THE HIGH COURT

[2008 No. 339 COS]

IN THE MATTER OF FERGUS HAYNES (DEVELOPMENTS) 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

KIERAN WALLACE

APPLICANT

AND

CHARLES FERGUS, DAIMON FERGUS AND JOANNE FERGUS-SHERIDAN

RESPONDENTS

JUDGMENT of Mr. Justice Herbert delivered the 8th day of February 2013

1. The applicant seeks a declaration, pursuant to the provisions of s. 150 of the Companies Act 1990, that the respondents named in the title hereof, who were directors of the insolvent company named in the title hereof at the date of and within twelve months prior to the commencement of its winding-up, failed to act responsibly in relation to the conduct of the affairs of that company. If so satisfied the section imposes a mandatory obligation on the Court to declare that the respondents shall not for a period of five years, be appointed to act in any way, whether directly or indirectly, as a director or secretary, or to be concerned or take part in the promotion or formation of any company unless that company meets the requirements set out in s. 150(3) of the Act of 1990.

2. The company was incorporated in the State on the 26th April, 1973. The principal objects named in the Memorandum of Association were to carry on the business of constructing residential homes, property speculation, the rental of plant and machinery and, the rental of holiday homes. The original directors of the company were the first named respondent and Ms. Marlyn Fergus. The second named respondent, a son of the first named respondent, was appointed a director of the company on the 29th May, 2003. The third named respondent, a niece of the first named respondent, was appointed a director of the company on the 8th March, 2005. The second and third named respondents resigned as directors of the company on the 1st September, 2008. Apart from a single issued share held by Ms. Marlyn Fergus, the entire issued share capital of the company was held by the first named respondent.

3. In *Bank of Scotland plc. v. Charlie Fergus* [2012] I.E.H.C. 131 (Unreported, High Court, 30th March, 2012), it was held by Finlay Geoghegan J. that the first named respondent was at all material times the chief executive and principal promoter of the company and the director thereof. In an affidavit sworn on the 19th August, 2008, in a matter in this Court, bearing record No. 2008/347 COS, and entitled, "In the matter of the Companies (Amendment) Act 1990, (as amended) and In the matter of Fergus Haynes (Developments) Limited", in which the company sought an order of the Court appointing an examiner to the company, the first named respondent stated that he had been involved in the day to day running of the company since its incorporation, that the second named respondent had responsibility for the company's plant and machinery, that the third named respondent was involved in the company on a day to day basis and was charged with taking care of the administrative side of the company's business, including the maintenance of its management accounts, and that Ms. Marlyn Fergus was not involved in the day to day running of the company. However, it is noted that a "Ms. Marlene Fergus" as a director of the company, together with the first named respondent, signed the annual returns of the company and the directors' report for the financial years ending 31st December, 2005 and 31st December, 2006.

4. The company petitioned for the appointment of an examiner on the 20th August, 2008. The application was refused on the 1st September, 2008. On the 6th September, 2008, Bank of Scotland (Ireland) plc by deed, appointed a receiver over the property, assets and undertaking of the company on foot of a fixed and floating charge. On the 17th September, 2008, on the petition of Atradius Credit Insurance N.V. claiming a debt unsatisfied after demand of €1,267,676.65, this Court made an order winding up the company and appointed the applicant, an insolvency partner in the firm of K.P.M.G., 1 Stokes Place, St. Stephens Green, Dublin, Official Liquidator. On the 24th February, 2010, Bank of Scotland (Ireland) plc, issued the proceedings, hereinbefore referred to against the first named respondent as guarantor on foot of an unsatisfied demand dated the 15th December, 2009, for a sum of €8,444,457.88.

5. On the 13th May, 2010, the applicant furnished a Report pursuant to the provisions of s. 56 of the Company Law Enforcement Act 2001, to the Director of Corporate Enforcement. By letter dated the 2nd September, 2010, the director, pursuant to the provisions of s. 56(2) of the Act of 2001, relieved the applicant of his statutory obligation to bring an application pursuant to the provisions of s. 150 of the Act of 1990 against Ms. Marlyn Fergus, but not as regards the respondents. On the 13th October, 2010, the applicant issued a Certificate that the company was unable to pay its debts within the meaning of s. 214 of the Companies Act 1963. The present motion was issued on the 13th October, 2010, grounded on an affidavit of equal date but was adjourned from time to time pending the decision of this Court in the aforementioned guarantee proceedings taken by Bank of Scotland (Ireland) plc, against the first named respondent. On the 30th March, 2012, this Court, (Finlay Geoghegan J.) gave judgment in favour of Bank of Scotland (Ireland) plc, against the first named respondent for a sum of €9,211,746 on foot of a guarantee dated 1st June, 2006.

