Neutral Citation Number: [2012] IEHC 263

THE HIGH COURT

2010 508 COS

IN THE MATTER OF DEVONA LIMITED (IN LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

CONOR PYNE

APPLICANT

AND

GERARD VANDEVENTER, BEN VANDEVENTER, GERRIT EARNEST KRUIS AND ALFRED SCHOENMAKERS

RESPONDENTS

JUDGMENT of Ms. Justice Dunne dated the 18th day of May 2012

The applicant herein has sought an order pursuant to s. 150 of the Companies Act 1990, against the four named respondents. The application made against the fourth named respondent is based on the applicant's belief that the fourth named respondent was at all material times a shadow director of the company. The company concerned herein was involved in the supply of mechanical and electrical consultancy services in respect of one off houses and large commercial developments from a premises located at Reen, Kenmare in the County of Kerry and operated under the trading name of D & K Partnership.

The fourth named respondent has raised a preliminary issue as to whether or not he was a shadow director of Devona Limited. If he is successful in that preliminary issue then obviously no order can be made against him in relation to s.150 of the Companies Act 1990.

The Background

The company herein was incorporated in 1982. The first named respondent and the third named respondent were appointed directors of the company at that time. Subsequently in 1996, the second named respondent was appointed as a director of the company and the three named respondents continued as directors of the company until the date of liquidation of the company.

The fourth named respondent was first employed by the company in November 2004, and was made redundant in April 2010. He became company secretary in 2005 (there is some degree of variance in the affidavits as to the date of appointment of the 4th named respondent as company secretary but nothing turns on this point) and remained in that position until the date of his redundancy. It is the applicant's case that he was a shadow director of the company and this is vehemently denied by the fourth named respondent who maintains that he was never a shareholder in the company and that he was at all times an employee of the company.

The fourth named respondent in his affidavit grounding this application described his involvement with the company. He stated that he was directed with the tasks in the management of general and office affairs of the company such as data entering for bookkeeping, scheduling of works, reporting to the directors on work progress, workforce requirements and general matters of a non technical nature. He stated that he did not have a written form of contract. He reported to the first named respondent on general matters and to the third named respondent on personnel matters and also in relation to book keeping matters. He emphasised that he was not the financial controller of the company. The financial control was exercised for the most part by the third named respondent. The fourth named respondent was not authorised to sign cheques or to determine the way in which monies were paid to creditors. He had no role in the choice of suppliers. He had no authority to bind the company in any way or to agree commercial contracts other than the witnessing of the signing of same by one of the directors. He had no influence in the choice of accountants and was not present in meeting with accountants except insofar as concerned book keeping matters. In his role as company secretary, he informed the accountants/auditors of the financial transactions to serve as a basis for the year end returns, but he pointed out that the directors had delegated all matters relating to the execution of company secretarial tasks to the accountants such as the preparation and filing of returns, the making and distributing of minutes of AGMs and other official meetings and the keeping and maintaining the shareholders register and filing the year end returns to the Revenue.

He related that the books of Devona Limited were kept in proper order on a regular basis. He described various steps taken by him in relation to this together with the steps taken by the directors. He noted that VAT and PAYE/PRSI returns were filed by the directors. He indicated that he cooperated with the official liquidator in respect of the preparation of the statement of affairs. He added that he was at a loss to know why the official liquidator was of the view that he was a shadow director and could find no basis from either the official liquidator's affidavit or hiss. 56 report to the Director of Corporate Enforcement as to why he was considered to have been a shadow director of the Devona Limited.

Exchange of Affidavits

The official liquidator, the applicant herein, in his affidavit sworn on the 27th January, 2012, said that it was apparent to him that the fourth named respondent had "a central role in directing the financial dealings of the company and as such directed the directors in this regard". The applicant relied on a number of matters in support of this contention. The first relates to the statement of affairs prepared by the directors and the fact that it was altered following contact with the fourth named respondent who had been outside the country when the original statement of affairs was prepared. The second matter relied on was the fact that the fourth named respondent was the main contact for the company in its dealings with its insurance brokers. The third matter related to contacts by the first named respondent with the Revenue Commissioners over a period of time. The fourth matter related to some small payments made to the fourth named respondent subsequent to his being made redundant. The final matter relied on was the involvement of the fourth named respondent in the signing of contracts with Xerox Finance Limited for the lease of two pieces of equipment in May 2006 and in December 2006. Those contracts were in respect of sums of €62,810 plus VAT and €14,300 plus VAT respectively. In those circumstances, the applicant expressed the view that the fourth named respondent was a shadow director, being the person having full responsibility for the financial control of the company and it was asserted that he directed the directors in this regard and

continues to do so.

