Neutral Citation: [2015] IEHC 803

THE HIGH COURT

[2014 No. 265 COS]

IN THE MATTER OF IRISH EDUCATION BUSINESS AND RESEARCH LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF SECTIONS 229, 236, 245, 245a AND 247 OF THE COMPANIES ACT 1963 – 2013

BETWEEN

DECLAN De LACY (As liquidator of IRISH EDUCATION BUSINESS AND RESEARCH LIMITED (In Liquidation))

APPLICANT

AND

FAKIR HOSSAIN, GOLAM SHOHAN AND

MEHEDI HASAN (also known as RUSSELL HASAN)

RESPONDENTS

JUDGMENT of Mr. Justice David Keane delivered on the 18th December 2015

Introduction

1. By Order of this Court made on the 30th June 2014, Declan de Lacy was appointed as official liquidator ('the liquidator') of Irish Education Business and Research Institute Limited ('the company').

2. The liquidator has brought an application seeking various reliefs, principal among which is an Order against each of the three named respondents pursuant to the provisions of s. 245 of the Companies Act 1963, as amended ('the 1963 Act'), summoning each of them to appear before the Court for the purpose of examination on oath.

Background

3. For the purpose of the present application, it appears to be common case that the company, which was incorporated on the 8th August 2011 and traded under the business name Irish Business School, was engaged in the provision of educational services (in the form of an English language and business school for foreign students) from premises in Dublin.

4. The Companies Registration Office records Ms Elizabeth Clery and Mr Mark McCann as the directors of the company and Ms Clery as owner of 100% of its issued share capital.

5. The liquidator avers that, on or about the 5th June 2014, he was furnished with a statement of the company's affairs as of the 27th May 2014 (the date of the order to wind up the company), prepared and sworn by Mr McCann.

6. The liquidator avers that he met with Ms Clery and Mr McCann on the 28th May 2014. Both Ms Clery and Mr McCann completed questionnaires in the form recommended by the Insolvency Subcommittee of the Accountancy Bodies in Ireland. The liquidator had further discussions with Mr McCann and Ms Clery separately on the 1st July 2014, having received a letter from Mr McCann dated the 12th June 2014.

7. The liquidator exhibits a copy of a letter dated the 8th October 2012, recording a proposed agreement between the first named respondent Fakir Hossain ('Mr Hossain') and Ms Clery. Although that document is expressed on its face to be a draft for discussion purposes only and 'subject to contract/contract denied', it is purportedly signed by each of those persons. That agreement provided, *inter alia*, that, upon completion, those persons were to execute a deed of trust, whereby Ms Clery was to remain the legal owner of the issued shares in the company but to hold them in trust for Mr Hossain, who was to become the beneficial owner of them, after which the directors of the company were to act in accordance with Mr Hossain's instructions. The liquidator also exhibits a copy of a declaration of trust, apparently executed by both Ms Clery and Mr Hossain on the 19th November 2012, which reflects the relevant terms of the agreement just described.

8. Another exhibit to the affidavit sworn by the liquidator for the purpose of the present application comprises copies of the questionnaires ostensibly completed by Ms Clery and Mr McCann at the liquidator's request. In those questionnaires, it is asserted that, from mid-November 2012 onwards, the directors were accustomed to act in accordance with Mr Hossain's instructions; that the company's memorandum and articles of association, minute books, register of members, register of directors etc were given to Mr Hossain "when he acquired the company"; that the second respondent Golam Shohan ('Mr Shohan') was responsible for maintaining the company's accounting records and reported to Mr Hossain in that regard; and that the software used to maintain those records was a bespoke system created by Mr Hossain. Ms Clery has asserted, in the personal questionnaire ostensibly signed by her, that she was accountable to Mr Hossain in the performance of her duties as director.

9. The liquidator avers that the directors have provided him with the following additional information.

10. Mr Hossain took primary control of all decisions and the management of the company. Mr Hossain owned and controlled another company named Eden Further Education Limited ('Eden'), now in liquidation, with which the company shared premises in Dublin city centre; a company named Chill Out Ventures Limited ('Chill Out'), which provided accommodation to the company for use by its students; and a company named Active Education Limited, trading as 'Ewings', which provided all promotional and marketing services availed of by the company in the operation of its business.

