Neutral Citation Number: [2005] IEHC 285

THE HIGH COURT

Record Numbers: 2002 No.38 Cos; 2002 No.25 Cos

IN THE MATTER OF: USIT WORLD PLC (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACT 1963-2001
IN THE MATTER OF: USIT LIMITED (BEING A COMPANY INCORPORATED UNDER THE LAWS OF NORTHERN IRELAND)(IN LIQUIDATION), AND IN THE MATTER OF THE COMPANIES ACTS 1963-2001
APPLICATIONS BY RAY JACKSON, "LIQUIDATOR", UNDER S.150 OF THE COMPANIES ACT, 1990

Judgment of Mr Justice Michael Peart delivered the 10th day of August 2005

1. This is an application brought by the liquidator for the purposes of obtaining orders from this Court pursuant to the provisions of s.150 of the Companies Act, 1990 which provides, in so far as is relevant, as follows:

> *"(1) The court shall, unless it is satisfied as to any of the matters specified in subsection (2), declare that a person to whom this chapter applies shall not, for a period of five years, be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in subsection 3; …… "*
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> *(2) The matters referred to in subsection (1) are --*
>
> > *(a) that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this section, ……"*

2. In the light of the provisions of s.149 of the Act, there is no question but that all the respondent directors named in the present application come within the scope of an application under s.150 of the Act.

3. The applicant is the liquidator of Usit World Plc (hereinafter referred to as "Usit World") and of Usit Limited (hereinafter referred to as "Usit") having been appointed as such on the 15th May 2002 and the 18th February 2002 respectively.

4. Usit World was the holding company for all the subsidiaries of the Usit Group worldwide, and Usit operated as the treasury company for the Usit Group of companies.

5. I will first of all set out a relevant history to these applications.

6. Having done so I will deal with the applications against the various named director/respondents on an individual basis, except insofar as in some instances a number of directors can be grouped together given the commonality between them in relation to their role.The applications brought by the liquidator are as follows:

Usit World Plc.:
7. In respect of Usit World, the liquidator seeks an order against the following directors:

> *"The original directors":*
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> > *Gordon Colleary* - he is described by the liquidator in his affidavit as being the founder and driving force behind the Usit Group, as well as being the chief executive and decision-taker in respect of most issues in relation to the affairs of the group until his resignation on 24th January 2002.
> >
> > *Mairín Colleary* - she is the wife of Gordon Colleary, and a director of Usit World plc.The liquidator expresses his view that she shares the same responsibility as other directors.He states that she had an active involvement in the business, with a particular focus on an entity referred to as Usit Ireland Limited.
> >
> > *Gerard Connolly* - he was appointed finance director of the company but was employed only from the 18th January 2001 to the 2nd July 2002.The liquidator states that he is unaware of the reasons for his resignation from that position, and has not made contact with him.
> >
> > *Lynn Millington-Wallace* - she was appointed director of corporate governance in USIT World plc, but her duties included looking after these matters in relation to UST limited also, although she was not a director of USIT Limited.
> >
> > *Xavier Moreels* - he was a director as of the date of appointment of the liquidator, but the liquidator does not believe that he had any active role in the company following the appointment of an Examiner to the company.As he is not in this jurisdiction, the liquidator has not made any contact with him.

8. These persons will be referred to as "the original directors" and were directors within the 12 month period prior to the date on which the liquidator was appointed.

The STA Directors

Richard Porter; Mark Adams; Dan McGing:
9. These persons were also directors at the time of the liquidation, but were not appointed directors until 23rd January 2002 in the case of Messrs.Porter and Adams, and the 12th February 2002 in the case of Mr McGing.They were nominated as directors by a company called STA Travel Holdings Pte Limited ("STA"), a subsidiary of which, Solgun Limited, had acquired 90% of the shareholding of Usit World on the 23rd January 2002.These three persons will be referred to as the "STA directors".

Usit Limited:

Gordon Colleary;Angel Olivares
10. These persons were directors of Usit Limited, as well as having been directors of Usit World, at the date on which the liquidator was appointed.

General Background:
11. A usefully concise description of the inter-relation and modus operandi of both companies can be gleaned from the liquidator's

affidavits, each sworn on the 4th July 2003 to ground these applications.In his affidavit sworn to ground his application in respect of *Usit World* he avers as follows at paragraph 9 thereof:

> *"… Usit World was the holding company for all the subsidiaries of the Usit Group.It owned shares in 29 companies worldwide.While it did not of itself engage in trading activity, at the date of liquidation it was indebted to Usit Limited in the sum of approximately €54,376,300.Usit Limited operated as a treasury company for the Usit Group of companies and the net effect of the conduct of the affairs of Usit World Plc.Was to create a bad debt of €54,376,300 for Usit Limited which in turn affected the creditors of Usit Limited which included a very significant body of third party trade creditors who are owed in the region of €120 million to €155 million."*

12. In his affidavit sworn to ground the application in respect of *Usit*, he avers at paragraph 6(i) and (ii) as follows:

> *" 6 (i) The subsidiaries of Usit World plc.Worldwide would book tickets from airlines on behalf of ultimate passengers.The matrix of agreements between the Usit group and the airlines was such that any such booking was treated as a purchase of the flight by Usit Limited from the airline in question.Accordingly, Usit Limited was responsible to pay the airline for the cost of the relevant ticket.In turn, the relevant subsidiary would owe Usit Limited the price of the ticket plus a margin which amounted effectively to an administration charge.The subsidiaries would account to Usit Limited for the ordering of tickets on a periodic basis and make transfers of money to Usit Limited arising from the payment they received from the ultimate passengers from time to time.In turn, Usit Limited used this money to pay the airlines and to fund other operating expenses throughout the Usit group.This arrangement appears to have applied to all the Usit subsidiaries, apart from Usit Ireland, which appears to have had some separate arrangements with airlines and in particular Aer Lingus."*
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> *6 (ii) In addition to operating through its subsidiaries, many third party travel agents worldwide would purchase tickets through the Usit group.The financial structure of these transactions was similar to that set out above.Third party agents would book tickets for ultimate passengers with airlines but on the basis that Usit would be responsible for paying the airlines and in turn, the third party agents would be liable to Usit Limited in respect of the price of the tickets.In practice, many third party agents acquired blocks of tickets from Usit Limited which they would then in turn sell on to ultimate passengers.Usit Limited enjoyed a greater margin in its dealings with third party agents, than it did in its dealings with subsidiaries.*
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> *Accordingly, Usit Limited was the vehicle through which most of the money entering and exiting the Usit group flowed."*

Mandatory nature of s.150:
13. There is no doubt that the terms of s.150 are mandatory as far as the Court's power to grant the orders sought are concerned, in the absence of the Court being satisfied that the respondents have acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he or she should be subject to the restrictions imposed by s.150.Towards the end of this judgment I address a novel situation regarding the non-participation by Ms.Millington Wallace and Mr Moreels, and the implications of this on the question of the whether it is thereby mandatory to make the orders sought against them.

The Liquidator's concerns re: the respondents conduct:
14. There is no onus on the Liquidator in an application under this section; but he, understandably and for the assistance of the Court in its consideration of what is put forward by the respondents in their efforts to persuade the Court that the orders sought should not be granted in the present applications, draws the Court's attention to certain matters which came to his notice as liquidator, after his appointment, and which have given him some cause for concern as to the manner in which the affairs of the companies were conducted in the period of two years or so leading up to his appointment.These matters are set forth in the liquidator's grounding affidavits.Again, there is a useful summary of these concerns contained in the helpful submissions provided to the Court at the hearing of these applications.

Concerns in respect of Usit World:
15. The liquidator states that the statement of affairs filed in relation to this company by the STA directors shows estimated realisable assets of €1,307,188 and liabilities of €69,047,077.He states that he also made his own calculations and estimates that the total liabilities could be in excess of €75 million and that total realisations will be in the region of €1,407,701.46.

· *in respect of the original directors:*

(a) There was non-compliance with certain requirements of the Companies Acts, and in particular:

(i) the requirement to file audited accounts - the last audited accounts filed being for the period ending 31 October 1999.

(ii) the obligations pursuant of s.202 of the Companies Act, 1990, to maintain proper books and records;

(iii) the obligation to convene an extraordinary general meeting of the company in accordance with s.40 of the Companies (Amendment) Act, 1983

(b) It appeared to the liquidator that proper books and records of the company, including statutory registers, were not kept by the company, and none such was available to the liquidator, which, he says, caused him difficulties in the liquidation, and particularly with the realisation of assets.

16. In his first grounding affidavit he sets out the various registers and books which he fears were not kept, and he states that he has not been furnished with same.He states in his affidavit that "there is a suggestion that the statutory books were held by the company secretary, Alan Fitzpatrick & Company Limited, and refers to a letter dated 12th June 2002 in which, he states, that firm denies having such records.However, Mr Colleary in a replying affidavit points out that the exhibited letter is in fact from a firm of accountants named "Fitzpatrick, Chartered Accountants, of 28, Pembroke Lane, Ballsbridge, Dublin 4, and not Alan Fitzpatrick & Company, of Old Bawn, Tallaght, who was in fact the Company Secretary.Mr Colleary also avers that he has been in touch with the latter who stated to him that he had never received a request for the books and records of the company.However, the liquidator in his further affidavit sworn in January 2004 has sworn that this takes him by surprise since he wrote to the correct firm in both January and February 2002 seeking books and accounts and that he received a response from that firm to the effect that they did

not have any such documents and he exhibits copies of this correspondence.Accordingly he maintains that he has not received these statutory books and registers and does not know their whereabouts.

(b) The liquidator takes the view that the company traded for some time while it was insolvent on a balance sheet basis.

17. He has concerns about the responsibility of the directors in continuing to trade in the years 2000 and 2001, and that they failed to realise the gravity of the situation, and failed to have adequate financial information available to them in order to properly assess the true financial situation of the company and the group of companies.Under this heading he has concerns about the commercial wisdom of a decision made in September 2001 to acquire the balance of 60% of the shareholding of a U.S.company which shall be referred to as *"CTS"*, and the manner in which this acquisition was financed, as well as concerns generally about the management of the company.

18. In his grounding affidavit the liquidator expresses the view that the company traded "for some time while it was insolvent on a balance sheet basis".He goes on to say that given the paucity of information available to him it is difficult for him to say at what point the company became balance sheet insolvent, or what precisely the directors knew about the financial affairs of the company.He does on the other hand exhibit two folders of documents comprising board Minutes and papers in respect of the period January 2000 to December 2001.He describes these papers as the primary management information relied upon by the directors in relation to the affairs of the entire group of companies.Having examined these documents he has ascertained a number of indicators that there were concerns at Board level from early 2000 concerning the group's financial position.He refers to a number of matters:

· Negotiations with potential investment partners were pursued in the context of restructuring and refinancing from early 2000;

· There were concerns at Bank of Scotland about the Group's financial position as at July 2000;

· There may have been difficulties regarding completing audited accounts as evidenced by discussions between Gordon Colleary and David Chapman of Chapman Flood Mazars in May 2000 when they "discussed three outstanding audits and Mr Chapman was to re-look at their proposed qualifications";

· The contents of a position paper put forward by Mr Colleary in July 2000.Without going into that document in great detail, it was a position paper prepared by Mr Colleary in the context of a decision taken in June 2000 by the Union of Students in Ireland (USI) to sell their 50% shareholding in UsitNow – a Usit subsidiary – back to the company.The cost was going to be about £9 million, and the paper discusses how this might be achieved by the company, given the serious undercapitalisation of the company.The paper discusses possible methods by which a deal could be done.

· A memo to Mr Colleary from a Dermot Shanley dated 24th May 2000 regarding what is described as "the poor state of management accounting for the group and the determination to cure historic failures in this regard";

· The evidence from the Minutes of continued efforts by the group to secure additional equity and/or further finance but without success;

· The Minutes of a Board Meeting of the 22 September 2000 record a resolution to convene an EGM of Usit World plc., in accordance with s.40 of the Companies (Amendment) Act, 1983, requiring a board to convene an EGM where the net assets of the company are less that half of the called up share capital of the company.The liquidator states in this regard that the board must have been aware that the net assets were less than half of the called up capital.The liquidator goes on to state that while the resolution to hold such a meeting was passed, he has no evidence that such an EGM ever took place, in which case the directors may be guilty of an offence under s.40(2) of that Act;

· By May 2001, there is evidence that cost-cutting measures and other ways of improving profitability were being considered and put forward with urgency, allied to continued efforts to secure equity support and/or refinancing;

· That notwithstanding these difficulties, of which the liquidator feels the Board must have been aware, the company, with funding provided by Usit Limited went ahead with a $12 million deal for the purchase of CTS in September 2001;

· That by November 2001 the directors appear to have been aware that the situation was then critical, since there is evidence that in that month the company's solicitor attended a meeting and that *"the board resolved to make an application for liquidation if solutions had not been found by 1 December 2001"*;

· That at a meeting on the 7th December 2001 it was stated *that "the board does not consider that a resolution in relation to the company ceasing trading should be made at this time as there is a reasonable assurance of a solution still available".*The liquidator is not aware of what that potential solution was.

(d) The financial information available to the directors was poor; and there were insufficient financial controls in place in order to monitor the financial position of the company.

19. The liquidator has described the manner in which the company conducted its business as "casual" for a company of its magnitude.He draws attention to the fact that it was the second largest student travel organisation in the world with a presence through subsidiaries in twenty five countries.The concern expressed by him is that there were no controls in order to ensure the performance of the company's subsidiaries or to monitor their ongoing performance.Referring to what he feels is the paucity of information available to him as liquidator he is of the view that such a shortage of information will have rendered it difficult for the directors to have any real or informed idea of the value of the trading subsidiaries on an ongoing basis or the value of any individual subsidiary at any given time.

Concerns about employees:

20. The liquidator states that due to the absence of proper records he is unable to ascertain what the proper position is relating to employees of this company, and that while Mr Colleary had initially told him that there were no employees, the fact is that eleven employees took proceedings against the company in the United Kingdom.He goes on to say however that while all these proceedings were withdrawn, he as liquidator incurred expenses regarding same.It appears that four of this eleven brought proceedings in Northern Ireland and also in this jurisdiction.He is optimistic however that these claims will be successfully defended, but expense will be incurred.

(e) Student Uni Travel Pty Limited:
21. The liquidator is concerned about a transaction in January 2002 whereby Mr Colleary appears to have disposed of Usit World's 40% shareholding in this company to the majority shareholder in that company, Gregor McCauley Consulting Services Pty for Aus$1, and states that further investigations are necessary in relation to this transaction.

· In respect of the STA directors:

These persons were directors at the time of the appointment of the liquidator, having been appointed in January and February 2002 following the resignation of the 'original directors' after the shares of Usit World were purchased by Solgun Limited, a company controlled by 'STA'.They were directors up to the date of appointment of the liquidator in May 2002.The liquidator has concerns as to their conduct during the months in which they were directors prior to his appointment, under the following headings:

(a) they did not take adequate steps to regularise the non-compliance with the requirements of the Companies Acts with regard to the filing of documents and the keeping of proper books and records.

(b) That they did not properly take into account the interests of the creditors of the company, as was their duty, when they disposed of certain of the company's assets while the company was in examinership, and rather had regard to the interests of STA.He has concerns also as to the costs involved in this asset disposal, the net benefit of same, and whether the best result was achieved.

(c) That these directors have not given the liquidator full co-operation following his appointment.

(d) If certain allegations being made by Mr Colleary and Mr Olivares against these STA directors and against STA itself, are true, as to their role in the collapse of the company, including certain misrepresentations made by STA prior to the sale of the shares in the company to STA, the liquidator believes that such conduct, if true, would raise serious questions as to the honesty and responsibility of their conduct.He accepts that the allegations are strenuously denied by STA and the STA directors.

Concerns with regard to Usit Limited:
22. As already stated this company is incorporated in Northern Ireland.The directors against whom relief is sought in relation to this company are Gordon Colleary and Angel Olivares.The liquidator believes that the total liabilities in the liquidation of this company could be in the region of €185 million to €210 million, and that total realisations will be in the region of €2.5 million.

(a) The liquidator believes that there were a number of breaches of Northern Ireland company law by reason of the failure to make annual returns, the failure to have audited accounts and the failure to maintain statutory registers.

(b) That proper books and records, including statutory registers were not available to the liquidator, and as far as he could see, none were maintained.

(c) The liquidator takes the view that the company traded for some time while it was insolvent on a balance sheet basis and has concerns about the responsibility of the directors in continuing to trade in the years 2000 and 2001, and that they failed to realise the gravity of the situation, and failed to have adequate financial information available to them in order to properly assess the true financial situation of the company and the group of companies.Under this heading he has concerns about the commercial wisdom, within Usit Limited, of a decision made in September 2001 that Usit World should acquire the remaining 60% of the shareholding of a U.S.company which shall be referred to as "CTS", and the manner in which this acquisition was financed, as well as concerns generally about the management of the company.

The liquidator has repeated in respect of this company what he has stated under this head of concern in respect of Usit World plc, and which I have set forth above.

(d) That there were inadequate systems of controls and management in place, and that it does not appear that any company meetings were held.He is of the view, given the very large sums of money involved that there ought to have been information available to this company so that it could identify the amounts due by various subsidiaries and third party debtors to the company so that the company could ensure that the levels of indebtedness could not escalate to dangerously high levels.He points to the fact that rather than having some sort of systematic payment of money by the subsidiaries and third parties to Usit Ltd, there were simply transfers of money generally on account of their indebtedness to Usit Ltd.

(e) A sum of €250,000 was transferred to the companies' solicitors, Reddy, Charlton & McKnight, from subsidiaries of Usit World which were debtors of Usit Limited, and that this was done in the certain knowledge that a winding up petition was imminent, and where the effect was to deprive the company of this sum.This sum was transferred one day before the appointment of the provisional liquidator.That firm of solicitors had acted for the Usit Group.The liquidator states that when asked about this, Mr Colleary has stated that these solicitors had asked for an advance of fees in relation to all the work done in relation to the work being done regarding the Solgun deal (this was the transaction by which the company was bought by STA).Mr Colleary had stated to him that the money was sought from all the subsidiaries but that payment was actually made by the subsidiaries in Portugal, Spain and Belgium, directly into the account of Reddy Charlton McKnight.The reason given for this method of payment is given by Mr Colleary in a memo to the liquidator, that the Group had no access to money in Ireland because of the issue that had arisen with National Irish Bank and it was unable to write a cheque in Ireland.The liquidator is of the view that this payment had the effect of depriving Usit Limited of €250,000 of receivables in a context where the directors must have known that a winding up petition was imminent.The liquidator has also made reference to a further payment to that form of solicitors of €70,000 in January 2002 and has not discovered where that money came from.

(f) Co-operation by Gordon Colleary and Angel Olivares:
23. It is worth noting that in his grounding affidavit the liquidator referred to the fact that initially his view was that Mr Colleary and Mr Olivares were not co-operating with him, but that since he filed his report in April 2002 he had received their co-operation.He states that Mr Colleary has been available to him and has assisted him and his staff, although some answers to some queries were

outstanding as at the date of swearing of his affidavit.In relation to Mr Olivares, the liquidator states that he received co-operation from him, but that in recent times he has not been residing in this jurisdiction and he has not been able to contact him.

