandatory statutory obligation on the auditor, in the event of him forming a view that there are irregularities with the way in which the company's books are being kept, to file a notice destined to warn those who may be dealing with the company or intending to do business with it, of this fact.

113. Paragraph 11 of Mr. Madden's affidavit sets out the basis for seeking to introduce the H4 document into evidence. Mr. Madden states that he agrees with the opinion of the auditor that proper books were not kept by the company in respect of the financial years ending June, 1997 and June, 1998 thus making it clear that he wishes the Court to act upon the opinion of the auditor.

114. The question therefore arises whether the rule against hearsay evidence precludes the applicant from introducing the auditors notice as evidence of the auditors opinion that proper books were not kept by Bovale over the relevant period.

115. The Court must firstly consider the status of the auditor at the time he lodged the H4 notice in compliance with his obligations under s. 194 of the 1990 Act. If it be the case that the auditor when lodging the H4 Notice can be deemed to have been a servant or agent of Bovale then the issue of hearsay does not arise. Keane, Company Law, 4th Ed. (Tottel, Sussex, 2007) at para. 30.152 advises that an auditor appointed under s. 160 of the Companies Act, 1963 may be regarded as an agent of the company when carrying out his duties under the Acts, but that he is not an agent for other purposes. In these circumstances the Court concludes that it should not require the applicant to remove references to this H4 notice from Mr. Madden's affidavit.

116. Even if the Court is in error in concluding that the auditor was acting as an agent of the company when fulfilling his statutory duty under s.160, no significant prejudice appears to arise from permitting references to the H4 notice to remain in the affidavits

given that the reports of PWC upon which these proceedings are based contend for manifest wrongdoing in terms of the record keeping on the part of Bovale for the same years. Accordingly it is highly likely that the respondents when delivering their replying affidavits in these proceeding will in any event be addressing the assertion, irrespective of its origin, that Bovale did not keep adequate books of account for the years ending 30th June, 1997, and 30th June, 1998.

D. Memoranda.

Two handwritten memoranda of Mr. O'Toole.
117. The respondents object to the admissibility of two handwritten memoranda which are exhibited by Mr. Lacy at paras. 17 and 19 of his affidavit. These memoranda were apparently written by Mr. O'Toole as a result of a meeting with the respondents on 26th July, 2000, regarding the finalisation of Bovale's accounts for the year ended 30th June, 1997. The memoranda set out concerns which Mr. O'Toole appears to have had regarding the books of the company following upon the examination of the books of Bovale for the purposes of finalisation the aforementioned accounts.

118. It is undoubtedly the case that these memoranda are introduced by Mr. Lacy in his affidavit to fortify the opinion reached by PWC regarding the accounts of Bovale for the years ended 30th June, 1997 and 30th June 1998. The memoranda set out Mr. O'Toole's opinion that proper books were not kept by Bovale and he even goes so far as to entitle the second memoranda "materiality + possible fraud".

119. The respondents object to Mr. Lacy introducing these documents and they state that if the applicant wishes to rely upon the opinion of Mr. O'Toole regarding the bookkeeping of the respondents, that they must call Mr. O'Toole to give evidence in that regard. Further, insofar as the documents are relied upon to support a conversation allegedly had between Mr. O'Toole and the respondents it is also stated that this evidence is hearsay and is consequently inadmissible.

120. The Court sees no reason why the applicant should be in a position to produce in support of his own case two highly prejudicial memoranda as being in some way corroborative of Mr. Lacy's own opinion without the need for Mr. O'Toole to give evidence. The respondents ought to be entitled to cross examine Mr. O'Toole as to whether the matters stated in his memoranda accurately reflect the meeting on 26th July, 2000, and to challenge, if necessary, the validity of any conclusions therein noted.

