

**THE SUPREME COURT**

*Hardiman J.*  
*Macken J.*  
*Finnegan J.*

382/2004

**IN THE MATTER OF**  
**TRALEE BEEF & LAMB 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:**

**TOM KAVANAGH**

**Applicant/Respondent**

**and**

**JOHN DELANEY, PATRICIA DELANEY, TERRY**

**DUNNE and SIMON COYLE**

**Respondents**

**JUDGMENT of Mr. Justice Hardiman delivered the 1<sup>st</sup>**

**day of February, 2008.**

This is the appeal of the fourth-named respondent (“Mr. Coyle”) against the judgment and order of the High Court (Finlay-Geoghegan J.) which judgment was delivered on the 20<sup>th</sup> July, 2004. By an order perfected on the 27<sup>th</sup> July, 2004 the High Court directed that the respondents and each of them:

“Shall not for a period of five years from the date hereof be appointed or act in any way whether directly or indirectly as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in subsection (3) of the said Section.”

This order is of the sort commonly referred to as a “restriction order”. Its statutory origins will be discussed below.

**Factual background.**

Mr. Tom Kavanagh, the plaintiff and the applicant in these proceedings is a chartered accountant who, by order of the High Court of the 28<sup>th</sup> January, 2002, was appointed liquidator of Tralee Beef and Lamb Limited (“the Company”). The respondents, including Mr. Coyle who is the sole appellant, were each directors of the Company at the date of the commencement of its winding up: this is established by the search in the Companies Registration Office referred to in the affidavit of Mr. Kavanagh. The first and second-named respondents are husband and wife.

It is undisputed that the Company was at the time of the commencement of the winding up unable to pay its debts, within the meaning of s.214 of the Companies Act, 1963. The official liquidator's Certificate to that effect is exhibited in his affidavit.

The official liquidator goes on to give details of the Company's difficulties. None of this has been disputed. He says that the first-named respondent, Mr. John Delaney, was the Managing Director of the Company and appears to have been the sole executive director. According to the records produced by the directors of the Company, a very large deficiency in its assets occurred during the last six months of trading for which, in the view of the liquidator, no reasonable explanation has been given. According to its draft accounts for the year ended 31<sup>st</sup> March, 2001, the net assets of the Company were €975,077.00. But according to the statement of affairs prepared by Mr. and Mrs. Delaney as of the 10<sup>th</sup> October, 2001, the excess of liabilities over assets then amounted to €5,325,662.00. The liquidator believes that these are attributable to heavy trading losses over the last six months of trading. This increase in the Company's liabilities is described by the official liquidator as "scarcely credible". He says that the level of losses calls into question the accuracy of the management accounts for the year ended 31<sup>st</sup> March, 2001 and indeed of the audited accounts to 31<sup>st</sup> March, 2000. It

will be seen that the figures indicate a drop in value in a short period of time of over €6.3 million euro.

There is, in the papers before the Court, a distinct lack of information that might allow the Court to form any view as to the reason for the insolvency. The Company was in the business of slaughtering cattle and lambs, mostly the former, which it boned and sold in Ireland and the U.K. or sent to other de-boning halls which sold the de-boned beef to companies outside the European Union. To a company engaged in that sort of business, quite clearly the BSE outbreaks and associated developments in and after the year 2000 were a major adverse development.

The appellant here, the fourth-named respondent Mr. Coyle, is a chartered accountant and a partner in the well known firm of Chapman, Flood, Mazars. He was nominated to join the Board of Directors of the Company by C.F. Investment Managers Ltd. ("CFIM") which is a company that manages seven distinct funds invested in Business Expansion Schemes in accordance with Part 16 of the Taxes Consolidation Act, 1997. These seven funds have over 1,000 investors. The Trusts establishing the various funds provided that the investors be represented on the board of a company in which the funds are invested in

order to facilitate the monitoring of company progress and the periodic reporting to investors and to the Central Bank. Mr. Coyle says in his affidavit in the present proceedings that the terms of his appointment as a non-executive director were that he should receive and review financial information from the executives of the Company and attend certain directors' meetings as a non-executive director. He was not however to play any active part in the management of the Company.

