THE HIGH COURT

COMMERCIAL

[2023] IEHC 673

[Record No. 2020/337COS]

IN THE MATTER OF DQ ENTERTAINMENT (IRELAND) LIMITED

(IN RECEIVERSHIP)

BETWEEN

POWERKIDS ENTERTAINMENT (SINGAPORE) PTE. LIMITED,

PATRICK BANCE (RECEIVER AND MANAGER)

AND MADISON PACIFIC TRUST LIMITED

APPLICANTS

AND

RASHIDA ADENWALA, TAPAAS CHAKRAVARTI, SANJAY CHOUDHARY,

LEO CONDRON AND DOMINIC POOLE

RESPONDENTS

JUDGMENT of Mr Justice Mark Sanfey delivered on the 30th day of November 2023

Introduction

1. By an originating notice of motion issued on 16 October 2020, the applicants in this matter sought numerous reliefs pursuant to the Companies Act 2014 against the respondents,

each of whom is a director of DQ Entertainment (Ireland) Limited ('**the Company'**), a private company limited by shares incorporated in this jurisdiction on 12 December 2008. Primarily, the applicants seek orders that the first to third named respondents be made personally liable for the debts and liabilities of the Company, which are very substantial.

2. The matter was originally listed for trial on 28 June 2022. It was estimated that the hearing would take three to four weeks. By that stage, the applicants had resolved matters as against the fourth and fifth named respondents, and were proceeding only against the first, second and third named respondents. However, those respondents did not attend the trial. I was satisfied by evidence that they were fully aware that the trial was due to take place, and had apparently chosen not to attend. Accordingly, the trial proceeded in their absence.

The Company

3. The Company's principal business was the provision of animation and live action production services for television shows and motion pictures. The Company is part of the DQ Entertainment group. The Company's immediate parent is DQ Entertainment (International) Limited ('**DQE India'**), an Indian company the shares of which are listed on both the national stock exchange and Bombay Stock Exchange of India. The evidence at trial established that approximately 75% of DQE India's shares are held by DQ Entertainment (Mauritius) Limited, an entity incorporated in Mauritius ('**DQE Mauritius**').

4. Each of the five respondents is a director of the Company. Mr Condron and Mr Poole are both Irish nationals who served as non-executive directors of the Company. Both of them resolved their differences with the applicants and Mr Condron gave evidence at the hearing.

The applicants

5. The first named applicant ('**Powerkids**') is an investment company owned by OCP Asia (Singapore) PTE Limited ('**OCP**'). OCP is an investment manager that operates in the Asia Pacific region.

6. The second named applicant, Mr Bance, is an accountant and a managing director of Kroll (formerly Borelli Walsh). In circumstances which I shall outline, he was appointed as receiver and manager over the assets and undertaking of the Company.

7. The third named applicant, Madison Pacific Trust Limited ('**Madison**') is a trustee company which holds the legal interest in certain bonds and security on trust for Powerkids. By order of this Court (Barrett J) of 1st March 2021, Powerkids was substituted for the original first applicant OL Master Limited ('**OLM**') and the third named applicant Madison was added to the proceedings as an applicant.

The reliefs sought

8. The applicants seek the following reliefs:

(1) a declaration pursuant to s.567 of the Companies Act 2014 that DQ Entertainment (Ireland) Limited is unable to pay its debts and the reason or the principal reason for it not being wound up is the insufficiency of its assets;

(2) a declaration pursuant to s.609 of the Companies Act 2014 that adequate accounting records were not kept by the Company and that this contravention resulted in substantial uncertainty as to the assets and liabilities of the Company and/or contributed to the Company's inability to pay all of its debts;

(3) a declaration pursuant to s.609 of the Companies Act 2014 that one or more of the respondents being officers of the company be made personally liable for all or part of the debts and liabilities of the Company as this honourable Court sees fit;

(4) a declaration that the respondents or any one of them, while officers of the Company, were each knowingly a party to the carrying on of any business of the Company in a reckless manner within the meaning of s.610(1)(a) of the Companies Act 2014;

(5) a declaration that the respondents or any one of them, while officers of the Company, were knowingly a party to the carrying on of any business of the Company with intent to defraud creditors of the Company, or creditors of any other person or for any fraudulent purpose within the meaning of s.610(1)(b) of the Companies Act 2014;

(6) a declaration pursuant to s.610 of the Companies Act 2014 that one or more of the respondents being officers of the Company be made personally liable for all or part of the debts and liabilities of the Company as this honourable Court sees fit;

(7) an order pursuant to s.612 of the Companies Act 2014 directing the respondents or any one of them to repay or restore to the Company the value of the assets transferred without valid cause, together with such rate of interest as this honourable Court shall deem just;

(8) a declaration that the first, second and/or third respondents or any of them, made a declaration of solvency without having reasonable grounds for the opinion referred to;

(9) as against the first, second and third named respondent, a declaration, pursuant to s.210 of the Companies Act 2014 that one or more of them be made personally liable for all of any debts or other liabilities of the Company, as this honourable Court sees fit;

(10) such further or other order as this honourable Court should deem appropriate in all the circumstances.

The evidence

Mr Ben Harris

9. Mr Ben Harris is the principal and legal counsel of OCP, an investment management company based in Singapore which manages the interests of Powerkids and its predecessor in title to its interest under the bonds and security to which I shall refer below. Mr Harris gave

evidence as to the commercial relationships between the various entities involved, leading to the present application. These are set out in his comprehensive witness statement which he adopted as part of his evidence in the case.

10. Mr Harris set out in his witness statement the position in relation to bond instruments and security pursuant to which the Company became substantially indebted to the first and third named applicants. These dealings may be summarised as follows:

- On 10 October 2014, OLM and DQE Mauritius entered into a bond purchase agreement for the sale and purchase of up to US$50,000,000 senior secured convertible bonds. On the same date, DQE Mauritius and the Company entered into an identical bond purchase agreement.
- Pursuant to these bond purchase agreements, OLM entered into two separate US$50,000,000 bond instruments with (1) DQE Mauritius (the '**DQE Mauritius bond instrument**') and (2) the Company (the '**DQE Ireland bond instrument'**), both dated 09 December 2014.
- By a debenture of that date made between the Company and OLM, the Company charged all its undertaking and assets to OLM as consideration for the obligations of DQE Mauritius.
- By an assignment of that date, DQE Mauritius assigned its interest in the DQE Ireland bond instrument to OLM as security for the repayment of the DQE Mauritius bond instrument.
- On 25 June 2015, OLM transferred its interest in the DQE Mauritius bond instrument to its wholly owned subsidiary, OL Master (Singapore Fund 1) PTE Limited ('**OLM Singapore**'). On 08 January 2018, OLM Singapore entered into a trust deed with Madison – to which DQE Mauritius is also a

party – by which OLM Singapore appointed Madison to hold its interests in the bond instruments on trust for it.

- By an assignment of 08 January 2018, OLM and OLM Singapore subsequently transferred all of their rights, title and interest in the 2014 debenture made between the Company and OLM to Madison in its capacity as security trustee.
- By a deed of second amendment and restatement of the same date between the Company, DQE Mauritius, OLM Singapore, OLM and Madison, the parties agreed to amend and restate the DQE Ireland bond instrument, and Madison was made a party to that instrument. OLM's rights under the DQE Ireland bond instrument were assigned to OLM Singapore.
- By a further debenture of the same date made between the Company and Madison, the Company provided a further charge over all of its assets and undertaking ('**the security**') for the benefit of Madison in its capacity as security trustee. Pursuant to the 2014 debenture between the Company and OLM and the 2018 debenture between the Company and Madison, the Company covenanted to pay the secured obligations as defined in those debentures which included amounts owed by DQE Mauritius under the bond instruments.
- By a guarantee of the same date, the Company entered into a guarantee with Madison, as security trustee, under which the Company irrevocably guaranteed to each "secured party" - defined in the guarantee to include Madison and OLM Singapore – to pay all sums payable by DQE Mauritius under, *inter alia*, the DQE Mauritius bond instrument of 09 December 2014.

- By transfer certificate dated 14 May 2020, OLM Singapore transferred the DQE Mauritius bond instrument to Powerkids.

11. Accordingly, the Company has a legal liability to make payments to Madison, as security trustee, which holds its interests on trust for Powerkids, the beneficial owner of the DQE Mauritius bonds. Under the terms of the 2018 debenture between DQE Ireland and Madison, the Company covenanted to Madison that it would pay on demand as primary obligor the sums due under the DQE Mauritius bonds when they became due. Mr Harris' evidence was that Madison has made a demand for payment from the Company under the 2018 debenture, which the Company has failed to repay.

12. In addition, the terms of the 2018 guarantee between the Company and Madison provide that the Company irrevocably guaranteed to each "Secured Party" – including Madison and OLM Singapore – to pay all sums payable by DQE Mauritius under the DQE Mauritius bond instrument.

13. Thirdly, under the 2014 security assignment of 09 December 2014, the right to receive payments on foot of the DQE Ireland bond instruments was assigned by DQE Mauritius to OL Master, who subsequently transferred that right to Madison on 08 January 2018.

14. Accordingly, the first and third named applicants are creditors of the Company pursuant to the security and guarantee documents set out above. Their status as creditors arises as a result of advances of money to the DQE group. Mr Harris gave evidence as to the sums advanced to the Company: in this regard, see the summary at para. 134 below.

