

THE HIGH COURT

[Record No. 2002 139 COS]

**IN THE MATTER OF WORLDPORT IRELAND LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACTS 1963-2001**

AND IN THE MATTER OF AN APPLICATION UNDER SECTION 150 OF THE COMPANIES ACTS 1990 AS AMENDED

Judgment delivered by the Honourable Mr Justice O'Leary on the 16th day of February, 2005

Background facts

1. The Court by order dated 21st October 2002 appointed one David M Hughes as Official Liquidator of Worldport Ireland Limited. As part of the process the liquidator has applied to the court for orders restricting the right of involvement of three entities in limited liability companies within the state under the provisions of Section 150 of the Companies Act 1990 as amended. Two of those in respect of whom orders are sought are natural persons in respect of whom the court will in due course consider evidence and adjudicate on the application. These persons are not parties to this preliminary application.

2. The third entity is a corporate entity Worldport Communications Inc. 2626 Warrenville Road Suite 160, Downer's Grove IL 60515 USA. The basis of the liquidators application in respect of this entity is that it acted as a shadow director of the liquidated company and therefore falls within the class of persons and/or entities in respect of which the restrictions envisaged by the Companies Act, 1990 can be applied.

3. Worldport Communications Inc (herein after called the respondent), without prejudice to its other rights herein has requested adjudication on the following points:

1. Whether a body corporate can be a shadow director for the purposes of an application for restriction under Section 150 of the Companies Act 1990 (as amended).
2. Whether a body corporate, incorporated outside the jurisdiction, can be a shadow director for the purposes of an application for restriction under Section 150 of the Companies Act 1990 (as amended).

4. The Court has consented to consider these matters by means of a preliminary application. In so doing the court has confined itself to the terms of the above questions and has in no way entered into the merits of this particular case. In the event of the questions being answered in the positive the application can proceed on its merits in tandem with the other applications in respect of natural persons outlined above. Therefore for the purpose of this application the court acts on the presumption that circumstances exist which would ground an application in this case if Worldport Communications Inc were a natural person.

Submission of Respondent

5. The respondent submits that as it is disqualified from appointment as a director of the company it cannot be a shadow director as this status is only attainable by those who have the capacity to be appointed directors.

Submission of Applicant

6. The applicant submits that the term shadow director is not a class of directorship but an entirely separate status. He therefore submits that the rules, which forbid the appointment of certain categories of persons and entities as directors e.g. a bankrupt person or a corporate body, do not apply to shadow directors.

The Law and matters arising therefrom

7. Section 11 (d) Interpretation Act 1937 provides as follows:

Person. The word "person" shall, unless the contrary intention appears, be construed as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons as well as an individual.

8. The law relating to the prohibition of a body corporate from the post of director of a company is to be found in Companies Act 1963 S 176 as follows:

S. 176 (1) - A company shall not, after the expiration of 3 months from the operative date, have as a director of the company a corporate body.

9. It is noteworthy that the legislature provided a short transitional period during which a body corporate could act as a director. This demonstrates that the provision exists as a matter of policy rather than demonstrating an inherent lack of capacity.

10. The law relating to shadow directors is set out in Companies Act 1990 S 27 as follows:

S. 27 - 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 to so act by reason only that they do so on advice given by him in a professional capacity.

11. It is of significance that in establishing the status or office of 'shadow director' the legislation was enacted in a manner, which uses the formula that the person who falls within the definition shall be treated as a director, rather than providing, for example, that the person so appointed shall be deemed to be a director. The concept of treating a person in a particular way is well known in ordinary life and its natural and ordinary meaning is well understood. If one chooses to treat a domestic employee as a 'member of the family' that does not mean that by that action one confers the status of member of the family on that person. It appears to the court that this section is highly suggestive of a meaning of shadow director that is independent of the office of director rather than categorising shadow directors as a particular sub-class of director.

12. There are other indications within the Companies Acts of the nature of shadow directors.

13. Part VII of the Companies Act 1990 sets out the restrictions that can be imposed on directors of insolvent companies. These are enumerated in Chapter 1 commencing at section 149.

14. In Section 149 (5) the following is enacted

(5) This Chapter applies to shadow directors as it applies to directors.

15. Similar words are used in Section 166(2) of the same Act.

16. The use of this formulation indicates that the legislature intended to convey that the two categories were separate and distinct. If shadow directors were merely a subcategory of directors this would surely have been conveyed by the use in an appropriate place of an expression such as 'This Chapter applies to directors (including shadow directors)'.