6. The applicant in the present application claims that the respondents had not acted responsibly. The claim that they had not acted honestly as directors of the company in the management and conduct of the affairs of the company which is insolvent was not pursued by counsel for the applicant at the hearing of the application.

7. The applicant claims that the respondents had not acted responsibly in failing to ensure that annual returns, required by s. 125 of the Companies Act 1963 and s. 7 of the Companies (Amendment) Act 1986 to be made to the Registrar of Companies, were made. I find on the affidavit evidence that whereas properly constituted and audited annual returns were made for at least the financial years ending the 31st December, 2004, 31st December, 2005 and 31st December, 2006, no annual returns were made thereafter up to the date of the commencement of the winding-up of the company. On the affidavit evidence before the court, the only document of account created in the financial year ending 31st December, 2007, is what appears to be a draft Balance Sheet (in format 2), as at

31st December, 2007. This document is not signed and is not certified by a director and the company secretary as having been approved by the board of the company. None of the other documents required by s. 7 of the Companies (Amendment) Act 1986 to be annexed to an annual return were forthcoming for the financial year ending the 31st December, 2007. A failure to comply with the requirements of s. 125 of the Act of 1963 is an offence punishable by a fine.

8. As was clearly indicated by the Supreme Court in *Re: Mitek Holdings Limited, Grace v. Kachkar* [2010] 3. I.R. 374, per. Fennelly J. at p. 386 etc., non-compliance with the formal statutory requirements of the Companies Acts 1963-2009, can warrant a finding of a failure to act responsibly in the management of the affairs of a company. However, the Supreme Court pointed out that any such failure must be considered in context. A relatively short term failure to comply with formal obligations of this nature, where historically there had been compliance over a longer period would be difficult to describe as irresponsible, unless it contributed to the insolvency or hid the true condition of the company from third parties dealing with it. In the present case, while deprecating the failure to make annual returns for the financial year ending the 31st December, 2007, I am satisfied that this failure related only to that financial year and could not reasonably be said to have contributed, either directly or indirectly, to the insolvency of the company or to have hidden its true condition from parties dealing with it.

9. The annual returns for the financial year ending the 31st December, 2005 were certified by the first named respondent and Ms. Marlene Fergus as having been approved by the board on the 30th May, 2006. These annual returns are date stamped as having been filed in the Companies Registration Office on the 25th August, 2006 or the 26th September, 2006 (both dates appear). The date upon which the annual returns for the financial year ending the 31st December, 2006, were approved by the board is, unfortunately, not inserted in the space allowed in the formal certification by the first named respondent and Ms. Marlene Fergus. However, these annual returns are date stamped as filed in the Companies Registration Office on the 9th October, 2007. Section 125 of the Companies Act 1963, requires that annual returns be completed within 60 days of the Annual General Meeting of the company for that year and, a copy signed by both a director and the secretary, "forthwith forwarded" to the Registrar or Companies. If this apparent historical practice of laying the annual returns before a meeting of the board in mid summer had continued into 2008, I am satisfied on the balance of probabilities that the company was by that time unable to pay its debts.

10. At para. 24 of his affidavit sworn in the examinership application on the 19th August, 2008, to which I have already referred, the first named respondent stated that the company was at that date insolvent and unable to pay its debts. At para. 20 of the same affidavit, the first named respondent avers that on the 7th August, 2008, Atradius Credit Insurance N.V. issued a petition to wind up the company because it was then unable to meet instalment payments as they fell due on foot of a debt repayment agreement. The affidavit evidence established that on the 30th July, 2008, A.C.C. Bank permitted an early encashment by the company of a Solid World Bond because it had been explained to the bank that the company was experiencing cash flow difficulties. I therefore consider it a reasonable inference that by May 2008, the company was probably unable to pay its debts and had ceased or almost ceased trading due to lack of funds.