15. Mr Harris gave evidence as to the steps taken by OLM to satisfy itself that it was appropriate to lend monies of this magnitude to the DQE group. The accounts of that group were audited and there was a publicly listed company within the DQE group; in those circumstances, Mr Harris avers that the balance sheet and financial information provided

were accepted as accurate in reliance on the representations and warranties made by the Company in the bond instruments.

16. A particular focus of OCP's due diligence was whether the level of debt sought was capable of being serviced and repaid by the DQE group. While carrying out financial due diligence, OCP engaged third parties to carry out background checks on the DQE group and its founder. Legal due diligence was also conducted in order to verify that the pipeline of animation work was genuine and in development. OCP placed reliance on a third party valuation obtained from an independent expert IP valuation firm based in the United States which had worked with a number of well-known media companies in transactional situations; however, this valuation, like OCP's due diligence, was based on financial information and projected future earnings provided to it by the DQE group which, according to Mr Harris, was "fundamentally flawed".

17. Mr Harris gave evidence that the Company's accounts in fact very significantly overstated the value of the Company's assets. While the receiver Mr Bance gave detailed evidence in this regard, Mr Harris said that it became clear ultimately that "trade receivables", which were very substantial in the Company's 2014 accounts, were not genuine. Also, the Company's accounts recorded significant values in respect of intangible assets which the Company purported to hold in animation series. Mr Harris' evidence was that it ultimately became clear that the value of many of these "assets" was artificially and misleadingly inflated, so that the intangible assets in the Company's balance sheet – as opposed to the DQE group's balance sheet – is estimated to have been overstated by €17,000,000 for the year ended 31 March 2014.

18. Mr Harris, at para. 3.15 of his witness statement, summarises the position as follows:

> "OCP's decision to enter into the bonds with DQE Mauritius would not have been made if the true financial position of the Company and the DQE Group was known to

> it. If OCP's [sic] was aware, as it is now, of the tendency of management of the DQE Group to manipulate and overstate the assets on its balance sheet and the future projected earnings for animation shows it would not have invested in the DQE Group. I believe that the DQE Group concealed its true financial position and knowingly provided inaccurate financial information to OCP and Consor [the independent valuation firm]. This inaccurate information resulted in a vastly inaccurate (and inflated) valuation of the DQE Group's IP and resulted in OCP being comfortable regarding the collateral coverage and the DQE Group's ability to repay the monies. OCP's decision to lend was based on inaccurate financial information and valuation provided to it by the DQE Group."

Involvement of Borelli Walsh

19. In April 2016, DQE India was seeking to draw down further monies under the bond instruments. At that stage, OLM Singapore had developed concerns about the manner in which the Company and DQE India were run and the credibility and reliability of the financial information provided by those entities. As a result of those concerns, OLM Singapore retained Borelli Walsh (as it was then known) through its manager OCP as independent financial adviser on 16 May 2016.

20. In his evidence, Mr Harris describes the various reports which were furnished by Borelli Walsh to OLM between June 2016 and December 2016. Mr Harris' evidence is that the work carried out by Borelli Walsh "raised serious concerns around the financial position of the DQE Group and the financial information provided…", but states that OCP concluded that advancing further monies was necessary in order to protect OLM Singapore's existing investment of US$35,000,000 and ensure recoverability of previously advanced amounts. OLM agreed a series of measures to limit its risk and exposure before advancing further monies. It advanced monies for specifically identified projects that it had assessed. It put

further financial restrictions on the group's ability to move monies from the Company including requiring Madison's written consent on payments above a certain amount. It insisted on the provision of monthly information to assess the financial viability of the Company, and discussed various other measures to improve the flow of information regarding the DQE group's financial position.

21. However, it appears that these measures were not sufficient to prevent further misapplication of the Company's money. Mr Bance, in his evidence, referred to a number of irregular and improper transactions and payments even after the measures introduced by OLM Singapore had been introduced.

22. Ultimately, OCP formed the view by 2019 that the DQE group was in very serious financial difficulty. OCP was of the view by that stage that DQE could not repay the full amount due and that a restructuring or enforcement would be necessary. It once again engaged Borelli Walsh in April 2019 and asked that they prepare an enforcement step plan. The purpose of this step plan was to avoid a non-consensual enforcement of the debt, and the "proposed step plan" was emailed to the first named respondent on 24 May 2019. It involved a consensual restructuring with a transfer of assets to OLM Singapore/Powerkids. Further iterations of the step plan ensued, with a final version issued on 02 October 2019. Borelli Walsh was concurrently requested by OLM Singapore to undertake an assessment of the affairs of DQE India and the Company.

23. At para. 5.10 of his witness statement, Mr Harris summarises the findings of Borelli Walsh as a result of its assessment as follows:

> "(A) A restructuring of DQE India or DQE group was not viable because the business was damaged and in decline, its management information systems were not reliable, its management was not credible, and the restructuring plans they had proposed were unrealistic;

(B) The local banks would be unlikely to agree to any form of consensual separation of the DQE India and DQE Ireland business including because any such restructuring would likely lead to a loss of their security; and

(C) DQE Ireland continued to fund the losses and mismanagement of DQE India, and this funding would be likely to accelerate the extraction of all cash received by DQE Ireland as the funding available to DQE India continued to deteriorate".

24. In September 2019, OLM Singapore received information in relation to proceedings being brought against DQE India by a number of Indian banks, indicating that a consensual restructuring was unlikely. OLM Singapore then sought advice from Borelli Walsh on whether to enforce its security and how best to maximise its recovery. Once it was clear that a consensual restructuring was not realistic, OLM Singapore proceeded to appoint a receiver over the Company's assets.

The receivers

25. A redemption notice was issued by OLM Singapore to DQE Mauritius on 20 June 2019 under the terms of the bond instruments. This notice required payment of a "Redemption Price" of US$111,113,564.63 in accordance with the Bond Instrument of 9 December 2014 originally entered into between DQE Mauritius and OCP. The Redemption Price was required to be paid by 2 August 2019. This Redemption Price was not paid within the notice period. A final notice was issued to DQE Mauritius on 14 October 2019 pursuant to the bond instruments, and Madison subsequently sent a letter of demand to the Company on 14 October 2019. No payment was received by Madison from DQE Mauritius or the Company. Accordingly, on 15 October 2019, Madison appointed Mr Bance and Eanna Brennan as joint receivers and managers over the assets and undertaking of the Company.

26. The intellectual property assets listed in the asset purchase agreement between the Company and Powerkids of 03 July 2020 were sold to Powerkids for US$63,000,000 by the

receiver and manager. This credit bid was set off against the indebtedness of the DQE group to the applicants.

27. In its points of defence, the respondents alleged that the Company's assets were sold to Powerkids at an undervalue and that Powerkids colluded with the receivers and managers. This allegation is robustly rejected by Mr Harris and Mr Bance in their evidence.

28. Mr Bance's evidence was to the effect that he was conscious of the obligation on the receivers and managers to obtain the best price possible for any assets to be sold, and embarked on a sales campaign for the sale of the Company's intellectual property assets. His evidence was that no offer was ever received to acquire the IP assets. Mr Harris' evidence was that the credit bid to acquire the IP assets for US$63,000,000 "was believed to be far in excess of the actual value of the IP assets". Mr Harris states that the reason for this "was to ensure that the receiver and manager was satisfied to accept the credit bid in light of his duty to get the best price obtainable and in circumstances where it was anticipated that the respondents may seek to claim that the IP assets were sold at an undervalue". [Paragraph 7.7 witness statement].

29. At the conclusion of his witness statement, Mr Harris states that, as of 07 March 2022, US$95,183,181.89 remains due and owing by the Company after incorporating interest and default interest. In fact, at the hearing, the applicants sought to limit their claim to a sum of US$30,800,238.92 as the amount in respect of which they urged that the respondents be made personally liable. While I shall refer to this sum in more detail below, it essentially comprises all monies drawn down by DQE group, the capitalised principal and cash interests due under the agreements, together with default interest due in respect of payments not made, less the repayments made by the DQE group from 2014 onwards, with credit being given for the US$63,000,000 credit bid.

Leo Condron

30. Mr Condron is one of two Irish directors of the Company, the other being Dominic Poole, the fifth named respondent. Mr Condron entered into a settlement agreement with the plaintiff, and attended at the hearing of the present application. A witness statement by him was furnished in advance of the trial, and he adopted it as his evidence for the purpose of the hearing.

31. Mr Condron stated that he owned and operated a bookkeeping and accountancy service in County Galway. Mr Condron has now sold the business and is retired.

32. In or around 2010, he was approached by an accountancy firm to become a director of the Company. He was told that the Company was set up in Ireland to avail of "section 50 film relief", and that the Company required Irish directors for this purpose. It was envisaged that he would not have any involvement in the day-to-day running of the Company, but would be required to sign off the audited accounts on a yearly basis.

33. In November 2010, Mr Condron attended a meeting in Salthill, Galway at which he met the third named respondent. Subsequent to that meeting, he was appointed a director, and invoiced for his services as director on a biannual basis.

34. Mr Condron gave evidence that he would be contacted on a yearly basis when the annual audited accounts were prepared, and would meet with Mr Poole to review the auditor's report and sign the accounts. Such a review would generally take an hour to an hour and a half. The draft directors' report and draft auditors' report would be reviewed; no other documents would be reviewed. Mr Condron stated that he never had contact with the Indian-based directors in relation to the accounts. He stated that, before signing the accounts, he would always have had sight of the draft auditors' report; Mazars were the Company's auditors throughout his tenure as director, save for the last year, when it was a different firm.