121. In the foregoing circumstances the Court does not believe it should depart from the normal rules of evidence. If the applicant wishes he can ask Mr. O'Toole to swear a grounding affidavit setting out what occurred between himself and the respondents on 26th July, 2000, and also stating his opinion on the appropriateness or otherwise of the books of account maintained by Bovale over the relevant period. If Mr. O'Toole is reluctant to swear such an affidavit, the applicant may seek to remit this action to plenary hearing, furnish particulars of the allegations upon which he wishes to rely and then seek to subpoena Mr. O'Toole to prove the contents of the said memoranda.

122. Finally, in relation to all of the documentation to which the respondents object, the applicant asserts that he can, by utilising the provisions of s. 370 of the Companies Enforcement Act, 1963 (as amended by s. 62 of the Company Law Enforcement Act 2001) and/or s. 110A of the Company Law Enforcement Act 2001 (as inserted by s. 52 of the Companies (Auditing and Accounting) Act 2003 and as amended by s. 74 of Investment Funds, Companies and Miscellaneous Provisions Act 2005) render otherwise inadmissible documents admissible.

123. For the purpose of considering this argument I have not taken into account the fact that, notwithstanding the significant passage of time that has occurred since the institution of the respondents' motion, no such certification has been made by the applicant. The Court sees no validity in the applicant's aforementioned submission. It is clear to the Court that the certification procedure provided for in the above mentioned legislation is simply a tool to enable the applicant introduce, where appropriate, copy documents rather than originals. If the original document is inadmissible it simply cannot be the case that through certification and the production of a copy that the information otherwise excluded becomes admissible. In this respect the statutory provisions themselves provide that a copy *"shall in all legal proceedings be admissible in evidence as of equal validity with the original"* as per s.370 of the Companies Act, 1963. It is clear that the use of the words "as of equal validity" means that certification does not improve the status or the admissibility of the original document, it merely allows the copy to be produced. If the applicant was correct in their submission as to the interpretation and effect of s. 370 of the Companies Act, 1963, documents could be produced in evidence almost without limitation and in complete disregard of the rules of evidence.

5. Impermissible delegation to PWC.
124. Much of the evidence which it is sought to adduce against the respondents in these proceedings is set out in the affidavit of Mr. Lacy, a partner in PWC, which firm was retained by the applicant to conduct an examination of Bovale's books and which investigations, when completed, were the subject matter of the two extensive reports referred to earlier in this judgment.

125. The respondents allege that the evidence which the applicant now wishes to put before the Court and which is to be found in the reports of PWC, is inadmissible in circumstances where the documentation which came into the possession of PWC for the purposes of permitting it to prepare its reports was not lawfully in its possession. The basis upon which it is contended that such material was not lawfully in the possession of PWC is based upon the statutory provisions under the Company Law Enforcement Act, 2001 and in particular the following assertions namely:-

(a) That one of the functions of the Director is to investigate instances of suspected offences under the Companies Acts, as provided for in s.12(1)(c) of Company Law Enforcement Act, 2001.

(b) That the Director may perform his functions through an officer as provided for in s. 12(6) of the Company Law Enforcement Act, 2001.

(c) That the delegation must be in writing as per s. 13(1) of the Company Law Enforcement Act, 2001.

(d) That the exercise of the power delegated must be in accordance with the instrument of delegation as per s. 13(2) of the 2001 Act.

(e) That the contract documentation exchanged between PWC and the Director does not include any instrument of delegation and that therefore there was no lawful basis for the transfer of any documentation to PWC and that its reports are therefore inadmissible.

(f) That PWC is an unincorporated body which amounts to a "person" who can be an officer of the Director within the

meaning of s. 3(1) (c) of the 2001 Act. However, it is contended that it is the partners of a firm who comprise an unincorporated body and since it is likely that PWC engaged a number of the firm's employees in the preparation of its report that they have acted unlawfully and that the reports are tainted by the illegality.

126. The Court rejects all of the respondents' submissions in relation to the admissibility of the reports of PWC based on the assertion that the delegation by the Director of some of his functions to PWC was impermissible and unlawful.

127. Fundamental to the Courts opinion in this respect is the difference in the role played by the Director when performing one of his "functions" as distinct from the exercise by him of one of the "powers" specifically ascribed to him in legislation.