(f) Position regarding National Irish Bank ('NIB'):
24. The liquidator was appointed on the petition of NIB.The company had no permitted overdraft facilities, but the liquidator states that the actions of the directors has produced a situation where the exposure of NIB in the liquidation is in the order of €4.6 million.The liquidator states that according to the affidavit filed by NIB when seeking to have a liquidator appointed, this unauthorised position arose was that the company lodged cheques with NIB payable to Usit Limited, which had been drawn on the bank accounts of companies associated with the Usit Group worldwide, those banks being other than NIB.Having lodged those cheques, the company then drew cheques on its own account with NIB.The affidavit grounding NIB's petition had gone on to state that, given the position of the directors and their knowledge of the financial situation of the company at the time, the bank believed that the directors knew or ought to have known that the cheques drawn on the associated companies could not be honoured and that there were no underlying funds to meet the cheques drawn by Usit Limited.The liquidator states that he agrees with this view and goes on to say that in his view, "such conduct is neither honest nor responsible and has caused a loss to the bank of approximately €4.6 million.

(g) Unexplained journal entries:
25. The liquidator has referred to many entries in the company's ledger which he has been unable to understand or investigate, through lack of detail and information in relation to them, and he has given some examples of some in relation to recipients named Usit Ireland Limited and Usit World.com Limited, being companies over which he has no control, as well as certain payments to an entity called "Usit Now" which he says is not a limited company and he does not know what sort of entity it is.He accepts that there may be rational explanations in relation to these items, but from the records which he has available to him, he cannot explain them.

Sunday Tribune shares:
26. He states in this regard that Usit Limited held shares in Sunday Tribune Newspapers plc, and that these shares appear to have been transferred to Mr Gordon Colleary in January 2002.He has had numerous conversations with him about this matter in which Mr Colleary has stated that he is in fact the beneficial owner of these shares, but that he is still awaiting proof that Mr Colleary paid for these shares which he states he purchased personally in 1996.

Responses by the Respondents:

Gordon Colleary:
27. It would be convenient to deal with the responses made by Mr Colleary as there seems to be little doubt, and indeed it is so stated to be the case by the liquidator in his grounding affidavit, that Mr Colleary was the founder and driving force behind the Group, and in my view is best placed to give an overview of the manner in which these companies were run.He filed a composite replying affidavit sworn on the 3rd November 2003 in relation to both Usit World plc, and Usit Limited.In a substantial, well organised and comprehensive affidavit, running to some fifty pages and one hundred and forty two paragraphs, he divides his responses into four sections, namely:

> Section A - General Background;
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> Section B - The collapse of the group;
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> Section C - The allegations made by the liquidator and his responses; and
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> Section D - Effect of the collapse of the group on him personally, and a summary.

28. Before he makes his averments specifically under these headings, he commences by stating that the Usit Group of companies ("the group") was, up to what he describes as "the unprecedented events of September 11th 2001", well positioned to become the largest student travel company in the world; that it had an excellent reputation in the market place, strong trading relationships with airline carriers which was built up over many years, and was in a strong strategic position.He avers also that it had many valuable franchise agreements relating to student cards in many jurisdictions and was about to embark on an exciting new phase of development in the USA.He expresses his view also that the group was well organised, had effective management and corporate structures, well qualified and committed employees, a Board of directors with enormous experience of the student travel industry built up over many years, and that the best advice available was sought, when required, in relation to marketing, corporate governance, finance, and legal issues.He avers as follows in paragraph 5:

> *"Notwithstanding the considerable pool of experience and wisdom from which it could draw, the Board of Directors of USIT World plc could not have predicted the events of September 11th 2001, which for the reasons I will set out below occurred at a time of success that curiously left USIT World plc vulnerable.September 11th 2001 was the single cause of the collapse of the group and notwithstanding the most strenuous efforts of this deponent and the other directors of USIT World plc, and at great personal cost to this deponent the USIT group collapsed."*

29. I should say at this stage, because it is what informs to a great extent my overall conclusions in this case, that while in the aftermath of the terrible events of September 11th 2001 one became used to hearing many economic misfortunes being somewhat conveniently blamed on that day's appalling tragedy, there is, in the case of the group, a rational and logical nexus between the collapse of the group and those events, and I believe that Mr Colleary can state this with reasonable justification in his quest to satisfy the Court that he has acted responsibly and honestly as a director.I will return to that question in more detail in due course.

Section A - General Background and history to September 2001:
30. Gordon Colleary states that he is, at the date of swearing of his affidavit, sixty two years of age, and that while attending University College Dublin in the 1960s, where he studied economics and mathematics, he was elected vice president of the Students Union in 1961, as well as President of the Union of Students in Ireland in 1964 and 1965.In the following decades he held leading positions in a number of international student and youth travel organisations.He believes that he enjoyed high respect in the travel industry based on a reputation for honesty and skills in dispute resolution.

31. He traces the history of the establishment of the USI Travel Bureau in the late 1960s to which he was appointed General Manager in 1967, and that by the 1970s the business had grown substantially, and that in 1972 the business was transferred to a new company, USIT Ireland Limited so as to facilitate the allotment of a 40% shareholding to Allied Irish Banks Plc.He returned to UCD and completed his degree in 1977, after which he returned to USIT Ireland Limited in 1977.

32. He details difficulties encountered in the 1970s following the oil crisis at the time and the effect rising oil prices had on the travel

industry, as well as in 1976 a significant financial loss to the company as a result of the collapse of a British company, Courtline Aviation.He adds in this regard that in spite of these difficulties, USIT managed to ensure that every student was carried at no extra cost.But by the late 1970s he states that the company's financial position was "precarious" following the oil crisis of those years, but that while the company was heavily indebted to financial institutions, it was supported by these institutions, and that as a sign of his commitment to the company he gave a personal guarantee.

33. He recounts as part of the history of that time that gradually the fortunes of the company began to turn around following cost cutting, so that by the mid-1980s the company had recovered to the extent of discharging all of its indebtedness to financial institutions.

34. He goes on to detail the expansion of the company's operations overseas during the 1980s, following its strong performance in this country and Great Britain.During this period the company developed strong links and business relationships with a number of airline carriers.He further avers that in the 1990s, changes taking place in the global travel business which saw the emergence of consolidated groupings of airlines such as One World Alliance and Star Alliance, and that this produced a need for USIT to expand globally in order to meet these challenges.Accordingly, in 1994/1995 USIT's management took the decision to develop the company into a global operation so that it became a worldwide developer and distributor of products and services to its niche market worldwide.This was achieved through the development of a worldwide network of retail operations by way of buying up existing companies in other jurisdictions and turning them around successfully, and he sets out the details of this expansion, and states that by the late 1990s the business had become very profitable resulting in changes being made to its corporate structure.He goes on to state at paragraph 17 of his affidavit that by 2001 *"USIT World plc and its subsidiaries had a combined turnover of €380 million and was operating through 800 sales and service outlets in 77 countries on five continents".*

35. The liquidator in his replying affidavit, when referring to Mr Colleary's statement at paragraph 101 of his affidavit that the unaudited reports and financial statements of USIT Limited available were accurate and up to date, states that even taking that statement as correct, he is of the view that on these figures which were available to the Board, net current liabilities at 31 October 1999 amount to €8,364,183, and a loss for the previous year is shown to have been €8,754,985.He says that this conflicts with what Mr Colleary has sworn in his affidavit, namely that in the late 1990s the company was "very profitable".

36. The liquidator also points to the fact that in the same accounts there is a qualification referable to loss after taxation for the year 31 October 2000 of €507,009, and at the balance sheet date the shareholders' deficit amounted to €9,650,043, and that the statements had been prepared on a going concern basis following assurances from the directors that sufficient finance will be made available to enable the company to continue trading for the foreseeable future.He submits that the significance of this is that it was clear even at that stage that the company was, on a balance sheet basis, insolvent and was continuing to make a loss and that the directors knew the position or at least should have known the position.

37. However, Mr Colleary has stated also that as the company expanded in the late 1990s, senior management sought advice from a UK specialist accountancy and management consultancy firm, Robson Rhodes, and that it was following on their advice that USIT World Plc.was formed.He gives considerable detail about the structures within that company, and the division of responsibilities within the subsidiaries worldwide, and the reporting procedures to USIT World plc.He was the Chief Executive of USIT World plc, as well as Chairman of USIT Limited, and he states that a Human Resources specialist was employed in order to identify the requirements of senior management and to source appropriate individuals as necessary.He sets out various appointments which were made in this regard, and states that by the year 2000 the company was well placed, but that the directors of USIT World identified a number of steps considered necessary in order to facilitate the globalisation of the group.These steps are set out as follows by Mr Colleary:

- The need to identify a corporate identity for the USIT World plc subsidiaries;
- The need for investment in a state of the art information technology system;
- The purchase of the Union of Students of Ireland (USI) shareholding;
- The establishment of a presence in the USA.

38. He states that in order to achieve these objectives, the Board considered that rather than using borrowings, it should seek an equity partner in order to fund these issues, and Mr Colleary for this reason as well as personal health reasons decided that he would reduce his shareholding in the group by involving an equity partner.

39. In order to address the corporate identity issue, the corporate identity "USIT World" was launched in 2000, and a project was initiated to develop a new computer system to integrate the selling and reporting to the USIT data centre in Dublin by subsidiaries.He sets out in considerable his understanding of this system and its objectives, but at the same time states that there were teething difficulties, and that by January 2000 the system was found to be unable to cope with the volume and frequently broke down.He states that KPMG were recruited to help solve these problems, and that by the end of the summer of 2000 these difficulties had settled down.But he states that these difficulties absorbed everybody's attention so much during this time that the plans for expansion were put on hold until mid-2001.

Purchase of USI shares in USIT Ireland:
40. It was considered in 2000 that the shareholding by USI (Union of Students in Ireland) in USIT Ireland, hindered the prospect of achieving an equity partner, and a Board decision was taken to purchase these shares in February 2000 for the sum of £6,000,000.This sum was discharged partly from cash and partly from loan notes from USIT World plc to USI.The liquidator in his responding affidavit states he does not understand why it was considered so necessary to acquire this shareholding in USIT Ireland Limited, since a number of subsidiaries of USIT World plc were jointly owned, and he points out that this purchase created a debt for USIT World which was in fact never repaid.

Purchase of CTS:
41. CTS was the market leader in the largest student travel market in the world - the USA, representing at the same time 11% of the world market.In 1999 it was for sale, at which time in February 1999 USIT World plc purchased a 40% stake for $8,000,000, together with an option to purchase the remaining 60% of the shares in the future.By 2001, the company's position was strong, according to Mr Colleary.It had purchased the USI shares, had engaged the services of a new Chief Financial Officer Mr Gerard Connolly, enjoyed a strong strategic position in the market, and had a strong effective management structure, as well as an up to date and functioning information technology system.In addition it had achieved a foothold in the United States of America with its shareholding in CTS with great potential for growth, However, and this is set forth in Mr Gerard Connolly's own affidavit sworn by him for this application, the profile of the group's funding and capitalisation was inconsistent with the group's size and its expansion plans, and new financing was

required.

42. At this time also, according to Mr Colleary, the company was negotiating with a number of significant potential investors regarding the purchase of some of his shareholding so that USIT World could achieve its plans to become a real competitor to Student travel Association ("STA") which then held 34% of the market worldwide.

43. Mr Colleary then goes on to recount what happened in the summer of 2001, and in my view this period of time is absolutely critical to the collapse of the group.He states that the Board of USIT World decided in the summer of 2001 to exercise its option to purchase the remaining 60% of the shares in CTS, which at that time had annual revenues of €220,000,000.Contracts were signed on 3rd August 2001.This purchase was completed on the 31st August 2001.It appears that the Board's approval for this acquisition was conditional on the availability of external funding.The purchase price was to be €12,000,000, but only €7,000,000 was to be paid on completion, with the remaining balance of €5,000,000 to be paid in due course when certain conditions were fulfilled.It was proposed to borrow €7,000,000 from Ulster Bank, and further sums from two other sources.In this affidavit Mr Colleary then states at paragraph 41 thereof:

> *"The funding from Ulster Bank had been approved but had not been drawn down.The funding for completion of the purchase was therefore provided from the resources of USIT World plc, together with a release of funds on short-term deposit with the Bank of Scotland." (my emphasis)*

44. Following the completion of this share purchase, business in CTS commenced under the ownership of USIT World just four days later on the 4th September 2001.Mr Colleary states that the Group auditors were very keen that the sale be completed on the 31st August 2001 so that the USIT audit could take place in tandem with the audit of CTS, so as to ensure that there was no delay in the consolidation of the sale.

Section B - the collapse:
45. Exactly one week later, "9/11" happened.Mr Colleary states that in the immediate aftermath of that day the focus of the group was to repatriate over three thousand students who were stranded in the USA and elsewhere.He states that no flights took place over a four day period in the USA.This led to an immediate reduction of 50% in sales by CTS, including a substantial number of refunds and cancellations of bookings.He says that the effect of this was dramatic, since the business operates on small margins and high volume, and that accordingly any decrease in turnover had a swift and significant effect on cashflow and profitability, and that the company's plan had been that the borrowings from Ulster Bank (not as yet by then drawn down, but approved) would be repaid from the increased turnover generated by the ownership of CTS.Immediate cost reduction steps were taken, such as forty staff redundancies, and all non-essential costs curtailed across the entire group.

46. However, Mr Colleary proceeds to set out three major events which he says flowed directly from 9/11.These are:

> 1. On the following day, the 12th September 2001 Ulster Bank informed USIT World plc that it was cancelling all of its investments in the USA including the facility by purchase.I set out below the liquidator's response to this alleged factor.
>
> 2. Bonding requirements to airline suppliers increased to €20,000,000, and that because a bonding facility which USIT World had with Independent Insurance Company was no longer available because of the collapse of that company, the entire of the group's bonding requirement had to be met from the group's own resources.However, the liquidator in his responses states that this collapse cannot be blamed on September 11th since that insurance company went into provisional liquidation on 17th June 2001.
>
> 3. The normal credit terms previously available were strictly enforced by suppliers, some of whom sought advance payment in order to help with their own cashflow.The liquidator states that he cannot verify this contention since he has not been provided with any aged debtor analysis which would be the normal way of verifying such a contention, nor any financial information sufficient to carry out such an analysis.

47. These difficulties, according to Mr Colleary, were compounded by the fact that the company was heading into a year with decreased sales and rising liabilities to suppliers.The group's cashflow was put under severe pressure, and the Board needed to take measures to ensure the survival of the group.Mr Colleary states that while it was obvious that the USA market would suffer immediately, it had not been appreciated at that time how greatly the European market would also be affected, but that by late November 2001 the picture was clear and the industry generally was facing enormous medium to long-term difficulties worldwide.

48. He states also that cost-cutting measures put in place produced annual savings of €9,000,000, and the position of all subsidiaries was monitored closely by senior management within the group.However, negotiations with a number of serious potential investors, which had commenced prior to 9/11 soon came to a halt thereafter, and he gives considerable detail about these in his affidavit.But without additional finance from investors, or at least a commitment to same, it was not possible to obtain the necessary accommodation with their existing bankers, Allied Irish Banks.He expresses the view that had they been able to do so, this combined with a rescheduling of payments to creditors would have seen the group survive.

49. However, the liquidator takes issue with what Mr Colleary has stated about Ulster Bank Ltd cancelling the loan facility for the purchase of the CTS shares following 9/11.Firstly he refers to the fact that the decision taken by the Board in relation to this acquisition was that it should not proceed until outside finance was in place, and yet the transaction proceeded by using the cash resources of USIT Limited.He states also that he has written to Ulster Bank Ltd about this assertion by Mr Colleary that Ulster Bank Ltd cancelled the facility, and he exhibits the response received.In his letter to Ulster Bank, the liquidator stated as follows:

> *"On my review however of the board minutes for USIT World I note that there is a comment that Ulster Bank's approval was likely to be given by the end of November 2001, not August, and similarly there is a comment that a Government Minister intended to write to your bank in early November 2001 advocating the progression of the facility.*
>
> *I would greatly appreciate therefore if you would advise whether the comments made by Gordon Colleary correctly reflect the situation with regard to the availability of funding from Ulster Bank for the CTS acquisition, and if not, what the actual situation was."*

50. Ulster Bank replied by letter dated 21st November 2002, and because of the importance of this matter I will set out the terms of that letter almost in full:

> *"I would like to clarify that at no point did Ulster bank consider providing facilities to USIT World Plc.Given inter alia the*

complexity of the USIT World Group, we were only prepared to consider the funding of the acquisition of Council Travel Services ("CTS") by USIT Ireland Limited or an approved wholly owned subsidiary.This was, in our view, effectively ring-fencing the proposal from USIT World Plc.

The proposal at the time was to provide a bridging facility to be repaid by 30 November 2001 to a newly formed company, Council Holdings Limited ("CHL") set up specifically to complete the acquisition of CTS.CHL was to be a 100% wholly owned subsidiary of USIT Ireland Limited.The facility was to be repaid from surplus cash balances that were to be in CTS at the time of the acquisition.

I have reviewed our file on the matter and can confirm the following.

We were in discussions with USIT management regarding the funding of the acquisition of CTS for some time during the summer months of 2001.Our discussions continued up until 11 September 2001.While we had verbally indicated we were looking favourably on the request for funding, at no stage was any offer made (formal or otherwise).Given the events of September 11th we ended our application process on that date and I confirmed the bank's position in a letter to Mr Alan Myles dated 16th September 2001."

51. The liquidator is of the view that this letter contradicts what Mr Colleary states with regard to the Ulster Bank position on funding prior to September 11th.

52. The liquidator also does not accept that the collapse of these companies can be accounted for by the events of September 11th 2001.In his replying affidavit he sets out a number of reasons for this statement:

(a) there was already by that date a substantial net asset deficit and operating losses, and that these were significant and known to the directors;

(b) the Board Minutes themselves show that there was concern about finances since the beginning of 2000;

(c) that in July 2000 when Mr Colleary was seeking an equity investor he sent a profile of USIT World to a person in Deutsche Bank, which included an analysis of the strengths and weaknesses, opportunities and threats faced by the group, and that therein the "weaknesses" included lack of profitability with continuing operating losses, a high cost base, an inadequate capital base and un-hedged exposure to financial risk, a weak shareholder base resulting from management and staff ownership creating limits to access to new capital, poor history of availability of timely and accurate management information, reliance on a small core of senior management.

(d) At the date of the liquidator's appointment, according to the Statement of Affairs there was a sum of over €54 million owed by USIT World to USIT Ltd, and that it does not appear to the liquidator that this debt arose only after September 11th 2001, since the debt appears to him to have risen consistently from the October 1999 to the 11th September 2001, and simply continued to rise thereafter.He believes therefore that it should have been known by the directors that there could be no reasonable prospect of this sum being repaid by USIT World, and he states that he is not aware of how the directors envisaged that the sum could or would be repaid.

(e) The passing of a resolution at the Board Meeting of USIT World plc on the 22nd September 2000 that an EGM be held in accordance with s.40 of the Companies (Amendment) Act 1983, which requires such a meeting to be called where the net assets of the company are less that half of the called-up share capital of the company.As already stated the liquidator is not sure whether such an EGM was ever called in fact.But the point which he makes in his replying affidavit is that almost one year before 11th September 2001, the Board appeared to be aware that the company was under capitalised.

(f) the liquidator also refers to the fact that in February 2001 Mr Gerard Connolly (one of the respondents) was seeking independent legal advice on a personal basis, and that this contradicts the assertion by Mr Colleary that the collapse was caused by the events of September 11th 2001.