In view of the issues arising it is well to set out precisely Mr. Coyle's factual contention in his own words. He says at paragraph 4:

“... It was at all times made clear to Mr. Delaney that my appointment was purely in connection with and as a consequence of the aforesaid BES investments in the Company. I say that the Trust Deed establishing the fund from which the investment in the Company was made (having been approved by the Department of Enterprise and Employment and notified to the Revenue Commissioners), requires that someone take a position as non-executive director of investor companies so as to represent the interests of the two investment funds. It was at all times made clear to Mr. Delaney that my appointment as a non-executive director of the company was only made in that context.”

It may be significant that Mr. Coyle's affidavit is sworn to reply, not to the affidavit of the official liquidator but to the affidavit of Mr. John Delaney against whom, by reason of the statutory provisions discussed below, the liquidator had also brought restriction proceedings.

It is clear from the liquidator's affidavit that he formed the view that Mr. Coyle had acted honestly and responsibly in relation to the affairs of the Company of which he was a non-executive director. He petitioned the Director of Corporate Enforcement to be relieved from the statutory obligation (set out below) to bring restriction proceedings in relation to Mr. Coyle but the Director of Corporate Enforcement declined to relieve him. The Director gave no reasons for this and did not attend or seek to be heard either before the High Court or before this Court on the hearing of this appeal. In view of the significance of the legal submissions and the legal issues raised, the absence of the Director of Corporate Enforcement is most unfortunate.

The learned trial judge was prepared to infer, from the fact that the Director of Corporate Enforcement refused the official liquidator's request to be dispensed from bringing a restriction application in respect of Mr. Coyle, that the Director did not agree with the official liquidator's conclusion that Mr. Coyle had acted honestly and responsibly in relation to the Company. I would not be prepared to draw such an inference. The fact is that the Director has given no reasons whatever for his attitude either to the official liquidator or to the Courts. One explanation for it would be that he disagrees with Mr. Kavanagh's assessment. However, since he has not had the opportunity that gentleman has had to discuss the

affairs of the Company with, and question, the Directors, it is not clear to me on what basis he could disagree with the official liquidator's professional judgment. His silence, and refusal to grant the official liquidator's request, seems to me just as consistent with a rigid policy decision that he will take no position in a case like the present and unload the entire responsibility on to the Courts with (as the learned High Court judge pointed out) no *legitimus contradictor* of what Mr. Coyle says. More neutrally put, he will maintain, for unspecified reasons, a distance between himself and the restriction proceedings.

**Statutory background.**

Section 150 of the Companies Act 1990 (as amended by Company Law Enforcement Act s.41 2001) relates to persons who are directors of a company which is found on winding up to be insolvent, or had been such directors in the year prior to the commencement of the winding up. Such a person may be subject to a restriction order under the following provisions:

“150. -(1) The court shall, unless it is satisfied as to any of the matters specified in subsection (2), declare that a person to whom this Chapter applies shall not, for a period of five years, be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in subsection (3); and, in subsequent provisions of this Part, the expression ‘a person to whom section 150 applies’ shall be

construed as a reference to a person in respect of whom such a declaration has been made.

(2) The matters referred to in subsection (1) are-

- (a) that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this section, or
- (b) subject to paragraph (a), that the person concerned was a director of the company solely by reason of his nomination as such by a financial institution in connection with the giving of credit facilities to the company by such institution, provided that the institution in question has not obtained from any director of the company a personal or individual guarantee of repayment to it of the loans or other forms of credit advanced to the company, or
- (c) subject to paragraph (a), that the person concerned was a director of the company solely by reason of his nomination as such by a venture capital company in connection with the purchase of, or subscription for, shares by it in the first-mentioned company.