128. The Director has a wide range of functions and these are set out at s. 12 of the 2001 Act. The functions include at s. 12(1) (c) the right to investigate instances of suspected offences under the Companies Acts.

129. At s. 3 of the 2001 Act the word "functions" is stated to include "powers and duties". The Director may carry out many of these functions without the need to exercise any specific powers. However, for the purposes of carrying out his functions the Director has been given significant powers. An example of one such power is that provided for at s. 29 of the 2001 Act, which repealed and substituted s. 19 of the Companies Act, 1990. Under that section the Director may exercise his power to require the production of books or documents which he is entitled to copy and he has further been given the power to oblige certain categories of persons to provide explanations or make statements referable to the said documents which may even be utilised in the course of certain types of legal proceedings.

130. Every time the Director carries out one of his functions within the meaning of s. 12 he is not necessarily exercising a "power".

131. The Director is entitled to carry out his functions through an officer and this is provided for in s. 12(6) which provides that:-

> "The Director may perform such of his or her functions as he or she thinks fit through or by an officer of the Director and in the performance of those functions the officer shall be subject to the directions of the Director only."

132. In the instant case it is clear that the Director has chosen to perform one of his functions, namely his investigation of suspected offences that may have occurred in Bovale by delegating this task to PWC as his officer. "Officer of the Director" is defined in s. 3(1) of the Company Law Enforcement Act, 2001 as including:

> "(c) A person employed by the Minister or the Director under a contract for service or otherwise, to assist the Director in carrying out functions of the Director under the Companies Acts or any other Act."

133. In the instant case the Director has employed PWC under a contract in writing to assist him in carrying out his functions. The definition section permits the Director to ask PWC to assist him in carrying out his functions without such a contract as the same is not mandatory and may be carried out "otherwise" than under a contract for services.

134. The respondents, in the opinion of this Court, mistakenly confuse the right of the Director to delegate any specific power under s. 13 with his right to obtain assistance in the carrying out of his function through an officer under s. 12(6). Section 13(1) provides as follows:-

> "(1) Without prejudice to the generality of section 12(6), the Director may, in writing, delegate to an officer of the Director any of the Director's powers under this or any other Act, except this power of delegation.
>
> (2) A power delegated under subsection (1) shall not be exercised by the delegate except in accordance with the instrument of delegation.
>
> (3) A delegate shall, on request by a person affected by the exercise of a power delegated to him or her, produce the instrument of delegation under this section, or a copy of the instrument, for inspection.

135. The Court concludes that the language of s. 13 makes it clear that the Director cannot casually delegate to third parties the very significant powers which have been afforded to him under the Company Law Enforcement Act, 2001. As stated above, the powers of the Director are very significant and where he wishes to exercise that legal right through a third party he must do so formally and in writing. The person who is the subject mater of the exercise of such powers is clearly entitled to satisfy themselves that the power which is being utilised against them has been lawfully delegated. Hence, if a company is asked by an unknown individual to hand over sensitive company documentation they are entitled to satisfy themselves that such a request is being validly made so that they can protect their own position.

136. The Court believes that it would be entirely illogical to suggest that every time the Director carried out one of his functions, which are extraordinarily wide ranging, that he must physically prepare an instrument of delegation as is contended for by the respondents. The Court sees no reason, having regard to the provisions of s. 12 and s. 3 of the 2001 Act, to believe that the evidence put forward by the Director through the reports of PWC is inadmissible by reason of any want of compliance with s. 13 of the 2001 Act.

137. The respondents allege that the reports of PWC relied upon by the Director are tainted with illegality because, as a matter of probability, the conclusions reached in the reports are based upon investigations carried out not only by the partners of PWC but by more junior staff. The respondents state that "an officer of the Director" has been defined as "a person". The respondents rely upon the s.18(c) of the Interpretation Act, 2005 which provides that:-

> "Person. 'Person' shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of 'person' shall be read accordingly;"

138. It is accepted by the respondents that PWC is an unincorporated body of persons but they submit that the unincorporated body is confined to the firm's partners thus rendering it unlawful for any other employees of the partnership to have participated in the preparation of the report.