11. The availability of annual returns for the financial year ended the 31st December, 2007, would, of course, be of enormous assistance to the applicant in the liquidation of this company. However, considering the admitted crisis in the property development market nationally and in the construction industry specifically and the evidence of the dire financial position of the company in the first half of 2008, it would be more than somewhat idealistic to expect that annual returns for the financial year ending the 31st December, 2007, would have been prepared at this time. Since this was the only failure to make annual returns prior to the winding up of the company on the 17th September, 2008, I am not satisfied that this failure alone would warrant a finding of lack of responsibility on the part of the respondents in the management of the affairs of the company.

12. I am not prepared to accept that the fact, that following a revenue audit in 2008, additional liabilities in a compromise sum of €106,927 were identified as due by the company to the Revenue Commissioners, over and above the sum of €14,657, included by the respondents in the list of current liabilities in the Statement of Affairs, as at the 17th September, 2008, is in itself sufficient to warrant a finding of lack of responsibility on the part of the respondents in the management of the affairs of the company. The affidavit evidence before the Court on this application is not sufficient to enable me to come to any conclusion as to how these additional liabilities to the Revenue Commissioners arose. As was pointed out by Finlay Geoghegan J. in *Re. Digital Channel Partners (In Voluntary Liquidation)* [2004] 2 I.L.R.M. 35, something more than non-compliance for a limited period of time with tax legislation is required to show that directors did not act responsibly in the management of the affairs of a company. At para. 60.1 of his grounding affidavit, the applicant avers that the fact of these additional liabilities, "would suggest that Revenue returns had not been returned on an accurate and timely basis . . .". In my judgment, however, it would not be just or fair for this Court to make a finding against the respondents of lack of responsibility in the management of the affairs of the company on surmise of this nature absent any factual evidence in the grounding affidavit demonstrating that this was so.

13. The applicant claims that the failure of the respondents to keep audited accounts, management accounts and board minutes after the financial year ending the 31st December, 2006, must mean that the respondents could not thereafter have determined or been aware of the true financial state of the company from time to time so as to be in a position to make reasonable commercial decisions in the conduct of its affairs. Additionally, he states that the absence of these documents prevented him as liquidator from following the transactions in which the company was engaged and from ascertaining the exact amount of its liabilities. The applicant does not however, make the case that no books and records were kept by the company.

14. At para. 4.2 of the exhibited Report of the Independent Accountant dated the 19th August, 2008, prepared for the purpose of the unsuccessful examinership application, the following is noted:-

> "The financial statements of the Company for previous years have been audited and no issues arose in relation to maintaining proper books and records of the Company;
>
> Management accounts for the Company are prepared by George Gannon and Company Accountants, an independent firm of professional accountants;
>
> I was provided with access to the books and records of the Company."

15. As I have already pointed out, at para. 6 of his affidavit sworn on the 19th August, 2008, for the purpose of the examinership application, the first named respondent averred that the third named respondent was involved in the company on a day to day basis and was charged with taking care of the administrative side of the company's business including the maintenance of its management accounts. However, in a second replying affidavit sworn on the 14th June, 2012, in the present application (the first was sworn on the 10th February, 2011, but did not address this issue) the first named respondent states as follows:-

> "The Liquidator alleges that my Niece Joanne Fergus-Sheridan was responsible for failing to keep accurate records. Joanne

> Fergus-Sheridan's responsibilities within the Company were to carry out the finishing touches to the properties in the form of internal declaration and quality finishes and to liaise with Auctioneers and customers and to forward on a weekly basis to the Tax Consultants George Gannon and Company any documentation that required his attention. On my request she liaised with Banks to draw down and repay loans to the Bank. She was not responsible for book keeping as she was not qualified or suitable, all accountancy was dealt with by the Accounts George Gannon Accountants, we employed three staff for this work. One of whom was a trainee Accountant.
>
> The Annual accounts were prepared based on the information that was forwarded to George Gannon. . . ."

16. In her first replying affidavit in the present application sworn on the 10th February, 2011, the third named respondent states:-

> "My function within the company was an assistant to the Managing Director, with responsibility with promoting sales and at late interior design of finished houses. I was not a Financial Controller, all major functions within the Company was under the sole control of my uncle, Charles Fergus."