(3) The requirements specified in subsection (1) are that-

- (a) the nominal value of the allotted share capital of the company shall-
  - (i) in the case of a public limited company, be at least €250,000,
  - (ii) in the case of any other company, be at least €50,000,
- (c) each allotted share to an aggregate amount not less than the amount referred to in subparagraph (i) or (ii) of paragraph (a), as the case may be, shall be fully paid up, including the whole of any premium thereon, and

- (d) each such allotted share and the whole of any premium thereon shall be paid for in cash.
- (4) Where a court makes a declaration under subsection (1), a prescribed officer of the court shall cause the registrar of companies to be furnished with prescribed particulars of the declaration in such form and manner as may be prescribed.
- (4A) An application for a declaration under subsection (1) may be made to the court by the Director, a liquidator or a receiver.
- (4B) The court, in hearing an application for a declaration under subsection (1) from the Director, a liquidator or a receiver, may order that the directors against whom the declaration is made shall bear the costs of the application and any costs incurred by the applicant in investigating the matter.

(5) In this section -

‘financial institution’ means-

- (a) a licensed bank, within the meaning of section 25, or
  - (b) a company the ordinary business of which includes the making of loans or the giving of guarantees in connection with loans, and
- ‘venture capital company’ means a company prescribed by the Minister the principal ordinary business of which is the making of share investments.”

The operation of this Section was transformed by the enactment of s.56 of the Company Law Enforcement Act 2001. This provided as follows:

**“56. - (1)** A liquidator of an insolvent company shall, within 6 months after his or her appointment or the commencement of this section, whichever is the later, and at

intervals as required by the Director thereafter, provide to the Director a report in the prescribed form

(2) A liquidator of an insolvent company shall, not earlier than 3 months nor later than 5 months (or such later time as the court may allow and advises the Director) after the date on which he or she has provided to the Director a report under *subsection (1)*, apply to the court for the restriction under section 150 of the Act of 1990 of each of the directors of the company, unless the Director has relieved the liquidator of the obligation to make such an application.

(3) A liquidator who fails to comply with subsection (1) or (2) is guilty of an offence.

It will be recalled that, in the present case, the liquidator requested to be relieved of the obligation to make a restriction application in respect of Mr. Coyle, but this application was refused. The liquidator made that request because he himself had formed the view that Mr. Coyle had acted honestly and responsibly.

#### **Consequences of the foregoing.**

The result of the foregoing is a statutory regime relating to the Restriction of Directors which is unique in the sense that it is quite different from the regime obtaining in other Common Law jurisdictions to which we often look for parallels in Company Law matters. It is also draconian in the sense explained below and at the same time largely symbolic in that being restricted pursuant to its provisions is of little

practical effect (requiring only that any new company of which the restricted person is a director be modestly capitalised) but is gravely damaging to the *reputation* of a person thus afflicted. Indeed, a number of the cases on the topic use the words “stigma” and “stigmatised”: see the judgment of Murphy J. in **Business Communications v. Baxter & Parsons** (unreported High Court, 21<sup>st</sup> July, 1995).

The jurisdiction may be regarded as a draconian one, firstly, in that the most recent statutory intervention, cited above, has made it mandatory for a liquidator to bring an application to restrict Directors in the case of insolvent winding up. The liquidator will himself be guilty of a criminal offence if he does not do so. This lends an air of unreality to the circumstances of the present case: the liquidator has positively concluded that the appellant did act in an honest and responsible manner in relation to the Company. Nevertheless, he must bring the application or find himself stigmatised by conviction of a criminal offence. He has taken the only possible step to avoid bringing an application in which he plainly has no belief: he has asked the Director of Corporate Enforcement to dispense him from doing so, as that official is empowered to do. But, as we have seen above, the Director has neither granted him this relief nor given any reason for not doing so. Accordingly, the liquidator of an insolvent company has been compelled to expend the Company's money,

which might otherwise go towards the satisfaction of creditors, in bringing an application in which he himself has no belief; and the factual basis for which does not in his view exist. This is an extraordinary position and one which makes it all the more regrettable that the Director has neither given reasons nor sought to intervene in the proceedings. I do not consider that the restriction on the disclosure of certain material by the Director, save “in accordance with law”, contained in s.17 of the Company Law Enforcement Act 2001, would preclude the giving of such reasons to the official liquidator or to the Court. See Kavanagh v. O’Donoghue [2003] 4 IR 443. But this view itself must be seen in light of the fact that, naturally, the Court has heard no argument on it by reason of the Director’s approach.