11. At the direction of Mr Hossain, responsibility for all of the company's financial controls and finances was delegated to Mr Shohan. Mr Hossain requested Mr McCann to remain on as a non-executive director and Mr McCann's accountancy firm, McCann & Co,

provided payroll services, filed P30s and made payments to the Revenue, through the latter's online system, in accordance with instructions provided by Mr Shohan, who had sole custody of the company's books and records and the benefit of a mandate to the company's bank permitting him to effect electronic banking transactions on the company's behalf (a copy of which is exhibited to the liquidator's affidavit). Mr Shohan was responsible for paying all creditors and reconciling all receipts. The accounting books and records of the company were stored in Mr Shohan's office at the company's city centre premises.

12. The third named respondent Mehedi Hasan ('Mr Hasan') founded the company with Ms Clery and was a director of it until the 1st December 2011. On the 13th June 2012, he became a director of a company named Academic Bridge Limited ('Academic Bridge'), with which Mr Shohan took up employment after his departure from the company. By direction of Mr Hussain, Mr Hasan was designated 'Acting Centre Manager' for a period of approximately six months prior to the appointment of another person in that role on or about the 28th April 2014; was given responsibility for all of the company's sales and marketing activities; and was responsible for running Ewings.

13. Mr Hasan was seen removing furniture and assets from the premises of the company in Dublin city centre on the night of the 28th/29th April 2014, and the books and records of the company have not been seen since that date. On or about Friday, the 2nd May 2014 (the date upon which the school operated by the company was forced to close), all of the assets present at the company's city centre premises were removed.

14. For reasons that will become evident, I pause here to note that, for the purpose of the present application, the liquidator avers solely to the fact of his receipt of the preceding information. He does not purport, as I understand the position, to assert that it is correct, nor does he invite the Court to accept it as fact. The veracity or falsity of the information is precisely what the liquidator wishes to investigate.

15. The liquidator does aver to a number of other matters. The first is that he wrote to Chill Out on the 16th June 2014 to enquire about its relationship with the company. In response, he received correspondence signed by Mr Hossain on behalf of Chill Out, and, subsequently, a copy of a lease made on the 18th April 2013 between Chill Out, as landlord, and the company, as tenant, in respect of five identified apartments for a term of one day short of a year commencing on the 1st May 2013 at a rental of €2,000 per apartment per month. That lease appears on its face to have been signed by Mr Hossain on behalf of Chill Out, as landlord, and by Mr Shohan on behalf of the company, as tenant. Copies of 12 monthly invoices, covering the period between May 2013 and April 2014, each in the aggregate amount of €10,000, were also provided.

16. Although he has so far been unable to obtain the company's accounting books and records, the liquidator avers that he has carefully examined the company's bank statements, copies of which are exhibited to his affidavit. The liquidator points to the following transactions recorded there:

> (a) Payments totalling €108,722.70, described as having been made to 'Ewings' and further payments totalling €23,397.49 made to persons who have been described to him by the directors of the company as employees of 'Ewings.'
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> (b) Payments of €112,550.00 made to Chill Out.
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> (c) Payments of €4,100.00 made to Mr Shohan.

Efforts to obtain information before the issue of the present motion

17. The liquidator wrote to Mr Hossain on the 9th June 2013, informing him that he (the liquidator) had formed the opinion that Mr Hossain was a shadow director of the company; requesting the return of the any of the company's property, books or records in Mr Hossain's possession or any information that Mr Hossain might have concerning the whereabouts of any such items; seeking to have Mr Hossain complete a questionnaire; and seeking to arrange to interview Mr Hossain in connection with the company's affairs. That letter concluded by stating that failure to complete the relevant questionnaire(s) or to agree to make himself available for interview would render it necessary for the liquidator to apply to this Court to have Mr Hossain examined in connection with the company's affairs.

18. In a letter dated the 27th June 2014, a solicitor replied on behalf of Mr Hossain that his client's instructions were that Mr Hossain did not have any of the company's property, books or records and that he disputes the liquidator's view that he was a shadow director of the company. The liquidator responded by letter dated the 27th June 2014, again calling upon Mr Hossain to complete and return the appropriate questionnaire(s) and to make himself available for interview. On the 4th July 2014, the liquidator wrote to Mr Hossain directly (having been informed by Mr Hossain on the telephone that he no longer retained the services of his former solicitor), referring to the telephone conversation between them earlier that day, repeating the requests that he had made earlier, and fixing midday on the 7th July as a deadline for Mr Hossain's confirmation that he would co-operate in the liquidation.