17. In a further replying affidavit in the present application sworn on the 14th June, 2012, the third named respondent states as follows:-

> "The Liquidator alleged that I was responsible for failing to keep accurate records. My responsibilities within the Company were to carry out the finishing touches to the properties in the form of internal decoration and quality finishes and to liaise with auctioneers and customers and to forward on a weekly basis to the Tax Consultants George Gannon and Company any documentation that required his attention.
>
> With the request of Charles Fergus, I liaised with Banks for him to drawn down and repay loans to the Banks as per his request. I was not responsible for book keeping as I was not qualified in that department although I recognised books and records were being kept, all of these files were removed by the Receivers.
>
> All accountancy was dealt with by the Accounts George Gannon accountants; we employed three staff for this work. One of whom was a trainee Accountant.
>
> The Annual accounts were prepared based on the information that was forwarded to George Gannon. All these were forwarded ready for the next set of accounts."

18. Historically perhaps and, I do not put the matter any stronger than this, management accounts may be been prepared by George Gannon and Company, Accountants. Though the burden is on the respondents to show that they acted responsibly in the conduct of the affairs of the company, no affidavit from this firm of Accountants was obtained by the respondents and put before the Court in this application. I note the use by the independent accountant of the expression, "are prepared" but also note, that the author of the report of the 19th August, 2008, in the examinership application does not state that he had made available to him and had considered any such management accounts, particularly in the period after the 31st December, 2006. The only document of account after that date to which he makes reference in his report is what appears to be and which he accepts as a draft Balance Sheet as at the 31st December, 2007. I find on the affidavit evidence before the Court that no management accounts were prepared and no board minutes were kept in the period from the 31st December, 2006, to the commencement of the winding up of the company on the 17th September, 2008.

19. Section 202 of the Companies Act 1990 requires every company to keep proper financial records in the form of proper books of account that correctly record and explain the transactions of the company and at any time enable the financial position of the company to be determined with reasonable accuracy. As was pointed out by Kenny J. in *Healy v. Healy Homes Limited* [1973] I.R. 309 at 311: "One of the ways in which this important object is achieved is by imposing an obligation on each director to make sure that this is being done". Non compliance can result in serious criminal and civil sanctions.

20. The Auditor's Report of M.J. Lyons, Accountants, 192 Dukes Road, Burnside, Rutherglen, Glasgow, forming part of the annual returns for the financial year ending the 31st December, 2006, states that in their opinion they had obtained all the information and explanations which they considered necessary for the purposes of the audit, that proper books of account had been kept by the company and, that the financial statements were in agreement with the books of account. The applicant claims that thereafter the books and records maintained by the company were not adequate to enable him to follow the transactions in which the company was engaged or to enable him to ascertain the exact amount of the liabilities of the company, including the true extent of its liability to the Revenue Commissioners. No details or particulars whatsoever of this alleged inadequacy is given in either of the applicant's affidavits. Both the first named respondent and the third named respondent aver – in remarkably similar passages (including errors) – in their respective affidavits in this application to which I have already referred, that a staff of three was employed by the company, one of whom was a trainee accountant, to keep books and records and, that all accountancy work was dealt with by George Gannon and Company, Accountants.

21. In the absence of any such details and particulars I cannot, even on a *prima facie* basis, determine whether what the applicant alleges in this respect is correct or not. I have no difficulty in accepting that without audited accounts and even management accounts, the task of the applicant in attempting to follow the transactions in which the company was engaged and, in assessing the full extent of its liabilities is made very much more onerous and time consuming. However, I cannot in the absence of evidence in the form of details and particulars in the applicant's grounding affidavit and his supplemental affidavit, conclude that an analysis of the books and records maintained by the company would not provide this information. Without pertinent details and particulars of the alleged inadequacies and shortcomings in the books and records of the company, it would in my judgment, be altogether unjust and unfair to cast on the respondents the burden of demonstrating that the books and records of the company did in fact enable the applicant to trace the transactions in which it was engaged and to assess the full extent of its liabilities. In an application of this nature a liquidator cannot by means of unsupported assertions or conclusions put the directors on proof that on the balance of probabilities their management of the affairs of the company was objectively responsible. For these reasons in the instant case I cannot and do not make any finding that the company failed to keep proper books of account and records or that the respondents failed to act responsibly in the management of the affairs of the company in not ensuring that such books and records were kept.