Secondly, the provisions may be regarded as draconian in the sense that, by reason of s.150(2)(a) of the 1990 Act, a restriction order *must* be made against a respondent unless the Court is satisfied that he has acted honestly and responsibly in relation to the conduct of the affairs of the Company and is also satisfied that “there is no other reason why it would be just and equitable” to make a restriction order. The burden is placed upon the respondent to prove, not only that he has acted responsibly and honestly in relation to the Company but to prove the negative proposition “(there is no other reason...)” set out in the last citation from the Statute.

This view of the statutory provision as casting the onus of proof, in an application to restrict a Director pursuant to s.150, upon the Respondent Director, is confirmed by the decision of this Court in **Re Squash (Ireland) Ltd.** [2001] 3 IR 35 and by the treatment of the topic in Keane's *Company Law*, 4<sup>th</sup> ed. (Dublin, 2007) both cited below.

I must confess to some doubt as to whether this blanket reversal of the onus of proof, including a requirement to prove a negative proposition, is consistent with fundamental fairness and constitutional justice. It is certainly in stark contrast to the procedures provided in the UK for the disqualification of Directors, and applied in the **Baring's** case, cited below and much cited in the judgment of the learned trial judge. There, the Secretary of State (the moving party) was compelled to make detailed written charges in advance of the hearing, so that the respondents and the Court knew the case that was being made and required to be answered.

Lastly, it may be observed that where as in this case the respondent/appellant is a professional man, in this instance a Chartered Accountant, the effect of a restriction order will be much greater than if he is a "cowboy" director, the class at whom the statutory provision was

originally directed (See Conroy, Change of Direction, (2006) 100 (4) Law Society Gazette, May, 36).

**Applicable Case Law.**

The criteria historically applied in considering whether a party has acted honestly and responsibly were for many years regarded as authoritatively expressed in what the article just cited describes as the “seminal dictum” of Shanley J. in Re La Moselle Clothing [1998] 2 ILRM 345. These criteria, which were cited by the learned trial judge in the present case are as follows:

- “(a) The extent to which the Director has or has not complied with any obligation imposed on him by the Companies Acts, 1963 - 1990.
- (b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.
- (c) The extent of the director’s responsibility for the insolvency of the company.
- (d) The extent of the director’s responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up, or thereafter.
- (e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards.”

This passage was approved by McGuinness J. in giving the views of the Supreme Court in Re Squash (Ireland) Ltd. at p.40. In the authoritative Irish work *Company Law* by the former Chief Justice, Mr.

Justice Keane, the passage is cited at paragraph 27.173 preceded by the words:

“The burden of proof rests on the director to satisfy the court that the order should not be made and the courts have identified a number of factors which will be relevant in determining in particular whether the director has acted ‘reasonably’. In *Re La Moselle Clothing Ltd. and Rosegem Ltd.*, Shanley J. said that the Court should have regard to [the factors set out above]”.

In her judgment in the present case Finlay Geoghegan J. set out the passage quoted above from Shanley J. and a passage from McGuinness J. in the **Squash (Ireland) Ltd.** case. She then decided that the matters set out by Shanley J. required “amplification”:

“I would respectfully suggest that the above matters need the following amplification when being considered in relation to the respondents herein. Shanley J. at paragraph (a) refers only to the obligations imposed on a director by the Companies Acts. At common law, directors owe duties to the Company which are normally divided into duties of loyalty based on fiduciary principles, developed initially by the Courts of Equity, and duties of skill and care developed initially by the Common Law Courts from the principles in the law of negligence. There is no suggestion in the above decision that the Courts should ignore those duties. Accordingly, it appears to me that when considering the matters referred to by Shanley J. in *La Moselle Clothing Ltd. v. Soualhi* [1998] 2.I.L.R.M. 345, under paragraph (a) a court should have regard not only to the extent to which a director has or has not complied with any obligation imposed on him/her by the Companies Acts but also with duties imposed by common law.”

This passage appears to me to be central to the result arrived at. Both the liquidator and the High Court found that each respondent had satisfied them that he or she acted honestly in relation to the affairs of the Company. No breach of any obligation “imposed on him by the Companies Acts” by the appellant was identified. Accordingly the entire issue is as to whether or not he can satisfy the Court that he acted responsibly. The judgment of the learned High Court judge discussed Common Law duties of directors at great length.