53. Having set out these matters, however, it is right I think also to refer to the averment contained in the liquidator's replying affidavit sworn the 9th January 2004 in response to the affidavit filed by Mairin Colleary, and in which the liquidator states at paragraph 10 thereof:

"In relation to paragraph 22 of the affidavit I quite accept that the attacks of 11th September 2001 had a detrimental effect on the business but as I averred to in my previous affidavit, I am of the view that USIT World plc.traded for some time whilst it was insolvent when properly assessed on a balance sheet basis……"

54. At any rate, Mr Colleary in his affidavit has stated that by November 2001 the Board had instructed the director of corporate governance, Ms.Millington-Wallace (one of the respondents herein) to seek legal advice from the group's solicitors, Reddy, Charlton McKnight, regarding the duties of directors in circumstances of such financial strain on the company, and that it was apparent at this time that the company might not be able to meet its liabilities to creditors from the end of January 2002.Steps were taken to meet with a substantial majority (by volume) of airline suppliers to discuss the financial position, and agreement on some of restructuring was reached with these bodies, based on what Mr Colleary believes was the group's track record up to that time.

Board Meeting on 28th November 2001:

55. A Board Meeting of USIT World was held on the 28th November 2001.It was clearly an important meeting in view of the financial pressures under which the group was operating and in view of the directors' own position in such circumstances.It is worth noting part of the Minutes of that meeting under the heading "Financial requirements".The Minutes record in that regard:

"The Board considered the progress of all fundraising prospects and discussed these with both legal and financial advice.

The Chairman reported on efforts made to secure the long term financing of Usit World.

It was noted that the Terra proposal was withdrawn on 20 November.This proposal was for an equity injection of €25m and an up-front bridging loan of €12.5m.

The Board is to explore all other avenues with a review date of 01 December, conscious that solutions must be found

this week.

James Thompson tabled a paper summarising the chronology of negotiations with Terra and others.Discussions with Terra ongoing.

Paul Keane summarised the legal responsibilities of the Directors, and in particular the need to keep the viability of the Company under constant review.

The Board resolved that if a reasonable assurance of a solution is not found then the company should cease trading and make an application for liquidation.Board meetings of all subsidiary companies should be held to consider the positions of each at this stage.

It was resolved to meet again on Saturday 1 December 2001 to review the situation as of that date."

Approach to STA:
56. On the day following that Board Meeting of the 28th November 2001, Mr Colleary visited the company already referred to as STA, the world's largest student travel STA.This was with the approval of the Board, albeit that the Board was somewhat reluctant that approaches should be made to the Group's main competitor.Mr Colleary states that the purpose of this approach to STA at this time was because it was the view of the Board that such an approach was in the best interests of the creditors of the Group.He met with Mr Richard Porter of STA (one of the STA directors/respondents herein), and explained the financial difficulties the Group found itself in, and the two discussed also the potential damage to the student travel market generally if the USIT Group was to collapse.Mr Porter apparently stated that he would consult the Board of STA's parent company in Switzerland and revert.He did so with news that there was provisional approval to the proposal to purchase USIT World.Due diligence commenced immediately with the assistance of Price Waterhouse Coopers.The deal was due to complete in January 2002.

57. Mr Colleary explains in his affidavit that the advantage of dealing with STA was that the company was familiar with USIT's business and was already a substantial company with significant resources so that a speedy decision could be made, and thereby in the best interests of creditors.A further meeting took place on the 23rd December 2001 with STA when some general information was given to STA about USIT's financial position, but there was a reluctance, according to Mr Colleary, to give too much detail because firstly STA was the Group's main competitor, and because STA would not sign a confidentiality agreement.This averment by Mr Colleary is relevant to something which Mr Porter states in his own affidavit about the lack of detailed information given to him.I will come to that in due course.

58. Board meetings of USIT World had been held on the 7th December 2001 and 14th December 2001.The Board was then of the view that as long as there was a chance that the Group would survive given the discussions which were taking place with STA, each of the subsidiaries should continue to trade as this was in the best interests of creditors, shareholders, employees and customers.

59. Mr Colleary states that it was represented to him by STA at all times that it had sufficient available resources and a willingness to restructure the debts of USIT World plc, so that the Group of companies could continue to trade.He believed that STA would take the necessary steps to ensure that the business of USIT World would be absorbed into STA and that the position of its staff and creditors would be better than if the Group ceased to trade and went into liquidation.

60. He states also that at this time he personally arranged that a sum of Stg £500,000 to which he and his wife, Mairín Colleary were beneficially entitled, be paid to one of the Group's key subsidiaries, namely USIT Britain.This payment was made by him against advice from his solicitor who advised him that there was no chance of recovering the sum paid should the deal with STA not be completed.He avers that this sum of money represented their only other major asset besides their family home.The reason why he made the payment, according to his affidavit, is that the sum was needed by that subsidiary in order to meet a large direct debit to the IATA clearing house, and that the failure to meet that liability would have resulted in the immediate collapse of that key subsidiary.But he also states that he made that payment in the belief that STA would complete the purchase and honour the liabilities of the Group, since in his view the deal was a very good one for STA.In his further affidavit sworn on the 9th January 2004, the liquidator accepts that this payment was made and that it represents a significant personal effort by Mr and Mrs Colleary to save the group.

61. However, the fact is that shortly after the sale to STA was completed with an STA subsidiary, Solgun Limited, a petition was presented by the company to have an Examiner appointed.The appointment of an Examiner was confirmed by Order of the High Court dated the 19th February 2002.

62. In March 2002 it appears that the sale of 88% of USIT World plc to Solgun Limited was referred to the Competition Authority by the Tánaiste and Minister for Enterprise, Trade and Employment.Mr Colleary refers to the STA submission to that authority in which it hoped to assist in the re-organisation of the company so as to protect the student travel industry, and in the interests of staff, customers, suppliers and other key stakeholders.It was, according to Mr Colleary, put to the authority that one of the reasons why the company was put into examinership was the elimination of STA's main competitor while allowing STA to acquire some of USIT's assets if the examinership led to its eventual liquidation (something vehemently rejected by the STA directors).

63. Mr Colleary voiced his concerns in his own submission to the Competition Authority.He states that the Competition Authority in its report recognises that the demise of USIT World plc and its subsidiaries has been of significant benefit to STA; that the cost of the break up of USIT World has been funded entirely by the sale of the subsidiaries; STA did not invest any funds in any rescue package; STA has achieved the elimination of a competitor representing 27% of the world market thereby strengthening its already dominant position in that market.

64. I have set out the history of the rise and fall of the USIT enterprise in such detail because I consider it important to look at the conduct of the respondents in the light not just of the events and actions taken in the months immediately preceding the collapse, but also, particularly in the case of Gordon Colleary and Mairín Colleary, in the wider and historical context of their conduct and management of a business built up over a period of thirty five years to a point where it became a significant world-wide player in a niche market.

Section C - The allegations made by the liquidator and his responses:

1. Adequacy of books and records:
65. In this regard Mr Colleary states that while he himself is not an accountant each of the subsidiaries employed a full-time financial

controller, and that the Board of USIT World plc delegated the task of dealing with financial matters to group's accountancy team, and that there was a Chief Financial Officer employed as well as a Group Financial Director who was a qualified accountant with extensive experience in the travel industry.This person had under him in turn six qualified accountants as well as other staff.

66. He describes in great detail the company procedures whereby airline tickets were bought and sold on to its subsidiaries or to third party agents, and he describes also how information was collated on a monthly and quarterly basis, and that this information was available to the Board of directors at each Board meeting.

67. He describes also the computer system in place under licence from Sun Microsystems, and he describes this system as one of the most widely used accountancy packages in the world.He goes on to state that from this system, each of the subsidiaries would provide up to date financial information to Usit World in a number of forms which he sets out in detail, such as sales reports on a country basis, weekly cash flow forecasts, monthly group management accounts, reports of payments to airline carriers, including information as to the expected billing date of the airlines and by actual invoice received, weekly aged debtor reports and debtor stop lists.He states also that the liabilities of USIT Limited to the airline carriers could at any time be accurately estimated from the systems in place.

68. The liquidator on the other hand, in his further affidavit sworn in January 2004 takes a different view of the computer system, and states that the system was not up to date on his appointment, and that transactions had been processed only up to the end of October 2002, to the extent that the liquidator has to employ eighteen staff in order to process information and tickets so that the system would be up to date and meaningful.

69. In relation to management accounts Mr Colleary states that these were available for all the subsidiaries for the period ending October 2001, and that draft balance sheet, statutory balance sheet and profit and loss accounts were also available, and that monthly management accounts were available for consideration at monthly Board meetings and that these were considered by the directors at these meetings.He cannot understand why the liquidator has been unable to locate any of the books and records to which he has referred in his affidavit, and that they were kept at the College Green offices, and were handed over to the Examiner after he was appointed.

70. Without going into everything which he says, I will just summarise it by stating that Mr Colleary is of the view that given the nature of the business and the transactions involved, the financial information available was as up to date as practicable, and typical of other operators in the market.He says that up to the time of his resignation from the company he was always able to identify the financial position of each of the subsidiaries with reasonable accuracy, and that the information available was always capable of ensuring that he was able to comply with the provisions of the Companies Act, 1963, and that all this information was given to the company's auditors for the purpose of filing the annual audited accounts.

71. In his further affidavit sworn in January 2004, the liquidator states that his concerns under this heading were shared also by the STA directors upon their acquiring ownership, and he refers to the affidavit of Richard Porter (one of the STA director/respondents herein), and I will deal with that affidavit in die course when addressing the application in respect of those STA directors.He also refers to the fact that his concerns were shared also by the independent accountant who issued a report dated the 1st February 2002, which accompanied the application to the High Court for the appointment of the examiner, pursuant to the provisions of s.3(b) of the Companies (Amendment) Act, 1990.

2. Technical breaches of the Companies Acts:
72. Mr Colleary has stated that in 2001, BDO Simpson Xavier had been appointed as auditors to USIT World.As already stated, that company was a non-trading group holding company.Therefore there were very few transactions, probably no more than 15 transactions per month.He states that these entries were held in the computer system and that these records were up to date to the end of December 2001, and that audited accounts for that period up to 31st October 1999 had been filed.

73. He further states that in respect of the years ended 31st October 2000 and 31st October 2002 respectively, no audit work had actually been carried out but that the accounts for USIT World plc as a stand-alone company were complete and ready for submission to the company's auditors.

74. He also states that the date for the filing of the company's annual return and accounts with the Companies Registration Office had not expired by the date of his resignation as a director.

75. In relation to USIT Limited, he makes the point that this is a company registered in Northern Ireland, and that the delay in filing the documents in Northern Ireland had been an issue with the Northern Ireland Companies Office.He states that in fact they were very supportive in relation to the difficulties encountered in relation to the consolidation of the group and agreed that one set of accounts could be filed for period to 1999 and annual accounts for the years ending 31st October 2000 and 31st October 2001.He sets out a number of reasons for the delay caused in this regard, but there is no need to set those out in full detail, but they involve the sudden resignation of the auditors at that time, and that once BDO Simpson Xavier had been appointed, work commenced on the backlog in the auditing of the USIT Limited accounts.

3. Adequate controls and corporate governance:
76. Mr Colleary does not accept that there were not in place, as alleged by the liquidator, adequate controls to clearly identify the amounts due by various subsidiary and third party debtors to USIT Limited and to ensure that these levels of indebtedness could not escalate to dangerously high levels.He describes a procedure whereby these matters were monitored.

77. In relation to corporate governance, he rejects the contention of the liquidator, and he sets out details of how Minutes of all meetings of USIT World were kept by the Director of Corporate Governance, Ms.Millington-Wallace, and that she was responsible for that, and that the affairs of USIT Limited were inextricably linked to the affairs of USIT World plc, and that accordingly at the end of every meeting of USIT World, the affairs of USIT Limited were considered by the directors and the Minutes were also recorded by Ms.Millington-Wallace.

78. I have already referred to the fact that Mr Colleary has sworn that it appears that the liquidator, when seeking out the statutory books maintained pursuant to s.202 of the Companies Act, 1990, he did so by writing to the wrong firm of accountants, and that the correct form has confirmed to Mr Colleary that they never received a request for the statutory books of USIT World, and furthermore, that this firm has confirmed to Mr Colleary's solicitors that in fact these books and records were maintained.

4.The size of the deficit:
79. Mr Colleary queries the basis for the liquidator's assessment of liabilities as between €185 million and €210 million, and his estimate

of €2.5 million for realisations of company assets.He states that his requests for a breakdown of how these figures have been arrived at have been refused, and that in the absence of this explanation, and also in view of his lack of involvement in the company since 2002 it is difficult to comment on the alleged deficit.His own view is that aggregate liabilities of USIT Limited are in the region of €99 million, of which €91 million consists of liabilities due to airline creditors, and in this regard he states that each debt due by USIT Limited to an airline creditor represented a ticket which had actually been paid for by the customer.He also states his view that "the amount due to airline creditors although significant was not out of the normal range expected in the industry" and that "any given time it was standard normal practice in the industry for airline creditors to be owed 20% of turnover by the student travel companies who were members of SATA" and that given the annual turnover of the USIT group was €600 million at 31st October 2001, the amount due to airlines at the time the liquidator was appointed was under the 20% referred to.

5. Treasury files:
80. Mr Colleary states in his affidavit that all books and records of USIT Limited were available at the company's premises at College Green and Aston Quay in the Sun Accounting package and on the TAA system until he resigned as a director in January 2002.The liquidator has stated in his replying affidavit that his staff never located these books and records in these offices, inspite of enquiries made of the USIT accountancy staff following his appointment.

6. Trading whilst insolvent:
81 The liquidator expresses a concern in his affidavit that the company traded whilst it was insolvent on a balance sheet basis.Mr Colleary submits that this is not the correct basis for deciding if the company should cease to trade and that insolvency is more correctly to be considered on the basis of whether or not the company can meet its debts as they fall due, and in this regard he is of the opinion that USIT Limited was at all material times able to discharge its debts as they fell due.He accepts in his affidavit that as of the 31st October 2001 there was shown to be a deficit of €13,624,796; but considers also that consideration should be given also to the fact that there were bonds which USIT World plc had put in place in respect of airline creditors' liabilities, which at that date exceeded €14 million.In the light of these, he considers that the value of the assets of USIT Limited, together with the value of these bonds was more than sufficient to cover the full amount of the company's liabilities prior to the impact of the events of September 11th 2001.In this regard the liquidator has stated that he has only limited information about these bonds, but believes that they were put in place by way of a facility from Anglo-Irish Bank to USIT Ireland Limited, and that two claims against USIT Limited were reduced by payments on foot of these bonds, but he is not aware to what further extent there was any benefit to USIT Limited.

82. Mr Colleary also refers to the Minutes of the Board Meeting of the 28th November 2001 to which I have referred earlier.He states that it is evident from these Minutes that the directors were at all times aware of their obligations in relation to insolvency, and that specific thought was given to the prospect that in January 2002 a situation of insolvency could arise, and that appropriate legal and corporate advice was taken by the directors, and a number of options were considered.Among other things, according to Mr Colleary, approaches were made to the Irish Government for assistance from an insurance scheme set up by the Government to assist airlines and other related firms, and that approval in principle had been given, but subject to approval from the EU Commission.That approval had not been received by the time of the sale of the group to STA.

83. In relation to the various matters which are set forth in the liquidator's affidavit, and to which I have referred when setting out the liquidator's concerns as to insolvent trading, Mr Colleary states first of all that the two folders of company Minutes are not the only information which was available to the directors at Board Meetings; but in any event he does not accept that these Minutes support the notion that USIT World was insolvent in December 2001, and that the liquidator is being selective in his consideration of these Minutes.Mr Colleary believes that a full consideration of these Minutes show that he acted honestly and responsibly.

84. Regarding the suggestion by the liquidator that there may have been difficulty having the accounts of the company audited, Mr Colleary states that following concerns raised by Chapman Flood Mazars in May 2000, the issues raised were dealt with and accounts were audited without qualification.

85. In relation to a memo dated 24th May 2000 regarding an alleged poor state of management accounting for the group, Mr Colleary states that the same memo is in fact a very positive report, and that there was a system of financial control in place, and that a breakdown had taken place, but that issues had been resolved, and that the Board had been kept fully informed about these matters.

86. Mr Colleary accepts that in May 2001 he was advising that cost-cutting measures were necessary in order to improve profit, but he submits that this expression of concern and the need for caution demonstrates that he was acting responsibly.This was a time at which plans were being made to acquire the remainder of the shares in CTS, and Mr Gerard Connolly had been employed by USIT World in order to secure further finance in order to replace the company's borrowings with Bank of Scotland and in order to obtain the necessary finance and identify an equity partner to purchase these shares in CTS.However, Mr Connolly resigned in June 2001 on health grounds, but even by then, according to Mr Colleary, discussions had taken place since December 2000 in order to secure finance.Mr Colleary points also to the fact that in July 2000 detailed information was given to Bank of Scotland which demonstrates that at all material times USIT World was able to give financial information to its banking creditors in the form of monthly cash flow projections, and that the company Minutes of July 2000 show also the level of information available to the Board of directors.He submits that in these circumstances it was reasonable for the company to continue to trade in 2000 and to make plans for expansion worldwide.

87. In his replying affidavit the liquidator states that Mr Colleary has provided no third party verification for his assertion that USIT Limited was able to pay debts as they fell due, and that the directors should also have been considering whether by continuing to trade the creditors would suffer further losses, and that further indebtedness ought not to be incurred in circumstances where there were reasonable grounds for believing that the company would not be in a position to pay its debts taking into account contingent and prospective liabilities.The liquidator states that he accepts that the company was generating large amounts of cash and that it appears that there were funds to meet creditors who pressed for payment, but he still believes that this question must be looked at against the background of escalating inter-company debts, and where there is some evidence that payment was not being made as debts were falling due, and he exhibits some examples for this contention.

7. The indebtedness to National Irish Bank ("NIB"):
88. This Bank is the creditor on foot of whose Petition the liquidator was appointed.The liquidator, as already set out herein, has pointed to the fact that although USIT Limited was not permitted to have its account with NIB overdrawn at all, the actions of the directors resulted in a situation where the account was overdrawn in the sum of €3.38 million, and that its ultimate exposure was €4.6 million.In response to this, Mr Colleary states in his affidavit that the manner in which funds were drawn from the account of USIT Limited should have come as no surprise to NIB, since what the liquidator expresses concerns about in this regard was in accordance with a practice which Mr Colleary states had been in existence for many years and as a result of the "unique relationship that existed between USIT Limited and National Irish Bank".He goes on to say that he had no reason to think at the time that cheques were written that they would not be honoured, and that he could not have anticipated that the subsidiaries on whose accounts the

cheques were drawn would collapse.

8. Payment to Reddy Charlton & McKnight:
89. Mr Colleary states that the amount of €250,000 paid to that firm of solicitors was in respect of fees due as well as fees into the future arising from the financial difficulties looming as of the date of payment, namely 21st January 2002.He says that it would have been impractical to brief another firm fully in the time available, and that this firm had many years of experience dealing with the USIT group, and a resolution by the Board was taken that this payment should be made as it would be in the interests of the group as a whole, since legal advice would be needed.The funds in question were in effect advanced by subsidiary companies to USIT World who in turn paid the funds to the firm of solicitors on behalf of itself and on behalf of the subsidiaries.

90. In his response to these averments the liquidator maintains his position that this payment is a cause for concern, given the fact that it was made only one day prior to the appointment of the liquidator, and that the directors knew that his appointment was imminent.He is of the view that this payment represented a diversion of funds which should have enured to the benefit of the creditors, so that an historic bill for fees and fees for future advices could be paid for.He also points out that when he approached the subsidiaries, on whose behalf Mr Colleary states he was making this payment to that form of solicitors, have stated that their contribution to that payment represents an advance on payment, and therefore going to reduce the debt due by them to USIT Limited.