19. On the 17th July 2014, the liquidator received a letter from Mr Hossain dated the 10th July 2014. In that letter, Mr Hossain did not deal with the liquidator's requests but instead reiterated a requirement, previously raised by his former solicitor on his behalf, that the liquidator provide him with the facts and any supporting documentation underpinning the liquidator's view that he was a shadow director of the company, for the purpose of enabling him to obtain 'appropriate legal advice.'

20. The liquidator wrote to Mr Shohan on the 16th June 2014, requesting that he deliver up any of the company's property, books or records in his possession; identify the location of any such items not in his possession insofar as that was within his knowledge; and confirm his willingness to attend for interview. That letter also concluded by inviting its recipient to note that failure to complete the relevant questionnaire(s) or to agree to make himself available for interview would render it necessary for the liquidator to apply to this Court to have him examined in connection with the company's affairs.

21. A further letter was written to Mr Shohan on the 7th July 2014 and various other steps were taken to locate and contact him, but he could not be traced and did not respond.

22. The liquidator wrote to Mr Hasan on the 16th June 2014, requesting that he agree to make himself available for interview, and again on the 4th July 2014, repeating that request, but no reply was received. On the 7th July 2014, the liquidator attended at the premises of Academic Bridge in an attempt to make contact with Mr Hasan but his enquiries proved fruitless.

The respondent's position after the issue of the present motion

23. The motion papers in the present application issued on the 1st September 2014 with an initial return date of the 10th September

2014. The issue of a motion in respect of an application for an Order pursuant to the provisions of s. 245 of the 1963 Act is, in itself, unusual. As the authors of McCann and Courtney *Companies Acts* 1963 – 2012 (Dublin, 2012) point out (at p. 513):

> "The application is usually made on an ex parte basis and if a person is aggrieved by the making of the order he can apply to have the order set aside."

The present application has been brought inter partes by motion on notice to the respondents, giving them an opportunity to argue against the making of an order under the section, rather than requiring them, if necessary, to bring an application to set aside such an order made on application ex parte.

24. Availing of that opportunity, Mr Hossain swore an affidavit before a notary public in the State of Florida, U.S.A., on the 9th October 2014. In that affidavit, Mr Hossain avers that he has not now, nor has he ever had, any money, property, books or records of any sort belonging to the company, and that he is not, and has never been, a contributory, agent or officer of the company.

25. However, Mr Hossain does appear to acknowledge that he entered into an agreement of some sort with Ms Clery to acquire Ms Clery's shares – which is to say, all of the issued shares – in the company. Despite that concession, Mr Hossain denies that he holds any of the company's constitutional documents or its seal, or that he ever had any responsibility whatsoever for the management or control of the company. In particular, Mr Hossain denies that he ever gave any instructions or directions to the directors or, as would necessarily follow, that they were ever accustomed to acting on foot of any such instruction or direction from him.

26. Mr Hossain avers that Mr Shohan was engaged by Ms. Clery on behalf of the company solely as a book-keeper on a part-time basis and that his sole involvement in that regard was to confirm that he had no objection to the arrangement. Mr Hossain denies that Mr Shohan ever reported to him.

27. Mr Hossain denies that he created a bespoke software system for the purpose of maintaining the company's accounting records but acknowledges that, in his words, he had "designed the user requirements" for "a very advanced web based student management system" for Eden, which "bespoke system" had been "developed offshore." Mr Hossain acknowledge that he owned and controlled Eden. Mr Hossain further acknowledges that the company and Eden occupied the same premises in Dublin city centre, though he takes issue with the liquidator's suggestion that those companies 'shared' that premises, the company having relocated to Eden's offices. Mr Hossain avers, rather, that the company entered into a lease with Eden in respect of part of those premises on commercial terms at an agreed market rent, the payment of which, Mr Hossain avers, can be seen reflected in the company's bank statements exhibited to the liquidator's affidavit. In addition to the rent that Eden received from the company, Mr Hossain acknowledges that his company Chill Out received rent from the company in respect of the apartment lease agreement already referred to.

28. Mr Hossain denies that he directed that responsibility for the company's financial controls and finances be delegated to Mr Shohan, although he acknowledges, later in his affidavit, that Mr Shohan is his cousin.