This discussion can be found, in particular, at pp 8ff of the judgment. I wish to make it clear that I am in agreement with these propositions of law enunciated by the learned High Court Judge. In particular, I would endorse her citation from the 3<sup>rd</sup> edition of Keane’s *Company Law* (Dublin, 2000) and the cases cited there. This discussion may be of the greatest use in future cases under the relevant sections. But I consider that the appellant has a legitimate ground of complaint under a number of headings in relation to the application of these principles to him.

(1) **“Amplification” of the La Moselle criteria.**

This step which the learned trial judge felt obliged to take is the engine of the finding against the appellant. Much of the rest of the legal

part of the judgment is devoted to identifying and defining the Common Law duties of a director. For present purposes, the whole of the “amplification” took place in relation to paragraph (a) of the citation from the judgment of Mr. Justice Shanley:

“The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts 1963 - 1990.”

Those duties, arising exclusively from statute, are readily ascertainable and it does not appear that either the liquidator or the learned High Court judge considered that Mr. Coyle was in breach of any of them. The other duties, by reference to which this criterion was “amplified”; are more amorphous and are expressed in words of very general purport. They include what the learned High Court judge called “duties of loyalty based on fiduciary principles, developed initially by the Courts of Equity and duties of skill and care developed initially by the Common Law Courts from the principles in the law of negligence.”

The learned High Court judge considered that in the judgment of Mr. Justice Shanley “There is no suggestion... that the court should ignore those (latter) duties”. That is not, perhaps, quite the same as saying that the judgment actually mandates the taking into account, apparently in the face of the mode of expression of paragraph (a) above, the much more

extensive and less well defined Common Law duties. Mr. Paul Gardiner S.C. for Mr. Coyle pointed out that, had Mr. Coyle taken advice as to his personal liability before he took the steps (and it was he who took them) that led to the winding up, and thus to the present application, he would have been advised along the unamplified lines of La Moselle. I accept this. There has been no suggestion that the proposed amplification or its terms were discussed at the hearing. Some further observations on these themes are made in the brief discussion of the Baring's case, below.

Having regard to the need to respect Mr. Coyle's constitutional rights, not only to fair procedures but to his good name and the associated right to earn a living by the practice of his profession, I do not consider that it was appropriate to "amplify" the criteria for restricting a director after the hearing. Furthermore, I do not consider that the findings against Mr. Coyle which were in fact made could have been made without such amplification. The judgment of a judge, however eminent, should not be construed as though it were a statute and I hope I can avoid that error. But when a judge of great authority in this area of the law, as the late Shanley J. was, speaks of compliance or otherwise "with any obligation imposed on him by the Companies Acts, 1963 - 1990" he may safely be taken to be speaking of those duties and not of others which may arise from another source. To reach this conclusion it is not necessary to apply, as

one might to the words of a statute, the maxim "*expressio unius exclusio alterius*". It is only necessary to construe the words in their ordinary and natural meaning and to bear in mind the near canonical status which they have enjoyed for a decade or so, as shown from their approval by the Supreme Court and their adoption in a text book of high authority.

Moreover, a survey of the periodical literature on the topic confirms the status accorded to the words by the practising profession: one author's statement to this effect has been quoted earlier in this judgment. A Common Law judge is of course quite entitled to modify, to develop or to amplify the decisions of his or her predecessors: the Common Law has for centuries developed in precisely this way. As I have said, I do not disagree with the content of the learned trial judge's "amplification". But in a hearing of great importance to the appellant, where his reputation and his professional standing are intimately involved, I do not think it right to alter amplification or otherwise the criteria for imposing on him what I am satisfied is a very significant stigma. This point weighs with me all the more strongly because the appellant has been expressly found to have been honest in his dealings, and I have no doubt that he was. I do not think that any amplification of the law, however desirable on general or policy grounds, should take place in the context of inflicting a grave stigma on such a person, or without detailed argument as to the content and wording of the amplification.