The fourth named respondent in his replying affidavit of the 14th February, 2012, disputed the averments of the applicant in relation to his role within the company, particularly that he had a central role in directing the financial dealings of the company, either prior to or subsequent to his redundancy.

He explained his involvement with the amendment of the statement of affairs. He had been away and on his return in November 2010, he was asked to look at the figures in the statement of affairs. He said that he was asked to do so as a former employee and former company secretary and that there was nothing inappropriate in doing so. He said that the amendments were made to include "the 2010 transactions of the company" which had not been entered in the previous statement of affairs. He entered data into the software and then on the 26th November, 2010, sent all the details to the applicant herein. He asserted that the amendments to the statement of affairs were "clearly and transparently set out" for the benefit of the official liquidator. No concerns were expressed to him by the applicant before sending the s. 56 report to the Director of Corporate Enforcement.

The fourth named respondent then dealt with a number of the other allegations made by the applicant in his affidavit. In relation to the issue in respect of the company's insurance brokers he said that he dealt with them during the course of his employment, but in his capacity as company secretary and employee of the company. He went on to discuss his dealings with the Revenue and reiterated that a meeting he had in 2007, with the Revenue Commissioners was in his capacity as company secretary and employee of the company. The third named respondent was also present as was Mr. Francis Moriarty, representing the company's auditors and accountants. He reiterated that any correspondence or communication he had with the Revenue Commissioners was in his capacity as company secretary and employee of the company. He also had correspondence with the Revenue subsequent to his redundancy. He stated that he was happy to provide assistance to the company but had no role in decision making before or after his redundancy.

He also dealt with the issue in respect of payments received by him after April 2010 when he was made redundant. He stated that the sums received by him were in respect of back dated remuneration and to cover costs and expenses in attending meetings with the company's solicitors following his redundancy. He also dealt with the issue of the lease agreements made with Xerox and he pointed out that the one made on the 4th May, 2006, was signed by him as "Assistant Manager" and not as a director.

He went on to discuss the level of his charge out rate as referred to in the s. 56 report of the applicant where it was pointed out that his charge out rate was €85 per hour as contrasted with a figure of €170 per hour for a director. He stated that this was an indication that his role was not a senior role at executive level in the company and was consistent with his role as an employee.

The third named respondent herein also swore an affidavit in connection with this issue. He stated that the fourth named respondent was engaged as an employee as office manager and company secretary in 2004. He described the nature of the work of the fourth named respondent. He pointed out that the fourth named respondent had no role in the hiring or firing of staff which was at all times a matter for the directors of the company. Equally, he had no responsibility for financial control in the company. He was involved in book keeping and the preparation of accounts. The third named respondent described the nature of the role of the various directors and pointed out that the company had been trading successfully for over 20 years before the fourth named respondent became involved in the company as company secretary and employee. He stated that the company's bank never suggested that personal guarantees or security be provided by the fourth named respondent for monies borrowed by the company while two of the directors had provided the bank with a charge over their houses. No security was provided by the fourth named respondent. He did not have the authority to sign cheques, bank authorisations or similar documents. He described the circumstance surrounding the creation of the leases in relation to Xerox and averred that he, the third named respondent, decided which equipment should be leased and he authorised the fourth named respondent to order the equipment and sign the necessary documentation upon delivery. He noted that the fourth named respondent apparently signed a direct debit form in this context and expressed surprise that this was never queried by the bank because the fourth named respondent was never a signatory on the bank accounts of the company. Had it been raised as an issue by the bank, it would have been confirmed that he had permission to sign the form but nonetheless he was surprised that this occurred without question.

He dealt with the issue of the statement of affairs at some length. At the time of the winding up order, the fourth named defendant was out of the country. The company's accountants were owed money by the company and apparently provided little assistance to the directors in the preparation of the statement of affairs. The fourth named respondent was then asked by the directors on his return to examine the accuracy of the statement of affairs. He indicated that the figures for 2010 were not taken into account and that the estimated amount of the company's debtors was incorrect. In those circumstances the directors contacted the official liquidator's office with a view to submitting a further statement of affairs.