22. I am not aware of any express statutory provision which requires company directors to prepare or keep management accounts. The requirement to keep financial accounts contained in s. 202 of the Companies Act 1990 was considered by Shanley J. in *Mantruck Services Limited (In Liquidation): Mehigan v. Duignan* [1997] 1 I.R. 340, where at p. 356 he held as follows:-

> "Section 202 details the nature and extent of the accounting records which a company is obliged to keep. It is clear from

> the words of the section that the obligation of a company to 'keep' proper books of account is not an obligation to act as a mere passive custodian of books and papers but rather the positive obligation to create books and records in a particular form with specified contents. It is also clear from the wording of the section that the obligation to keep proper books of account is necessarily a continuing obligation: they should be kept on a 'continuous and consistent basis' and must be such that they 'will at any time enable the financial position of the company to be determined with reasonable accuracy' (s. 202, sub-s. 1(b)) and books of account shall contain entries 'from day to day' of all sums of money received and expended by the company (s. 202, sub-section 3(a))."

23. I am not satisfied that even this positive statutory obligation to keep what after all are financial accounts may properly be expanded into a statutory obligation to prepare and maintain management accounts, even if both are dependent upon the same basic sources of information.

24. However, as was pointed out by MacMenamin J. in *M.D.N. Rochford Construction Limited (In Liquidation): Fennell v. Rochford* [2009] I.E.H.C. 397 (Unreported, High Court, 18th August, 2009), citing the decision of Murphy J. in *Vehicle Imports Limited (In Liquidation)* [2000] I.E.H.C. 90 (Unreported, High Court, 23rd November, 2000), it is the duty of each individual director of a company to inform himself or herself about its affairs and to join with the other directors in supervising and controlling those affairs (see also *Re: Mitek Holidays Ltd. (ante)* at p. 386 *et. seq*.).

25. In this respect MacMenamin J. held that profitability was the key issue for every company, whether great or small, and directors of a company if acting responsibly in the supervision and control of the affairs of that company must engage in a continuing assessment of its profitability. MacMenamin J. then continued as follows at para. 50:-

> "One test which must be applied as to directors' responsibility is the extent to which they were alert to this key issue, and ensured that there were available to them management accounts so as to ascertain whether, on a month by month basis, a company was trading profitably. This is not to impose a counsel of perfection on directors. It is mere prudence in order to ensure that an enterprise is not engaging in over-trading, and that increased turnover is not misconceived as increased profitability. It is by no means unusual in applications of this type for directors to have confused one for the other. Monthly management accounts, and a clear assessment of where the company is going, are as essential to company directors as navigation instruments are to a pilot. Directors cannot excuse the fact that they were, for an extended period, 'flying blind', by asserting that their duties had simply been delegated to 'someone else'. . . ."

26. I am therefore satisfied that while there is no express statutory or legal obligation to prepare management accounts, a failure to do so may, in the circumstances of a particular case, constitute a breach of a director's common law duty to inform himself of herself about the affairs of the company and to participate in supervising and controlling those affairs. For decades past it has been the professional practice of all Accountancy Bodies to strongly recommend the keeping of management accounts, at monthly or other frequent intervals depending upon the nature of the business being carried on by the company, as a good business practice to assist directors and managers in the proper management of the affairs of their company. The affidavit evidence suggests that in the instant case, management accounts were in fact prepared probably up to and including the financial year ending the 31st December, 2006.

27. In my judgment this failure to prepare management accounts on a monthly or even more frequent basis for an entire period of at least nineteen months prior to the 19th August, 2008, when the first named respondent in his affidavit of that date, to which I have already referred, admitted that the company was insolvent and unable to pay its debts, was highly irresponsible. The company carried on a construction and development business which manifestly called for forward planning, budgeting, operational and financial control and, informed decision taking on an ongoing basis. None of this could be carried out responsibly without management accounts. I am satisfied on the affidavit evidence that this company, to borrow the very expressive phrase of MacMenamin J., was "flying blind" during the entire of this lengthy period in the course of which market and trading conditions changed, disimproved, became difficult and, by mid 2008 catastrophic. In these circumstances the draft balance sheet of the 31st December, 2007, was of no practical assistance. Though the onus was on them to establish that they had in fact acted responsibly in the management of the affairs of the company, particularly during this lengthy period, I find that the respondents failed to address this issue at all and, failed to point to any system as having been in place which, however crude and unscientific, might as a matter of probability have fulfilled the same function as periodic management accounts.