29. Mr Hossain denies that his company Active Education Limited trades, or has traded, as 'Ewings.' Mr Hossain avers to his understanding from his own dealings with that entity that 'Ewings' is a collective of agents engaged on a commission basis to market what Mr Hossain describes as "English language College" through foreign agencies. Accordingly, Mr Hossain denies that the payments made by the company to 'Ewings' have anything to do with his company Active Education Limited.

30. Mr Hossain denies that he ever gave a direction or instruction to the directors to delegate responsibility for all of the company's sales and marketing activities to Mr Hasan.

31. Mr Shohan swore an affidavit on the 31st October 2014 in opposition to the liquidator's application. In it, Mr Shohan avers that he first became aware of that application when he was informed about it by Mr Hossain, although he acknowledges that a friend with whom he shared a flat in Dorset Street had previously opened a letter from the liquidator and informed him of its contents on the telephone. Mr Shohan avers that he was on holiday in Bangladesh at the time to celebrate his marriage. It is striking that Mr Shohan does not aver to the date on which Mr Hossain informed him of the application, nor to the earlier date upon which his friend apprised him of the liquidator's request for assistance to which he did not respond, nor to the date of either his departure from the jurisdiction on holiday or his return to it.

32. Mr Shohan avers that he was engaged as a part time bookkeeper by Ms Clery on behalf of the company, though never registered as an employee of it, and that, during the period of his engagement, he continued to be employed as a bookkeeper for Eden, the company owned and controlled by his cousin Mr Hossain.

33. Mr Shohan acknowledges that he had access to the company's online bank account and that he had the necessary authorisation and information to process transactions in relation to it. Mr Shohan avers that he only ever did so on the express authority and instruction of Ms Clery. Later in his affidavit, Mr Shohan avers that Ms. Clery was herself unable to process payments electronically on the company's behalf.

34. Mr Shohan denies that responsibility for the company's financial controls and finances was ever delegated to him or that the management of the company was ever 'predominantly' in his hands and those of his cousin Mr Hossain.

35. Mr Shohan denies that he has retained or removed any of the company's documentation from its premises and avers that he undertook his bookkeeping work for the company by reference to material provided to him by Ms. Clery or an employee of the company named Akber Ali.

36. Mr Hasan swore an affidavit on the 3rd October 2014. In it, he acknowledges that, while working as the director of business development at Mr Hossain's company Eden in December 2012, he attended a meeting with Ms Clery and Mr Hossain at which he was informed that the colleges run by Eden and the company had formed a marketing alliance and had agreed to occupy the same premises in Dublin city centre. Mr Hasan avers that, at that meeting, he was asked to promote the company's business to Eden's existing agents and that he did so, referring interested agents to Mr Akber Ali who, Mr Hasan avers, was in charge of marketing at the company.

37. Mr Hasan denies that he had responsibility for all of the company's sales and marketing activities or that the management of the company was ever in his hands with those of Mr Hossain. Mr Hasan denies that he held the position of centre manager for six months or, indeed, ever.

38. Mr Hasan further denies that he holds any property belonging to the company.

39. Mr Hasan avers that the papers were sent to his 'old' address and that Ms Clery was at all times aware of his new address, his e-mail address and his phone number. Mr Hasan does not say when he changed address or what arrangements he made to have his post forwarded to his new address. Nor does he comment on the liquidator's averments concerning the liquidator's unsuccessful attempts to contact him by attending at the premises of Academic Bridge on the 7th July 2014. Instead, Mr Hasan avers to his belief that the liquidator deliberately attempted to contact him at an old address in an effort to establish his non-cooperation.

40. In summary, each of the respondents asserts that he has no property belonging to the company and none of the respondents is willing to co-operate with the liquidator, whether by completing the appropriate questionnaire(s) or by making himself available for interview. Rather, each of the respondents asserts, in essence, that in light of what he has averred concerning his limited involvement in the company's affairs, he should not be expected or required to co-operate with the company's liquidator, whether in the manner requested or, indeed, at all.

The law
41. S. 245 of the 1963 Act, as amended, provides in relevant part:

> "(1) The court may, of its own motion or on the application of the Director, at any time after…the making of a winding-up order, summon before it any officer of the company or any person known or suspected to have in his possession any property of the company…or any person whom the court deems capable of giving information relating to the promotion, formation, trade, dealings, affairs or property of the company.
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> (2) The court may examine such a person on oath concerning the matters aforesaid, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.
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> (3) The court may require such person to produce any accounting records, deed, instrument or other document or paper relating to the company that are in his custody or power."