He confirmed that travel and other expenses were reimbursed to Mr. Schoenmarkers following his redundancy in relation to assistance provided by him after that period.

A further replying affidavit was furnished by the applicant in which he took issue with the affidavit of the third named respondent. He queried how it was that the third named respondent who said he was responsible for financial control in the company was not capable of preparing the correct information in the statement of affairs. As a result of that failure, a deficit of €200,000 was excluded from the statement of affairs. He noted that certain of the figures involved included claims for mileage and subsistence for the first, second and third named respondents and salaries for which no PAYE/PRSI was returned and he expressed incredulity at the idea that the third named respondent would not have included those entries in the statement of affairs, given that he would have a personal knowledge and interest in those figures.

The applicant then went on to deal with a series of matters referred to including the issue of the attendance by the 4th named respondent at meetings of the directors in his capacity as company secretary, the role of the fourth named respondent in relation to compliance with the Companies Act and the filing of returns and was critical of him in regard to those matters.

He placed particular emphasis on a report of the 25th September, 2008, which was prepared by the fourth named respondent, the subject of which was described as "Company Development and Economics". That document focused on the difficulties the company was then facing and a number of comments from that report were cited by the applicant in support of his contention as to the role of the fourth named respondent. The document noted for example that "this document reports on possible steps that can be decided upon that may lead to survival of the company in one form or another. . . . The main task of management is to decide towards constructive influences on inflows as well as on outflows in such a way that shareholders can expect to ultimately receive returns on their investment to be paid from the positive balance of same". The applicant also referred to and emphasised the sentence in which it was stated "We should closely maintain and monitor the cash flow projections on a weekly base and decide on measure immediately when appropriate". Particular emphasis was placed by the applicant on the use of the word "We". The point was made by the applicant that various advices set out in that report were followed by the directors and in particular the directors incorporated

another company called Anoved Limited in July 2009, which was according to them set up "to operate as a separate entity for targeting projects abroad with the basis outline business plan to target foreign markets". It is said that this step was in line with the advice given by the fourth named respondent to the effect that for the business to survive, work would have to be sought from different markets. The applicant dealt with a number of other issues in the course of that affidavit, but focused in particular on the fact that the statement of affairs was altered on the return of the fourth named respondent to the country by virtue of the fact that he had observed a number of material inaccuracies in the statement of affairs. The fact that the other respondents were willing to amend the statement of affairs at that stage indicated to the applicant the following:-

> "The third named respondent was not the person with financial control of the company,
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> the fourth named respondent was the person with financial control of the company and
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> the first, second and third named respondents were persons over whom the fourth named respondent exerted a considerable level of influence."

Finally the applicant made reference to the fact that the fourth named respondent is employed by Anoved and is a co-director of another company with the respondents.

At this point it would be useful to look at the two statements of affairs and the aspect on which the applicant relies. In the original statement of affairs under the headings of "Assets", para. 2 entitled "Assets not specifically charged" listed trade debtors and loan advances. In each case the estimated realisable value of those was stated to be €0. In the subsequent statement of affairs under the same heading, the figure for trade debtors was stated to be €184,985. The figure in respect of loans at and advances was stated to be €22,000. That is the discrepancy between the two documents upon which emphasis has been placed.

The Law
Section 27 of the Companies Act 1990 provides at subs. 1 as follows: "Subject to subsection (2), a person in accordance with whose directions or instructions the directors of a company are accustomed to act (in this Act referred to as 'a shadow director') shall be treated for the purposes of this Part as a director of the company unless the directors are accustomed so to act by reason only that they do so on advice given by him in a professional capacity." By virtue of the provisions of s. 149 of the 1990 Act, the provisions of part 7 of the Act relating to the disqualifications and restrictions apply to shadow directors in like manner as it applies to directors.