(2) **The position of this Director.**

In an attempt to find a form of words to express the Common Law duties of a director the learned trial judge had recourse to a well known decision of Mr. Justice Parker in the United Kingdom in an application for the disqualification of directors which arose out of the notorious collapse of Barings Bank due to fraud by a single employee: in **Re Barings Plc and Ors.** (No. 5), **Secretary of State for Trade and Industry v. Baker and Ors.** [1999] 1 BCLC 433. This is an interesting case and amply repays study. But it concerned a vast company and the judgment extends from p.433 to p.620 of the Report, and incorporates its own separate Table of Contents. Barings was a company run with a high degree of formality, as one would expect having regard to its size and the vast sums of money it dealt in. The managerial responsibilities of each of the executive Directors implicated in the case were established in evidence in some very considerable detail: all had specific responsibilities in relation to Leeson's (the fraudulent employee) department. Moreover, all relevant directors were Executive directors. In my view, apart from any general amplification of the words of Shanley J., there is a yet unmet need to make authoritative findings after full debate, as to the respective duties of an Executive and a non-executive director and, perhaps, a non-executive director appointed (as the appellant was) for a particular and specific purpose. But this has yet to occur.

I would not be prepared simply to apply the **Baring's** criteria, without such argument, to all these classes of director, or to assume that their common law duties are identical. I am slightly uneasy that, in this case, there may have been an assimilation in particular of the position of a non-executive director to that of an executive one. Such an approach might derive some support from the judgment of Roderick Murphy J. in **Vehicle Imports Ltd (in liquidation)** (Unreported, High Court, 23<sup>rd</sup> November 2000), but it is not explicit and in any event there does not appear to have been argument on the topic of the duties of the different classes of director, mentioned above.

I do not consider that this case, or that of **Vehicle Imports**, mandates the assimilation of the position of a non-executive director to that of an executive in terms of their common law duties. The position of a highly paid executive director of a vast Bank may be of limited use in considering the common law duties of a non-executive director, appointed to keep BES investors informed, of a small company.

Clearly, in applying words of general application from a decision relating to so vast a corporation, care must be taken to avoid being unrealistic in relation to a small meat company in rural Ireland run

effectively, so the evidence in this case goes, by one man. This was Mr. Delaney, the sole executive director.

Secondly, some regard must be had to the position of the appellant. It is true that he was and is a chartered accountant from whom financial expertise might be expected. It is also true, and is uncontradicted, that he became a director solely because the Trusts governing the Business Expansion Scheme funds required that someone representing the investors be on the Board of the Companies invested in.

The relevance of this last point is as follows. Pursuant to s.150 (2), two of the grounds on which one can resist a restriction order are as follows:

- “(b) Subject to paragraph (a), that the person concerned was a director of the company solely by reason of his nomination as such by a financial institution in connection with the giving of credit facilities to the company by such institution, provided that the institution in question has not obtained from any director of the company a personal or individual guarantee of repayment to it of the loans or other forms of credit advanced in a company, or
- (c) Subject to paragraph (a), that the person concerned was a director of a company solely by reason of his nomination as such by a venture capital company in connection with the purchase of, or subscription for, shares by it in the first-mentioned company.”

It is not suggested that the appellant here met those specific criteria. But it is clear from the uncontradicted evidence that he went on the Board solely because someone had to represent the interest of the

BES investors so that he was in a position not unlike that of a director who might have been exempt from restriction under the paragraphs quoted above. I believe that this factor at least required a proper consideration.

Indeed, the learned trial judge remarked, at p.24 of the judgment:

“... I accept that the court in considering Mr. Coyle’s actions or inactions as a director of the Company should also take into account the fact that he was appointed to this position by CFIM and for the purpose of safeguarding the interest of the investors in the BES Scheme.”

It is not clear to me, however, exactly how this fact was taken into account. Indeed, it appears from p.21 of the judgment and certain other passages that the learned trial judge tended to exclude Mr. Coyle from the benefit of certain inquiries he had made as to the Company’s affairs on the grounds that they were made in his CFIM capacity:

“In considering whether Mr. Coyle has discharged the onus of satisfying the court that he acted responsibly it is important to recall that the court in considering this application under s.150 is only considering whether Mr. Coyle acted responsibly as a director of the company i.e. Tralee Beef and Lamb Ltd. (In liquidation). The court is not considering whether Mr. Coyle acted responsibly as a director of any other relevant company such as CFIM...”