35. Mr Condron stated that his dealings were "almost exclusively limited to reviewing the draft auditors' report and signing the accounts". He spoke by phone to the second named

respondent shortly after his appointment as director by way of introduction, and only ever spoke to the first named respondent after the receivers were appointed to the Company in October 2019. He spoke only four or five times over the years with the third named respondent in relation to payment of his fees and tax clearance certificates. He states that he was never made aware of any visits by any of the Indian directors – apart from in 2010 – to Ireland in all his years as a director of the Company.

36. Mr Condron stated that he was never invited to, or notified of, or was involved in any directors' meetings. He states that he had no knowledge of the operations or dealings of the Company, and was never sent nor did he view any agreements, contracts, loan documents or other ancillary documents. He states that Mr Poole appeared to be in a similar situation.

37. Mr Condron stated that he had reviewed documentation received on discovery in relation to directors' meetings. Mr Condron stated that, notwithstanding the various minutes of directors' meetings, which purportedly took place either via remote meeting or in person at the Company's registered office, he was given no notification of board meetings, nor did he attend same. He stated that he was not apprised of any of the transactions or arrangements referred to in the various meetings provided under discovery. He stated that he never attended the Company's registered office.

38. He recounted being sent various minutes of "meetings" on 09 September 2019, which meetings purported to have taken place in 2017 and 2018. He contacted Mr Poole in relation to these matters, and ultimately signed the documents and returned them to the Company. He now states that the minutes referred to fictitious meetings for the purposes of retrospectively validating the actions of the Company, and comments in his witness statement that he was "incredibly foolish and naive in signing the minutes, however, I genuinely believed that these were just a box-ticking exercise for compliance purposes".

39. Mr Condron then reviewed a number of minutes of board meetings from February 2012 until February 2018. His consistent evidence was that he did not pass the resolutions referenced in the minutes, nor was he aware of any of the transactions to which the minutes referred. At the conclusion of his witness statement, he stated as follows:

> "For the avoidance of doubt, I did not attend, nor was I invited, to any directors' meetings, nor do I believe that they, in fact, took place. I say and so believe that the meetings referred to were fictitious, and the meetings were created after the fact to retrospectively validate the actions of the directors".

Patrick Bance

40. Mr Bance is a chartered accountant, insolvency practitioner and managing director of the Singapore office of Kroll (formerly known as Borelli Walsh). He was appointed as receiver and manager to the Company by deed of appointment of 15 October 2019.

41. Mr Bance attended at the hearing of the application and gave evidence in person. He also adopted a very comprehensive witness statement as his evidence in support of the application.

42. Mr Bance set out the background to the matter in a manner consistent with the evidence given by Mr Harris. His evidence primarily concerned the engagement and role of Borelli Walsh in relation to its investigations of the affairs of DQE, and his subsequent appointment with Mr Eanna Brennan as receiver of the Company. This involvement commenced with the appointment of Mr Henry Gowing of Borelli Walsh as interim CFO of DQE with effect from 03 October 2016. Mr Gowing was charged with monitoring and reporting on all financial issues relating to the Company. Mr Gowing's appointment and the initial engagement of Borelli Walsh concluded in March 2017.

43. Mr Bance outlined the reengagement of Borelli Walsh in April 2019 by OLM/Powerkids, and the requirement to prepare a proposed enforcement "step plan".

Ultimately, Borelli Walsh issued an assessment report to DQE India and OCP on 01 September 2019. Findings were as set out at para. 23 above and referred to by Mr Harris in his evidence. As a result of these findings, Mr Bance and Mr Brennan were appointed as receivers of the Company the following month.

Failure to keep proper books and records

44. Mr Bance gave evidence that proper books and records were not kept by the Company, and that the respondent had failed or refused to provide him with access to the Company's books and records despite repeated requests. The books and records with which he was furnished were "in many respects incomplete or grossly inadequate". At para. 4.3 of his witness statement, Mr Bance makes a number of particular points in this regard:

(a) There was no evidence of any board meetings being held in respect of the Company. There were no minutes or records of meetings of the Company's board of directors held within the Company's books and records. Board minutes were produced for the first time in the process of discovery from the Second and Third named Respondents. The Board minutes do not appear to have been kept within Ireland as required.

(b) The respondents failed to prepare regular management accounts in respect of the Company.

(c) There is no evidence or evidence or record of the directors having monitored the solvency of the Company or taking any steps in this regard.

(d) The registered office of the Company in Galway was a bare room containing only a handful of documents. Mr Bance avers that the purported board minutes of the Company "were not held at the registered office of the Company or by the secretary, Dominic Poole…".

(e) The respondents have "failed or refused to provide a substantial portion of the Company's books and records, including the Company's general ledger and agreements for the period prior to 01 April 2014, to the receivers and managers". In Mr Bance's view, this rendered it "not reasonably possible" for the receivers to review and investigate the Company's accounts for the five year period up to 01 April 2014.

(f) No or no adequate explanation was provided as to why the existence of agreements in relation to the intangible asset items were only provided to the applicants after the proceedings were issued.

(g) There was insufficient information to assess whether certain intangible asset items met the requirements of the International Accountancy Standard 38 ('**IAS 38'**) in order to be recognised as intangible assets.

(h) The respondents were in breach of their duty to provide the receiver with all books and records relating to the Company.

(i) It appeared that substantial amounts of intangible assets represent production costs being recognised as "series in production" and "IP copyright" that were paid to DQE India and other production service companies, in circumstances where there was no sufficient or any documentation supporting the basis and making of these payments.

(j) As a result of this, Mr Bance was unable to properly verify the validity of any arrangements that may have been entered into by the Company, the validity of any payments made, or the associated value of the Company's purported intangible assets.

(k) The respondents failed or refused to provide the receivers and managers with any or any material books and records or information in respect of a related entity, **"DQ Entertainment Ireland Dubai Branch".**

(l) There was no evidence to indicate the basis for the auditor's opinion that the accounting records were sufficient to permit the financial statements to be readily and properly audited.

(m) Staff at the office of DQE India, including the first and third named respondents, initially refused to assist with the provision of the Company's books and records to representatives of the receivers.

45. Mr Bance did not accept that the reasons certain records were not available was because the Company was only required to retain records for a certain number of years. He expressed the view that where a company has live, active and enforceable contracts that have not yet been completed or expired, or where a contract is the basis for the carrying value of an asset or a liability on the balance sheet, that contract or agreement should be held with the Company's books and records. Mr Bance was dismissive of the suggestion that live contracts could be destroyed on the basis that regulations permitted such destruction.

46. Mr Bance also did not accept the claim of the respondents that a fire at DQE India's office in India had destroyed many of the Company's records and the servers which stored the information. He pointed to the ability of the Company, notwithstanding the fire, to be in a position to produce agreements during the proceedings that were not initially made available. The fire purportedly occurred on 06 May 2018 and was reported by the owner of the building as suspicious; the Company was also in a position to retain new auditors shortly after the fire who had sufficient information to enable them to prepare audited accounts for the period 31 March 2018, notwithstanding the fire.

47. Mr Bance stated that, in these circumstances his belief was that the Company has:

"(a) failed to keep adequate accounting records, in breach of s.281 of the Act;

(b) failed to maintain accounting records that are sufficient to correctly explain and record the transactions of the company, in breach of s.282 of the Act;

(c) failed to maintain accounting records that are sufficient to enable, at any time, the assets, liabilities, financial position and profit or loss of the company to be determined with reasonable accuracy, in breach of s.282 of the Act;

(d) failed to maintain accounting records that are sufficient to enable the financial statements of the Company to be prepared and audited, in breach of s.282 of the Act;

(e) failed to maintain accounting records that are sufficient to correctly explain and record the transactions of the Company, in breach of s.282 of the Act;

(f) failed to maintain accounting records on a continuous and consistent basis in accordance with s.282(2) of the Act;

(g) failed to maintain accounting records containing all of the matters prescribed in s.282(3) of the Act;

(h) failed to keep its accounting records at its registered office or other location within the State, in breach of ss. 282 and 283 of the Act;

(i) failed to make its accounting records available to the Receiver in breach of s.284 of the Act; and

(j) failed to retain adequate accounting records or information, in breach of s.285 of the Act." Para. 4.7 witness statement].

48. Mr Bance's evidence was that these breaches contributed to the Company's inability to pay its debts, resulted in substantial uncertainty as to the assets and liabilities of the Company, resulted in him being unable to establish with certainty the financial position of the Company, "substantially impeded the receivership of the Company", inhibited him from

taking control of, valuing and selling the intangible assets of the Company, and increased the cost of the receivership: see para. 4.9 of his witness statement.

The Company's insolvency

49. Mr Bance expressed the view that the Company is "grossly insolvent", and that the principal reason for it not being wound up was the insufficiency of assets. He stated that there were no material unencumbered assets for any liquidator to realise to cover his or her costs in conducting a liquidation. He acknowledges that the respondents suggested in pleadings that it is the actions of OLM and Mr Bance himself which have caused the Company to be in a position where it cannot meet its debts and liabilities as they fall due, by reason of seizing control of the Company and selling the Company's assets at an undervalue. Mr Bance states that this argument "is an assertion that is unsupported by any evidence and inconsistent with all of the objective facts" [para. 5.3 witness statement].