28. During the period 31st December, 2006 to 17th September, 2008, when no management accounts were prepared and no minutes of board meetings and no evidence that any such were held has been put before the Court, the company, without any form of contract or agreement in writing carried out very extensive works at property owned by the first named respondent. At para. 15(b) of his affidavit sworn in the examinership application on the 19th August, 2008, the first named respondent states that in 2006 he purchased 31 acres of severely waterlogged land, forming part of a flood plane, near the village of Kinlough, Co. Leitrim. Planning permission was obtained for a 120 bedroom hotel, 95 detached dwellings, an office building and a post office to be built in phases. Because of the nature of the site, the first named respondent accepts that the company was obliged to carry out a large amount of excavation and backfill work, emplace piled foundations, carry out a large amount of drainage work and construct a pumping station. The first named respondent states:-

> "I engaged the Company to construct and develop the residential houses. However, there is no formal written agreement in place between the Company and me. The Company is owed a sum of approximately €3.6 million by me in respect of the works which the Company has carried out. I believe that in time I would be in a position to deal with this liability."

29. At para. 40 of his grounding affidavit in this application, the applicant states that he was informed by the receiver (appointed to the company named in the title hereof on the 6th September, 2008, by Bank of Scotland (Ireland) plc.) that he had written to the first named respondent on the 26th November, 2008, requesting clarification of this matter but had received no response and, that he considered that there was no prospect of realising this debt. This debt was not included under the heading, "Current Liabilities" in the Statement of Affairs as at the 17th September, 2008, (commencement of the winding up) sworn by the respondents on the 7th November, 2008. In the draft Balance Sheet as at the 31st December, 2007, under the heading, "Current Assets", a figure of €19,694,518 is given for work in progress. In the Statement of Affairs forming part of the independent accountants report, dated the 19th August, 2008, in the examinership application, this figure is divided into, "Work in Progress" - €6,968,461 and, "Work in Progress at Kinlough", - €12,726,120. This latter figure is then written down to €3,698,649 as of the 31st July, 2008, which is said to be a directors' estimation based on market conditions.

30. I am satisfied that this conduct, by any objective standards and regarding it in the best possible light, was so incompetent as to amount to gross irresponsibility. It could not in my judgment in any reasonable sense be regarded as just a commercial error or an unfortunate misjudgement. Whether regarded as an unsecured and probably now irrecoverable debt of €3.6 million – if that is in fact the correct sum owing – or a major misemployment of company assets and personnel at a time when bank borrowings were increasing,

(bank loans other than overdrafts, from €8,077,547 as at the 31st December, 2006, to €9,947,127 as at the 31st December, 2007) and when only 20 of the 53 residential units in Phase 1 of the company's own development at Stracomer Hill, Bundoran, were completed and sold and the other 33 residential units remained at various stages of completion, I am satisfied on the evidence that it contributed significantly to the insolvency of the company named in the title hereof. The exhibited accounts and statements of affairs show that the company was highly dependent on bank borrowings and that its inability to service existing bank debt and a consequent withdrawal of bank credit was a key feature in bringing about its insolvency.

31. The applicant has pointed at para. 34 of his grounding affidavit to five seemingly very significant discrepancies between the Statement of Affairs as at the 17th September, 2008, (commencement of winding up) filed and verified by affidavit sworn by the respondents on the 7th November, 2008, (hereafter Winding-Up) and the Statement of Affairs as at the 31st July, 2008, contained in the independent accountants report of the 19th August, 2008, submitted to this Court in the examinership application, (hereafter I.A.R.). These are:-

> - A net sum of €14,426 representing the early encashment value of an A.C.C. Bank Bond, less deductions is not included in the Winding-Up but is included in the I.A.R.
>
> - The figure given for "work in progress" in Winding-Up is given at €15,497,376, but in I.A.R. the figure given is €8,625,492.
>
> - The figure for "Bank overdraft" in Winding-Up is given as €670,382, but in I.A.R. the figure is €79,935.
>
> - The balance of "Bank loan" in Winding-Up is given at €10,940,512, but in the I.A.R. the figure given, on a winding-up basis, is €11,888,478.
>
> - The figure given for "trade debtors" in the Winding-Up is €338,609 but no figures for debtors is given in the I.A.R.