91. He makes a further point that this payment of €250,000 to that firm of solicitors had been preceded by another payment of €70,000 on the 18th January 2002 which was on foot of an invoice addressed to USIT World Plc headed: "Re USIT World plc.and its subsidiaries - retainer in respect of National Irish Bank and associated insolvency issues".He says that the subsequent payment of €250,000 seems high thereafter.

9. Sunday Tribune Shares:
92. The liquidator has raised a query about the transfer of these shares by Mr Colleary in January 2002, and also stated that he had difficulty getting information about the transaction.Mr Colleary states that it is simply coincidence that the transfer of these shares took place in January 2002, and that the market value of the shares was then nil and remains nil as of the date of swearing of his affidavit.He goes on to state that the transaction was noted in the accounts of Tribune Newspapers Plc for the relevant years and that any delay in the registration of the transfer, and some larger transactions resulted from lost share certificates.However in his replying affidavit, the liquidator states that what Mr Colleary has stated is not consistent with what he has said to the liquidator as referred in the liquidator's grounding affidavit at exhibit RJ8, and he also has stated that Mr Colleary has not yet provided proof that he purchased these shares in 1996.

Section D – Effect of the collapse of the group on Gordon Colleary personally, and a summary:
93. In this section of his affidavit, Mr Colleary states that as a result of the collapse of the USIT group, he has lost his entire life's work – and that over the period of thirty six years of the company's existence he believes that he conducted himself with normal commercial probity and to proper standards to be expected of him as Chief Executive of both companies.He points also to the great financial loss which he has felt since the collapse, including the loss of personal savings which he put into the company against legal advice.He believes that as soon as it became apparent following September 11th 2001 – an event which he regards as the sole reason for the collapse – the Board shifted its focus to the position of the creditors, and continued to trade because it believed at that time that this was in the best interests of the creditors.He maintains that he took all appropriate legal and financial advice, and took steps designed to address the best interests of the creditors.He believed that the approach to STA was in the best interests of the company, and he expresses the view that the conduct of STA following the completion of the transfer of the business to them was "reprehensible", and not something which he had anticipated when he approached them.In relation to Mr Colleary's allegations against the STA directors, the liquidator in his replying affidavit cannot say whether what Mr Colleary says is correct or whether the STA directors are correct.He says that there is circumstantial evidence which supports both views, and he comes down neither on one side or the other.

Mairin Colleary:
94. In his grounding affidavit, the liquidator has stated that Mairin Colleary, wife of Gordon Colleary, was a director of USIT World plc from 18th January 1999 to her resignation on the 24th January 2002 upon the sale of the company to Solgun Limited on behalf of STA, and that since this was the same period of time as a director as the Gordon Colleary, Angel Olivares and Lyn Millington-Wallace, she should share equal responsibility for the conduct of the company during that time.

95. However, in her first affidavit, Mairin Colleary states that in fact she became a non-executive director only on the 18th January 2001, and not the 18th January 1999, and that her role on the Board was primarily to represent the interests of USIT (Ireland) Limited, and that she was not part of the group management team.The liquidator has stated in his grounding affidavit that Mairin Colleary has cooperated with him in his capacity as liquidator.He states that she had an active involvement in the business, and that she had been involved for many years with her husband in the travel business, but he goes on to state that she seems to have had a particular responsibility in relation to the affairs of USIT (Ireland) Limited.In this affidavit the liquidator does not bring to the Court's attention any particular matter in relation to Mairin Colleary, and as I have already set forth the liquidator states that Gordon Colleary was effectively the decision taker in respect of most issues in relation to the group up to the date of his resignation.But clearly in so far as the liquidator states in relation to USIT Limited and USIT World plc that the Board of Directors did not ensure that they had adequate and complete and up to date financial information as their disposal at relevant times, for all the reasons which I have already set forth, this complaint refers as much to Mairin Colleary as to any other director, since she was a member of the Board.He makes no particular complaint of dishonesty against her, and has accepted that she cooperated with him as liquidator, but he would be of the view that she as well as the other directors did not act responsibly in relation to the affairs of the companies, in the same way as this complaint is made in respect of Gordon Colleary and which I have already set forth in some detail.The same would apply to the complaints made generally in relation to corporate governance, trading while insolvent, the payment to Reddy Charlton McKnight, the national Irish Bank debt and so on.

96. Mairin Colleary concentrates in her first affidavit on dealing with the issue of whether she acted responsibly, since she believes that there is no allegation made or suggested that she acted dishonestly.She describes her background, and the fact that she is a director and principal shareholder in Co-ordinated Project Management Limited (CPM) which is a company which provides consultancy and project manager services since 1997, and that this company continues to trade and file its accounts in a proper manner.Prior to 1997, she had acted as a consultant to USDIT Ireland Limited and to another company Encounter Ireland Limited.She says that for about ten years prior to joining the Board of USIT Ireland Limited she had been a consultant to USIT in relation to hostels, UCD on-campus accommodation, and property management.She gives a considerable amount of detail in relation to these activities.

97. She describes how in 1998 she became a non-executive director of USIT Ireland Limited in May 1998.In 2000 she was asked to become managing director of that company on the resignation of the incumbent managing director, but she declined, while at the

same time taking on a consultancy role for a period of twelve months, which lasted in fact until 5th June 2002.She describes how she was heavily involved on behalf of USIT Ireland Limited in the aftermath of September 11th 2001 in bringing back some 3000 students who were stranded in the USA at that time.She went to New York and Washington with a team of other people.

98. USIT Ireland went into examinership in February 2002 and her consultancy to that company was extended during the period of examinership so that USIT Ireland Limited would have senior management during the examinership.She points to the fact that during the examinership no criticism was made of her either in relation to her role in that company or USIT World plc.Following the completion of examinership she resigned as a director of USIT Ireland Limited following the sale of that company to a new consortium.

99. She states that while a director of USIT World from 18th January 2001 to 24th January 2002 (one year) she believes that she made a substantial contribution to the company at Board level, particularly in relation to what she calls operational matters and to the need to keep costs down to a minimum.During the seven months between January 2001 and September 2001 she attended seven Board meetings, and became familiar with the issues being discussed.She believes that the Minutes of these meetings demonstrate that she acted responsibly and participated fully, and that she questioned many matters raised in these meetings.

100. She also believes that the events of September 11th 2001 (seven months after she became a director) had a catastrophic effect on the affairs of the USIT group and was what she calls the "dominant reason for its collapse." Following that date she says that she attended five Board meetings and played a positive and questioning role at these meetings.

101. In relation to the Ulster Bank funding for the buy-out of the remaining 60% of CTS she states also that the company had received "agreement from Ulster Bank to provide the necessary funding", but that within ten days of the completion of that purchase September 11th had happened, and that this had resulted in an immediate drop of 50% in sales by CTS, and a reduction of 30% across the USIT Group as a whole.She states also that the company was particularly vulnerable because of the acquisition of CTS so soon before, and that serious cashflow pressures resulted, and that this led the Board to seek outside investment in order to try and secure the future of the group, leading to the sale of the company to Solgun Limited for €1.She supported this sale as she believed that it held out the best prospect for saving jobs and the business, and she refers to the fact that as a Board legal advice was taken, and that the position of creditors and the staff of the subsidiaries.

102. Mairin Colleary states that she believes that the liquidator has overstated her role in the company.She highlights the non-executive nature of her directorship, and its limited focus in relation mainly to the interests of USIT Ireland Limited.She believes that many of the matters about which the liquidator expresses his concerns in his grounding affidavit in fact predate her appointment as a director.She states that she is not therefore in a position to comment on the liquidator's concerns about possible insolvent trading during 2000, and as far as 2001 is concerned and while she was a director she was satisfied that the company had engaged the services of a professional and competent team of accountants, that regular management accounts were produced to the Board, and that a director had been appointed (Ms.Millington-Wallace) with specific responsibility for good corporate governance.

103. In her affidavit she gives some detail as to the effect that the collapse of the USIT Group has had on her and her family, and she gives details of a number of voluntary and charitable bodies from which she will have to resign if an order as sought by the liquidator is made against her.

104. She filed a second affidavit in January 2004 in response to a further affidavit filed by the liquidator, which did not in fact refer to her specifically, but to the affairs of both companies, USIT Limited and USIT World.She first of all points out that she was never a director of USIT Limited, only USIT World, and she repeats some of what she already averred in her first affidavit.But she takes issue with something averred by Richard Porter (one of the STA Directors) in his own affidavit in answer to the application made for an order against him.Mr Porter has averred that upon the acquisition of the USIT there was "virtually no financial information available" and "no balance sheets for individual subsidiaries…".She believes that he is mistaken in that regard since she was personally shown and taken through management accounts at a number of board meetings prior to her resignation, and that these accounts were kept on the computer at the offices at Aston Quay, and she says also, in relation to USIT Ireland Limited, that since she was responsible in relation to that company for the production of accounts, she knows that balance sheets existed and cannot understand how they were not available to him.She takes issue also with what Mr Porter has said in his affidavit about discovering on his appointment as a director to the company that it had "no staff, no bank accounts and no assets other than shares in its subsidiaries around the world…"

105. By way of response she states that at the time of her resignation there was a core senior management team comprising a Chief Executive Officer, Chief Finance Officer, a Chief Operations Officer, and a Chief Informations Officer, and that all these persons met with Mr Porter and his advisers in Dublin and London and at all times made themselves available to him after the sale of the company.She also says that they left the company not having been paid for their work for January and February 2002.In addition to this core management team, Mairin Colleary states that there was a middle management team, and a team of accountants.She also knows that the company had a bank account because as part of the sale agreement Mr Porter had agreed to meet with the company's Bankers, but that the only bank they met with was in fact Bank of Ireland.She refutes any suggestion by Mr Porter that the company was not run in a business like manner.She also points out that after the sale of the company to STA (through Solgun Ltd) it went in to examinership, and that as far as she is aware the Examiner in his report to the High Court did not express any concern as to a lack of books and records.

106. In a further affidavit the liquidator states that in spite of what Mairin Colleary has said in her affidavit he remains of the view that the books and records of the company were inadequate, and also that her view of the financial state of the company is overstated.

107. In relation to the acquisition of the remaining shares in CTS she states that she does not regard the decision to do so as irresponsible, even though the record shows that she voted against doing so.She says that her sole reason for so voting was that she believed that it would be better to await some up to date financial information following the year end for CTS, and that her instinct also was not to trust some of the financial information they had been given by the CEO of CTS.She states also that it was not because she believed that the company could not afford the purchase, and that on the contrary all the advice was that the company would benefit from same.She believes that were it not for "September 11th " she would still be a director of one of only two global student travel companies – the other being STA.

108. She also refers to the payment of Stg£650,000 to USIT Britain Limited to which Mr Colleary referred to in his affidavit.She states that at the time they both made this payment they each knew that they had no further interest in the Group as the sale to STA had been agreed.But nevertheless she states it was a payment which they made only in the interest of the survival of the Group for the benefit of the creditors and the purchaser, and that the sum represented their only asset of any significance besides their home, and that it was a payment made against the advice of their solicitors who had warned that it would be irrecoverable if the sale did not

complete.

109. In support of the position of Mairin Colleary, there is also an affidavit from Mr Alan Myles whose position in the company, USIT World plc was described as "financial director", but who never in fact acted as a director and was not a member of the Board.

110. However, he wishes to confirm what Mairin Colleary has stated about the existence of books and records of the company while he was in that position from January 2001 to January 2002.Without going into his affidavit in detail it is fair to say that he believes that books and records were kept and were available, and that up to date management accounts were kept in the company's offices at College Green, and alter at Aston Quay.He also says that he was never asked by the liquidator or any of his staff for any financial records of the company, except that he was asked for the latest trial balance, contact details for the subsidiaries, a chart setting out the group structure and the last set of statutory accounts, all of which he says that he provided.He believes that the company's records were kept up to date, and that any person seeking to access to the financial information related to the company would have been able to do so, and that if anybody had asked him to provide such information he would have been able to do so.However, the liquidator has answered this by stating inter alia that his staff, and in particular a Ms.Geraldine Dowling, had cause to contact Mr Myles seeking financial information about USIT World plc, and that Mr Myles referred her on to a Mr Coveney, who was a member of the staff of the Examiner appointed, and that he in turn stated that he did not have the books and records being sought, but would be happy to assist in any other way, and further that Mr Myles subsequently indicated that he could be of no further assistance.

111. The liquidator has also said in relation to what are described as the "treasury files" in relation to USIT Limited, that the existence of these files was disclosed to him by a staff member of USIT Ireland Limited who was employed by him, and that the existence of these files was acknowledged by Gordon Colleary.He goes on to say that having requested these files from Mr Myles by e-mail and verbally on a number of occasions, Mr Myles informed him that they were missing, and as of the date of that affidavit by the liquidator, namely the 10th May 2004, they were still missing.

112. In response to these averments and others by the liquidator Mr Myles swore a further affidavit pointing out some confusion on his part, for which he apologises, as to what information was being referred to.

Gerard Connolly:
113. As stated at the outset, he was appointed finance director of the company but was employed only from the 18th January 2001 to the 2nd July 2002.In his first affidavit in which he seeks to satisfy the court that he acted honestly and responsibly in relation to USIT World plc, he sets out his career history since the mid-1970s as a Chartered Accountant.His career has seen him overseas working with US multinational companies, nine years in banking and financial services, becoming group finance director with a listed company.He gives further details also of his career experience which as set forth in the affidavit is extensive.He goes on then to state how he became involved with USIT World.He states that in about November 200o he was approached by Bank of Scotland which was a lender to the USIT group and he was asked whether he would be interested in taking a position with the company with a view to assisting in addressing the financing of the group.He was introduced to the Chairman of the group, as well as to Mr Gordon Colleary.He was offered the position which was in the context of both its ongoing operations and its plans to acquire another entity.He describes his brief as being:

> 1. to secure finance facilities to replace the company's borrowings with Bank of Scotland (Ireland) Ltd;
>
> 2. to secure through borrowing or equity investment the financing of the company's planned acquisition of a majority stake in CTS (Council Travel Services);
>
> 3. to identify an equity partner or purchaser for the company with a view to allowing Gordon Colleary, on health grounds, to withdraw from the company and its business;

114. He was appointed to the Board on 18th January 2001 although he had done some consultancy work in December 2000.In June 2001 he left the company on health grounds, and ceased to be a director in July 2001.The duration of his directorship was therefore less than six months.

115. Nevertheless, he goes on to outline his view at the time of his joining the company that the group was a very substantial business with a strong strategic position in the market.He states that one of the principal issues facing the group was that the profile of its funding was inconsistent with its size and its expansion plans, and that new financing was required.But he did not consider that during his time at the company there was any funding crisis, but rather, he states, it was taking ordered steps to restructure its financing while continuing to trade normally and to advance its expansion plans.He believes that he helped during his brief period with the company to improve the profile of the group's cashflows.

116. He goes into some further detail about the financial situation at the company, and says that in due course a $20 million facility was secured from Anglo-Irish Bank, repayable over a fixed term.This more structured borrowing arrangement, he states, enabled the auditors to issue what he describes as "an unqualified opinion on USIT Ireland Limited's financial statements for the period ended 31 October 1999.He also describes his involvement in attempts to obtain an equity investor, and that discussions with a number of major potential investors had advanced by the time of his departure from the company in June 2001.He was also involved in discussions and negotiations in relation to the purchase of the remaining 60% of the shareholding in CTS and he conducted a due diligence examination on behalf of the company.While the acquisition had not been completed by the time of his departure, he understood that it was planned for completion by 31st July 2001.He was of the view that CTS had significant cash balances and working capital and was an attractive business, and he favoured the acquisition since he believed that it would strengthen the company's business and liquidity, and also increase the availability of additional funding from financial institutions.

117. In his affidavit he expresses satisfaction with the access which he had to all necessary financial information and he fully acquainted himself wit the financial position of the group and the subsidiaries, as well as its trading activities and financing needs.He was of the view that the financial information available was both comprehensive and provided in a timely fashion, and he goes into some detail as to the nature of the information which was available.He says that he was never informed of any adverse comment by any auditor as to the financial information available or the timeliness of it being made available, and neither was he aware of any adverse comment or qualification regarding the maintenance of proper books and records.

118. He also makes the point that the financial information provided by the group was examined by several potential lenders and investors, including in the case of one potential investor by external accountants and marketing consultants.Two of the four major banks who conducted due diligence in fact made formal offers to provide significant funding to the group.He says also that he was closely involved in the negotiations with these potential lenders and was never aware of any criticism of the financial functions or the financial personnel or the books and records of the group.

119. In relation to the liquidator's comments about the absence of books and records, Mr Connolly states that it is by the date of swearing of his affidavit more than two years since his departure from the company, and therefore he cannot assist in relation to their whereabouts, except that he wants to assure the court that while he was at the company they existed and were properly maintained.He believes that his involvement with the company was to carry out a specific project as already described, and that he was able to do this from London, rather than relocate to Ireland.He believes that his job was a restricted one, even though he was appointed to the Board.He was never a cheque signatory, and had no involvement in the finance or treasury side of the company.Neither did he take any part in the trading activities of the company or in the preparation of group accounts, budgets or business plans.

120. He then states that in June 2001 he suffered a stroke due to a blood clot to the brain and was hospitalised, and was advised to rest and reduce his workload and travel commitments, and taking that advice he tendered his resignation in July 2001, and thereafter he had no further contact with the company.He says that he has never been contacted by the liquidator or by any other party in connection with the winding up of the company other than by the service of this application upon him.

121. In relation to what the liquidator has said about the company's affairs, Mr Connolly states that because of his short involvement with the company he cannot comment in relation to matters such as the statement of affairs, the alleged breaches of company requirements to file accounts which would not have arisen by the time of his departure, and in particular the audited accounts for 31st October 2001 were not overdue by the time he left the company, and that by that time he had no reason to believe that they would not be ready.He also believes that he had no day to day responsibility in relation to the keeping of records and books, including statutory books, for the company.He goes on to say that he was aware from his role in the company that books and records did exist in relation to the subsidiaries, and that they provided detailed financial reports in according to the group's reporting process and timetable.

122. He takes issue with the liquidator's description of his role as that of Finance Director.He says again that his role was a limited project type role and that another individual, Mr Myles, who was not a Board member held the title of "Finance Director", and that he reported to Gordon Colleary.

123. In relation to the liquidator's allegation that the company was insolvent on a balance sheet basis, Mr Connolly states that at no time during his period at the company was he aware of any insolvency, whether on a balance sheet basis or otherwise, but he believes that the appropriate test is whether the company could meet its debts as they fell due.He believes that the company was solvent and that this is borne out by the fact that various institutions carried out due diligence while he was a director and found nothing to suggest insolvency.He also points to the fact that following his departure from the company the acquisition of the 60% of CTS for US$12 million was funded from the group's own resources, and that this is evidence of the group's ability to pay its debts as they fell due.

124. Even though he believes that when he joined the company it was undercapitalised, he was of the view that the company could trade without difficulty, and as part of his role he assisted in obtaining additional finance and to improve the repayment terms of the company's borrowings.