The arguments
42. The liquidator relies on two authorities in support of his application for an order against each of the respondents pursuant to the terms of s. 245. The first is the decision of the House of Lords in *B & C Holdings plc v. Spicer & Oppenheim* [1993] BCLC 168. That was a case involving the proper construction of the power conferred on the court under s. 236 of the Insolvency Act 1986, a provision couched in very similar, though not identical, terms to those of s. 245 of the 1963 Act.

43. In giving judgment for a unanimous court (Lords Keith of Kinkel, Ackner, Jauncey of Tullichettle and Lowry concurring), Lord Slynn of Hadley expressed the following views (at pp. 175-8 of the report):

> "The words are quite general. Thus s 236(2) refers to 'any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company', and by sub-s (3) such a person may be ordered to produce 'any books, papers or other records in his possession or under his control relating to a company or the matters mentioned in paragraph (c) of the subsection'.
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> …[I]n *Re Gold Co* (1879) 12 Ch D 77 at 85 in a case under s 115 of the Companies Act 1862 (which enabled the court to summon any officer or any persons supposed to be capable of giving information concerning the transactions and trade dealings of the company) Jessel MR said:
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> '…the whole object of the section is to assimilate the practice in winding-up to the practice in bankruptcy, which was established in order to enable assignees, who are now called trustees, in bankruptcy to find out facts before they brought an action, so as to avoid incurring the expense of some hundreds of pounds in bringing an unsuccessful action, when they might, by examining a witness or two, have discovered at a trifling expense that an action could not succeed.'
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> Similarly, Chitty J said in *Re Imperial Continental Water Corp* (1886) 33 Ch D 314 at 316:
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> 'Those extensive powers are conferred upon the Court for the beneficial winding up of the company, for sometimes it happens that the liquidator is unable to obtain from unwilling person the information which he requires.'
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> In *Re North Australian Territory Co* (1890) 45 Ch D 87 at 92, in relation to the same section, Bowen LJ said:
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> 'The section which the Court is putting in force in the examination of a person under such circumstances is the section which places the decision as to an examination and as to its limits within the discretion of the Court. That being so, I do not think that we ought to attempt beforehand to classify all the occasions on which it may be proper to make such an order…'
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> In *Re London and Northern Bank Ltd, Haddock's Case, Hoyle's Case* [1902] 2 Ch 73 at 84, Cozens-Hardy LJ recognised the discretionary nature of the court's powers under s 115 of the Companies Act 1862. In *Re Rolls Razor Ltd* (No 2) [1969] 3 All ER 1386 at 1397, [1970] Ch 576 at 592 Megarry J referred to 'the unfettered discretion of the judge brought to bear on any exercise of this extraordinary jurisdiction' under s 268 of the Companies Act 1948, which replaced s 115 of the 1862 Act. In *Re Highgrade Traders Ltd* [1984] BCLC 151 at 177 Oliver LJ in relation to s. 268 said: 'The jurisdiction is a most useful one, and I certainly do not wish to say, and it is unnecessary to say, anything which would limit its scope.' In *Re J T Rhodes Ltd* [1987] BCLC 77 at 79-80 Hoffman J again emphasised the discretionary nature of an order made under s 561 of the Companies Act 1985, the successor of s 268 of the 1948 Act.
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> In my opinion, although there may be some difference in the wording of these sections, the position under s 236 of the Insolvency Act 1986 is broadly the same as that under s 268 of the Companies Act 1948 as explained by Buckley J in *Re Rolls Razor Ltd* [1968] 3 All ER 698 at 700, in a passage subsequently approved by the Court of Appeal in *Re Esal (Commodities) Ltd* [1989] BCLC 59 at 64:
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> 'The powers conferred by s 268 are powers directed to enabling the court to help a liquidator discover the truth of the circumstances connected with the affairs of the company, information of trading, dealings, and so forth in order that the liquidator may be able, as effectively as possible and, I think, with as little expense as possible…to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all of its various aspects,

including, of course, the getting in of any assets of the company available in the liquidation. It is, therefore, appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of a company, or some other person who is, in some way, concerned with the company's affairs, to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim.'

…

As Megarry J said in *Re Rolls Razor Ltd (No 2)* [1969] 3 All ER 1386 at 1397-1397, [1970] Ch 576 at 591-592:

'The process under s 268 is needed because of the difficulty in which the liquidator of an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding-up. The process, borrowed from the law of bankruptcy, can only be described as sui generis.'