32. These discrepancies and, the applicants concern that the stated value of "debtors" outstanding to the company may be overstated, may justify the applicant in seeking an order from this Court pursuant to the provisions of s. 245(1) of the Companies Act 1963, as amended, for an examination of the respondents. However, in my judgment, I cannot draw any inference from these seeming discrepancies which would support a finding that the respondents failed to act responsibly in the management of the affairs of the company or, that they dealt with its assets in an improper manner detrimental to the proper distribution of those assets in accordance with insolvency law. For the same reason I do not propose to address the issue, raised by the applicant in his grounding affidavit, of whether or not the respondents or any of them have or has failed to cooperate with the applicant in the conduct of the liquidation or have or has intermeddled with or have or has in their or his/her possession or control any money or other property of the company.

33. I am satisfied that the first named respondent, as managing director of the company, had a duty greater than the other respondents to act responsibly in the conduct and management of its affairs. I find on the evidence that he failed to so act. However, the legislative object of s. 150 of the Companies Act 1990 is not to punish the first named respondent for not so acting. Its purpose is to protect and safeguard persons who, in dealing with any other company which he might promote or form in the future or of which he was a director or secretary, would find themselves dependant in a business and financial sense on his acting in the manner in which he so singularly failed to act in the instant case. In this respect, I am satisfied that the first named respondent represents a serious and continuing danger and risk to such persons. I therefore have no hesitation in granting the declaration sought in respect of him.

34. As regards the second named respondent, for the purpose of an application pursuant to the provisions of s. 150 of the Act of 1990, I am satisfied on the evidence, that though a director of the company, he was a mere cipher in that office. There is no evidence that he played any real role in the day to day management of the affairs of the company and in particular its business and financial affairs. I am satisfied that he occupied a particular niche in the company where he looked after its plant and machinery only.

35. In the audited annual returns of the company for the financial year ended the 31st December, 2006, under the title, "Director Loan Account" the following is disclosed:-

> Charles and Daimon Fergus
>
> At 1/1/2006, €1,500,409
>
> Advanced During Year €2,206,370
>
> Repaid during year €3,386,449
>
> At 31/12/206 €319,791

However, in an affidavit sworn on the 14th June, 2012, in the present application the second named respondent states as follows:-

> "From time to time my Father in conjunction with the Banks arranged loan agreements to the benefit of the company. But for reasons not known to me they were put in my name, and then showed up as Directors Loans to me from the company. I also borrowed money in my own name to assist my father and other members of my family. I believe it to be a fact that approx. One Hundred and Twenty thousand Euros, is owed to me, by the developments and family members. I did not act dishonestly in any way. I ensured that all banks were repaid. In most cases, the Banks restructured the loans. This was an arrangement between my father and the banks. There is no issue between my family and I in regard to losses I incurred."

36. It must be a matter for the applicant to decide whether he accepts this account or not. If he does not, or feels he cannot in the proper discharge of his duties as liquidator of the company, he has ample statutory powers under the Companies Acts 1963-2009 to inquire further into the matter. Considering the affidavit evidence solely in the context of s. 150 of the Act of 1990 and, its purpose, I find that while the second named respondent may have failed to act independently and assertively having accepted the office of director of the company he did not, in any but this very limited sense, neglect to exercise an appropriate degree of responsibility with regard to the management of its affairs. I am satisfied, looking at the entirety of the evidence, such as it is, touching the whole period of his tenure as a very nominal director of the company, that the second named respondent on the balance of probabilities does not represent a danger to persons who might chose to do business with any company of which he is a director or secretary

which he might decide to promote or form. I will therefore decline to make the declaration sought in respect of this respondent.

37. The function of the third named respondent in the company is described by the first named respondent in para. 6 of his affidavit sworn in the 19th August, 2008, in the examinership application from which I have already quoted. However, what is stated there is entirely at variance with what he stated subsequently in his affidavit sworn on the 14th June, 2012, in the present application, the relevant portion of which I have already quoted. While it may be true that this affidavit, sworn on the 19th August, 2008, is stated to have been made, "for and on behalf of the Company with its authority and consent", carrying the necessary implication that its contents had been approved by all the respondents and Ms. Marlyn Fergus, at a board meeting, and that the third named respondent had not taken issue with the statement that she was, "charged with taking care of the administrative side of the company's business, including the maintenance of management accounts", I consider that it would be unfair and unjust to make a finding that the third named respondent had failed to act responsibly in the management of the affairs of the company solely on the basis of this affidavit.