50. At para. 5.4 of his witness statement, Mr Bance sets out the matters which indicate that the Company is grossly insolvent. The respondents themselves filed a statement of affairs as of 15 October 2019 which estimated a balance sheet deficit of €87,373,650. the Company has failed on multiple occasions to make payments in respect of the bond instruments, and is indebted to the first and third-named applicants in a sum in excess of US$52.9m excluding costs and interest. The audited financial statements for 2017 and 2018 show substantial balance sheet deficits, and in any event – according to Mr Bance – present "an inaccurate and overly favourable view of the Company's financial position". the Company has operated at a loss every year since 31 March 2015 according to its own filed audited financial statements. Those statements acknowledge that the Company is dependent on ongoing financial support from its parent DQE India. However, that company is unable to provide any financial support to the Company, and is itself trading at a loss.

Sales of intellectual property assets

51. In his evidence, Mr Bance addressed the allegation by the respondents that the Company's assets had been sold at an undervalue. He confirmed that the intellectual property assets ('IP assets') were sold by him for US$63m to Powerkids. This agreement followed an extensive campaign to attract a purchaser for those assets. Mr Bance pointed out that, in their own filed statement of affairs prepared following his appointment, a realisable value was placed by the respondents on the IP assets of €48,387,068 (equivalent to US$53,385,452 as of 15 October 2019). In fact, in the Company's latest available audited accounts for the year ended 31 March 2018, the net book value of IP assets amounted to €31,831,368.

52. Mr Bance set out the steps he took to market and sell the Company's assets, which involved a targeted approach to potential buyers in the market. While expressions of interest were received from certain parties, no offer was made to acquire the IP assets. Mr Bance stated that it was clear from the sales process that there was no third-party interested in acquiring the IP assets, and in those circumstances he decided to sell the IP assets to Powerkids. He expressed the view that the offer of $63m was in excess of the value of the IP assets, and accepted it as the best price reasonably obtainable. The sale price was settled by way of credit bid and deducted from the total debt owing by the Company to Powerkids.

Artificial inflation of the Company's intangible assets

53. Mr Bance stated that the books and records made available to him contained very little meaningful information for the period prior to 01 April 2014. This caused considerable difficulty in verifying the cost and net book value of individual intangible asset items. He reviewed the Company's audited accounts for the years ended 31 March 2013 to 2018, and noted that the Company's intangible assets included the cost of distribution rights, advances paid for distribution rights, IP and direct/indirect and subsequent expenditure incurred on film production projects under development.

54. In his evidence, Mr Bance set out the cost and net book value of the Company's intangible assets according to its audited financial statements and trial balances at each period end. He compared this with his estimate of the actual value of the relevant assets, based on a review carried out by him and his team. In the year 2014, the value of the Company's intangible assets as per the Company's accounts was €43.3m. Mr Bance and his team, after reviewing the available information, estimated this value to be overstated by €17m. The receiver estimated the overstatement for 2015 to be €16.1m; between 2016 and 2019, the overestimation of the value of the Company's IP assets in the accounts ranged from €35.2m to €31m. A trial balance to 30 September 2019 suggested that the value as per the Company's accounts as of that date were €70.8m, which the Receiver estimated was an overestimate of €31.7m, with the IP assets having a true value of €39.1m.

55. Mr Bance's evidence was that many of the Company's intangible assets had no material value and had values that were grossly overstated. The inclusion and recognition of the assets at these inflated values increased the size and value of the Company's assets on its balance sheet, and enabled the Company to access and draw down funds which would not have otherwise been available to it.

56. The Company had recorded in its books as of 30 September 2019 assets with a value attributed to them of €95,000,397, which after provisions for amortisation and impairment had a value of €70,758,601. The bulk of these assets was comprised by the following projects:

	€
Jungle Book	36,248,665
Peter Pan	20,637,290
The Psammy Show	9,004,360
Lassie the Dog	4,977,969

Robin Hood	4,159,021
Miraculous Season 2&3	2,695,450
Toadily Awesome	2,508,589

57. In his evidence, Mr Bance set out the matters to be addressed by IAS 38 in relation to intangible assets and how they are to be valued. Importantly, this standard provided that intangible assets arising from development could only be recognised if an entity could demonstrate all of the following:

> "(a) the technical feasibility of completing the intangible asset so that it would be available for use or sale;
>
> (b) its intention to complete the intangible asset and use or sell it;
>
> (c) its ability to use or sell the intangible asset;
>
> (d) how the intangible asset will generate probable future economic benefits;
>
> (e) the availability of adequate technical, financial and other resources to complete the development and to use or sell the intangible asset; and
>
> (f) its ability to measure reliably the expenditure attributable to the intangible asset during its development."

58. Mr Bance expressed the view that the information available to him indicated that the Company had significantly inflated its intangible assets through the use of agreements with third parties which purportedly granted intellectual property rights but which, in fact, did not confer any material meaningful rights or benefits on the Company, or alternatively conferred rights or benefits of limited value.

59. Further, many of the intangible assets included on the Company's balance sheet did not meet the IAS 38 requirements set out above. Mr Bance pointed to a lack of documentation, agreements or information available to verify the nature, balances and value of those assets. He indicated that many of the Company's intangible assets had no underlying

documentation, agreements or information verifying the existence of the IP assets carried in the accounts, nor was he able to locate the final products that were supposed to be developed from those IP assets.

60. In his evidence, Mr Bance set out at length his findings and his assessment of the extent to which the valuation of assets failed to meet the standards of IAS 38. In particular, he identified three co-production agreements in 2014 and 2015 with Method Animation AS ('**Method**') a French animation business. Mr Bance concluded that these agreements, which required contributions of $2.5m, €2.8m and €3.526m to be made by Method, were falsified; Method had confirmed to the Receiver that it had no knowledge of these agreements and had never signed them. the Company did not have the employees to deliver the production services referred to in the purported agreements, nor was there any reason for Method to engage and pay the Company or DQE India for these services.

61. Mr Bance also gave evidence that the Company created structures in relation to the development of various series, and in particular Jungle Book, Peter Pan and Lassie the Dog. These structures enabled the Company to immediately record intangible assets on its balance sheet, and show production income being generated while the Company developed its own animation series. This was done by means of licencing each production of a series to a special purpose vehicle ('**SPV**') or shell company. The SPV would in turn enter into service agreements with DQE India and the Company for the production of the series. the Company would also enter into a distribution agreement with the SPV whereby it paid a minimum guarantee for the distribution rights to the SPV. The amount paid as a minimum guarantee could then be reflected as an intangible asset on the Company's balance sheet.

62. Effectively, the structure allowed the Company to record immediately valuable intangible assets rather than cash on its balance sheet, and allowed the Company and DQE India to recognise income over the course of a TV series development. Minimum guarantee

amounts used in respect of Jungle Book, Peter Pan and Lassie the Dog appear to have been grossly overestimated. In order to record the minimum guarantee amounts in its balance sheet, the Company would need to have been able to demonstrate future economic benefit. There was evidence however of minimum guarantee amounts of approximately €33 million being paid to SPVs in circumstances where there was no evidence that estimated future production costs and distribution revenue would be increased. Mr Bance's evidence was that only €24.6 million was repaid by those SPV's in production service fees to the Company, so that the net transfer out of the Company in respect of those three series was €8.45 million: see Mr Bance's witness statement at para. 7.35.

63. Mr Bance sets out in his witness statement very considerable detail of his analysis of the overstatement of the intangible assets as of 30 September 2019.

64. He also sets out details of other alleged assets in respect of which there was no information or evidence to support what the items were, or whether they met IAS 38's requirements for being recognised as intangible assets. Mr Bance comments in his witness statement as follows:

> "7.103 Given the extent by which the value of assets was overstated, the number of years for which this persisted, and the number of assets to which these issues related, this in my view could not have been attributable to isolated errors or inadvertence by the respondents. The management of the Company must have known that the Company's accounts did not present an accurate picture of the value of their assets. In my view, it must have been the case that the Company's management adopted a strategy of presenting information in the Company's accounts which made the Company's financial position appear far stronger than was actually the case, and which they knew was inaccurate and misleading".

65. Mr Bance also expresses the view in relation to other intangible asset items that "…there is insufficient information to assess whether they met the IAS 38's requirements for being recognised as intangible assets, and whether such amounts at each period/year end were recorded correctly, and whether the impairment and depreciation were reasonable given the questions with regard to the reliability of the estimated future economic benefits raised above" [para. 7.104 witness statement].

Artificial inflation of trade receivables

66. The trade receivables of the Company, which are an asset on the Company's balance sheet, mainly comprised distribution revenue due from various debtors. Mr Bance referred to a number of matters which gave rise to very serious concerns that the Company's trade receivables had no material value, had values that were grossly overstated, or did not exist. The effect of the inclusion in the Company's accounts of these receivables, and the sales to which they related, was to make the Company's revenue and assets appear higher than was in fact the case.

67. In relation to the audited financial statements as of 31 March 2016, the auditor considered a provision of $8.8m, representing 85% of the gross trade receivables of $10.4m, should be made. In the financial statements for the following year, the directors of the Company recognised full provisions for the uncollected trade receivables relating to the balances in existence at 31 March 2016. Effectively, the vast majority of the relevant "debts" allegedly owed to the Company was written off by the directors.