…

At the same time it is plain that this is an extraordinary power and that the discretion must be exercised after a careful balancing of the factors involved: on the one hand the reasonable requirements of the liquidator to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary or 'oppressive' to the person concerned. The latter was stressed by Bowen LJ in *Re North Australian Territory Co* (1890) 45 Ch D 87 at 93:

'That is an inquisitorial power, which may work with great severity against third persons, and it seems to me to be obvious that such a section ought to be used with the greatest care, so as not unnecessarily to put in motion the machinery of justice when it is not wanted, or to put in motion at a stage when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person who is called upon to appear and give information.'

Such an approach was stressed more recently by Brightman J in respect of an oral examination in *Re Bletchley Boat Co Ltd* [1974] 1 All ER 1225, [1974] I WLR 630.

The protection for the person called upon to produce documents lies…in the fact that the applicant must satisfy the court that, after balancing all the relevant factors, there is a proper case for such an order to be made. The proper case is one where the administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the adminstrator's requirements. An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or contractor with the company in administration, but all these will be relevant factors, together no doubt with many others."

44. The second authority relied upon by the liquidator for the purpose of the present application is the decision of the Supreme Court in the case of *In re Comet Food Machinery Co. Ltd*. (In liquidation) [1999] 1 I.R. 485. Specifically, the liquidator points to the apparent endorsement by Keane J., with whose judgment the other members of the court (O'Flaherty and Murphy JJ.) concurred, of two propositions derived from the English case in Re Embassy Art Products [1988] B.C.L.C. 1 concerning the position of a liquidator, as opposed to a creditor, who seeks an order directing the examination of a person in a winding-up. It is submitted that those propositions are: first, that the liquidator does not have to demonstrate that some financial benefit is likely to accrue from the examination; and, second, that the court should ordinarily attach considerable weight to the liquidator's view that an examination is necessary.

45. In opposition to the liquidator's application, the respondents rely on a single broad argument, supported by a single authority. The argument, as I understand it, is that the liquidator has failed to adduce sufficient properly admissible evidence to warrant the making of an order under s. 245.

46. The authority invoked in support of that argument is the decision of the Supreme Court in the case of *Re Bovale Developments: Director of Corporate Enforcement v. Bailey* [2011] 3 I.R. 278. Specifically, the respondents pray in aid the portion of the judgment of Hardiman J. in that appeal which addresses in trenchant terms the issue of the admissibility (or, in the particular circumstances of that case, inadmissibility) of certain hearsay evidence contained in certain affidavits that the Director of Corporate Enforcement sought to rely on in support of his application, pursuant to s. 160(2) of the Companies Act 1990 ('the 1990 Act'), for a disqualification order against the respondent company directors in that case. The respondents submit that the principles of natural and constitutional justice and fair procedures, which informed the finding of the Supreme Court that the relevant evidence in *Bovale Developments* was inadmissible, apply with equal force to the affidavit evidence of the liquidator in this case concerning the information that he has obtained from Ms Clery and Mr McCann, as directors of the company. In consequence, they submit that the necessary substratum of admissible evidence, which would warrant the making of the orders sought in the present application, is not present.

47. The relevant passage from the judgment of Hardiman J. (Macken and Finnegan JJ. concurring) is the following (at pp. 307-8):

"[89] I wish to make it clear that in my view the fundamental objection to the admissibility of hearsay evidence in proceedings before a court is that, to the extent that it is admitted, it deprives the applicant of his right to cross-examine. This case, like many of these applications, features allegations of a kind which, if they could be stood up in evidence, would amount to conduct disgraceful in a businessman and company director and would be gravely damaging to his reputation and his ability to earn a livelihood. Persons, official or otherwise, who make such allegations must be prepared to stand them up in direct evidence. The person against whom they are made, if he contests them as the respondents clearly do, is entitled to the rights identified in *In re Haughey* [1971] I.R. 217 including, vitally a right to confront and cross-examine the witnesses against him. This is not a technicality but the exercise of a right which, as I have observed elsewhere, has been the means of the vindication of innocent people.