In the course of submissions I was referred to a number of decisions and in particular to the case of Re. *Hocroft Developments Limited (In Liquidation), Dowall v. Cullen and Others* [2009] I.E.H.C. 580, a decision of McKechinie J. in relation to an application for a restriction order against all of the respondents including one who was said to be either a de facto director or a shadow director of the company. A preliminary was raised in that case as to whether or not he was indeed a *de facto* director or a shadow director. The company in that case was established to carry on the business of builders and property developers. The only building project undertaken was in respect of the Paramount Hotel, Parliament Street. That was the property owned by Mr. Cullen. Ultimately the company was to carry out development of the hotel and it agreed a fixed price for the development. The construction work was tendered for by a separate company and it commenced work. Difficulties arose in regard to the completion of the works and ultimately the company was wound up. The brother of Mr. Cullen was a director of that company. The liquidator argued that Mr. Cullen was a shadow director of the company and he relied on a number of matters in that regard. One of those was the fact that Mr. Cullen was authorised in 1996 as a signatory of cheques on the company account from 1996 until 1999 shortly before the company went into liquidation. Other matters relied on were that the main contractors and sub contractors on the project appear to have regarded him as the controlling force behind the company; that he received requests for direct payments of invoices due in relation to the hotel project, that he attended at project meetings and made contributions at those meetings and that at the time of the liquidation, the hotel project was the sole source of the company's funding.

It was accepted that Mr. Cullen was a cheque signatory until December 1999, but it appears that he did not actually sign any cheques. In relation to his involvement with the development, it was pointed out that he was inevitably involved as the owner of the underlying development and that his involvement with the project did not indicate that he controlled the company or was a director of the company. It was submitted in that case that there was insufficient evidence to establish that he had acted as a de facto or shadow director of the company In the course of his judgment in that case, McKechnie J. reviewed at length the law in relation what constituted a *de facto* or, in the alternative, a shadow director.

One of the decisions cited by him was the decision of O'Neill J. in the case of In Re. *Lynrowan Enterprises Limited* [2002] I.E.H.C. 90. In the course of his judgment McKechnie J. quoted from that judgment the following passage at para. 59:-

> "Before leaving In *Re Lynrowan*, there is a further passage that should be referred to, which is:
>
> > '4. In the absence of clear evidence of the foregoing [see para. 55 supra.] and when there is evidence that the role of the person in question is explicable by the exercise of a role other than director, the person in question should not be made amenable to the section 150 restriction.' (para. 18)
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> Even though this statement was said in the context of a de facto director, it must likewise apply to a shadow director as both are equally exposed, *inter alia*, to the restriction provision. *See La Moselle Clothing Ltd v. Soualhi* [1998] 2 ILRM 345 at 350 (Shanley J.). So if uncertainty remains about whether the acts alleged are referable to an assumed directorship or to some other interest or role, whether within or outside the company, the onus will not be discharged and the provisions of s. 150 CA will not apply. That case related to the correct interpretation of s. 22(5) of the Company Directors Disqualification Act 1986, which is substantially similar to the terms of s. 27 of the CA 1990."

McKechnie J. then went on to quote from two other decisions which are of assistance. They are the judgments in the case of Millett J. in Re. *Hydrodarn (Corby) Limited* [1994] B.C.C. 161 and Morritt L. J. in *Secretary of State for Trade and Industry v. Deverell* [2000] 2. B.C.L.S. 133. It would be helpful to cite two paragraphs from the judgment of McKechnie J. where he sets out passages from those two judgments. He stated at para. 63 as follows:-

> "63. The case of *Hydrodam* must again be referred to as Millett J., having considered s. 251 Insolvency Act 1986, which defined a shadow director in the same way as s. 27(1) CA 1990, sets out the test as follows:
>
> > 'A shadow director ... does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow

director of a company it is necessary to allege and prove:

(1) who are the directors of the company, whether de facto or de Jure;

(2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so;

(3) that those directors acted in accordance with such directions;

and

(4) that they were accustomed so to act.

What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.' ([1994] BCC 161 at 163)

64. In considering that case and later decisions given in the intervening period, the Court of Appeal in *Secretary of State for Trade and Industry v. Deverell* [2000] 2 BCLC 133, per Morritt LJ., stated at para. 35:

'(1) The definition of a shadow director is to be construed in the normal way ... [and] ... should not be strictly construed .. .

(2) The purpose of the legislation is to identify those ... with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities.

(3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in light of all the evidence. In that connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or expectation may be relevant but it cannot be conclusive. Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction.

(4) Non-professional advice may come within the statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover, the concepts of 'direction' and 'instruction' do not exclude the concept of 'advice' for all three share the common feature of 'guidance'.

(5) It will, no doubt, be sufficient to show that in the face of 'directions or instructions' from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered to their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are 'accustomed to act in accordance with' such directions or instructions. It appears to me that [such a requirement imposes]... a qualification beyond that justified by the statutory language.'"