17. The separate status of shadow directors is also indicated by S 172 3(b)(ii) which defines officer for a particular purpose as a person connected, within the meaning of Section 26 of the Companies Act 1990, with a director, and a shadow director.

Primary Conclusion

18. The only conclusion open to this Court on the nature of the status enjoyed by shadow directors is that they are a separate entity than directors. The legislation makes the distinction clear. Specifically it appears to the court that shadow directors are not a subset of the office of directors but entirely separate (though of course connected).

19. *Prima facie* therefore Section 176 (1) Companies Act 1963 which does not mention shadow director has no application to shadow directors and there is no reason based on this provision why a body corporate cannot be a shadow director for the purpose of a restriction under Section 150 Companies Act 1990.

Subsidiary Submissions

20. Section 150 Companies Act, 1990 provides a mechanism for the imposition of restrictions on directors and shadow directors. The restrictions prevent, for a period of 5 years, the director or shadow director from acting, directly or indirectly, as a director or secretary or from being concerned or taking part in the promotion or formation of any company (subject to certain exceptions).

21. It was submitted by the respondent that as the nature of the restriction imposed by a Section 150 order includes restrictions on the appointment of the person in question as a director (for 5 years) and as a corporate entity cannot in any event be a director, the section was never intended to apply to corporate shadow directors.

22. This submission is wrong, in the view of the Court, for two reasons.

Firstly, the restrictions under the section go far beyond the mere prohibition on the person acting as a director. A section 150 order also prevents the affected party from direct or indirect involvement in the promotion or formation of a company. The fact that some of the provisions have no effect in an individual case does not render the section redundant in such cases. The remainder of the restrictions have both a purpose and an effect. In the present instance the restriction, if imposed, will prevent the respondent from involvement in the promotion and formation of an Irish company for a 5-year period except under the exceptions provided in the legislation.

Secondly, the law is replete with penalties and restrictions that are applied one on top of another. Examples are imprisonment of a person already serving a sentence and disqualification of a motor vehicle driver already disqualified for another offence. Further these examples are not limited to cases where the sentence is just lengthening the term of a previous decision but frequently are applied concurrently. The making of a Section 150 order would add a further reason for disqualification to the already existing ban but would not be in conflict with any existing statutory provision.

23. There is no reason why the limited nature of the application of the restriction, if applied, should be a bar to the implementation of a provision that will have a significant effect on the capacity of an entity to promote Irish companies.

24. The respondent made a separate submission as follows. As section 150 permits those restricted under the Act to be involved in companies which fulfil the requirements of 150 (3) it was submitted this would allow a disqualified corporate shadow director (who fulfilled the requirements of 150 (3)) to be a company director contrary to Section 176 of Companies Act 1963.

25. This submission is rejected. Any person who wishes to take the benefit of the provisions Section 150 (3) must of course also fulfil the general requirements for appointment as a director. As an example if a person disqualified under Section 150 was also adjudged a bankrupt he/she could not become a company director based on the Section 150 (3) exception as he/she is otherwise disqualified.

26. The lifting of any restriction imposed by a Section 150 order (whether by the use of section 150 (3) or otherwise) cannot guarantee that the person in question is thereby eligible to be appointed a director. He/she must of course fulfil the other requirements for appointment. The inclusion of corporate entities among those eligible for restriction will not create a problem as these entities will remain disqualified for appointment as directors under S 176 Companies Act 1963.

27. Having considered the foregoing the court is of the view that a body corporate can be a shadow director both generally and for the purpose of S 150 Companies Act 1990.

28. The second matter to be determined is whether a body incorporated outside the State can be a shadow director for the purposes of S 150 Companies Act 1990.

29. This arises from the combined effect of S176 Companies Act 1963 as set out above and the definition of 'body corporate' in S 2(3) of the same Act. This provides as follows:

(3) Reference in this Act to a body corporate or to a corporation shall be construed as not including a corporation sole but as including a company incorporated outside the State.

30. It is clear that a body corporate (including a company outside the State) is covered by the Section 176 prohibition and Section 150 makes no distinction between the way in which Irish based company promoters and foreign-based ones are dealt with. There appears to be no reason why the conclusion on the eligibility of bodies corporate to be shadow directors should not apply equally to Irish and foreign entities

Conclusion

31. For the purposes of this application the Court answers in the affirmative the two preliminary points raised.

32. Cost to be dealt with at the hearing of the substantive application.