38. I am satisfied from what is stated in the affidavits sworn by the third named respondent on the 10th February, 2011, and the 14th June, 2012, and in her letter dated the 22nd November, 2009, to the applicant, that the third named respondent was involved as an executive director, with the first named respondent as managing director, in the day to day conduct of the affairs of the company including its financial affairs. On the balance of probabilities I am prepared to accept that the third named respondent did not prepare any accounts herself nor deal with the day to day task of maintaining the books and records of the company. However, in her letter dated the 22nd November, 2009, to the applicant, the third named respondent states that she was assistant marketing manager of the company. She described her functions in this capacity in her affidavits of the 10th February, 2011, and the 14th June, 2012, as having been to deal with the interior design and decoration of completed dwelling-houses, promote sales and, liaise with auctioneers and customers. In her letter of the 22nd November, 2009, the third named respondent stated that she also dealt with secretarial and related duties within the company. In her affidavit sworn on the 14th June, 2012, she stated that she was responsible for forwarding to "tax consultants" George Gannon and Company, any documentation that required their attention. She further stated that at the request of the first named respondent she liaised with banks "for him", in drawing down and repaying loans to the banks.

39. Regardless of what may or may not have been her accountancy qualifications, I am satisfied that the third named respondent was as an executive director of the company constantly involved in furnishing important financial information concerning the company to its tax advisers, who were also its accountants. In her affidavit she does not say who it was that decided what documentation needed to be sent to George Gannon and Company. Even if I accept her statement that in liaising with the banks – the company had borrowed and was continuing to borrow very large sums of money from banks – she was always acting on instructions from the first named respondent (which might well be so, given that he was managing director of the company) in so acting she was taking an active role in the financial affairs of the company and it is evident that the banks accepted her as having that role. In the absence of facts as distinct from assertions in her affidavits, I am unable to assess the true extent of her involvement in the management of the affairs of the company, but I am satisfied from the foregoing, that it was significant.

40. The onus lies on the third named respondent to satisfy this Court that considered objectively, on the balance of probabilities, she acted responsibly in the management of the affairs of the company. I have already found that this company traded without any or any possibility of proper commercial management for the very long period of nineteen months or more prior to the commencement of the insolvent winding up. As a director active on a day to day basis in the several indicated aspects of the company's business and affairs, the third named respondent cannot evade responsibility for this lack of proper management simply by claiming, as she does in her affidavit sworn on the 10th February, 2011, that all major functions within the company were under the sole control of the first named respondent. This demonstrates a wholly unacceptable lack of understanding on her part, of the role and the legal obligations of directors, especially executive directors of a company.

41. There is not even one iota of documentary or factual evidence to be found in the affidavits of the third named respondent to show that she had expressed any concerns whatsoever about non-compliance by the company with the obligations imposed by the Companies Acts 1963-2009, the lack of management accounts, the non preparation of annual returns, or the failure to hold board meetings and keep minutes of board meetings, but that these concerns were overruled or disregarded by the first named respondent acting as managing director of the company.

42. Equally alarming, particularly as regards persons doing business with any other company which the third named respondent might promote or form or of which she might be director or secretary, is her apparent attitude to trading and insolvency. In her letter of the 22nd October, 2009, to the applicant declining to complete the questionnaire submitted by him to each of the respondents, the third named respondent stated as follows:-

> "As a property development company Fergus Haynes (Developments) Limited was always trading with a healthy balance of liquid investment and supporting assets provided by management and carried the endorsement of several financial institutions who are happy to endorse the activities of the company until they decided to withdraw outside investment which suddenly and inevitably altered the status of a vibrant organisation subjected to the frailties of lending institutions, withdrawal of whose financial support was guaranteed to place people like myself to dependence on social welfare and the company unable to trade. This should all be evident from the books, and the company if assisted through the financial partnership of the institutions responsible, is still asset rich and capable of trading out of the difficulties caused by state supported financial institutions. . . ."

43. This demonstrates in my opinion a serious lack of understanding on the part of the third named respondent of the proper standards to be applied in the management of a company and its business. In my judgment, having actively participated as an executive director in the day to day management of the affairs of the company, including its financial affairs, the third named respondent has not discharged the onus which lies on her of satisfying this Court that she acted responsibly in relation to those affairs. In these circumstances I am required by the provisions of s. 150(1) of the Companies Act 1990, to make the declaration sought by the applicant against the third named respondent.