McKechnie J. went on to note the observations by Laffoy J. in respect of the decision in Deverell in the case of *Fyffes plc v. D.C.P. plc* and others [2005] I.E.H.C. 477, where she expressed the view that for advice to be included as one of the issues to be considered in deciding whether someone was or was not a shadow director, that advice "had to carry the same 'imperative quality' as any other communication".

McKechnie J. continued by setting out a number of principles to be derived from the judgments referred to by him in the course of his judgment. At para. 72 of his judgment he stated as follows:-

"72. From the above it seems to me that the following can be stated:-

1. The question of whether a person is a 'shadow director' is purely a question of statutory interpretation with the normal applicable rules of construction applying:

2. ...

3. For a finding to be made there must be directors of a company, either de jure or de facto and, in addition, two further requirements must be met,

(i) Firstly that directions/instructions were given by the person in question, and

(ii) Secondly, that the true directors (or majority) were accustomed to act upon such instructions or directions.

4. These conditions, in addition to being conjunctive are interlinked by cause and effect: the implementation must be causatively connected to the communication.

5. The making of such communication and the reliance thereon must be by force of habit, that is habitual: they must be repetitive, customary and recurring: they must be part of the usual course of things. Or, as said, they must constitute "a well established practice or pattern" of behaviour. (Forde & Kennedy "Company Law (4th Ed.)" para. 613). On the other hand if either the communication, reliance or both are infrequent, rare or occasional they will not come within the section.

6. The nature or character of the communication, however so labelled, couched or phrased, must, by objective assessment, be such as to equate with the ordinary meaning of the words direction or instruction. It must have an obligatory or imposing force or command behind it. This may be self evident or may be deducible from the habitual

responses of the directors.

7. Any communication falling short of this standard is excluded, including advices "per se".

8. Advices given by a person in a professional capacity ("professional advice"), including those upon which directors are accustomed to act, are for the avoidance of doubt, expressly excluded: professional advice is to be understood in context.

9. The nature of the affected business must be of a type in respect of which the directors would as a matter of course act executively. The scope of the affected business must be such as to demonstrate a real influence over a wide ranging area of the company's affairs; although not its total affairs.

10. The above analysis is to be judged by the entire circumstances as presented. Factors such as motive, intention, expectation etc., are all useful to consider but not decisive. Neither is the ability to show, in all cases, an abdication of independence greater than that envisaged above, or that the company or the subject person took steps to conceal his true role. The weight of each admissible and material factor is relative and degree based. Finally,

11. Where the involvement of the person in question is explicable, or at least equally explicable, by the exercise of a role other than that of director, a positive finding should not be made."

One of the facts relied on in that case was, as mentioned previously, the fact that the third named respondent, Mr. Cullen was an authorised signature to the company's account. McKechnie J. in his judgment accepted that such could be considered damning evidence, but he accepted that as a brother of the one of the directors of the company there may have been "some justification behind him having such authority in the case of emergencies". The fact that there was no evidence to show that Mr. Cullen ever utilised that power, despite having had it for a number of years was a matter that "put in great doubt any adverse inference which could be drawn from his being an authorised signatory". Ultimately McKechnie J. concluded that Mr. Cullen was not to be regarded as a shadow director. That decision is a useful exposition of the principles to be considered on an application such as this.

I was also referred to a decision of the Court of Appeal of New South Wales case of *Buzzle Operations Pty Limited (In Liquidation) v. Apple Computer Australia Pty Limited* [2011] N.S.W.C.A. 109. A question arose in that case as to whether Mr. Lekyddes, the financial director of Apple and Apple itself were acting as shadow directors of Buzzle. In the course of the judgment in that case, reliance was placed on the analysis of Millet J. in the case of *Re. Hydrodam (Corby) Limited* [1994] 2 B.C.L.C 180. The *Deverell* case was also referred to with approval. A number of principles to be derived from the authorities were then set out at para. 228 to 243 inclusive and I would refer in particular to para. 237 of the judgment of Hodgsom J.A. at para. 237 where he stated:-

> "The primary judge at [307] correctly said that what needs to be shown is that the governing majority of the directors must act in accordance with the third party's wishes or instructions if there is to be a finding that the third person is a shadow director. 'Directors' does not necessarily mean all of the directors, a governing majority suffices (Ultraframe at [1272]) and it is not necessary that the influence extend over the whole field of corporate activities (As nominees at 52: Deverell). However the influence must be in what would be within the field of a director not just a manager (Ultraframe)."