139. This Court concludes that PWC, being an unincorporated body of persons, falls within the definition of an "officer of the Director" for the purposes of s. 3 of the Company Law Enforcement Act, 2001. To suggest that, in appointing an officer to assist him in his

functions, the Director must identify by name not only the firm who he wishes to appoint, but also the name of each employee who may carry out the investigative work on his behalf, is in the opinion of the Court untenable. The respondents have produced no legal authorities in support of this submission and neither have they produced any evidence as to the involvement of non - partners in the investigations undertaken. There is no case law casting any doubt on the validity of such a scenario and accordingly this submission on the part of the respondents is rejected.

6. The District Court production order.
140. The interim report of the Tribunal was published on the 26th September, 2002. Shortly following the publication of the Tribunal's report, on the 22nd November, 2002, an application was made to the District Court for the issue of a production order pursuant to s. 63 of the Criminal Justice Act, 1994. The production order was granted on the basis that there were reasonable grounds for suspecting that Caroline Bailey, Thomas Bailey and Michael Bailey had:-

> "(b) Committed an offence contrary to Section 31 of the Criminal Justice Act, 1994, as amended or;
>
> (d) Benefited from an offence in respect of which a Confiscation Order might be made under Section 9 of the Criminal Justice Act, 1994."

141. Whilst no specific relief is set out in the notice of motion, the respondents in the course of their application have asked the Court to decide whether or not the production order obtained on the 22nd of November, 2002, is valid. The respondents' position is that if the Court determines that the production order of the District Court dated the 22nd November, 2002, is invalid that they will contend that the applicant must prove that he had an alternative valid source for the use by him of all of the documentation referred to in the two reports of PWC exhibited in the affidavit of Mr. Lacy.

142. The Court has not been asked to decide whether or not PWC has actually utilised the documentation which came into their possession on foot of the production order for the purposes of preparing their reports. The applicant's stated position is that all of the documentation relied upon in these proceedings has been lawfully obtained and is validly before the Court. Hence, the only matter to be determined by the Court on this application is whether or not the production order was validly sought in light of the provisions of s. 63 of the Criminal Justice Act, 1994.

Chronology:
143. The respondents' assertion regarding the invalidity of the production order emerges from the following chronology which is ascertainable from the affidavits and exhibits to this application namely:-

> 1. The second interim report of the Tribunal was published on the 26th September, 2002. A production order was made by the District Court on the 22nd November, 2002, at the applicant's request.
>
> 2. In January, 2004 the applicant engaged PWC to undertake an initial review of what is described in Mr. Madden's affidavit at para.15 as the "available documents".
>
> 3. In August, 2004 PWC was asked to conduct a more specific examination of the company's books. This investigation was ultimately limited to the financial years ending the 30th June, 1997, and 30th June, 1998.
>
> 4. The applicant in the proceedings states that reliance has been placed not upon documentation obtained on foot of the production order but on foot of information and documentation made available to him consequent upon a requirement issued on behalf of the Director on the 17th October, 2005, under s.19 (3)(a) of the Companies Act, 1990 (as substituted by s.29 of the Company Law Enforcement Act, 2001).
>
> 5. The requirement issued by the Director on the 17th October, 2005, under s. 19(3)(a) of the Companies Act, 1990, as amended, was complied with on the 1st December, 2005, as a result of which copy returned paid cheques and other documents were forwarded by the Bank of Ireland, Montrose, Stillorgan, County Dublin to PWC.
>
> 6. On the 20th June, 2006, the applicant received two completed reports from P.W.C.

144. It is the aforementioned chronology that leads Mr. Thomas Kevin Smith at para. 14 of his second affidavit of the 23rd February, 2007, to assert on the respondents' behalf that the decision of the applicant to issue the requirement on the 17th October, 2005, was:

> "inextricably linked to his knowledge of the documentation obtained pursuant to Section 63 of the Criminal Justice Act, 1994".