> [90] The Director of Corporate Enforcement argued that he must, even in the case of a contested case, first make some showing in affidavits; that he cannot compel any person, such as for example the auditors or the revenue staff to swear an affidavit; and therefore he should be able to rely on these reports at least at an early stage. He did not say that the any particular person had, in fact, refused to swear an affidavit.
>
> [91] Certainly it is true that people against whom disgraceful allegations of the sort the Director of Corporate Enforcement is making here are entitled to notice of the nature of the allegations and the evidence which is said to support them. But, on the basis of *In re Haughey* [1971] I.R. 217, they are entitled to have these allegations made viva voce and to cross-examine those who make them. Paper does not refuse ink; and for that reason it would be disgraceful of the Director to put on affidavit, on the basis of hearsay, an allegation which he lacks a witness to stand up, and I am sure he would not do so. But the nature of the evidence can be notified without putting it on affidavit on the basis of hearsay and it wrong that evidence which may be wholly exploded in cross-examination should go on to enjoy a malign half life in hearsay affidavit form. There is in my view no reality to the Director's repeated suggestions that he would be in some way at a disadvantage if he could not put these allegations on affidavit: he would not and he can easily notify the persons against whom he is making accusations of the nature and substance of them in all necessary detail even though he cannot force such persons to make an affidavit.
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> [92] I am of the opinion that, in the absence of the *In re Haughey* [1971] I.R. 217 rights, a person, a company director or not, simply cannot be put to answer. His right to have only admissible evidence deployed against him does not depend on what answer he makes to an ex parte statement of the case against him, made on the basis of hearsay."

48. There are three reasons why I do not accept that the analogy between the situation addressed by Hardiman J. in *Bovale Developments* and that which arises here is an apt one.

49. First, the application at issue in *Bovale Developments* was one seeking the disqualification of each of the respondent directors from acting as such. As the authors of McCann and Courtney, *Companies Acts* 1963-2012 (Dublin, 2012) put it (at p. 1366): "a disqualification order constitutes a total banishment from corporate life." It involves a substantial interference with the freedom of the individual. As Hardiman J. pointed out in that case, the making of such an order, although its purpose is not primarily punitive, is capable of causing grave damage to a person's reputation and to his or her ability to earn a livelihood.

50. As Denham J. noted in *Bovale Developments* (at p. 282), in that case the Director of Corporate Enforcment was seeking the disqualification of the respondent directors on three separate grounds: that they had been guilty, as officers of the company, of fraud in relation to the company, its members or creditors (s. 160 (2) (a)); that they had been guilty of breach of their duty as officers of the company (s. 160 (2) (b)); and that their conduct made them unfit to be concerned in the management of a company (s. 160 (2) (d)).

51. The present application, in contrast, does not involve an adjudication of any kind in respect of an allegation of any sort against the respondents. Instead, the Court must consider only whether each of the respondents is a person suspected to have in his possession any property of the company or a person capable of giving information regarding the trade, dealings, affairs or property of the company. If the court is so satisfied in respect of any of the respondents, it must next consider whether the examination of that respondent is necessary in the interests of the winding-up and, if so, that it is not oppressive, unfair or unjust to the respondent concerned. If those tests are met, no order remotely comparable to a s. 160 disqualification order will be made against any such respondent but, rather, he will be summoned for the purpose of an examination before the court and may also be ordered to produce any relevant documents in his possession or power relating to the company.

52. It is well-established that the nature and extent of the *In re Haughey* rights available to a person vary according to the context in which those rights are engaged. As Keane J. put the matter in *Mooney v. An Post* [1994] ELR 103 (at 116): "The concept [of natural justice] is necessarily an imprecise one and what its application requires may differ significantly from case to case." The context here is very different from that of a s. 160 disqualification application.

53. Second, by reference to the very different context of the present application, the nature of the evidence relied upon is fundamentally different from that which was at issue in *Bovale Developments*. It is tolerably clear that, in *Bovale Developments*, the Director of Corporate Enforcement was seeking to rely upon the truthfulness of certain information received from a firm of auditors and from the Revenue Commissioners as probative of the respondents' culpability in fraud or breach of duty, or their unfitness to be involved in the management of a company. It seems to me that such is text book hearsay evidence. In this instance, the liquidator is not seeking to rely upon the truthfulness of the information that he has received from Ms Clery or Mr McCann concerning the respondents; rather, he is seeking to rely on the fact that he has received that information (whether it be true or false) as probative of his contention that the examination of each of the respondents is necessary in the interests of the proper winding-up of the company, in circumstances where each of the respondents has failed or refused so far to co-operate with the liquidator. In my view, the liquidator's evidence of his receipt of identified information from Ms Clery or Mr McCann or, indeed, from other sources is not hearsay evidence.