I should also refer briefly to one other authority which was referred to by Mr. Murphy on behalf of the fourth named respondent, namely the decision in the case of *Panorama Developments (Gilford) Limited v. Fidelis Furnishing Fabrics Limited* [1971] 2 Q.B. 711, a decision of the Court of Appeal. That is a case which concerned the role of a company secretary. Salmon L.J. in the course of his judgment at p. 717, commented:-

> "The second point is of much more general importance. Whatever the position of a company secretary may have been in 1887, I am quite satisfied that it has altered a great deal from what it was then. At the end of the last century a company secretary still occupied a very humble position- very little higher, if any, than that of a minor clerk. Today, not only has the status of a company secretary been much enhanced, but that state of affairs has been recognised by the statutes to which Lord Denning M.R. has referred. I think there can be no doubt that the secretary of the Chief Administrative Officer of the company. As regards matters concerned with administration, in my judgment, the secretary has ostensible authority to sign contracts on behalf of the company...."

Counsel on behalf of the applicant was broadly in agreement with the legal principles relied on by Mr. Murphy on behalf of the fourth named respondent. She referred in addition to the decision of the Supreme Court in the case of Re. *Worldport Ireland Limited (In Liquidation)* and one passage from the judgment of Fennelly J. at p. 406 in that case may be of some assistance. Quoting from the decision in the court below, he commented:-

> "The judge rightly held 'that shadow directors are not a subset of the office of directors but entirely separate'. The section is addressed to persons who, in many cases if not most cases, will not hold any formal title as director. The shadow director is a 'person in accordance with whose directions or whose instructions, the directors of a company are accustomed to act'. The finding that a person is a shadow director is a finding about how that person is accustomed to behave in relation to the company. It is quite unrelated to and distinct from the observance of any formalities concerning that person's appointment of election as a director. No such formalities are required. There is nothing inconsistent about finding a person to be a shadow director for the purposes of s. 27 and the fact that the person is legally ineligible to hold the position of director."

She relied on that passage to argue that the conclusion reached by McKechnie J. at the end of para. 59 of his judgment where he stated "So if uncertainty remains about whether the acts alleged are referable to an assumed directorship or to some other interest or role, whether within or outside the company, the onus will not be discharged and the provisions of s. 150 CA will not apply" is not the correct test to be applied. She states that the existence of an alternative explanation is not enough. Accordingly, she says that McKechnie J. in that passage does not reflect the appropriate test to be applied. In support of her contention she also referred to the fact the purpose of s. 150 was the protection of the public and not the punishment of the directors.

I have to say that on this issue I find it somewhat difficult to agree with this argument. I do not see any disharmony between the passage cited from the judgment of Fennelly J. in the case of *Worldport Limited* and the concluding section of para. 59 of McKechnie J. in the case of *In Re. Hocroft*. I am of the view that the point being made by McKechnie J. relates to the requirement on the part of the liquidator to discharge the onus of proof. Inevitably, if there is a doubt or uncertainty as to whether the acts alleged to demonstrate that a person was acting as a shadow director are referable to another role or interest, the onus on the liquidator will

not have been discharged. To give one example, in this case the fourth named respondent was the company secretary. If the fourth named respondent in that capacity had given directions or instructions as to the administrative requirements of the company, for example, in relation to matters such as filing annual returns, could that be regarded as acting as a shadow director if the Board of Directors complied with the instructions and/or advice in that regard? I hardly think so. In fairness, the applicant herein has not made that case. However, there may be circumstances in which the evidence establishes that a person who has given instructions and/or advice to the directors upon which they have acted was doing so in an appropriate capacity which does not carry with it the suggestion that they were, in giving such instructions or advice acting as a shadow director. That, in my view, is what was being articulated by McKechnie J. in the passage referred to above. I do not think that he was distilling all of the principles he had outlined into one single test comprised in that sentence. It is simply one of the factors to be considered in a comprehensive list of matters to be considered in reaching a conclusion as to whether or not an individual is a shadow director of a company.