145. He also asserts at para. 13 that:

> "it is evident that the documentation obtained pursuant to Section 63 was furnished to PWC and must, therefore, have been taken into account by them for the purposes of compiling their reports which is, I say and believe, a purpose for which the documentation could not have been obtained or used."

146. The respondents make an assertion that because of the aforementioned chronology, PWC must have taken into account documentation obtained pursuant to the s. 63 production order when compiling the reports for the purposes of these proceedings. The respondents boldly assert that the applicant invoked his powers under s. 19(3)(a) of the Companies Act, 1990, as amended, by reason of his knowledge that the documentation concerned had initially been obtained on foot of an invalid production order and would thereby be inadmissible in any subsequent proceedings.

147. Mr. Smith has called into question the truth of the assertion made by the applicant that the information relied upon by PWC for the s. 160 proceedings comprised copy returned cheques which were lawfully obtained from Bank of Ireland, Montrose, Stillorgan, County Dublin by letter of the 1st December, 2005, on foot of a requirement issued on behalf of the applicant on the 17th October, 2005, under s.19(3) (a) of the Companies Act, 1990 (as substituted by s. 29 of the Company Law Enforcement Act, 2001).

148. Whilst I have been strongly urged by the applicant not to consider the issue of the validity of the production order, the parties in their affidavits and submissions have dealt extensively with this issue. Further, at the commencement of the respondents' motion the Court heard lengthy legal submissions as to whether or not the applicant should be entitled to file a supplemental affidavit dealing with the issue of the validity of the production order. Thereafter the dispute regarding the admissibility of the applicant's supplemental

affidavit was resolved by an accommodation between the parties whereby it was agreed that if the Court decided to determine the validity of the production order that the Court should not embark upon a consideration of the consequences of such a finding for the proceedings and that this issue would be deferred to the full hearing of the proceedings.

149. Having regard to what has been stated above, the Court sees no reason for not determining the issue of the validity of the production order given that the parties may benefit from a ruling at this juncture. The respondents wish to proceed to trial knowing whether or not the s. 63 production order is valid or not and I believe that it is in the applicant's interest to know the Court's ruling on this issue prior to proceeding further with this litigation

150. A further reason for acceding to the respondents' request to determine whether or not the production order made by the District Court on the 22nd November, 2002, is valid is that counsel on behalf of the applicant advised the Court on questioning that if the Court were to apply the reasoning of Clarke J. in the case of *Dylan Creaven Silicone Technologies (Europe) Limited and Bradenville Holdings Limited & Anor. v. District Judge Patrick Clyne and The Minister for Justice, Equality & Law Reform* [2006] I.E.H.C. 290 to the facts of the present case that it would appear the production order must be invalid.

151. Section 63 of the Criminal Justice Act, 1994 provides as follows:-

> "S. 63(1) A member of the Garda Síochána may, for the purpose of an investigation into drug trafficking or an offence under section 31 of this Act or an investigation into whether a person has benefited from drug trafficking or an offence in respect of which a confiscation order might be made under section 9 of this Act, apply to a judge of the District Court for an order under subsection (2) of this section in relation to any particular material or material of a particular description.
>
> (2) If on such an application being made the judge is satisfied that the conditions in subsection (4) of this section are fulfilled, he may order that the person who appears to him to be in possession of the material to which the application relates shall –
>
> (a) produce it to a member of the Garda Síochána for him to take away, or
>
> (b) give the member access to it, within such period as the order may specify.
>
> (4) The conditions referred to in subsection (2) of this section are -
>
> (a) that there are reasonable grounds for suspecting that a specified person has carried on drug trafficking or has committed an offence under section 31 of this Act or has benefited from drug trafficking or from an offence in respect of which a confiscation order might be made under section 9 of this Act.
>
> (b) that there are reasonable grounds for suspecting that the material to which the application relates -
>
> (i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, and
>
> (ii) does not consist of or include items subject to legal privilege,
>
> and
>
> (c) that there are reasonable grounds for believing that it is in the public interest, having regard -
>
> (i) to the benefit likely to accrue to the investigation if the material is obtained, and
>
> (ii) to the circumstances under which the person in possession of material holds it,
>
> that the material should be produced or that access to it should be given."