125. He refers to the fact that he obtained some legal advice of his own in February 2001 shortly after his arrival at the company.He says in that regard that he felt it prudent to take some legal advice from his professional body as well as from solicitors in Dublin, because he was aware from the outset of the "financing difficulties" of the group.This advice, he says, was taken before the procurement of the additional funding from Anglo Irish Bank, and he states that the advice which he received was to the effect that as long as the company was in a position to meet its obligations as they fell due and that there was a reasonable prospect of new investment coming into the company he need not be concerned as to his position as a director.Being confident in this regard he continued to act as a director in the reasonable belief that the company would continue to trade for the foreseeable future.He believes that he acted reasonably, honestly and responsibly at all times given his belief that the company was not insolvent, which he says was a reasonable belief.He says also that at no time during his time with the company did any evidence come to his attention that the company might be insolvent even on a balance sheet basis.He was, he says, aware from the information that was available to him from the time he joined the company that certain aspects of the company's activities were loss making and he attempted to draw the attention of the directors to the need to address these matters so that losses could be reduced or eliminated, and thereby assist the development of the company.He refers to some extracts from the Minutes of May and June 2001 in this regard.He also notes from Minutes of Board meetings which followed his departure that the company continued to engage in business in a manner which was consistent with an entity which while under some financial strain, was trading actively and was intent on effecting a financial recovery.

126. Mr Connolly then in his affidavit states in relation to a number of matters raised by the liquidator in his grounding affidavit that these matters arose either before he joined the company or after he had left the company in June 2001.

127. He expresses the view that there can be no doubt that the impact on cashflow arising from September 11th 2001, occurring as it did in a month (September) which is in any event a weak month from a cashflow point of view was the major cause of the group's difficulties and which ultimately led to its collapse.

128. By way of response to Mr Connolly's affidavit, the liquidator has averred in relation to the roles which Mr Connolly states he was engaged to fulfil, that the company which engaged him, namely USIT World plc.in fact had no borrowing from Bank of Ireland (Scotland) and that the company which had borrowings with that bank was USIT (Ireland) Limited, and that in fact also as already averred by him, that bank had wanted not to get involved with USIT World and only with USIT Ireland.Mr Connolly responds to this in his further affidavit of March 2004 by saying that his role was to address the group's financing needs in the context of its ongoing operations, and that the identity of the specific company in the group to which funds would be advanced was secondary to the requirement to obtain funding for the group.

129. He also avers that it does not appear to him that Anglo Irish Bank agreed to provide finance to USIT World, and that again it was USIT Ireland Limited to whom Anglo Irish Bank provided a facility.Mr Connolly in his later affidavit says he believes that the liquidator is mistaken in his view in this regard, and that the Anglo Irish facility "represented incremental borrowing capacity for the group over and above that previously available from Bank of Scotland (Ireland) Ltd."

130. The liquidator goes on to state that he has been unable to investigate this funding and establish the views of Anglo Irish Bank about the affairs of the group as a whole as distinct from USIT Ireland Limited, as having requested the file relating to the transaction from the company's solicitors, they have responded by refusing to hand over the file on the basis of a duty of confidentiality to USIT Ireland Limited and that the latter company is not prepared to make the file available.

131. The liquidator takes issue also with Mr Connolly's assertion in his affidavit that USIT World plc, being only a holding company for the group did not require to keep detailed accounting books and records, since it had no bank accounts, property or other assets of its own or liabilities or transactions with third parties.The liquidator is of the view that *"as the holding company whose investments comprise the entire worth of the group, it seems to me that that company required timely and accurate financial information regarding the performance and value of its investments worldwide."*

132. Mr Connolly reiterates in his response to this point that his reference to books and records in his affidavit was the books and records of the company and not the group, and he maintains his view that "the company" as opposed to "the group" was not required to keep detailed books and records, but simply basic book and records.In his replying affidavit sworn on the 22nd March 2004, Mr Connolly states out at great length his further views about the liquidator's criticisms as to books and records of the company, and also the liquidator's view of the company's draft balance sheets at 31st October 2001 and February 2002.I do not propose to set out these further responses in further detail, other than to say that there seems to be fundamental disagreement between these two professional accountants.

Angel Oliveres:
133. For the purpose of attempting to satisfy the court that he acted responsibly and honestly, Mr Olivares has sworn an affidavit on the 25th May 2004, but was not represented before me.He states that although resident abroad he has at all times been as co-operative as possible, and he notes that the liquidator has acknowledged this co-operation.He says that he simply does not have the necessary funds "to contest this application", but I take that to mean that he cannot afford legal representation.He wishes to state in his affidavit that he believes that he acted honestly and responsibly in relation to the conduct of the affairs of the company while he was involved in USIT World plc and USIT Limited.He states that he has over 25 years experience in the travel industry, and that his involvement with USIT began when he was appointed Managing Director of the Belgian subsidiary in March 1986.Three years later he was offered the position of managing Director of USIT International Plc for Continental Europe and he became in due course a director of each of the continental Europe subsidiaries, and then in the British and Irish subsidiaries.In 1992 he was given responsibility for the development of the sales and distribution of the Ticket Acceptance Agreement with the airlines.He describes the development of the business through the 1990s, and that in 1998 he was appointed Chief Operations Officer of USIT and that in 2000 his role was strengthened to head up the Human Resources of the Group.

134. He believes that USIT World plc was well organised and that all necessary financial information was available and in a timely fashion in relation to all the subsidiaries worldwide, and that where there was any delay he would personally intervene.He says that he was aware that the group needed funding, and he was aware also that Gordon Colleary was fully dedicated and committed to that objective, and to finding an equity partner.He refers to the Board decision in 2001 to acquire the 60% shareholding in CTS.He says that the decision was taken conditional on the availability of external funding which he says had been approved by Ulster Bank, and that additional funding had been confirmed by the "Central Reservation System Galileo", but that on the 12th September 2001 Ulster Bank informed the company that it was cancelling all investments in the United States.He says that this put a great financial strain on the USIT World and its subsidiaries as it was heading into its low season.He details the cost-cutting steps taken to address the difficulties which existed, as well as its efforts to seek an investor, and its negotiations with creditors for debt rescheduling.

135. He then describes at STA (through Solgun Limited).He says that as a director he believed that this sale was in the best interest of the creditors of the company, and since USIT had subsidiaries in countries in which STA had none, he saw a lot of synergies between STA and USIT World.He states that when the share sale agreement was signed with STA, he believed as a result of representations made by Richard Porter of STA, that 70% of the company was saved.He goes on to say that although Solgun Limited had paid only €1.00 for the shares, STA had an excellent opportunity to make STA grow substantially through the integration of the USIT World's profitable subsidiaries and their business.He refers to the encouraging intentions evidenced by an STA Press Release from Mr Porter in which the latter is quoted as saying:

> *"STA has entered into this agreement to protect the Student Travel niche and…to protect the interests of staff, customers and suppliers…STA Travel's intention is to incorporate the majority of USIT's operations under the STA Travel brand, and we are now prepared to commit additional resources to reorganise the USIT business and strengthen the niche."*

136. Mr Olivares states that if he had known what was in fact going to happen after the sale he would have most probably objected to the sale and to have recommended strongly to the Board that USIT World plc seek court protection in the various jurisdictions in which it operated rather than sell its shares to STA.

137. He also refers to the fact that immediately after the sale went through, Richard Porter instructed him to withdraw the USIT Airline ticket from all the markets and that he did as he was instructed in this regard, and he also sent an e-mail to all executives in this regard and which also told them that they would be supplied with STA ticket stocks as soon as possible.He says that he had been told by Mr Porter that the STA airline ticket would replace the USIT ticket "at least in USIT's main markets".

138. However he sets forth that on the 25thJanuary 2002 he and Ms.Millington Wallace were invited by Richard Porter to a meeting with Pricewaterhouse Coopers ("PwC"), and that the subject of that meeting was that STA wanted to place the British subsidiary USIT Britain in liquidation/receivership, and that even though he and Ms Millington Wallace had been asked to resign, and resigned as directors of all the subsidiaries upon the share sale, they were asked to introduce the petition for liquidation.He says that he felt he was being used by STA, and that the only reason why they were continuing to employ him was to liquidate the USIT subsidiaries, and that STA had no intention to integrate him into the STA business.He was eventually made redundant in April 2002, and he believes that PwC were trying to use him to make USIT staff worldwide redundant without them being seen to be responsible in that regard.

139. Mr Olivares also states that the former USIT directors has offered to assist STA in the meeting with airline creditors which was organised for 30th January 2002, but that not only did STA decline that offer, but they also informed the creditors at that meeting that there would be no STA funds made available to pay the debts of USIT World or any subsidiary.

140. The companies thereafter began to lose their rights to issue airline tickets, leaving them with nothing to sell and their value plummeted.

Richard Porter, Mark Adams, Dan McGing (the STA directors)
141. As already stated, Messrs Porter and Adams became directors of USIT World plc on the 16th January 2002 upon the acquisition by STA through Solgun Limited.Mr McGing was appointed a director on the 12th February 2002.Each of these continued to be directors up to the 15th May 2002.

142. The liquidator wishes to emphasise the scale of the liabilities in this liquidation, which he estimates could be in the region of €73

million after realisations, and that the basis for this estimate is the statement of affairs filed by these STA directors together with his own ongoing assessment of the likely liabilities and realisations.

143. He also avers that he has been informed by these directors that their intention upon the acquisition of the USIT group was to place the group under the protection of the Irish courts.He states that on the 4th February 2003 a petition was presented by the then directors of USIT Ireland Limited, a subsidiary of USIT World plc and that an interim examiner was appointed to that company and to two related companies, USIT World.com Limited and USIT World plc.The liquidator states that while these petitions were presented by the then directors of USIT Ireland Limited, he believes that the process was being driven by the STA directors.He refers to the fact that in the petition to appoint an examiner it was stated that the purpose of the appointment of an examiner was to avoid the appointment of a liquidator on foot of the debt owed to USIT Limited or third parties.He says that it was argued that the protection of the court for these three companies would assist customer confidence in USIT's Irish travel business.He believes that the seeking of the protection of the court for USIT World was directed towards support for the business of USIT Ireland Limited rather than being for the benefit of creditors and shareholders.

144. The liquidator has also set out in some detail his concerns about the asset disposal programme embarked upon by STA, being the subsidiary companies of USIT World plc which were not of interest to STA.The liquidator has serious concerns about the value achieved for these businesses.The STA directors on the other hand maintain that the value of the businesses in question had deteriorated due to the collapse of the group.There is also concern expressed by the liquidator in relation to the amount of fees charged by PwC relative to the amount of money yielded from the disposal of assets on which they advised and wee involved.He believes that this requires further explanation.Eventually the STA directors decided that no scheme of arrangement would be put forward and in due course the examiner was discharged and the liquidator was appointed to USIT World plc.A scheme of arrangement was put forward in relation to USIT Ireland and USIT World.com Limited, and each company continues to trade.The liquidator notes that the investor in these companies was not STA, as the examiner was able to obtain better terms from a third party, and he believes that STA has no ongoing relationship with USIT Ireland Limited or USIT World.com Limited.

145. In relation to books and records, the liquidator states that the STA directors have advised that their solicitors attempted to get the statutory books of the company but that solicitors for the vendor shareholders informed them that these books were with Alan Fitzpatrick & Co, accountants, and that this firm had a lien over them for fees.It will be recalled that when the liquidator wrote to that firm they denied having the books.However the liquidator states that as far as he is concerned it does not appear that the STA directors took steps to regularise the position regarding the filing of documents in the Companies Registration Office, or to address the deficiencies in the financial records, and nor did they even open a bank account notwithstanding the asset disposal programme.

146. The liquidator also makes a complaint about the level of co-operation which he received from the STA directors.He says that he has been unable to meet with them, although he has spoken on one occasion in a general way with Richard Porter, and that the latter indicated that thenceforth he would prefer to communicate via solicitors.Ultimately, after some difficulty, queries raised by the liquidator were dealt with.

Responses of Richard Porter:
147. He outlines in his affidavit his own career history, including that since 1991 he has been Chief Executive Officer of STA Travel worldwide.He is Australian although he has lived in England since 1973.He is the founder of STA Travel in the UK and Europe, and was Managing Director of same from 1976 until 1991.He is currently a director of 18 STA Travel companies in 15 countries.He states also that these companies operate to International Accounting Standards and are globally audited and consolidated, and that none of these companies have defaulted in their legal or financial obligations under his stewardship.STA, he says, is the largest operator in the world in the student travel niche market.

148. He then states that STA had known and done business with the USIT group over many years, and that in November 2001 STA was approached by Gordon Colleary and Mairin Colleary of USIT who were seeking assistance to resolve financial difficulties which had arisen following September 11th, and which had increased as a result of the acquisition by USIT of CTS in the US.He states that more detailed discussions took place, and that it was clear that without assistance the USIT group would collapse, and that such an event would inevitably have a knock-on effect on the student travel market generally and could thereby impact on the STA business.He states that motivated by a desire to protect both its own interests and position in the industry, STA decided to assist USIT as requested.Agreement was reached on 23rd January 2002 which involved the acquisition by Solgun of 90% of the USIT World plc for €1, subject to the agreement of the Minister for Enterprise, Trade and Employment under s.9 of the Mergers, Takeovers and Monopolies (Control) Acts 1978-1996.

149. Mr Porter goes on to state that on the basis that the group would be placed into examinership, STA also agreed to facilitate the continued trading of USIT Ireland Limited by providing travel tickets at cost with no margin for STA, and that STA agreed to make cash available to USIT Ireland by way of loan, this offer being based on cashflow projections submitted by USIT Ireland, and subject to a maximum limit of €600,000.

150. He proceeds to state that after the acquisition by STA, the directors of USIT Ireland presented a petition to the High Court for the appointment of an examiner who was duly appointed.He believes that the success of this petition was due in no small way to the assistance given by STA, and to the issuing of tickets referred to already.

151. It was also part of these arrangements that the existing directors would resign and would be replaced by the STA directors.Firstly, Mr Porter and Mr Adams were appointed on the 23rd January 2002 (the date of the agreement for sale), followed also, on the 12th February 2002 by Mr McGing who is an Irish resident.He states that on the 4th February 2002 the company was placed under the protection of the court, and that on the 15th May 2002 the liquidator was appointed.

152. Having referred to the limited amount of financial information which was available to him before the sale to STA, he goes on to describe how the strategy of the directors was to quickly assess the possibility of restructuring the USIT group as a whole.He says that because of the lack of availability of balance sheets for the subsidiaries and lack of financial information generally PwC was appointed to assist in getting this information together.The insolvency of the group and the attendant adverse publicity was impacting on the businesses around the world and their value, and it was considered best for the holding company to sell off or restructure its businesses which were viable.

153. In relation to PwC fees, Mr Porter states that that form was not prepared to get involved unless their fees were underwritten by STA.He says that following his appointment as a director on the 23rd January 2002 and up to the appointment of the liquidator no cash came into the company and that the proceeds of sale of the subsidiaries was paid either to PwC or to their solicitors in respect of fees, and that the nett proceeds after these costs were paid to the liquidator.

154. He refers to the statement by the liquidator that the company was insolvent since the year 2000, and he proceeds to state that STA's involvement in the company was *"predicated on a condition that the company immediately seek the protection of the High Court"*, and that this was done.No transactions took place after 23rd January 2002, and in the case of each disposal, appropriate advice was taken from PwC, as well as in relation to financial information.He believes that in relation to the sale of assets advice was taken and the best price obtainable was taken, and the Examiner was kept appraised of these matters by PwC.Where the Examiner raised any query about a sale (and he did in the case of Costa Rica and Sweden) or sought to object to same, these were not proceeded with.

155. Mr Porter says that it was his belief that the examinership would have a successful outcome, and that he was involved in lengthy negotiation with the examiner and his advisers in relation to the preparation of an investment proposal but that it was ultimately unsuccessful.He states also that STA continued to support the examinership by the provision of tickets, even after the examiner had indicated that he would not be proceeding with the STA investment proposal or any proposal.

156. He believes that even though he was a director only for a very short time prior to the liquidation, he attempted to regularise the situation within the company in a number of ways which he sets out in his affidavit, namely attempting to obtain financial information, appointing advisers, PwC and Messrs.Arthur Cox solicitors, attempting to locate the statutory books, ensuring that full and accurate accounting records were maintained, and ensuring that full Board minutes were maintained.

157. He then makes the point that when the sale to STA sale was going through he was advised by his solicitors of the risks regarding becoming a director of an insolvent company, and that he and the other STA directors should only do so provided that the company was placed under the protection of the court so that an examiner could be appointed to investigate the affairs of the company, and provided that we ensured that the company did not incur any further liability which could not be paid, and also that if it was felt advisable to sell off businesses that this be done only after appropriate professional advice.He says that this is what he and the other STA directors did.

158. In relation to some matters referred to by the liquidator, Mr Porter highlights the fact that the insolvency of the USIT companies occurred prior to any involvement in USIT World plc by the STA directors.

159. With regard to cooperation with the liquidator Mr Porter takes exception to the manner in which the liquidator has sought to establish this by reference to what Mr Porter considers to be only portion of correspondence between him and the STA solicitors, and Mr Porter exhibits other correspondence indicating that the STA directors were willing to meet the liquidator in order to deal with any outstanding issues.I will not detail everything stated in this correspondence.It suffices to say that within there was an offer of a meeting which Mr Porter says the liquidator did not take up.

160. Mr Porter also deals with the liquidator's concerns about the value obtained from asset disposal and the level of fees paid out of these proceeds to PwC.He believes that these fees though high were justified given the amount of work worldwide which was required to be done by PwC in gathering financial information and assisting in the disposal of assets.He believes that the retention of PwC by the Board for professional advice was necessary, and was a responsible action to take, rather than a negative one which he believes the liquidator seeks to portray it as.

161. There are many other matters dealt with in great particularity by Mr Porter in his efforts to demonstrate that he acted both honestly and responsibly during his period as a director of the company.I cannot deal with every matter deposed to, but it is fair to say that he disagrees completely with manner in which the liquidator has made complaint against him and the other STA directors in the period 23rd January 2002 and the 12th May 2002 when the liquidator was appointed.

162. I can say at this point that Mr Adams and Mr McGing have also sworn affidavits which are shorter in length than that of Mr Porter, but they refer to his affidavit and rely on the matters deposed to by Mr Porter as well as matters deposed to by themselves in their own affidavits.I do not propose to set out those affidavits in any detailed way.

163. The liquidator has filed a further affidavit in response to the affidavits of Richard Porter and the other STA directors.The liquidator says that the gross insolvency of USIT World plc is a relevant factor in considering whether these directors acted honestly and responsibly during their brief tenure as directors.He submits that this factor imposed a duty on these directors to act in the best interests in the creditors of USIT World plc as a whole, and he says that it was for this reason that he had highlighted in his earlier affidavit the level of indebtedness (€54 million) of USIT World plc to USIT Limited in respect of which he was also appointed liquidator.He refers to the fact that Mr Porter refers to this indebtedness as being money owed to USIT Ireland instead of to USIT Limited, and the liquidator makes the point that if the STA directors were in fact acting in the best interests of the creditors of USIT World plc that they would have communicated with the largest creditor namely USIT Limited and that they did not do so.

164. He poses the question as to whether by engaging in the disposal of the assets around the world, the STA directors were acting in the interests of the creditors of USIT World plc or in the interests of STA, and also questions whether these assets were disposed of responsibly.In the context of the latter question, the liquidator feels that the net benefit to the creditors of USIT World needs to be looked at.The liquidator details at length his attempts through correspondence to get information from Messrs Arthur Cox as to precisely who they were acting for and in an attempt to get assurances that during the course of the examinership the assets of USIT World would not be diminished and would be preserved for the creditors of USIT World plc, (of which USIT Limited was the largest).