Similarly, on the question of contact between Mr. Coyle and Mr. Delaney, the Managing Director, the learned trial judge says:

“... Mr. Coyle did not dispute this lack of contact from him personally but did refer to attempts by employees of CFIM to obtain financial information from the Company.”

Further on this topic, it is said at p.22:

“There is considerable dispute between Mr. Coyle and Mr. Delaney as to communications seeking financial information which occurred after January 2000. From Mr. Coyle’s perspective the further it can be put is that there were certain written communications and certain oral communications from executives of CFIM to executives of the Company requesting both the management accounts and audited accounts. Insofar as those communications were in writing and have been exhibited they appear to have been made pursuant to the contractual arrangements under the BES Investment Agreements.”

Having regard to the history of Mr. Coyle’s involvement with the Company and its size and relatively informal management structure, it seems to me that it is unrealistic to make too rigid a distinction between the different capacities in which Mr. Coyle “received information relative to his role as a director of the company”.

(iii) **Conflict with fellow director.**

On at least two occasions in the judgment the learned trial judge remarked that there was considerable conflict on affidavits between Mr. Coyle and Managing Director, Mr. Delaney. One of these has been quoted above, referring to the vital question of Mr. Coyle’s attempts to

obtain information, specifically management accounts. It appears to me that Mr. Delaney's evidence was in effect treated as part of the case against Mr. Coyle, and possibly vice versa. But each was swearing the affidavits to resist his own restriction, not to advance the case for restricting another director. We have already seen that the official liquidator did not himself believe that Mr. Coyle should be restricted. It must have been apparent to Mr. Coyle that he was being attacked by Mr. Delaney, and I have already drawn attention to the fact that he specifically swore an affidavit directed to Mr. Delaney's allegations, but it is still somewhat unsatisfactory that the evidence against Mr. Coyle was that of a person resisting his own restriction i.e. defending his own conduct of affairs as a director by trying insofar as he could to shift the blame on to Mr. Coyle. This state of affairs existed due to the Delphic posture adopted by the Director of Corporate Enforcement.

In my view this mode of proceeding left the case against Mr. Coyle in an unacceptably ill defined form. Mr. Coyle was in effect obliged to take on Mr. Delaney's evidence because, as the learned judge says at p.20 of the judgment, he "... was aware that the court was taking into account affidavits sworn by other respondents, including Mr. Delaney in considering the application against him."

I question whether that should have been so. Mr. Delaney was the subject of a motion brought against him by the official liquidator which, as we have seen, the official liquidator brought unwillingly and only because not to have done so would have involved him (the liquidator) in the commission of a criminal offence. As it happened, the liquidator was bringing similar motions against three other persons and of course it represented a convenience and a saving of trouble and expense to hear these applications together. But that is not to say that it is proper to consider what other respondents to the liquidator's motion said in their own defence as part of the case against Mr. Coyle. To approach the case in that way seems to me to deprive him of part at least of the benefit of the fact that the official liquidator had concluded that he had acted honestly and responsibly by supplementing the moving parties case with what other respondents said in their own defence. This tends to obscure the fact that the Official Liquidator considered that Mr. Delaney should, and Mr. Coyle should not, be restricted. I am concerned that the learned trial judge may have had regard to Mr. Delaney's Affidavit even where it was unsupported by the Liquidator, to that extent putting Mr. Delaney into the Liquidator's position and treating him as the *legitimus contradictor* of Mr. Coyle.

I am not clear how this importation of the other respondent's evidence into the case against Mr. Coyle can be achieved consistently with the principles of adversarial litigation and I am disturbed by it, in combination with the other matters mentioned above. It is noteworthy that, in UK proceedings for disqualification of a director, such as those in **Barings**, cited above, the moving party must set out in detail and in advance, the grounds of his application. This requirement precludes him from taking advantage of material fortuitously available from a separate motion against another person, available only because both motions happen to be heard together.

In all the circumstances I am gravely concerned about the justice of the procedures leading to the decision to restrict Mr. Coyle. I would therefore allow the appeal and set aside the order of the High Court.