152. The production order dated the 22nd November, 2002, was made following upon an information sworn by Detective Sergeant Denis O'Sullivan, a member of An Garda Síochána attached to the Office of The Director of Corporate Enforcement. This information is exhibited at exhibit "TKS1" to the affidavit of Thomas Kevin Smith. In that information Detective Sergeant Denis O'Sullivan stated that he was investigating a number of persons including the respondents. It is clear that the member of the Garda Síochána must be investigating an offence under s. 31 of the Criminal Justice Act, 1994 or alternatively an offence under s. 9 of the same Act.

153. It is not necessary to set out the entire provisions of s. 31 or s. 9 of the Criminal Justice Act, 1994. It is sufficient for the purposes of this judgment to record that s. 31 of the Criminal Justice Act, 1994 effectively deals with the offence of what is commonly described as money laundering consequent upon either drug trafficking or other criminal activity. Section 9 of the Criminal Justice Act, 1994permits the court to make confiscation orders consequent upon a conviction for particular categories of offence.

154. At para. (b) on p. 3 of the information, Detective Sergeant Denis O'Sullivan stated that it was his belief and suspicion that the material sought would provide primary evidence of the crime of fraudulent trading contrary to s. 297 (1) of the Companies Act, 1963, (as substituted by s.137 of the Companies Act, 1990). It is further clear from p.2 of the information that Detective Sergeant Denis O'Sullivan wished to investigate whether or not Bovale had kept proper books of account, he having been made aware of the statutory notice filed in the Companies Office by the auditor to Bovale on the 28th of July, 2000, pursuant to his obligations under s. 194 (1) (b) of the Companies Act, 1990.

155. Detective Sergeant Denis O'Sullivan set out his aforementioned concerns on a standard application form for a s. 63 production order. This form permits the applicant to identify the category of events he is investigating by selection from a number of listed offences. The offences are those specified as follows: -

> (a) Drug trafficking or;
>
> (b) An offence under s. 31 of the Criminal Justice Act, 1994 as amended or;

(c) Benefiting from drug trafficking, or;

(d) Benefiting from an offence in respect of which a confiscation order might be made under s. 9 of the Criminal Justice Act, 1994.

156. The standard form requests that the applicant delete (a) (b) (c) or (d) as appropriate.

157. In the instant case Detective Sergeant Denis O'Sullivan deleted paras. (a) and (c) above. Notwithstanding this fact, Detective Sergeant Denis O'Sullivan proceeded to set out in the information at p. 3 thereof that his belief was that the documentation sought would be material to his investigation of the potential crime of fraudulent trading contrary to s. 297 (1) of the Companies Act, 1963, as amended.

158. It appears to this Court that the district judge, from the aforementioned circumstances could not have satisfied himself that the requirements set forth in subs. 4 of s. 63 of the Criminal Justice Act, 1994 had been complied with. He could not have been satisfied that there were reasonable grounds for suspecting the commission of an offence contrary to s. 31 of the Criminal Justice Act, 1994 and neither could he have been satisfied that the respondents might have benefited from an offence in respect of which a confiscation order might be made under s. 9 of the Criminal Justice Act, 1994.

159. The investigation being carried out by Detective Sergeant Denis O'Sullivan principally arose by reason of the statutory notice filed by Mr. Joseph O'Toole, auditor to Bovale, stating his belief that proper books of account had not been kept by the company and also as a result of matters which had come to the Director's attention as a result of the Tribunal findings. Nowhere in the information concerned was there any suggestion that the applicant was investigating the type of events to which the production order is limited. Detective Sergeant Denis O'Sullivan was investigating the primary offence of fraudulent trading under the Companies Act, 1963.