Further misapplication of company assets

68. Mr Bance refers to a co-production agreement in relation to "Miraculous" season 2 and 3 between Method, Zagtoon and the Company under which the Company was required to make a financial contribution of US$2.5m to Method for its participation and share of rights in the Miraculous season 2 and 3 series. There was subsequently a cancellation agreement

provided by Method to the Receiver, in which the Company decided not to pursue the co-production and the agreement was deemed void upon reimbursement of the financial contribution by Method to the Company.

69. The Company drew down US$2.5m under the bond instruments to perform the co-production agreement. The agreement however was cancelled almost immediately after receipt of funds; notwithstanding that, the Company diverted US$1.5m of the funds to DQE India and received no or no adequate benefit in return; failed to reflect the cancellation of the agreement in its accounts and consequently overstated the value of its intangible assets; failed to inform the secured creditor of the cancellation of the agreement; and failed to repay the money borrowed from the secured creditor. The receiver expresses the view that the Miraculous co-production agreement was a sham agreement that was put in place simply to enable the Company and DQE India to extract monies from OLM to use in a manner not approved by OLM. Method confirmed to the Receiver that the co-production agreement was cancelled and the full amount of US$2.5m repaid, albeit with US$1.5m paid directly to DQE India at the request of the first named respondent.

70. Mr Bance gave evidence that the Respondents caused the Company to make "approximately 43 different payments" to DQE India totalling €9,489,490 between April 2014 to 30 September 2019, details of which are set out at para. 9.7 of his witness statement. He stressed that … "[b]ased on the books and records made available to me, including through discovery, there was inadequate documentation supporting the making of any of these payments". [para 9.8 witness statement].

71. The Receiver states that the respondents caused the Company to make payments totalling €12,474,639 to Lifeboat Distribution DMCC ('**Lifeboat**') (a United Arab Emirates company) across forty-one payments between January 2015 and March 2018 for which there was "no valid or no adequate commercial purpose". The Receiver was unable to find any

adequate supporting invoices or agreements justifying the making of these payments, which in his view constituted a misapplication of the Company's money.

72. The Receiver gave evidence that the respondents caused the Company to make payments totalling €5,834,956 to a company called "Sunsky" by means of twenty-five payments between April 2014 and May 2016 for which there was no discernible or adequate commercial purpose. As with Lifeboat, there were no supporting invoices or agreements justifying the making of the payments, including in the respondents' discovery. The Receiver is of the view that these payments also constitute a misapplication of the Company's money.

Trading while insolvent

73. Mr Bance is of the view that the Company has been insolvent since at least 31 March 2017. His evidence is that the Company continued to trade while insolvent until his appointment as Receiver and manager in October 2019. the Company's balance sheet position suggested that the Company made substantial profits in the years 2014, 2015 and 2016, but made losses of €4.1m and €6.2m in 2017 and 2018. As we have seen, the Receiver is of the view that these figures must be adjusted in view of what he considers to be the substantial overstatement of intangible assets. His evidence is that, after adjustment of the figures in the audited accounts, the Company had net liabilities of €13.2m in 2016, €35.2m in 2017, and €41.4m in 2018, with an estimated trial balance loss of €30.4m in 2019.

74. The Receiver points out that he does not have sufficient information to estimate the amount of the overstatement in trade receivables, but given the overstatement of the value of the Company's assets, the Company's true financial position "was significantly worse than that shown in its financial statement" [para.10.4].

75. As Mr Bance puts it at para. 10.5 of his witness statement:

> "According to its own financial statements, the Company has been operating at a loss since 31 March 2015 and continued to operate at a loss again in 2016, 2017, 2018 and

> 2019. The turnover of the Company has been declining every year since the year ended 31 March 2014. As turnover declined, the Company's losses have increased significantly. Even based on its own accounts, the Company made losses of more than €34.4m in the five years to 31 March 2019…"

76. Mr Bance addresses the relationship with DQE India, pointing out that the Company's 2016, 2017, and 2018 audited financial statements noted that the Company "is dependent on funds provided to it by DQE India", but stated that the directors were "satisfied the parent will continue to make available such funds as are needed by the Company". Mr Bance characterises the respondents' continued reliance on DQE India's ability to fund the Company as "unreasonable and reckless", given that DQE India itself operated at a loss for the years 2017 and 2018 and defaulted on certain of its loan obligations during this time.

77. The Receiver comments that it appears that at no point after the Company began operating at a loss in 2015 did the respondents take additional steps to monitor the Company's insolvency position, consider putting the Company into liquidation, or give proper consideration to how allowing the Company to continue to trade at a loss might detrimentally impact creditors of the Company. The respondents failed to arrange for regular management accounts to be prepared and, as we have seen, there is no evidence, or any adequate evidence, of board meetings being held during this period.

78. The Receiver comments that there was no sufficient separation or distinction made between the business and affairs of DQE India and the Company, and that the directors of DQE India made the majority, if not all, of the decisions regarding the Company. As a result of that approach, the Receiver is of the view that the interests of DQE India were at all times given priority to the interests of the Company. The first, second and third respondents were, at all material times, directors of both companies. They also each held executive management positions in DQE India.

Declaration of solvency without reasonable grounds

79. Mr Bance stated that, on 12 January 2018, the first, second and third named respondents made a declaration of solvency in respect of the Company for the purposes of compliance with, *inter alia*, ss. 82, 202 and 203 of the Act. In the declaration, they averred that they had made a full inquiry into the affairs of the Company and had formed the opinion that the Company would be able to pay its debts and other liabilities in full as they fell due during the subsequent twelve-month period. In relation to the declaration of insolvency, Mr Bance states as follows at para. 12.2 of his witness statement:

> "The first, second and third named respondents made that declaration without having reasonable grounds for the said opinion. I believe that the said respondent[s] did not have reasonable grounds for that opinion for the reasons set out in detail above, and in particular the following:
>
> (A) the Company had operated at a loss during the period from 2015-2018.
>
> (B) in the Company's audited financial statement for the year ended 31 March 2017, the Company had net liabilities of €4.1m. the Company made a loss of €23.1m.
>
> (C) in the Company's audited financial statement for the year ended 31 March 2018, the Company had net liabilities of €6.2m. the Company made a loss of €2.1m.
>
> (D) the Company in its audited financial statements for the year ended 31 March 2017 and 31 March 2018 indicate that it was reliant on parental support from DQE India in order to continue to trade as a going concern and that it was actively looking to refinance and restructure its debts. DQE India itself operated at a loss for the years 2017 and 2018 and defaulted on certain of its loan obligations during this time. The respondents were or should have been

aware of the difficulties also faced by DQE India and its inability to fund or support the Company.

(E) the Company had been unable to find a willing lender to refinance its debt.

(F) all of the other facts referred to herein [in the witness statement]".

Evidence of service on the respondents

80. Mr Harris, Mr Condron and Mr Bance all gave evidence to the court. Each of them adopted their respective witness statements as their evidence for the purpose of the trial. As the respondents did not attend the hearing of the application, none of the witnesses was examined on their evidence.

81. The applicants proffered an affidavit of service to establish that the respondents were aware of the application and had been properly served. The affidavit was sworn by Andrea Brennan, a solicitor employed by the firm of solicitors acting on behalf of the applicants.

82. Ms Brennan averred that the respondents were represented by a prominent firm of solicitors and counsel from the initiation of the proceedings; however, a notice of discharge of those solicitors of 22 September 2021 was delivered by the respondents. At that point, the pleadings had closed, and the respondents commenced to represent themselves and proceeded with the process of exchanging discovery requests.

83. Ms Brennan avers that the respondents attended at remote hearings of the Court and complied with directions laid down subject to certain agreed and approved revisions. The first respondent, Ms Rashida Adenwala, was the respondent that interacted most with the court and through correspondence on behalf of the respondents. On 04 October 2021, when the matter first appeared before the court following the notice of discharge, Ms Adenwala attended and indicated to the court that the second and third respondents were not available to attend but that she was appearing on their behalf. It appears that Ms Adenwala continued to

sign letters which conveyed that she was acting on behalf of all the respondents. The third named respondent, Mr Choudhary, continued to be emailed by the solicitors for the applicants.

84. Mr Choudhary resigned as a director of the Company on 24 October 2020, the day after the present proceedings were initiated. He did not swear an affidavit of discovery, and in this regard, the first named respondent, by letter of 11 April 2022, stated as follows:

> "I confirm that no affidavit has been delivered by Sanjay Choudhary, I have taken all reasonable steps to communicate with Sanjay but have been unable to obtain a response. In any event, Sanjay has been joined to these proceedings in his capacity as a director for which I have no responsibility".

85. The third respondent did not produce a witness statement despite being copied on all relevant correspondence in this regard.

86. A remote hearing in relation to the matter was held on 09 May 2022. On that date, the first and second respondent attended court but only the first respondent addressed the court. An application was made by the first respondent to postpone the trial to enable the respondents to obtain legal representation. At that stage, the date for the hearing of the application – 28 June 2022 – had been given, and the High Court (McDonald J) refused the application for the adjournment and confirmed that the application would go ahead on the appointed date.

87. There was a further remote hearing on 30 May 2022 at which none of the respondents was present at first call. The first respondent attended remotely on second call and addressed the court. It was ordered that the trial be a physical hearing, and McDonald J – according to Ms Brennan – "made it clear that the respondents needed to be present in person at the trial". The question of mediation or settlement was raised, but the court made it clear that any such

negotiations must run alongside trial preparations and that the hearing must proceed on 28 June 2022.