54. As Kingsmill Moore J. expressed the position in *Cullen v Clarke* [1963] IR 368 (at 378):

> "[I]t is necessary to emphasise that 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. …This is the rule known as the rule against hearsay."

55. Third, it seems to me that, even if the evidence concerned could be characterised properly as hearsay evidence (and I have concluded that it cannot), it would in any event fall within the exception to the rule against hearsay evidence provided by Order 40, rule 4 of the Rules of the Superior Courts ('RSC'). That rule provides, in relevant part, that: "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 of his belief, with the grounds thereof, may be admitted." In my view, the present application falls within the meaning of the term 'interlocutory motion' properly construed, whereas an application under s. 160 of the 1990 Act does not. In consequence, it seems to me that, were the liquidator to express a belief in the truth of the relevant information on stated grounds, evidence of that belief would be admissible for the purpose of the present application, subject to whatever argument there may be in regard to the appropriate weight to be attributed to it.

Conclusion

56. Having carefully considered the evidence before me, I have reached the following conclusions.

57. First, the power of the High Court to order the examination of the persons referred to in s. 245(1) of the 1963 Act is a discretionary one; *per* Keane J. in *In re Comet Food Machinery Co. Ltd. (In liquidation)* [1999] 1 I.R. 485 (at 490).

58. Second, the primary function of that power is to enable the liquidator of a company to complete his functions as effectively as possible with as little expense and as much expedition as possible; *per* Buckley J in *Re Rolls Razor Ltd* [1968] 3 All ER 698 (at 700).

59. Third, by reference to the evidence already summarised, I am satisfied that each of the respondents is a person reasonably suspected to have in his possession certain property of the company (despite the sworn denial of each that that is so), and that each of the respondents is a person the court deems capable of giving information relating to the trade, dealings, affairs or property of the company (beyond the carefully drafted and selective averments that each has so far made on affidavit).

60. Fourth, I am satisfied that the examination of each of the respondents is necessary in the interests of the winding-up. The liquidator has described the difficulties that he has encountered in locating or obtaining the company's books, records, papers and accounts, and, specifically, has averred that, apart from certain bank statements, he has "absolutely no details as to the management or more importantly the financial history of the company" and "grave concerns as to payments made by the company."

61. Fifth, I am not satisfied that there is anything unfair, much less oppressive or unjust, in making an order against each of the respondents pursuant to the terms of s. 245 of the 1963 Act. If the role of the respondents in the conduct of the affairs of the company was as limited as each has averred, and if they are as bereft of any books, records, papers, accounts or other property of the company as they contend, then there will be nothing particularly onerous for them in complying with the order now sought. There is, for example, no suggestion in this case of the oppression asserted by the firm of auditors which was the subject of the equivalent order in *B & C Holdings plc v. Spicer & Oppenheim* in respect of the requirement to produce a "very large volume of documentation", amounting to an "intolerable disruption" of that firm's business, leaving aside the fact that, in that case, those assertions were, in any event, rejected by the House of Lords on the basis that neither inconvenience, nor the work entailed in compliance, nor any resulting vulnerability to future claims render such an order unreasonable or unfair, although they are relevant factors to be weighed in the balance.

62. Sixth, conducting the necessary balancing exercise against the background of the factors already described, I am satisfied that it is appropriate to make the orders sought. In that context, I have had particular regard to the following considerations: first, that there is no evidence or suggestion in this case that the liquidator is seeking the orders concerned in order to obtain an inappropriate litigious advantage in any existing or intended legal proceedings; and second, that, as it has yet to be ascertained whether Mr Hossain was a shadow director of the company, the position of each of the respondents should be considered as that of a third party, rather than that of an officer of the company, for the purpose of the balancing exercise concerned.

63. For the foregoing reasons, I will make the appropriate orders under s. 245 (1), (2) and (3) of the 1963 Act or, insofar as may be appropriate, under the equivalent provisions of s. 671 of the Companies Act 2014 in respect of each of the respondents to the application.

64. I do not propose, at this stage, to rule on the liquidator's application for further or alternative orders under ss. 236, 245 (4), 245 (8), 247 or 231 of the 1963 Act but, for the avoidance of doubt, it seems to me that those applications may be renewed later, should it be considered necessary and appropriate to do so.