160. The decision of Clarke J. in *Dylan Creaven Silicon Technologies (Europe) Limited and Bradenville Holdings Limited v. District Judge Patrick Clyne and The Minister for Justice, Equality & Law Reform* [2006] IEHC 290 delivered on the 6th October, 2006, is of assistance. In that case Clarke J. analysed the circumstances in which a production order might be made. He concluded that in order to justify the making of a production order there had to be an investigation into whether a person had **benefited** from an offence and that there had to be, in being, at the time of the application for the order, an investigation into such benefit. Clearly there was no such investigation in being at the time of the making of the production order of the 22nd November, 2002.

161. Clarke J. in *Dylan Creavan* rejected the argument put forward in that case that production orders could be made as part of an investigation into a substantive offence and held that had the Oireachtas wished to provide for such a provision the statute could easily have provided that production orders could be made in aid of any prosecution. Clarke J. at para. 7.1 of his judgment stated as follows:-

> "It is important to note that in order to justify the making of a production order there must be an investigation into whether a person has benefited from an offence in respect of which a confiscation order might be made. It seems to me that the natural meaning of the provision as drafted concentrates on the investigation into the benefit."

162. At paragraph 7.5 the trial judge continued:-

> "I am therefore satisfied that both in its ordinary meaning, and having regard to what might be said to be the overall purpose of the legislation, the proper construction to place upon s. 63 requires that in order that materials be required for the purposes of an investigation covered by sub-s. (1)(f) there should be an investigation in being, into benefit which might lead to an application for a confiscation order. Furthermore, the materials sought should be relevant to that investigation."

163. In this particular case it is clear that Detective Garda O'Sullivan laid information before the District Court on the basis that the applicant was entitled to request a production order from the Court to obtain information for the purposes of prosecuting a primary offence, in this case the offence of fraudulent trading under s. 297 of the Companies Act, 1963, as amended. This was not the purpose for which the legislation was intended and there is no construction of s. 63 of the Criminal Justice Act, 1994 which could render the production order made on foot of the information sworn by Detective Garda Denis O'Sullivan valid.

Conclusion

164. For the reasons set out earlier in this judgment the Court concludes that the respondents' application is not premature. The time for the making of an application such as the present one in proceedings directed by the rules to be conducted by originating notice of motion and grounding affidavit is the time when the allegedly offending affidavit is filed and not after the delivery of a replying affidavit.

165. Having regard to the provisions of O. 40, r. 4, O. 19, r. 27, the rules of evidence and the principles of natural justice the Court will direct the exclusion from the grounding affidavits in this case, of all of the evidence put forward by the applicant which emanates from:

(a) the Tribunal report,

(b) the Revenue documentation.

(c) the two memoranda of Mr. O'Toole referable to the meeting with the respondents on 26th July, 2000.

166. The Court does not preclude the applicant from relying upon the H4 notice filed on behalf of Bovale as evidence of the opinion of the company's auditors regarding the failure on the part of Bovale to keep proper books of account for the relevant period, namely, for the two years ended the 30th June, 1997 and the 30th June, 199.8.

167. The Court rejects all of the respondents' arguments regarding the lawfulness of the delegation by the Director of some of his functions to PWC in accordance with s. 12 of the Company Law Enforcement Act, 2001. The Court is of the opinion that PWC was at all times acting as a lawfully appointed officer of the Director for the purposes of assisting him in carrying out his functions.

168. Finally, the Court concludes that the production order issued by the District Court pursuant to s. 63 of the Criminal Justice Act, 1994 on 22nd December, 2002, was not validly obtained.

169. The court will therefore make an order pursuant to O. 40, r. 12 and O. 19, r. 27 of the Rules of the Superior Courts directing the removal of paras. 9, 10, 13, 17, 27, 28 from the affidavit of Mr. Madden. The court will also order the removal from the same affidavit of that portion of para. 32 as refers to the tribunal report. The court will not direct the removal of para. 8 from Mr. Lacy's affidavit.