88. The applicants' solicitors wrote by letters of 01 June 2022 and 13 June 2022 confirming that the trial was set for 28 June 2022 and would take place by means of a physical hearing to which the respondents would be required to attend in person. In the latter communication, the applicants' solicitors enclosed proposed draft indices to the trial booklets and again referred to the trial date and the requirement that the respondents attend in person. This letter was emailed to all of the respondents.

89. By a further letter of 15 June 2022, Ms Brennan wrote to the respondents seeking their legal submissions, the date for delivery of which had passed. There was a response of 16 June 2022 received by email from the first and second respondents. The email was marked "without prejudice", and Ms Brennan therefore does not refer to its contents, but stated that "…the content of the letter made clear that the first and second respondents did not intend to deliver written legal submissions or any further witness statements". By letter of 17 June 2022, the applicants' solicitors informed the solicitors of the date and time of the callover list being held on 24 June 2022 and the requirement that they attend. A link to the remote hearing of this list was provided in the letter. Ms Brennan avers that no response was received to this letter.

90. Ms Brennan's affidavit, sworn by her on 27 June 2022, sets out her belief that the first and second respondent "are fully aware that the within proceedings are listed for trial on 28 June 2022. I further say and believe that Mr Justice McDonald made it very clear to the first and second respondents that the trial would go ahead on this date and there would be no adjournment or postponement given".

91. In relation to the position of the third respondent, Ms Brennan avers as follows:

> "19. I say and believe that the third respondent has been attempting to distance himself from the Company, and its affairs, since the initiation of the proceedings. That said, he, together with the other respondents, was represented by solicitor and counsel until September 2021 and he signed the notice of discharge. Since that date, Mr Choudhary has been copied on all correspondence related to the proceedings to his Yahoo email address. I say and believe that this is the third respondent's address. I say and believe that the third respondent has received my emails and letters but this has not prompted him to engage with the proceedings. For completeness, I should say that at no time has the third respondent indicated that he had an illness or other difficulty that might mean he was not capable of defending the proceedings."

92. In the circumstances, I am satisfied that each of the respondents was aware of the various steps leading up to the hearing, of the arrangements it was necessary to make to prepare for the hearing, of the date of the hearing itself, and of the necessity to appear in person to contest the applicants' application. I do not consider that there is any basis for differentiating the position of the third respondent from that of the first and second respondents. The evidence establishes that each of the respondents chose not to contest the application.

93. In those circumstances, the evidence presented by Mr Harris, Mr Condron and Mr Bance is uncontested. I should say that, although their evidence was not tested by cross-examination, each of the witnesses appeared to me to give their evidence honestly and in a forthright manner, and I have no reason to doubt the veracity or reliability of their evidence.

Application of Companies Act provisions to the facts

94. As is clear from the reliefs set out at para. 8 above, the applicants claim to be entitled to declaratory relief arising from the application of various provisions of the Companies Act 2014 ('the Act') to the facts of the matter as set out above. While many of the reliefs sought

are normally appropriate to insolvent liquidations, the applicants contend that s.567 of the Act applies certain provisions of the Act to insolvent companies which are not in liquidation.

95. Section 567(1), in as far as relevant, is as follows:

> "This sections applies in relation to a company that is not being wound up where - … (b) it is proved to the satisfaction of the court that the company is unable to pay its debts, taking into account the contingent and prospective liabilities of the company, and …it appears to the court that the reason or the principal reason for its not being wound up is the insufficiency of its assets".

96. Section 567(2) provides that, in such a case, "…the sections specified in the Table to this section apply, with the necessary modifications, to a company to which this section applies, notwithstanding that it is not being wound up". The table to which the subsection refers includes the following:

"Section 609	Personal liability of officers of company where adequate accounting records not kept.
Sections 610 and 611	Civil liability for fraudulent trading.
Section 612	Power of court to assess damages against certain persons…".

97. It is clear that s.567 applies to the Company, as the Company is clearly "unable to pay its debts", this being proved to the satisfaction of the court. In addition, it is clear that "the reason or the principal reason for its not being wound up is the insufficiency of its assets". As the applicants point out, "[s]ubstantially all of the Company's assets are secured…[i]n any winding up, there would be no assets, no possibility of distribution to unsecured creditors and no way to discharge a liquidator's fees"… [para. 22 written submissions].

Section 610 – personal liability for reckless trading

98. Section 610 of the Act gives the court power to make directors personally liable for reckless or fraudulent trading. The court may exercise this power "…if …it appears that… (a) any person was, while an officer of the company, knowingly a party to the carrying on of any business of the company in a reckless manner…". In such a case, the court has power to declare, if it thinks it proper to do so, "…that the person first-mentioned in para. (a)…shall be personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct…" [s.610(2)].

99. Section 610(3) provides that, without prejudice to the generality of sub. (1)(a)

> "…An officer of a company shall be deemed to have been knowingly a party to the carrying on of any business of the company in a reckless manner if –
>
> (a) the person was a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his or her position, the person ought to have known that his or her actions or those of the company would cause loss to the creditors of the company, or any of them, or
>
> (b) the person was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts (taking into account the contingent and prospective liabilities)".

100. Section 610(4) provides that a court may not impose liability for reckless trading unless (a) the company is insolvent within the meaning of s.570 of the Act and (b) "an applicant for such a declaration, being a creditor or contributory of the company or any person on whose behalf such application is made, suffered loss or damage as a consequence of any behaviour mentioned in sub. (1)."

101. As s.610(3)(a) makes clear, it is not necessary to establish that the director was actually aware that loss would be caused to creditors ("…the person ought to have known that his or her actions or those of the company would cause loss…"). As Hogan J held in *Re Appleyard Motors Limited (in voluntary liquidation)* [2016] IECA 280 in relation to s.297A(2) of the Companies Act 1963 as amended "…the court must be satisfied that the officer of the company in question ought to have known that this conduct would cause the creditor loss. It is not enough to show that this *might* have occurred: the loss to the creditor must have been foreseeable to a high degree of certainty…" [italics in original] [para. 52 of judgment]. The test under 610(3)(b) also has an objective element ("…did not honestly believe on reasonable grounds that…").

102. Section 610(8) of the Act is as follows:

> "(8) Where it appears to the court that any person in respect of whom a declaration has been sought on the grounds set out in subsection (1)(a) has acted honestly and responsibly in relation to the conduct of the affairs of the company or any matter or matters on the ground of which such declaration is sought to be made, the court may, having regard to all the circumstances of the case, relieve him or her either wholly or in part, from personal liability on such terms as it may think fit."

103. In this regard, the applicants cite the decision of Finlay Geoghegan J in *Re PSK Construction* [2009] IEHC 538, in which the respondent was aware that the company was in financial difficulty but nevertheless caused it to continue trading and to under-declare tax liabilities. The court referred to the decision of Lynch J in *Re Hefferon Kearns Limited (No. 2)* [1993] 3 IR 191, as "the principal authority on reckless trading", a decision which concerned the interpretation of s.33 of the Companies (Amendment) Act, 1990, framed in materially identical terms to s.297A of the 1963 Act, the statutory predecessor of s.610(1)(a).

In that case, Lynch J referred to the use of the term "knowingly" in s.33(1)(a) and stated that this subsection

> "…must have been intended by the Oireachtas to have some effect on the nature of the reckless conduct required to come within the sub-section. I think that its inclusion requires that the director is party to carrying on the business in a manner which the director knows very well involves an obvious and serious risk of loss or damage to others, and yet ignores that risk, because he does not really care whether such others suffer loss or damage or because his selfish desire to keep his own company alive overrides any concern which he ought to have for others" [p.222 of judgment].

104. In *PSK Construction*, Finlay Geoghegan J, having reviewed the judgment of Lynch J in *Hefferon Kearns* stated as follows:

> "30. I am satisfied, in respect of Mr. Killeen, that the applicant has established, as a matter of probability, that Mr. Killeen must have known, in March 2005, that if he continued to keep the company trading by under-declaring and under-paying to the Revenue Commissioners, that such decision involved an obvious and serious risk of loss or damage to creditors of the company. It is always dangerous for a Court to examine with the benefit of hindsight decisions taken by directors of a company at the relevant time. I have reached this conclusion taking into account what Mr. Killeen acknowledges he knew at the relevant time...
>
> 31. Whilst I accept Mr. Killeen's averment that, at the relevant time, he intended the under-declarations and under-payments to be a temporary measure, until, as he states, cash-flow problems were sorted out, I am not satisfied that he then had any reasonable basis for a belief that this might only be a temporary measure. He must have been aware that the decision he made involved a serious risk of loss or damage to others and decided to ignore that risk because of his desire to keep the company alive…".

105. Section 610(1)(b) provides that fraudulent trading occurs where "…any person was knowingly a party to the carrying of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose". It thus must be shown that the relevant director was "knowingly a party to the carrying on of any business of the company", and that the director acted either "with intend to defraud creditors of the company", "with intent to defraud…creditors of any other person", or for any fraudulent purpose". The "intent to defraud" or "fraudulent purpose" can be inferred by the court from the circumstances of the case.

106. For instance, in *Re Aluminium Fabricators Limited* [1985] ILRM 399, directors of the company kept two separate sets of accounts, one for their own use and the other for production to the Revenue Commissioners. Accounting records disappeared in the course of the liquidation. Cash transactions were never declared. Cash was lodged to offshore accounts held by the directors. The directors purchased vehicles for their personal use using company money. As O'Hanlon J concluded at p.17 of his judgment:

> "The privilege of limitation of liability which is afforded by the Companies Act in relation to companies incorporated under the Act with limited liability, cannot be afforded to those who use a limited company as a cloak or shield beneath which they seek to operate a fraudulent system of carrying on business for their own personal enrichment and advantage".