Counsel on behalf of the applicant also referred to the decision of Laffoy J. in the Fyffes case. In particular she referred to para. 149 of the judgment in which Laffoy J. stated:-

> "It is difficult to state in the abstract the legislative intent which underlies the rather terse definition contained in s. 27. However, in the light of the submissions in this case I make the following observations. First, it seems to me that it is implicit in s. 27 that the directions or instructions emanating from the alleged shadow director must have an imperative quality. It may be that advice, in a given factual context, will have an imperative quality. If that is the case, it would explain the apparent oddity to which counsel for the plaintiff pointed: why the legislature thought it necessary to exclude advice given in a professional capacity, if advice does not come within the expression 'directions or instructions'. Therefore, for a communication of any type to constitute a direction or instruction, it must have an imperative quality. Secondly, just because there is consideration by the board interposed between the direction, instruction or imperative advice does not mean that the act of the board is not to be taken into account in applying s. 27, if the board acts in accordance with the direction, instruction or imperative advice. If it were otherwise, the effect of s. 27 could be seriously diluted, particularly because of the difficulty inherent in making an objective assessment as to why the board acted in the manner it did. Thirdly, s. 27 does not require that the board should always act on the directions and instructions if a shadow directorship is to exist. That is indicated by a requirement that the board should be accustomed so to act."

Thus, it was emphasised that the fact that a Board considered the "direction or instructions" did not lessen the fact that the Board did not act in accordance with the direction or instructions of the alleged shadow director.

Counsel also made reference to the *Buzzle* decision and to the definition of director in s. 9 of the Corporations Law in 2000, which is as follows:-

> "Director of a company or other body means:-
>
> (a) A person who:-
>
> (i) is appointed to the position of a director or
>
> (ii) …
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> (b) Unless the contrary intention appears, a person who is not validly appointed as a director is:-
>
> (i) they act in the position of a director;
>
> (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes
>
> Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity or the person's business relationship with the directors of the company or body"
>
> She contrasted that definition with the proviso ins. 27(1) to the effect that_ "The directors are accustomed so to act by reason only that they do so on advice given by him in a professional capacity."

The court in *Buzzle* at para. 191 of the judgment accepted the views of the primary judge in that case dealing with the proviso in which it was stated as follows:

> "243. In my view the reason that third parties having commercial dealings with the company who are able to insist on certain terms if their support for the company is to continue, and are successful in procuring the company's compliance with those terms over an extended period, are not thereby to be treated as shadow directors within the definition, is because to insist on such terms as a commercial dealing between a third party and the company is not ipso facto to give an instruction or express a wish as to how the directors are to exercise their powers. Unless something more intrudes, the directors are free and would be expected to exercise their own judgment as to whether it is in the interest of the company to comply with the terms upon which the said party insists, or to reject those terms. If, in the exercise of their own judgment, they habitually comply with the third party's terms it does not follow that the third party has given instructions or expressed a wish as to how they should exercise their functions as directors."

It was submitted on behalf of the applicant that there is a difference in emphasis on the role of consideration by the Board to be seen in the comments of Laffoy J. in contrast with those expressed in the *Buzzle* decision referred to above. The argument in this regard is very interesting. In my view, it is appropriate that this Court should look to the decision in the *Fyffes* case before considering the position in another jurisdiction in regard to legislation which is in similar but not precisely the same terms. Having said that, I am not sure that the two passages referred to, from the judgment of Laffoy J. and that of Hodgson J.A. in the *Buzzle* case are necessarily in conflict. The point being made in the *Buzzle* case is that the critical question is whether the Board are acting freely and exercising their own judgment in their consideration on the particular issue. The fact that a Board meeting has taken place and a decision has been rendered as a result of that Board decision does not of itself mean that the directors are not acting on foot of the directions or

instructions of the alleged shadow director. If the evidence establishes that the directors at a Board meeting are "rubber stamping" the directions and instructions of the shadow director, then, clearly, the directors are not acting freely and not exercising their own judgment. It may well be that in certain cases and having regard to commercial reality the decision making of the directors may be curtailed in the context of the company's dealings with a third party by commercial considerations but that does not mean that a decision taken in those circumstances necessarily constitutes the third party a shadow director. Such circumstances were part of the background in the *Buzzle* case. To some extent, this issue is not directly relevant in that the facts of this case have little to do with the factual matrix in the *Ffyffes* or the *Buzzle* cases.

I have set out at length the legal submissions made by counsel on behalf of the applicant and on behalf of the fourth named respondent. There is, as I have said, little real conflict between counsel in respect of the legal principles to be applied although, as I have noted, there are some subtle distinctions between the views expressed. I am satisfied that for the purpose of this decision it is appropriate to consider the principles set out by McKechnie J. in the *Hocroft* decision.