165. The liquidator complains that he found it impossible to be kept informed about the up to date position regarding the affairs of USIT World plc, and that he was also in correspondence with Reddy Charlton McKnight as to exactly who they were acting for and could get no confirmation that they were acing for USIT World plc.

166. In this further affidavit the liquidator refers also to the net benefit to the creditors of USIT World plc of the asset disposal programme was €328,661, and he says that he does not have sufficient information to say whether this represents the best that could have been done.

167. He also refers for the benefit of the Court to the serious allegations made by Gordon Colleary against the STA directors, to the effect that the STA directors took positive steps to weaken the individual components of the USIT group of companies, while simultaneously trying to purchase the assets from the examiner, receiver or liquidator with no ongoing commitment to staff or creditors.But the liquidator goes on to again state that he does not have any conclusive evidence which would support or contradict what Mr Colleary states in this regard.

168. The liquidator also expresses disagreement with Mr Porter as to level of cooperation which he received which would have been to

the benefit of the creditors of USIT World plc.He makes this comment particularly in the context of a lack of information as to the status and value of subsidiaries of the company.

169. Mr Porter has filed further affidavits in response to what the liquidator has stated, and to what Gordon Colleary has alleged in relation to the motives of the STA directors when acquiring 90 % of the shares of the company in January 2002.I do not propose to set out in detail the allegations and rebuttals thereof between Mr Colleary and Mr Porter, and nor to the continued disagreement between the liquidator and Mr Porter and the STA directors as to their role.The details are to be seen throughout these affidavits, and no useful purpose is served by detailing them in this judgment at this stage.

Legal submissions and conclusions:

Onus of proof:
170. Brian Murray SC on behalf of the liquidator has submitted that there is under the section an onus on the respondent director(s) to satisfy the Court that he/she acted honestly and responsibly in relation to the conduct of the affairs of the company, and that there are no other reasons why it would be just and equitable that restrictions should be imposed, and that should the court not be so satisfied the Court enjoys no discretion in the matter, and must make the order.There is nothing particularly controversial about that statement, but I will reserve further comment on it until later in the judgment because I raise what for me seems to be an interesting aspect of this onus in the context of Ms.Millington Wallace and Mr Moreels who have not participated in any way on these applications.

171. Mr Murray has also referred to the helpful observation by Murphy J.in *Business Communications Ltd v.Baxter and Parsons*, High Court, 21st July 1995 where he stated:

> *"…it does seem to me that the most important feature of the legislation is that it effectively imposes a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attaches to them as a result of either dishonesty or irresponsibility." (my emphasis)*

172. That is an important observation in s.150 applications generally, but in the present case especially, I find the link between the conduct of the directors and the collapse of the companies in question to be one which requires the most careful scrutiny.It follows in my view that the burden on a director seeking to satisfy the Court as to his/her behaviour in relation to conduct in the affairs of the company for the purposes of escaping from an order under the section, includes if necessary, establishing that where there are matters about which they can be rightly the subject of criticism, there is in reality no causal link between those culpable matters and the insolvency.This would certainly apply in my view in relation to irresponsibility, since irresponsibility can be a matter of degree.Where honesty is at issue and the Court has not been satisfied that the director has acted honestly, that dishonesty is more fundamental and goes to the core of a person's integrity.I say that even though the section draws no distinction between honesty and responsibility.But it is significant that both words have been used in the section.

173. Dishonesty implies something akin to improper dealing with money or other assets belonging to the company, or some form of fraudulent trading.In an extreme case this would involve a director depleting the assets of the company directly for his own benefit, rather than settling his creditors, thereby leading to the collapse of the company; or obtaining funds from others with a fraudulent intent.Clearly such a director who is prepared to steal or deal with the company's or another's assets in such a fashion, or behave in any other way in which dishonesty is manifest will have demonstrated that the trust invested in him in exchange for the privileges attaching to limited liability through the mechanism of a limited liability company has been abused to the extent that he should be restricted within the terms of the section from being a director.Such dishonesty will of course also amount to irresponsibility.

174. But irresponsibility is a different concept.While dishonesty will always amount to irresponsibility the converse is not true.

175. In the present case no dishonesty has even been alleged by the liquidator against any director, and the Court is satisfied that none of the respondents has acted dishonestly, even Ms.Millington Wallace and Mr Moreels, who have filed no affidavits and have not appeared before the Court.

176. I will return toward the end of this judgment to a consideration of the position of Xavier Moreels and Lynn Millington Wallace given the lack of participation and I will deal with what I consider to be an interesting question, and one which has not directly arisen in any of the helpful judgments to which I have been referred during the course of extensive submissions.It is this.Is it possible, from the manner in which s.150(1) of the Act has been worded, and from the absence of the express creation of a presumption as such, that the court may derive its satisfaction as to honesty and responsibility in respect of a respondent who has not appeared or been represented on the application, from what other respondents have said in their affidavits, so that a restriction order would not be made in circumstances where the Court, though satisfied that one ought not be made, is compelled to do so by default as it were? I will leave that interesting question over for the moment.

177. Given the enormity of the losses incurred, running as they do on anyone's estimate to many tens of millions of Euro, it would be tempting to too easily blame the collapse on some irresponsibility of the directors, or some, or any one of them.However, in this context it is worth recalling the words of Murphy J.in *Business Communications Limited v.Baxter and Parsons*, unreported, 21at July 1995:

> *"…of course one must be careful not to be wise after the event.There must be no 'witch-hunt' because a business failed as businesses will."*

178. It is also worth noting the comment of Finlay Geoghegan J.in *Kavanagh v.Cummins* [2004] 2 ILRM 35 at page 41 when she stated the directors had discharged the onus upon them of establishing that they acted responsibly as directors and that the size of the deficit did not preclude her from reaching that conclusion.I respectfully agree that the size of the deficit should not of itself be determinative, although obviously the greater sums involved in the business the greater the care required to accompany decisions taken.

179. When the matters about which the liquidator and the Court have concerns in this case are scrutinised, it is not the case in my view that these can be seen as having caused the collapse of the group.

180. For example, and it is something which I shall return to later, there is no doubt that some documentation required to be filed in the Companies Registration Office ("CRO") was not so filed.That is beyond doubt, even though individual directors may seek to argue that within the organisation of the company's affairs it was not within their remit to look after those matters.

181. In some situations, there is no doubt that in the absence of these documents being filed, some creditor may be deprived of relevant information prior to lending money, or providing services to a company which later goes into liquidation, and had it seen the up to date state of affairs of the company from an examination of the company file in the CRO it may say that it would have chosen not to do business.In such a situation clearly there is a causative link between the culpable behaviour of the directors and the loss sustained by the creditor on liquidation.In the present case there is no such causative link.The largest creditor of USIT World was USIT Limited to the tune of about €56 million.

182. Therefore in the context of the present case, the failure to file some returns, while being something of importance and to be observed by directors, is so incidental to the collapse of the group as not to be capable of being a matter of irresponsibility for the purposes of an application of this kind, and in the sense of being connected causally to the collapse of the group.

183. It is unlike a worse situation where over perhaps many years of trading, officers of the company have ignored completely the obligations under the Companies Acts regarding the requirement to file returns, and/or other statutory requirements, where such behaviour would be demonstrative of such a degree of irresponsibility of attitude generally, and such egregious and wanton disregard of the obligations upon officers of limited companies as to liabilities as to indicate their complete lack of suitability for the entrustment of the privileges of limited liability.From such persons the public are entitled to be protected in the future.But, we are far from that scenario in the present case in spite of the enormity of the liabilities.

Acting honestly and responsibly:
184. A vital question is what level of honesty and responsibility must be shown to be present in conduct of the director if the Court is satisfied that that director acted honestly and responsibly.Referring to one aspect of this question, McCracken J.stated the following in *Gasco Limited (in liquidation)*, unreported, 5th February 2001:

> *"……regard must be had to the area of management in the company for which the director was personally responsible.This does not mean, of course, that a director can disclaim responsibility altogether on the basis that financial matters were the responsibility of another director, but nevertheless one of the matters to be considered in assessing whether he acted responsibly was whether his reliance on the actions of another director was itself responsible."*

185. In this regard, Mr Murray for the liquidator has submitted that to draw any distinction between as between directors on the basis of their involvement in the management of the company is incompatible with section 383(3) of the Companies Act 1963 (as substituted by section 100 of the Company Law Enforcement Act, 2001 which provides that:

> *"It is the duty of each director and secretary of a company to ensure that the requirements of the Companies Acts are complied with by the company."*

186. I would be of the view that this should be interpreted as meaning exactly what it says, namely that each director is responsible in that regard.But in the context of an application under s.150 it does not appear to run contrary to the section to draw a distinction in an appropriate case to the level or degree of that responsibility as between one director and another.No director can close his eyes completely to this responsibility, and it may in the end boil down to the question identified by McCracken J.in Gasco, namely "whether his reliance on the actions of another director was itself responsible."

187. Murphy J.in *Business Communications Limited v.Baxter and Parsons* [supra] stated:

> *"……However it does seem to me that the most important feature of the legislation is that it effectively imposes a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attaches to them as a result of either dishonesty or irresponsibility."*

188. In *Squash Ireland Limited* [2001] 3 IR 35, McGuinness J.stated at page 39:

> *"The question before the Court is whether they [the directors] acted responsibly, and this, as was correctly stated by counsel on behalf of the respondent, must be judged by an objective standard.In the case of all companies which have become insolvent it is likely that some criticisms of the directors may be made.Commercial errors may have occurred; misjudgments may well have been made; but to categorise conduct as irresponsible I feel that one must go further than this."*

189. She stated also in that same judgment at page 41 that:

> *"the Court should look at the entire tenure of the director and not simply at the few months in the run up of to the liquidation.It appears from the history of the company that the appellants have always acted responsibly and honestly and have put the interests of the company in the forefront of their minds, even insofar as losing their own money in an effort to assist the continuation of the company."*

190. There are aspects of these remarks relevant to the present case, certainly in respect of Mr and Mrs Colleary.

191. But the concept that the entire period of tenure should be looked at is, at first glance, at odds with what McCracken J.has stated in his judgment in Gasco [supra] when he stated:

> *"I think it is quite significant that no restrictions can attach to somebody who ceased to be a director of the company more than twelve months before the winding up.This seems to me to indicate that the primary aim of section 150 is to deal with directors who have behaved irresponsibly or dishonestly during the last twelve months of the life of the company, and that the actions of a director who is subject to Section 150 are to be looked at primarily in the light of his actions during that period.This indeed has a considerable practical logic, as it is presumably intended to focus attention on the behaviour of the directors in the period leading up to the winding up, and to try and ensure that they deal with creditors when a company is in difficulties.In my view therefore there should be particular scrutiny of the actions of directors during the final months before winding up."*

192. The distinction between these two judgments is that in the case of the former, the backward gaze of the Court was with a view to getting an overall picture as to how the directors in question had conducted themselves and that this would be relevant in assessing whether it was right to restrict them, as opposed to the liquidator doing a trawl through the years of the company's existence in order to point to some matter or matters way behind twelve months which could be regarded as having at that time been

dishonest and irresponsible, but which did not lead to insolvency.

193. In the latter case, however, the reference to the twelve month period is to a period in respect of which there may be found by the liquidator to have been some conduct which could give rise to a finding of dishonesty or irresponsibility.That would be in contradistinction to a situation where the respondent may be regarded as having at a much earlier stage in his or her tenure as a director been guilty of some dishonest or irresponsible act, but not during the final twelve months prior to the appointment of the liquidator.In this way, the emphasis is on the link between the act or acts which are dishonest and irresponsible and the insolvency of the company.

194. From cases such as *Business Communications Limited v.Baxter and Parsons*, unreported, 21st July 1995, *La Moiselle Clothing Limited v.Soualhi* [1998] 2 ILRM 345, Re *Vehicle Imports Limited*, unreported, High Court, 23rd November 2000, *Squash Ireland Limited* [2001] 3 IR 35, and *Colm O'Neill Engineering Services Limited* (in voluntary liquidation), unreported, 13th February 2004, a body of case-law has developed which gives considerable guidance to the Courts faced with considering whether in a particular case a director has acted honestly and responsibly.I do not propose to set out in any great detail what this case-law establishes, save to say that there are a number of factors which can be looked at in order to form an overall view as to whether the actions of a director are to be judged honest and responsible.A useful summary can be seen in the judgment of Shanley J.in *La Moiselle Clothing Ltd v.Soualhi* [supra] at page352 as follows:

> *"(a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts 1963-1990.*
>
> *(e) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.*
>
> *(f) The extent of the director's responsibility for the insolvency of the company.*
>
> *(g) The extent of the director's responsibility for the net deficiency in the assets of the company.*
>
> *(h) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards."*

195. The list I am sure cannot be regarded as exhaustive, and neither in my view does the presence of one or more of these factors in a particular case mean that in that case the director must be regarded as having acted either dishonestly and/or irresponsibly to such an extent as to warrant restriction.Each case will have to be looked at on its own particular facts.In one case a director may have been culpable in respect of a number of the factors on the list, but in the heel of the hunt none of those factors had any direct or meaningful bearing on the failure of the company.In another case, a director may fall foul of only one of the factors, yet that one lapse may be of such a degree and have such a direct bearing on the insolvency of the company that it outweighs all the other ways in which the director conducted himself/herself honestly and responsibly as a director, and be such that the public should be protected for the period of restriction from any risk that it might happen again.

196. As will have been readily apparent from the contents of the affidavits which I have tried to summarise in a reasonably comprehensive way, there are conflicts between what the liquidator states and what the directors state in respect of some matters.These differences of opinion remain.The question arises as to how the Court is to deal with these conflicts when making its assessment as to the honesty and responsibility of any of the respondents insofar as those matters about which there remains disagreement are relevant to these questions.An important consideration is the fact that these applications are dealt with by way of affidavit evidence.While there is the usual procedure available to any party to serve Notice to Cross-examine any deponent in order to test what has been stated, none has been served in this case.Counsel for Mr Colleary, John O'Donnell SC referred the Court to a passage from the judgment of Browne Wilkinson VC in *Re Lo Line lectrical Motors Ltd* [1988] BCLC where he stated as follows:

> *"In the present case there are many factual issues on which the evidence given by Mr Browning in his affidavit directly contradicts allegations made against him by the official receiver.Yet he has not been cross-examined.In my judgment proceedings for disqualification are no different from any other proceedings: it is not possible for the Court to disbelieve evidence given on oath in the absence of cross-examination of the witness.I therefore proceed on the footing that Mr Browning's evidence is correct."*

197. Nevertheless, where matters deposed of by a director/respondent relate less to purely factual matters than to a view held by the director as to the probity of his actions, the Court may of course take into account the fact that such a director will inevitably be seeking to place as favourable an interpretation of facts and events as he can, so as to discharge the onus upon him.

198. Similarly in a situation where the liquidator states that for example he was unable to locate any books and records of the company and seeks to have an inference drawn that none were prepared and kept, a mere denial that this is true will not be sufficient necessarily to dislodge the inference, even in the absence of cross-examination, unless the denial appears to be corroborated by other evidence or from the circumstances generally.In that sense only would I seek to qualify the passage from Browne Wilkinson VC.In general I would approach the standard of proof by the director as to his honesty and responsibility on the basis of a balance of probability, taking all relevant circumstances into account.

USIT LIMITED - ISSUES OF CONCERN

Gordon Colleary and Angel Olivares:
199. As already set forth, the liquidator has pointed to the failure to make annual returns, the failure to have audited accounts and the failure to maintain statutory registers with the CRO in Northern Ireland.

200. He has also concerns that proper books and records, including statutory registers were not available to the liquidator, and by implication that none may have been kept.

201. As far as Mr Olivares is concerned, he is not represented before the Court but has taken the trouble to have an affidavit filed and to which I have referred earlier.He has stated that he does not have the funds to contest the application against him.I am not taking that to mean that he concedes the application is granted against him, since his affidavit is to the contrary.It would be unfair to penalise him for not being legally represented, especially where he has filed an affidavit.

202. It is possible for me to form a view from all the papers filed in this application that Mt Olivares conduct was both honest (which was never in dispute) and responsible.As far as the filing of returns and the keeping of proper books and records is concerned, Mr

Colleary has sworn that there had been some delay in filing documents in Northern Ireland, but that that office were very supportive in relation to the difficulties encountered in relation to the consolidation of the group and agreed that one set of accounts could be filed for period to 1999 and annual accounts for the years ending 31st October 2000 and 31st October 2001.That delay involved the sudden resignation of the auditors at that time, and that once BDO Simpson Xavier had been appointed, work commenced on the backlog in the auditing of the USIT Limited accounts.In relation to the liquidator's concerns about proper books and records, statutory registers and so on is concerned, he has sworn that these were kept at the company's premises at College Green and Aston Quay in the Sun Accounting package and on the TAA system until he resigned as a director in January 2002.I know that the liquidator has said that he was unable to locate them, but there is some corroboration for what Mr Colleary says which is contained in a letter from Ms.Millington Wallace, to Reddy Charlton McKnight dated 21st July 2003 (exhibited by Mr Colleary) and in which she states that she can confirm that these documents in respect of USIT Limited were kept at the College Green offices of the company.She was the director of corporate governance for USIT World plc, but part of her duties involved corporate governance of the group of companies.I believe that in a group as large and spread and to which directors with particular expertise had been appointed to various specialist positions, it was not irresponsible for Mr Olivares to leave matters such as these to the director of corporate governance.He cannot have been expected to have any direct responsibility in that regard as part of his day to day activity with the company, even though as a director he has a shared responsibility for all matters.In any event, I do not believe that even if there was a failure to observe the requirements in these respects, they went in any way towards the demise of the company in the circumstances of this case, and while it is right that the Court would have regard to a matter such as this when making its assessment of responsibility, it could not in this case be persuasive.

203. For much the same reasons the same applies to Mr Colleary under this heading.

Trading while insolvent
204. Mr Colleary has dealt at great length with this point.He has made the point that the liquidator's concern is based on a belief that the company traded while it was insolvent on a balance sheet basis, rather than on the basis that the company was unable to pay its debts as they fell due.The liquidator has put forward some suggestion that even on the latter basis the company traded while insolvent, but Mr Colleary believes that this is not correct.I have set out his averments in this regard at some length and it is not necessary to repeat them.But there remains a conflict of views in this regard.It is an important conflict, but nevertheless one which I cannot resolve on an application such as this, being one heard on affidavit.But I am persuaded by what has been sworn by Mr Colleary that on the balance of probability it was reasonable for the Board to believe that the company was not trading while insolvent, and that as soon as it was thought that the company could not or may not in the near future be in a position to pay debts as they fell due, appropriate steps were taken including by the taking of appropriate legal and other advice.

205. I think that it is important to note that it is not incumbent on a board of directors, at the first moment at which it is becoming apparent that debts may not be capable of being paid as they fall due, to immediately call in the liquidator and cease trading.Many companies will experience for many reasons unrelated to the general health of the company a downturn in profitability over a quarter, two quarters or even three quarters.That in my view does not mean that even where a risk of insolvency downstream is warned or anticipated, some reasonable effort at rescuing the situation may not be permitted to be undertaken.To attempt to trade out of a difficulty is not an irresponsible act.Care of course must be taken to ensure that effective and realistic steps are taken and that creditors' interests are kept to the fore, rather than that a careless or reckless gamble is taken without proper advice and planning to an achievable end.Some sort of short term emergency fire-fighting must be permitted to take place without those efforts, provided they are reasonable and responsible, from being made.Many companies have survived and prospered after temporary setbacks.