107. Likewise, in *PSK Construction,* Finlay Geoghegan J found that a director who had knowingly under-declared amounts due to the Revenue Commissioners had done so for a fraudulent purpose.

108. The applicants submit that the power to impose personal liability for reckless and fraudulent trading under s.610(2) of the Act is warranted, and that it is "very clear" that the

directors are guilty of reckless and fraudulent trading. They contend in particular that the directors:

> "(A) Fraudulently recorded millions of euro of trade receivables which did not exist.
>
> (B) Implemented a contrived series of transactions with connected entities and inflated the value of the Company's intangible assets and facilitated the diversion of millions of Euro to connected parties.
>
> (C) Continued to recognise tens of millions of euro in intangible assets and failed to impair those assets where, as the directors must have known, there was no realistic possibility of those amounts being recovered.
>
> (D) Misapplied millions of euro in the Company's money, including money borrowed by the applicants, by making payments to related companies for which there was no justification and which conferred no apparent benefit on the company.
>
> (E) Continued to trade the Company, and continued to borrow, when the directors must have known (or at least ought to have known) there was no possibility of the Company repaying its debts in full.
>
> (F) Falsified documents, including board minutes and alleged co-production agreements with Method." [Paragraph 44 written submissions].

Power of court to assess damages on other grounds: section 612

109. Section 612 sets out other circumstances in which the court may make orders that certain persons repay, restore or contribute certain sums to the assets.

110. The court has power to make an order under s.612(2) where, *inter alia*, a promoter or officer of the Company has "misapplied or retained or become liable or accountable for any money or property of the Company", or is guilty of "any misfeasance or other breach of duty or trust" in relation to the Company.

111. The applicants submit that the section provides "…a summary form of remedy for the recovery of monies which the persons in this section would in any event be liable to repay, or account for, to the company" [see *Re Greendale Developments (No. 2)* [1998] 1 IR 8 (Keane J)]. They submit that, in examining the duties of directors the breach of which may give rise to orders under s.612, the court should have regard to the principal fiduciary duties of directors set out in s.228(1) of the Act. It is submitted that these include the duties to:

> "(a) act in good faith in what the director considers to be the interests of the Company;
>
> (b) act honestly and responsibly in relation to the conduct of the affairs of the Company;
>
> (c) act in accordance with the Company's constitution and exercise his or her powers only for the purposes allowed by law;
>
> (d) not use the Company's property, information or opportunities for his or her own or anyone else's benefit unless –
>
> > (i) this is expressly permitted by the Company's constitution or
> >
> > (ii) the use has been approved by a resolution of the Company in general meetings;
> >
> > …
>
> (f) avoid any conflict between the director's duties to the company and the director's other (including personal) interests unless the director is released from his or her duty to the company in relation to the matter concerned, whether in accordance with provisions of the company's constitution in that behalf or by a resolution of it in general meeting;
>
> (g) exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person, having both –

(i) the knowledge and experience that may reasonably be expected of a person in the same position as the director; and

(ii) the knowledge and experience which the director has;" …

[Emphasis as inserted by applicant in para. 50 of written submissions]

112. In the present case, the applicants emphasise the duty on the respondents regarding financial statements pursuant to s.290 of the Act, and in particular the responsibility of the directors of a company to prepare them in accordance with applicable accounting standards: see s.290(4) of the Act. The applicants lay particular emphasis on s.289(1) of the Act, which provides that:

"(1) The directors of a company shall not approve financial statements for the purposes of this part unless they are satisfied that they give a true and fair view of the assets, liabilities and financial position, as at the end of the financial year, and profit or loss, for the financial year…".

113. The applicants submit that it is manifest that the respondents have breached their duties in this regard. The applicants also submit that it is evident that the directors have caused the Company to misapply money, in which case it is appropriate that the recipient be treated as a constructive trustee and liable to account to the Company: see *Re Frederick Inns* [1994] 1 ILRM 387. The applicants also submit that the evidence "…makes very clear that the directors are guilty of breach of duty, breach of trust, and misapplication of company money. They have diverted millions of euro in cash from the Company to connected parties, without any valid basis for doing so" [para. 57 written submissions].

Accounting records

114. Chapter 2 of part 6 of the Act deals with the obligations of the company and its officers in relation to accounting records. Section 281 simply states that "a company shall keep or cause to be kept adequate accounting records". Section 282 outlines the "basic

requirements for accounting records"; s.283 deals with "where accounting records are to be kept"; s.284 addresses "access to accounting records"; and s.285 deals with "retention of accounting records".

115. In *Re Rayhill Property Company* [2003] 3 IR 588, Smyth J adopted the principles set out in *Maloc Construction Limited (in liquidation) v Chadwick* [1986] 3 NZCLC 99 as follows:

> "These accounting records every company must cause to be 'kept'. It has been held by the Court of Appeal in *R v. Bennett & Anor.* [1985] 2 NZCLC 96-034 that the word 'kept' is not limited to retaining or storing such records as happen to come into possession. It imports as well the obligation to create those records necessary to conform to the description in subss. (1) and (2) which are not already in existence and retained.
>
> The records must speak for themselves. They must, without more, do or enable to be done, the matters spelt out in the four paragraphs of subs. (1). It does not avail a company to say, as was said here, that those objectives could be achieved by reference to the accounting records available, plus further information and explanations that can be furnished by a company officer or employee.
>
> The records themselves do not have to show the financial position of the company. They must be such that they will, at any time, enable that position to be determined. This requirement is not complied with if the company keeps only basic accounting records such as chequebooks, deposit books, bank statements, invoices and the like. It may be that using such basic records an accountant could construct further records that would enable the financial position of the company to be determined. But the section requires that this basic accounting information should be assembled and

recorded in such a way that the record itself will not only enable the financial position to be determined, but will enable that to be done at *any* time…"[italics in original].

116. The applicants submit that no computer server necessary to access accounting records was kept in Ireland, contrary to s.282(6) of the Act. Any records that existed were kept in India; there was no attempt to comply with s.283(2) which requires that, if accounting records are kept at a place outside the State "…there shall be sent to and kept at a place in the State such information and returns relating to the business dealt with in the accounting records so kept as will – (a) disclose with reasonable accuracy the assets, liabilities, financial position and profit or loss of that business at intervals not exceeding six months, and (b) enable to be prepared in accordance with this Part…the company's statutory financial statements required by section 290 or 293 and the director's report required by section 325".

117. It is submitted that, contrary to s.284, the Company did not make its accounting records, or information and returns referred to in s.283(2), available for inspection to the Receiver, and in fact withheld relevant records from the receiver. the Company did not adhere to its responsibility pursuant to s.166(1) of the Act to "cause minutes to be entered in books kept for that purpose of… (c) all resolutions and proceedings at all meetings of its directors and of committees of directors". The applicants submit that the respondents in fact forged board minutes, and rely on the evidence of Mr Condron in this regard.

Personal liability for failure to keep adequate accounting records

118. Where a company has failed to keep adequate accounting records, a court may make any defaulting director personally liable for some or all of the company's debts. In this regard, s.609(1) and (2) provide as follows:

"(1) Subject to subsection (2), if –

(a) a company that is being wound up and that is unable to pay all of its debts has contravened any of sections 281 to 285, and

(b) the court considers that such contravention has –

(i) contributed to the company's inability to pay all of its debts, or

(ii) resulted in substantial uncertainty as to the assets and liabilities of the company, or

(iii) substantially impeded the orderly winding up of the company,

the court, on the application of the liquidator or any creditor or contributory of the company, has the following power.

(2) That power of the court is to declare, if it thinks it proper to do so, that any one or more of the officers and former officers of the company who, with respect to the contravention, is or are in default shall be personally liable, without any limitation of liability, for all, or such part as may be specified by the court, of the debts and other liabilities of the company."

119. The matters in s.609(1) must be established on the balance of probabilities: see *Mehigan v. Duignan* [1997] 1 IR 340 at pp. 360-361. In that case, in which the court was concerned with s.204 of the Companies Act 1963 – the statutory predecessor of s.609 – Shanley J stated as follows:

"…[o]n its face, s.204 appears to allow that a Court, in the exercise of its discretion, can impose unlimited liability on an officer of a company in respect of all the debts of a company where the s.202 contravention has not in itself resulted in any loss to the company, but has substantially impeded the orderly winding up of the company, or resulted in substantial uncertainty as to its assets and liabilities. There may be circumstances where, if the court's discretion is exercised in this way, the result achieved would be so harsh, unfair and disproportionate, having regard to the wrong committed, as to constitute an unjust attack on the personal rights of the affected officers". [Pages 358-359].

120. Shanley J went on to conclude as follows:

> "It seems to me that the three elements [causation, culpability and duration] identified by Tompkins J [in Maloc] are relevant to the principles which should guide the exercise of discretion under s. 204 and that in assessing liability under s. 204, the court should have regard to the extent to which the officer's involvement in the s. 202 contravention resulted in financial loss and, if it did, whether such loss was reasonably foreseeable by the officer as a consequence of the contravention and that, save in exceptional circumstances, liability should not be imposed for contraventions not resulting in loss, or for losses not reasonably foreseeable as a consequence of the contravention." [Page 360].