Decision
Accordingly, I now propose to consider the facts of the case having regard to the principles as outlined in the authorities referred to above and in particular the principles outlined in *In Re Hocroft Limited.*

The principal fact relied on by the applicant herein was the involvement of the fourth named respondent in the amendment of the statement of affairs. The original statement of affairs as set out above was sworn to by the directors on the 5th November, 2010. It omitted to refer to any sum for trade debtors or for loans and advances. When the statement of affairs was altered on the advice of the fourth named respondent, it was amended to include the figures coming to a total of approximately €200,000. The fourth named respondent had been redundant for some seven months when the original statement of affairs was furnished. The main point made by the applicant is that on consulting the fourth named respondent, the directors amended the same to include the sums which had the effect of increasing the deficit in the company by the further sum of €200,000. He commented on this in the context where the third named respondent described himself as the person with financial control of the company and where the accountants swore the company provided some assistance in preparing the statement of affairs. The evidence of the third named respondent was to the effect that when the statement of affairs was being prepared, the company's accountants were owed money and provided little assistance to the directors in the preparation of the statement of affairs. It was in that context that the fourth named respondent was asked to check the figures set out in the statement of affairs. The fourth named respondent himself has always contended that his role in relation to the company was limited. He was responsible for *inter alia* bookkeeping and in that regard he reported to the third named respondent. It appears from what he stated in his affidavit of the 28th January, 2012, at para. 15, that transactions for the year 2010 of the company were not included in the statement of affairs and that "[he] entered those data into the software and on the 26th November, 2010, ... sent all 2010 details to the official liquidator". It is clear from the evidence that following the intervention of the fourth named respondent, the respondents, as the directors of the company, were prepared to furnish the amended statement of affairs. Could it be said in those circumstances that they acted on the instructions/directions of the fourth named respondent? Given the role of the third named respondent as the person who was responsible for the financial affairs of the company and to whom the fourth named respondent stated on affidavit that he reported in respect of book keeping matters, it is somewhat surprising that the third named respondent who has, after all, an accepted responsibility in this regard did not and was not apparently in a position to supply the missing details. Nevertheless, on it own, the involvement of the fourth named respondent in the preparation of the amended statement of affairs is not such that I would be of the view that the test set out above has been met by the applicant. I am not satisfied that it is the case that the fourth named respondent directed the directors of the company how to act in relation to the company and that the directors acted in accordance with his directions and that they were accustomed so to act. If I can revert to the principles set out by McKechnie J. at paras. 4, 5 and 6 as referred to above, I think it is clear that there is a cause and effect element in relation to the statement of affairs in the sense that the directors acted on the communication of the fourth named respondent, but it is impossible to say that there is the element of force ofhabit in relation to the conduct of the directors vis-a-vis the fourth named respondent as a general proposition. As set out by McKechnie J. at para. 5 of the principles "the making of such communication and the reliance thereon must be by force of habit that is habitual: they must be repetitive, customary and recurring: they must be part of the usual course of things". There is simply no evidence before the court of anything that falls into the description of habitual communication and reliance thereon.

The 2008 report in relation to the company was relied on as evidence of habitual communication and reliance thereon; it seems to me that the 2008 report prepared by the fourth named respondent is an important document in relation to the company having regard to its then circumstances, but it does not, even taken in conjunction with the statement of affairs, establish that the making of such communications and reliance thereon is habitual.

A number of other matters were relied on by the applicant, namely, the contracts with Rank Xerox in 2006, his communications with the Revenue Commissioners and the company's solicitors. The fourth named respondent was clearly in a managerial position within the company, was the company secretary and was very much involved in financial matters as the person responsible for book keeping and to that extent I think his dealings in relation to these matters is explicable by reference to his role within the company. They do not point to him being a shadow director in my view.

Finally, I think it is significant to note that the fourth named respondent had no authority to sign cheques on behalf of the company and that he was never seen by the company's bank as someone from whom security should be taken in respect of loans made to the company. This is of some significance in circumstances where it was contended that he was in financial control of the company.

Looking at the situation overall and bearing in mind the principles set out in *Hocroft* I cannot come to the conclusion that the fourth named respondent herein was a shadow director of the company. I simply am not satisfied that the evidence before me goes as far as contended for by the applicant. In the circumstances the fourth named respondent is entitled to the relief sought herein.