206. The Board undoubtedly was concerned, and it would have been irresponsible for it not to be, that any possible cost-cutting measures should be identified and put in place during 2001 and particularly after August 2001, and even more so after September 11th 2001.But I am satisfied that responsible action was taken in the sense that legal and accountancy advices were taken from reputable professional firms, and steps were taken to address the difficulties which were perceived at relevant times.It is not to be regarded as irresponsible behaviour by this Board that they did what they did between September 11th 2001 and the appointment of the liquidator.

207. This is not a case in which heads were placed in the sand so that problems on the horizon were ignored.There is evidence from the Minutes of Board meetings which suggests considerable effort and energy devoted to addressing the problems identified.With the benefit of hindsight it is natural perhaps that a liquidator can look at the situation at a particular time and from a perfectly proper view that a situation should have been looked at differently or that a different decision ought to have been made.But that is not the point in my view when this Court must decide whether it is satisfied whether directors acted honestly and responsibly.It does not mean that decisions taken must turn out later to have been the right decisions.What is at issue is whether it was irresponsible to have taken the decision at the time.That irresponsibility implies some element of recklessness or culpable want of care on the part of a director, which in the present case is absent.I do not believe that either Mr Colleary or Mr Olivares can be considered to have been irresponsible in this regard, and I have been satisfied in respect of each of them in this regard.

Adequacy of financial controls
208. Mr Colleary does not accept that there were not in place, adequate controls to clearly identify the amounts due by various subsidiary and third party debtors to USIT Limited and to ensure that these levels of indebtedness could not escalate to dangerously high levels.In his affidavit he has described the procedure in place.There is no doubt that Mr Colleary believes that the systems in place both for USIT Limited and USIT World plc were adequate for the purpose of running the companies responsibly.He has described how the financial information for Board meetings was always available and in a timely fashion.The group had Chief Financial Officer and a Group Financial Director who had extensive experience in the travel business.There is no suggestion anywhere that these people were other than completely competent and suitable to their positions in the group.There was a team of six accountants working to the group financial director.Information was available from the TAA computer system in order to inform the Board of the indebtedness of USIT Limited to airlines.The well-recognised Sun Accountancy system was in use at the offices at College Green.The timely availability of financial information has also been conformed in the affidavit of another of the respondents, Gerard Connolly, a former director of USIT World plc.He has made the point also that in fact the financial position was subjected to audit and due diligence by a number of banks and investors and had not been found to be deficient.I have set out the various averments made by Mr Colleary, and by the liquidator in this regard.Again there is a conflict of views in as much as the liquidator maintains that for a group of this size the systems were not sufficient, and he has made the point that he was not able to access information he wanted from the systems.

209. Mr Olivares has sworn in his affidavit that detailed financial information was available from all the businesses and subsidiaries, including weekly sales reports, and that these were monitored against targets, and that there were management reports also from the subsidiaries.In cases where there was delay he says that he intervened personally to address those matters.

210. The Court must look at the situation from the point of view, not as to whether the system was the best possible system which could have been in place in any ideal world, but as to whether the system appears to have been one which no director acting

responsibly would have considered to be appropriate for this business.I have no basis on which to simply reject what has been sworn to by those involved in operating and relying on the system in place.I have certainly not been persuaded that the insolvency of this group resulted in any way from the type of computerised accounting system which was in place.The financial director appears to have had no difficulty with it, and neither as it happens did the court appointed examiner to this company in any of his reports to the Court have anything to say as to the inadequacy of the books and records of the company.On the balance of probabilities, and taking what has been said by all concerned in their affidavits I cannot find that by having these type of controls and information systems in place, either Mr Olivares or Mr Colleary was acting irresponsibly.The evidence does not go that far.

Preferential payment to Reddy Charlton McKnight
211. This payment is certainly one which comes into the category of what should be looked at closely by the court.It is a large payment first of all, and its timing is also important since it was made to the solicitors advising the directors as well as the group, on the day before the liquidator was appointed.I need to draw attention immediately to the fact that in this case there is no allegation of dishonesty made against any of the respondents by the liquidator either in respect of this payment or any other matter.Neither in respect of this payment has the liquidator gone as far as to suggest even that this payment constitutes a fraudulent preference.What he believes is that the payment was one made at the expense and therefore to the detriment of creditors and at a time when the Board ought to have been acting in the interests of the creditors.Mr Colleary on the other hand has submitted that at that particular time the solicitors acting for the company had required a payment to discharge past fees and on account of fees going forward in connection with pending insolvency and legal matters arising therefrom.Mr Colleary makes the point that legal advice was needed and essential at this time and in these circumstances.No issue has been taken with that assertion by the liquidator.Mr Colleary states that there was nothing unlawful about making this payment, and suggests that if legal advice was not taken at that time he might equally be suggested as acting irresponsibly.He believes that if these solicitors were not in a position to continue to act for the group, it would have been detrimental to the group given the firm's familiarity with the group's position for some time and given the complex nature of issues likely to arise in situations of examinership, insolvency generally, the sale of shares in USIT World plc to STA and soforth.

212. An obvious reason why this Court would be obliged to look very closely at a payment such as this is to ensure, and I suggest not simply on the basis of a balance of probability, that there was no question that this payment made to solicitors was being made as a means of extracting funds from the dying company and putting it into the hands of any one or more of the directors.In the present case I am completely satisfied in that regard, and indeed as I have said there is not even a hint of such a suggestion made by the liquidator.

213. His concerns, and rightly so, are for the creditors.However, large and all as this payment to the solicitors is, it is small relative to the scale of the company's enterprise and to the overall losses to creditors.That is relevant to the extent that one can consider an imaginary situation where the payment was not made, and form a judgment as to whether in such a scenario any meaningful difference for the better would have accrued to any one creditor if the payment was not made.This answer is in my view obvious.I do not consider this payment to have been irresponsible in the light of what has been averred to, and the extent of the problems looming ahead for all concerned.

National Irish Bank position
214. Mr Colleary states in his affidavit that the manner in which funds were drawn from the account of USIT Limited should have come as no surprise to NIB, since what was done was in accordance with a practice which Mr Colleary states had been in existence for many years and as a result of the "unique relationship that existed between USIT Limited and National Irish Bank".He goes on to say that he had no reason to think at the time that cheques were written that they would not be honoured, and that he could not have anticipated that the subsidiaries on whose accounts the cheques were drawn would collapse.

215. The liquidator, on the other hand, has pointed to the fact that although USIT Limited was not permitted to have its account with NIB overdrawn at all, the actions of the directors resulted in a situation where the account, having been overdrawn in the sum of €3.38 million, was caused to rise to its ultimate exposure in the sum of €4.6 million.

216. The liquidator states that he agrees with the view of the bank (as revealed in its affidavit grounding the petition to wind up, that the directors knew or ought to have known that cheques were drawn on the associated companies could not be honoured and that there were no underlying funds to meet the cheques drawn by Usit Limited, and goes on to say that in his view, and goes on to say that such conduct is neither "honest nor responsible" and has caused a loss to the bank of approximately €4.6 million.It would appear that the liquidator is not maintaining the suggestion of dishonesty, since it is my recollection that he was accepting that these respondents have not acted dishonestly.Ultimately of course that is a matter for the Court.But the view which I have taken with regard to the NIB debt is that the conduct was not dishonest and was not in the circumstances irresponsible.

217. Firstly, it appears to be the accepted position that the company had no authorised overdraft facilities.Secondly, it appears to be the position that prior to the drawing of the cheques to which the liquidator refers and which he believes the directors ought to have known that there were no underlying funds to meet them, the company was already and presumably with the tacit acquiescence of the bank overdrawn in the sum of €3.38 million.Mr Colleary says in his affidavit that this was the way business was done with NIB over many years and because of what he describes as "the unique relationship" of the company with the bank.I am not sure what that means exactly but it suggests, and it is not contradicted as such, that the bank because of its ongoing relationship with the company over many years allowed a situation to develop whereby large unauthorised positions were permitted on the account.

218. This is not the type of situation where the company in one last ditch effort at survival has "hit" the bank in some dishonest and calculated way for another million Euro.If it were to be so characterised, the public, and banks in particular, would have to be protected against any recurrence of such behaviour, amounting to theft, by restriction orders being imposed.But I do not see this in that light.The bank at any stage in the months (and maybe years) prior to the liquidation could have insisted on the company observing the terms of the banking arrangements by ensuring that the account was not overdrawn.They appear to have acquiesced in the other scenario, and it is that decision on their part, no doubt made at relevant times for sound business relationship reasons, and has happens all the time that exposed the bank to the final numbers.To view that situation in any other way would I think be to do so with the advantage of hindsight.The court must look at the situation as of the time the action was taken to write the cheques.Sunday Tribune shares

219. In the overall scheme of things I believe that the issue raised as against Gordon Colleary by the liquidator in relation to these shares is too tangential to be really relevant to the questions to be addressed in this application.

USIT WORLD PLC:

Re the 'original directors', namely Gordon Colleary.Mairín Colleary, Angel Olivares, Gerard Connolly, Lynn Millington-

Wallace, and Xavier Moreels
220. Issues raised by the liquidator in relation to these directors can be broadly listed under the following heads, namely compliance with Companies Acts, trading while insolvent, failure to maintain proper books and records, adequacy of financial controls.A concern expressed within the last of these matters is one which goes to the very heart of what happened to the group in the final months of trading in 2001, namely the acquisition of the balance of 60% of the CTS shares in the US, followed almost instantly by the events of September 11th 2001.I will come to that.

221. The concerns relating to the statutory registers, as well as books and records in relation to USIT World plc is really no different than with USIT Limited which I have already dealt with.

222. In relation to registers, there is sworn evidence from Mr Colleary that these registers were kept.There is evidence that a director of corporate governance was employed by the company, namely Ms.Millington Wallace, one of the respondents.There is evidence that these records were kept at the company's offices at College Green, in the form of the letter to which I have referred to from Ms.Millington Wallace to Reddy Charlton McKnight in which she says that these registers were kept at the College Green premises.There is also evidence by the liquidator that he could not locate them inspite of extensive search and enquiries.But there is no doubt that company minutes were kept in relation to both companies by Ms.Millington Wallace.They exist and are available and they appear to be detailed and comprehensive.Again, in relation to this conflict in the evidence I cannot resolve it conclusively, but I am left on the basis of a probability that these records were kept and maintained even though the liquidator for whatever reason never obtained them, except for the minutes.

223. In relation to books and records, the point has been made that USIT World plc was a non-trading holding company.Each subsidiary maintained its own books and records which were considered by the company.These subsidiaries provided up to date financial information to the Board of USIT World plc on a monthly basis.This information comes from both Mr and Mrs Colleary, as well as from Mr Olivares.Gerard Connolly, another of the respondents and the person who was a director of the company for only six months, has stated in his affidavit, as I have already stated, that the financial information available in relation to the group was timely and comprehensive and he goes on to state "based on my extensive experience with such information in a variety of businesses over a period of 30 years, was of high quality and more than adequate for its purposes".He also made the point that this information was subjected to audit by independent auditors to companies, and that he is not aware that there was ever any criticism voiced about the quality of the books and records and information available.

224. Again, I appreciate that from the perhaps different perspective of a liquidator who is trying to piece together the details of the finances of a group spread over many countries and in a situation of insolvency, it may have proven difficult to readily find all the information which he sought.I think that it is important to distinguish his position as liquidator from the position of the directors, some of whom have worked in the group and the business as it was prior to the restructuring, and who had great experience of working with the systems in place.

225. Even allowing for the fact that the group enjoyed a massive turnover running to hundreds of millions of Euro by 2001, I am not left with an impression, taking both companies as a whole, that this was a group which was run in some sort of haphazard, slipshod, reckless or even unprofessional manner.There is no doubt that sophisticated systems were in place and which as far as the directors were concerned, and the group's auditors were concerned, produced the information necessary to enable the group to function efficiently.There is no evidence which satisfies that system failure or even weakness was the cause or even contributed to the collapse of the group and that is also relevant to consider.Professional advices had been taken when the group was being structured to enable it to expand worldwide, as has been described.Highly experienced and professionally qualified personnel were drafted into the group for key positions of responsibility.

226. Under this heading I am satisfied that the directors acted responsibly, even though the liquidator may have experienced the difficulties which he has outlined.

227. In relation to trading while insolvent, there is really nothing to add to what I have already stated in relation to USIT Limited.I am satisfied that the directors of USIT World plc have acted responsibly in this context for all the reasons which I have already referred to in relation to the other company.

228. One is left at this stage asking why, if the company and the group of companies was run as professionally and responsibly as it was, and if the personnel who occupied key positions were all as competent and diligent and responsible as they say they were, and if the group was solvent as claimed, and the affairs of the group were conducted so responsibly, there was such a catastrophic decline in fortune after August 2001, when immediately prior to that time the future looked so exciting.There can be no doubt that all concerned saw the group as poised, and capable both financially and strategically, to make major advances entry into the United States market through the acquisition of the remaining 60% shareholding in CTS.So what happened? If there was some catastrophic event which caused the collapse, then the question whether action or decision by one or more directors which gave rise to that event was irresponsible must be asked, since it has a direct nexus to the losses caused to the creditors.

229. To me, inspite of all the matters legitimately and properly brought to the attention of the Court by the liquidator about which he has concerns, one must look exclusively at the acquisition of this shareholding, the way in which it was to be financed, the manner in which it was in fact funded out of cash reserves ahead of Ulster Bank funding, and the instantaneous fallout from September 11th on the proposed funding and thereby the attainment of the objectives of that acquisition.The absolutely crucial feature to be looked at in my view is the decision of the Board, not a unanimous decision, to go ahead with that acquisition prior to the Ulster Bank funding being *actually in place*.

230. There must be a serious question to be asked at least about the commercial responsibility, not simply with the benefit of the clear vision of hindsight, of depleting to such a large extent the cash reserves of the group to complete a discretionary share purchase at that moment, and ahead of actual approval and availability of funding from Ulster Bank, no matter how confident the Board may have been and even been entitled to be, that the funding would be put in place by whatever means.It is in my view the one single act in all of this tragic saga for all concerned, which leaps out from the final chapter in the story of the USIT Group in 2001/2002.

231. The sequence of events leading up to the share purchase has been fully set out from the affidavits filed.There is no need to repeat it in detail.I am satisfied first of all that there was nothing irresponsible in the Board approving of the proposal that these shares be acquired, noting at the same time, as I do, that Mairín Colleary voted against the proposal on the basis that she believed that it would be better to await some up to date financial information following the year end for CTS, and that her instinct also was not to trust some of the financial information they had been given by the CEO of CTS.She states also that it was not because she believed that the company could not afford the purchase.It is true that financial pressures were being addressed during the previous

year, but that is to be expected and the fact that steps were taken is key.But global expansion was at the centre of the group's strategic plans.Specific planning had gone into putting the company into a position to achieve this expansion.Professional advices had been taken as to what key personnel were required and how the group should be structured.Mr Connolly had been taken on board with the specific brief to restructure the company's finances and seek a significant equity partner to assist the objectives set.A vital cog in the global expansion plans was a foothold in the lucrative United States market, and with this in view a 40% stake in CTS had been acquired for US$8 million in February 1999.This company was seen as having great potential for growth.

232. It is the very essence of entrepreneurial endeavour that risks are taken.Risks can differ in character.Something can be characterised as a risk simply because the outcome cannot be known with certainty, whereas those with responsibility to see it through and with the knowledge base from which to assess and weigh the magnitude or reasonableness of the risk may see the risk of failure as being far less than the likelihood of success.

233. A risk taken against such a background of planning and knowledge, and with appropriate advice taken, might be reasonably characterised as a calculated risk without any element of carelessness, rashness or recklessness attached to it which could attract to it the tag of irresponsibility.Clearly the greater the amount of money involved in the risk the greater is the obligation on all concerned to ensure that appropriate care is taken in all aspects of its planning, so that all factors, reasonably foreseeable, which may cause the venture to fail, will be anticipated and guarded against.

234. If an entrepreneur were to be obliged, on pain of being found to be irresponsible and of being restricted under the section, to avoid taking any decision which at some date in the future might be found to have risk attached to it, the business life and a large component of the economic driver of the economy of the State would stultify.I do not believe that this is what the legislature had in mind wen enacting section 150.

235. It is fair to assume that what was in mind was that, given the privileges attaching to those who engaged upon commercial enterprise under the protection of limited liability, and given also that in order to set up, and be a director of, a company one needs no education or qualification whatsoever, there will be some who will abuse that privilege - some unintentionally, perhaps through ignorance, lack of education, naive enthusiasm, lack of experience in business, lack of appropriate advice, carelessness, misadventure, negligence, and in some cases there may also exist some element of sheer bad luck.

236. This list is not exhaustive but such persons may, depending on the circumstances, be regarded as not having acted responsibly, either intentionally or unintentionally, and as such may be persons from whom the public, being potential future creditors, should be protected in the future by a period of restriction.

237. At the other end of the scale are those less naïve in the art of business and of life who see the privilege of limited liability, not as a cloak with which to display themselves, but as a mask behind which they can hide in order to deceive others for their own enrichment, and then make their escape.Such persons will willingly and freely take risks which pose no danger to their own position, but only to that of others.

238. Some can be calculating, callous and opportunistic in this endeavour to the point of criminal intent.Others may be so contrived, yet so convincing, in the manner and style of their deceit that they can overcome with ease the reluctance of others to commit their often hard earned cash, or valuable services, to one so recently acquainted.These are persons who will quickly attract the adjective 'dishonest' when, as will often and perhaps inevitably be the case, the mask slips only to reveal the deception and the loss in all its glory.These are truly people from whom the public are rightly to be protected in the future in so far as the law provides for that possibility, and such will have an impossible task ahead of them to persuade a Court that they have acted honestly.

239. This 'appalling vista' (to borrow a phrase) is so far removed from the present case, as to be unrecognisable.

240. In my view, the ultimate founder of the USIT business, Gordon Colleary, who is accepted by all as having been the decision-taker and prime mover in these major strategic moves, acted responsibly in seeking to achieve the legitimate and apparently achievable objective of acquiring the balance of CTS.There was commercial logic to the decision, and plans were made specifically with that in view.There were no voices raised from any quarter, as far as I have been told, against the principle of so doing, even if the actual timing of it may have been questioned by Mrs Colleary.The group's combined turnover after the acquisition of CTS would be in the order of €600,000,000.The draft accounts for the twelve month period up to 31st October 2001 showed an accumulated deficit of €14,403,647.Mr Colleary was confident, given these positions, that this deficit could be eliminated in the short-term after the CTS acquisition.That is one view from inside the group, even though it differs from the liquidator's post collapse view.It can be seen as a decision - even, ought I say, a risk - taken in the full light of day, after appropriate planning, strategy and advice.Irresponsible, careless, negligent, rash, reckless, naïve are all words which do not fit this scenario.It is otiose to say that there is no question in his case of lack of education, qualification or experience in either business or life.

241. Passing from whether it was responsible to set out on the road of this acquisition in the first place, to the means by which it was to be achieved, the road gets rougher.Everybody on the Board agreed that it was a good idea.Everybody on the Board seems also to have agreed that it ought to be done only if outside funding was available.That was inspite of a belief prior to the purchase that the company's financial position was strong and that trading prospects were good.That was certainly a prudent stance to adopt given the need which had earlier been perceived at Board level to cost-cut in order to improve liquidity, and to take other steps to improve the financial picture generally.

242. Mr Colleary has sworn that the plan was that €7 million was to be borrowed from Ulster Bank and that this was the sum to be paid immediately upon completion of the sale, with the balance remaining payable after certain conditions were fulfilled.He says also that it the Group's auditors were most anxious that the transaction be completed by end August 2001, so that the Group's audit and that of CTS could be done in tandem.He maintains that he had approval for the loan from Ulster Bank.The liquidator disagrees and in support of this disagreement has exhibited a letter from Ulster Bank which was written to him in response to a specific enquiry from him.I have already set out the terms of that letter almost in their entirety, but I will repeat one passage from it.It states:

> *" The proposal at the time was to provide a bridging facility to be repaid by 30 November 2001 to a newly formed company, Council Holdings Limited ("CHL") set up specifically to complete the acquisition of CTS.CHL was to be a 100% wholly owned subsidiary of USIT Ireland Limited.The facility was to be repaid from surplus cash balances that were to be in CTS at the time of the acquisition.*
>
> *I have reviewed our file on the matter and can confirm the following.*
>
> *We were in discussions with USIT management regarding the funding of the acquisition of CTS for some time during the*

summer months of 2001.Our discussions continued up until 11 September 2001.While we had verbally indicated we were looking favourably on the request for funding, at no stage was any offer made (formal or otherwise).Given the events of September 11th we ended our application process on that date and I confirmed the bank's position in a letter to Mr Alan Myles dated 16th September 2001."

243. Even though the bank wanted to "ring-fence" USIT World from the financing arrangements, there is nothing to indicate that the bank was reluctant to get involved at all.In fact the tone appears to have been positive subject to finding the appropriate vehicle through which to channel the funding for the share purchase.The Court is obliged to step into the shoes of particularly Gordon Colleary at that point in time in August 2001 when there were in his view no dark clouds on the horizon.Discussions of a positive nature had clearly been engaged upon with Ulster Bank.Clearly there was more work to be done.But there is nothing to indicate that had September 11th not happened, these arrangements would have been finalised, and this borrowing would have been put in place.

244. It is interesting to note that the borrowings are described as being intended to be in the nature of a short-term facility to be repaid out of anticipated cash surpluses in CTS after acquisition.These were not long-term capital borrowings.In my view, given that feature and the presence of cash surpluses, it was reasonable for him as of August 2001 to take the view, or at least not irresponsible to do so, that given the urgency being pressed to complete by the end of August, it was feasible to "borrow" the funding in the short term from the cash within the company, in the belief that it would be soon replaced from the Ulster Bank funds when they became available.I think his belief that the funding would be available was not baseless or reckless.That being so, there was no question that by proceeding as he did he was going against the Board decision that the purchase should not take place in the absence of outside funding.

245. The decision which he made, and I clearly attach the responsibly for that decision to Gordon Colleary, as the prime decision-maker in the company, may come within the general description of a risk.That risk was obviously that even though he believed that the facility was "in the bag" so to speak, that the Ulster Bank would in fact refuse it.At that point in time, I believe that the risk of that was probably small.If he considered the risk, which he may not have, a consequence would have been that he would have taken a step which would not have been with Board approval.The Board could of course subsequently ratify the act.But it would mean that the company's cash reserves would remain depleted until such time as alternative funding was sourced.His consideration of the risk would not reasonably have led him to the conclusion that the company would collapse.Some pressure - even considerable pressure - would have been placed on liquidity, but given the acquisition of increased turnover and the positive effect that this would have on cashflow, it would have been not irresponsible for Mr Colleary to believe that no catastrophe would result from dipping into the cash reserves in the interests of completing the purchase at what was regarded by him and the auditors as the optimal time.

246. My view now is that if it was reasonably foreseeable by Gordon Colleary that by using the cash reserves in anticipation of a not yet formally sanctioned loan facility in order to complete the CTS purchase, so that he could complete this transaction at the time of his choosing, he was placing the future of the group in real jeopardy in the event that funding was refused or was otherwise not forthcoming, the use of those reserves would have constituted conduct which he would not be able to satisfy the Court was responsible.But that is not in my view on any reasonable interpretation of what happened a correct assessment of the risk undertaken by him in this instance.In my view it escapes being an irresponsible act, and comes within the category of entrepreneurial risk which I called a calculated risk.It lacks recklessness or carelessness, or wilful disregard of the interests of others, whether creditor or shareholder or employee, which would be classify it as irresponsible, and for this reason I believe that he has satisfied the Court that his actions were responsible in this regard.

247. His exoneration in this regard must also lead to exoneration of the other respondents who in my view would be less culpable than him in any event, even if he was found to be irresponsible in the action he took.

Sept 11th as the cause of the collapse:
248. I should say something about the issue raised in this regard.First of all there can be no doubt at all that the reason why Ulster Bank ceased proceeding on foot of the application for funding on the 12th September 2001 was directly as a result of September 11th.They have said so.This resulted in the funding intended to replace the cash reserves utilised for completion of the purchase of CTS from coming through, leaving the company strapped for cash.Under normal circumstances, I am satisfied on the basis of a probability, that this difficulty could have been weathered, especially given the increased cashflows to be generated by the CTS business.It will be recalled that Gordon Colleary believed that the balance sheet deficit of €14 million shown at year end 31st October 2001 would quickly have been eliminated with these increased revenues.

249. The problem about losing the cash reserves like this was that solely on account of the outfall from September 11th they were needed in a way which could never have been anticipated and certainly was not anticipated.At that particular moment the group was entering what was seasonally and known to be a low sales period.September 11th caused the coming months to be even leaner than normal, especially in the US market which was the very market on which the company was relying to deal with the increased financial obligations arising from the CTS purchase.In colloquial language it was “a double whammy” ! That is Mr Colleary’s contention and belief.

250. The liquidator, while not discounting the serious impact which September 11th will have had on the student travel market and the fortunes of USIT as a group, nevertheless believes and submits that not all the ills of the group can be blamed on that day, and as I have set forth he has pointed to what he perceives as having been other weaknesses and pressures which should have caused the Board of directors to act differently, and he contends that even on the known state of affairs of the companies it was irresponsible to act in the way that they did.

251. I am persuaded by the sheer inexorable logic of the situation that the probability is that Mr Colleary and his colleagues are correct about the link between September 11th and the collapse of the company.The coincidences of timing are too exact – the CTS purchase on September 4, the events of September 11 themselves, the withdrawal of Ulster Bank on September 12, the obvious impact in the immediate aftermath on the student travel business worldwide, the winter low sales season, and collapse in January 2002.

252. Another way of putting this is that in my view the probability is that if September 11 had not occurred, and even if Ulster Bank funding had not come through, the group could have survived, even if Mr Colleary might have had some answering to do to his fellow Board members as a result of the loss of cash reserves.

Gerard Connolly:
253. It is clear from what I have said that I am satisfied on the balance of probabilities in view of certain conflicts of evidence that both Gordon Colleary and Mairín Colleary have acted honestly and responsibly.It almost follows as a matter of course that I be satisfied also in relation to Gerard Connolly whose tenure as a director was short, and ended after only 24 weeks in July 2001 for

health reasons which I accept as having been the reason.His brief as a director was quite specific, namely to assist in the development and implementation of a restructuring plan, so that additional new borrowings could be obtained and on improved terms, securing the necessary finance for the CTS acquisition, and also identifying an equity partner or purchaser for the group.He was not a cheque signatory, and took no active part in day to day management or treading operations.The liquidator has pointed to the fact that prior top his departure he did not appear to have been successful in any of these stated objectives, but Mr Connolly has disagreed and has gone into some detail as to the work and effort put in by him towards the objectives set.

254. Mr Connolly has stated also that while he was a director of the company it was paying its debts as they fell due, and he found no fault with the books and records and records of the company and feels happy that all necessary financial information was available to the Board when it was needed.

255. In so far as complaint is made generally against the respondents by the liquidator under the various headings set forth, I am satisfied that from what Mr Connolly has sworn to, and from what the other respondents who have sworn affidavits have stated also, that there is no room for a finding of irresponsibility against Mr Connolly.

256. There has never been any suggestion that Mr Connolly acted other than honestly as a director, and I am satisfied also that he acted responsibly.

Lynn Millington Wallace and Xavier Moreels:
257. it remains for the moment to address the question which I touched upon earlier herein, namely how to deal with the application in respect of Lynn Millington Wallace and Xavier Moreels, who have neither filed affidavits nor been represented in the application.

258. The question which I posed earlier whether it is possible, from the manner in which s.150(1) of the Act has been worded, and from the absence of the express creation of a presumption as such, that the court may derive its satisfaction as to honesty and responsibility in respect of a respondent who has not appeared or been represented on the application, from what other respondents have said in their affidavits, so that a restriction order would not be made in circumstances where the Court, though satisfied that one ought not be made, is compelled to do so by default as it were.

259. In my view the Court is entitled to find itself satisfied in that regard even in a situation, as in the case of Ms.Millington Wallace and Mr Moreels, who have not filed affidavits.In that regard, it is important to note that the section does not state that the director must satisfy the Court.It says that "unless the Court is satisfied".In such a situation, it seems to be contrary to common-sense, if nothing worse, that a Court could be satisfied that the conduct of all the directors was responsible in all the circumstances from its consideration of such a volume of documentation as in this case, as well as perhaps the submissions of other parties, and yet have to decide, in a way which flies in the face of that finding, that a particular director should be restricted because, for whatever reason - perhaps lack of means - he/she had not engaged lawyers to participate in the application.

260. This does not mean that there is onus of proof on the liquidator.There is not.As has happened in this case, the liquidator will bring to the Court's attention the matters which have given him cause for concern.Some of those concerns may, if not sufficiently dealt with by the director concerned, prevent the Court from being satisfied as to honesty and responsibility, because they appear to constitute dishonesty or irresponsibility to the necessary degree.In other cases, the Court may well be satisfied on the documentation and information provided to it by the liquidator that even though there are concerns expressed, the director respondent has nevertheless acted honestly and responsibly.

261. Because it appears to be the case that a liquidator appointed by the Court is required to bring these applications in every case, there will inevitably be cases where the court can be satisfied, even in the absence of justification of conduct by a particular director, that he or she has acted honestly and responsibly.The section cannot be fairly interpreted, in the absence of express wording to such effect, as meaning that a presumption of dishonesty and irresponsibility is to be inferred where a director takes no step to participate in the application.Such a presumption could fly in the face of matters glaring from the application itself from which the Court is satisfied as to honesty and responsibility.The task of the court is to be satisfied.The section does not confine the Court as to the source of that satisfaction.

262. I have been concerned when dealing with cases under this section that some directors have felt it necessary for economic reasons to concede dishonesty and irresponsibility rather than try and mount a case to meet what they perceive as the onus upon them to satisfy the Court that they acted honestly and responsibly.It is inevitable that there will be many cases where an insolvency has occurred in which the directors themselves have been impoverished.It is not always the case, but in a great many cases it must be so.It follows that the expense of meeting an onus to satisfy the Court as to their honesty and responsibility will be a burden financially which they cannot bear, and it is easier to concede the matter than to resist it.

263. In these circumstances I feel that if the section can be interpreted from the plain and ordinary meaning of the words used in the section in a way which does not prevent the Court from being satisfied other than by what may simply be urged upon it by a particular director either personally or through lawyers, justice can be done in a way which may in some cases be absent, such as where the court is satisfied as to honesty and responsibility in case where the director has not filed an affidavit in response.It amounts to an injustice, in my view, to meet upon such a director a restriction order where the court is able to be satisfied by means perhaps of the liquidator's own account of the affairs of the company in the final twelve months prior to his or her appointment as liquidator that the respondent has acted honestly and responsibly.For a director to be forced to concede the matter rather than resist, on the basis of it being the lesser of two evils, the greater being perhaps to try and borrow funds to meet the application, cannot be necessary or, more importantly, just and equitable.

264. In my view, justice requires that the court, even where there is no response by the respondent, should first consider whether it can be satisfied from the facts placed before it by the liquidator that the respondent has acted honestly and responsibly.If it is so satisfied, then it follows that no order should be made, even in the absence of participation by the respondent, as to do otherwise is to presume that an absence of participation gives rise to a presumption of dishonesty and irresponsibility, and the Act provides for no such presumption.It is undesirable that a director should be deemed to have conceded a matter about which the court can be satisfied to the contrary on the documentation before it, especially where the consequences of so doing are penal in nature, if not intent.The effect is to provide protection to the public against someone in respect of whom the public has no need to be protected.That is nonsensical, absurd and unjust.

265. I therefore find myself satisfied that both Ms.Millington Wallace and Mr Moreels acted honestly and responsibly as directors.

USIT WORLD Plc - the STA directors
266. As will be recalled, these directors were those who were appointed after the acquisition of USIT World plc in January 2002.Their

tenure of office was therefore of very short duration, and commenced only after the insolvency of the company and, effectively, its collapse had already occurred, and in a situation where the liabilities on anybody's assessment were massive and irretrievable.Certainly the sale price for 90% of the company, namely €1.00 reflects that reality – a sale by the way which required ands presumably received the approval of the Minister for Enterprise, Trade and Employment, as I have already referred to.There was in my view never any prospect of the creditors receiving anything meaningful from the ashes of the group.

267. It seems to me that on balance, STA saw the collapse of USIT, its main competitor worldwide, as having the potential to cause damage to it also, and that it might assist if it took over what remained and could then control to an extent what would happen thereafter, as well as presumably hovering up what remained live in the group.It has been averred by Mr Porter that the purchase was predicated on the company being paced under the protection of the Court, which was done.

268. I have already set out what these directors have said on affidavit.I have also set forth what Mr Colleary and Mr Olivares have said about how disturbed they were at what they perceive to have been a 'volte face' on what was believed to be a purchase of the company which would benefit the creditors as well as employees of the group, so that the ultimate collapse of the group was assured, rather than the reverse.

269. There are allegations of mala fides involved in what has been alleged, and I certainly am not in a position to resolve these issues on an application of the present kind.The liquidator has said that the evidence relating to these allegations are inconclusive.

270. The liquidator has queried whether the asset disposal programme which was undertaken (under the supervision of the Court appointed Examiner) was undertaken in the interests of the creditors.The directors on the other hand states that they went about these disposals having obtained top professional advice and assistance, and they answer the value for money concerns of the liquidator by stating, inter alia, that the collapse of the group had a depressing effect on the value of subsidiaries, and that this can account for the fact that the benefit after costs of disposal are low.They make the point that they consulted the Examiner in relation to proposed sales of subsidiaries, and where (as happened) he raised an objection that sale did not proceed.

271. The liquidator has serious concerns about the high level of fees paid to PwC.The directors state that these fees were high because it was necessary to engage this top firm to gather together financial information from subsidiaries in a number of different jurisdictions, and that this was time consuming.They also were engaged to advise on the asset disposal programme, and their fees were discharged from the sale monies received.

272. Mr Porter filed a very extensive and detailed affidavit.Mr Adams and Mr McGing also filed affidavits, but at the same time have relied upon what Mr Porter ahs said.I believe that they ought to be entitled to do so.

273. I am not concerned with the allegations made by Mr Colleary and others about the motivation of STA in acquiring what remained of USIT World.The evidence is not conclusive.STA took over a dying beast, and clearly saw no prospect of saving its life by a disproportionate injection of capital.Instead they oversaw the final outcome.I see nothing dishonest in what STA did, and in particular these directors.They certainly had no need to get involved at all.They could have just let the beast die alone, but they must have seen some benefit in getting involved in the last moments.There is no question about them having had any involvement in the collapse itself.This had happened already, hence the approach made by USIT personnel to STA in the first place.

274. As far as filing further documents in the Companies Registration Office is concerned, it is probable that this ought to have been done, but the failure do so that could not in the context of this case be regarded as something dishonest or irresponsible.

275 I am satisfied in the circumstances that these STA directors have acted honestly and responsibly.

No other reasons why it would be just and equitable to restrict the respondents:
276. This is the final matter to be considered and disposed of.The allegations made, and in some respects maintained by the liquidator regarding the level of cooperation which he received after his appointment is something which can be considered under this heading, since it is plainly not something which could occur during their tenure as directors.

277. There could in other cases be matters brought to the attention of the Court by the liquidator which might be grounds for imposing restrictions, which are separate from either dishonesty or irresponsibility.None seem to arise in this case, even in the case of Ms.Millington Wallace and Mr Moreels.I do not believe, taking the case of these two respondents again, that it requires an affidavit for the court to be satisfied in that regard.Because "no other reason" is such a broad term, a respondent is left simply to aver that he or she does not believe that there is any such reason, and for the most part such a reason would relate to conduct by a respondent during the course of the liquidation, and as such would be in respect of complaints made in any relevant respect by the liquidator.One could envisage the destroying of company files as being just one of many possibilities.

278. In the present case, I am satisfied from the very full amount of factual evidence which I have been given on affidavit from a great number of deponents, including many from the liquidator, that if there was anything relevant under "no other reason" category I would know about it by now, and there being none I am satisfied that the only matter which needs to be considered briefly is the question of cooperation by the respondents post liquidation, as this has been touched upon by the liquidator.

279. The liquidator was of the view initially that he had not received adequate cooperation from Gordon Colleary, but he has changed from that position now, and has accepted the level of cooperation by him as satisfactory.I am satisfied that he has cooperated and will, if required to do so in the future will do so.

280. There was never any complaint of lack of cooperation by Mairín Colleary, and I am satisfied that she did cooperate, and will continue to do so as required.

281. The liquidator has been satisfied with the cooperation received from Angel Olivares, and I am satisfied that he has cooperated and will, if required to do so in the future will do so.

282. There was never any complaint of lack of cooperation by Gerard Connolly.He had left the company nearly a year before the liquidator was appointed in any event.

283. In relation to Xavier Moreels no particular complaint of lack of cooperation is made.The liquidator does not appear to have required anything of him, and I am satisfied that there is no other reason in this case why the order should be made against him.

284. In relation to Ms.Millington Wallace, there was some alleged difficulty obtaining an up to date address for her, but she stated in

the correspondence already referred to that she did not understand why there would have been any difficulty.In any event that difficulty was resolved and service of documents took place to an address in France.I am satisfied that there is no other reason why an order should be made.

285. I should perhaps add in relation to the last two named respondents, that in my view no account should be taken in this case of their failure to participate in these applications in the context of deciding if an order should be made for any other reason under the section.

STA Directors:
286. The liquidator also makes a complaint about the level of co-operation which he received from the STA directors.He says that he has been unable to meet with them, although he has spoken on one occasion in a general way with Richard Porter, and that the latter indicated that thenceforth he would prefer to communicate via solicitors.Ultimately, after some difficulty, queries raised by the liquidator were dealt with.The allegations made by the liquidator are denied and Mr Porter has dealt with his side of that matter in quite a detailed way.I do not propose to examine closely each punch and counter punch in that exchange at this stage.But I am satisfied that while the liquidator for whatever reason felt that he was not receiving cooperation, matters required to be dealt with were dealt with, and there remains an offer of a meeting contained in a letter dated 23rd August 2003 from Messrs.Arthur Cox to Messrs.Mason Hayes and Curran.That letter states that these respondents (STA directors for whom Messrs.Arthur Cox are acting) have stated a willingness to meet with the liquidator in the event that there is anything further which the liquidator requires which is over and above what information has been furnished already.It appears that this offer is still open and can be availed of by the liquidator if he wishes.

287. On balance I am satisfied that nothing disclosed under this heading constitutes a reason why a restriction order should be made against these respondents.

288. The Court being so satisfied, it declines to make any order under section 150(1) of the Act.