Declaration of solvency without reasonable grounds

121. Under s.82 of the Act, it is unlawful for a company to give financial assistance for the purpose of acquisition of the company's shares. Such financial assistance is not however unlawful where the transaction is approved by members in a summary approval procedure: in this regard, see s.82(6). Section 203(1)(f) of the Act requires that, as part of the summary approval procedure, the company's directors must make a declaration to the effect that they:

> "…have made a full inquiry into the affairs of the company and that, having done so, they have formed the opinion that the company, having entered into the transaction…will be able to pay or discharge its debts and other liabilities in full as they fall due during the period of 12 months after the date of the [transaction]".

122. Where the declaration of solvency is made by a director without reasonable grounds, s.210(1) of the Act provides, *inter alia*, that a court may make that director personally liable for all or any of the company's debts "without any limitation of liability". Under s.210(3) of the Act, the court has power to "give such further directions as it thinks proper for the purpose of giving effect to the declaration".

123. The applicants submit that, in January 2018, in order to enter into a transaction with OL Master to continue availing of funding under the bond instruments, it was necessary for the Company to approve that transaction by the summary approval procedure. Accordingly, the first, second and third respondents each signed a declaration of solvency to the effect that the Company would be "able to pay or discharge its debts and other liabilities in full as they fall due during the period of 12 months…after that transaction".

124. The applicants submit that the directors did not have reasonable grounds for that opinion, as "the Company was heavily loss-making, balance sheet insolvent, and dependent on the support of its parent which was itself in financial distress. Furthermore, as the directors must have been aware, the Company's financial statements overstated the value of its intangible assets by tens of millions of Euro…". [Para. 86 written submissions].

Conclusions on the Company's treatment of the assets

125. From the uncontested evidence of the investigations conducted by Borelli Walsh and Mr Bance as Receiver, certain conclusions in relation to the Company's treatment of the assets of the Company are unavoidable. They may be summarised as follows:

- The value of the Company's intangible assets was consistently overstated by the Company, so that, as of 30 September 2019, intangible assets were overstated in the Company's accounts by €31.7m;
- the Company's records included three purported co-production agreements between the Company and Method Animation SAS. These agreements were not genuine, and the Company had no right to receive revenue under them, notwithstanding that it claimed to have incurred production expenses in respect of these agreements which were included on the balance sheet;
- SPV structures were created in respect of numerous projects – notably Jungle Book, Peter Pan and Lassie the Dog – which had the effect of facilitating the

inclusion of intangible assets in the balance sheet before the projects were completed and sold, the recording of those assets at inflated values, and the net transfer of substantial cash amounts from the Company to the SPVs;

- there were numerous instances established by Mr Bance of misappropriation or diversion of assets from the Company, including in particular:
    - the payment by Method in accordance with the first named respondent's instructions of €1.5m to DQE India of funds from the cancelled Method co-production agreement in 2017;
    - payments of €9.489m to DQE India without any corroboration or apparent justification;
    - payments of €12.474m to Lifeboat Distribution DMCC without corroboration or apparent justification;
    - payment of €5.835m to Sunsky Entertainment without corroboration or any apparent justification.

Conclusions on books and records

126. The evidence of Mr Bance is that the records retrieved from the Company's offices in Ireland and India were "severely deficient". Some documents were provided for the first time during the proceedings; Mr Bance provides a list of these at tab 17 to his witness statement. The investigations by Borelli Walsh and Mr Bance are replete with references to documentation which should have been made available by the Company, but was either not produced or did not appear to exist.

127. The evidence of Mr Condron, who was a director of the Company since 2010, established that meetings which he was supposed to have attended and chaired "were fictious and did not occur". His evidence was that such meetings were "created after the fact to

retrospectively validate the actions of the directors". There is in fact no evidence that any board meeting was ever held in respect of the Company.

128. No management accounts appear to have been prepared for the Company, and no meaningful records were kept in Ireland or on a computer server located in Ireland in breach of the requirements of the Act.

129. As the applicants put it at para. 136 of the written submissions:

> "The inadequacy of the records has made it impossible for the Receiver to properly verify the validity of various contracts or the basis for tens of millions of euro of suspicious payments. It has seriously inhibited the realisation of value from the Company's intangible assets. It has resulted in hundreds of thousands of euro of additional costs for the receivership".

Conclusions on trading while insolvent

130. The evidence clearly establishes that the Company has been insolvent at least since 31 March 2017. the Company had, according to the Company's audited and unaudited financial statements, become balance sheet insolvent by at least that date.

131. According to its own financial statements, the Company has been operating at a loss since 31 March 2015, with the turnover of the Company declining every year since the year ended 31 March 2014. the Company has been dependent on support from DQE India since 2016. However, it appears that that company operated at a loss for the years 2017 and 2018, and has defaulted on its loan obligations during that time.

132. The filed accounts of the Company in 2016, 2017 and 2018 each claimed that management was in the process of restructuring the financing of the group, and that the directors were confident that these discussions would be concluded successfully within twelve months. The applicants submit that there were no reasonable basis for maintaining this

position for three consecutive years, and point out that the Company continued to borrow heavily during this period, including from the applicants.

133. It is submitted that there is no evidence that the directors ever took additional steps to monitor the Company's solvency position, consider putting the Company into liquidation, or consider how continued trading might detrimentally affect creditors. In the circumstances, the applicants submit that the directors must have known – or at least ought to have known – for many years that the Company would never fully repay its creditors; despite this, in January 2018 the first, second and third respondents made a declaration that they had formed the opinion that the Company would be able to pay its debts and other liabilities in full as they fell due during the next twelve months. It is submitted that there were no "reasonable grounds" for making that declaration.

The amount claimed by the applicants

134. I referred at para. 29 above to the amounts which, according to Mr Harris, are due and owing by the Company, and the amount of US$30,800,238.92 in respect of which the applicants contend that the respondents should be made personally liable. Mr Harris presented a very detailed calculation of this sum in his oral evidence at the hearing, and went through that calculation in detail. It may be summarised as follows:

Amounts drawn down 16/12/2014–16/12/2017	$52,919,559.31
Capitalised principal	$16,395,584.20
Cash interests due (6.5%)	$17,936,371.48
Cash interests paid	($10,844,663.81)
Credit bid	($63,000,000.00)
Default interest due 16/6/2019-7/3/22	$17,393,387.73
	_____
	$30,800,238.92

==========

135. The figure of US$30,800,238.92 represents the applicants' calculation of the outstanding principal and interest to 7th March 2022 payable under the bond instruments, with credit given for repayments and the credit bid of $63m. It does not include the "redemption price" which was required to be paid in accordance with the redemption notice: see para. 25 above.

Personal liability of the respondents

136. In view of the evidence presented to the court which was not only uncontested by the respondents, but which was thorough, forthright and compelling, I am satisfied that personal liability should be imposed on each of the respondents in respect of their conduct as directors of the affairs of the Company. In particular, I am satisfied, on the evidence before me, that they each have knowingly been a party to the carrying on of business of the Company in a reckless manner, and have been knowingly a party to the carrying on of business of the Company with intent to defraud creditors of the Company, in breach of s.610(1)(a) and (b) of the Act.

137. The applicants seek to impose personal liability on the respondents in accordance with s.610, and an order for judgment pursuant to s.611, under which the court has power to make orders to give effect to a declaration pursuant to s.610. The applicants also seek directions in relation to the respondents' actions pursuant to ss.609 and 612. Given the evidence before the court, it seems that such orders are warranted, as is an order pursuant to s.210 of the Act in relation to the making of a declaration of insolvency without reasonable grounds.

138. Section 610 permits the imposition of liability "without any limitation…for all or any part of the debts or other liabilities of the company as the court may direct". The amounts misapplied or misappropriated in connection with Method, DQE India, Lifeboat and Sunsky – see paras. 68 to 72 above – amount to over €29m, and this alone would warrant imposition

of personal liability on the first to third respondents in the amount sought by the applicants. However, the totality of the egregious conduct of the respondents as outlined in the applicant's evidence and summarised above – including in particular the soliciting of investment on the basis of falsified and utterly unreliable books and records at a time when the respondents must have known that the Company's solvency was seriously in doubt – suggests that imposition of personal liability on each of the respondents in the sum of US$30,800,238.92 is just and proportionate in all the circumstances.

139. Section 610(6) provides that, where the court makes a declaration under that section "… it may provide that sums recovered under this section shall be paid to such person or classes of persons, for such purposes, in such amounts or proportions at such time or times and in such respective priorities among themselves as such declaration may specify". In view of the security held by Madison over the assets and undertaking of the Company, it seems to me that it is appropriate in all the circumstances to order that the amount in respect of which the first, second and third respondents are held liable should be payable to Madison.

Conclusion

140. In all the circumstances, I propose to make the following orders:

(1) An order that the application as against the fourth and fifth named respondents be struck out, with no order as to costs as between the applicants and those respondents;

(2) a declaration pursuant to s.567 of the Act that the Company is unable to pay its debts and that the reason for its not being wound up is the insufficiency of its assets;

(3) a declaration pursuant to s.610 of the Act that each of the first, second and third respondents has been knowingly a party to the carrying on of the

business of the Company in a reckless manner within the meaning of s.610 of the Act;

(4) a declaration pursuant to s.610 of the Act that each of the first, second and third respondents has been knowingly a party to the carrying on of the business of the Company with intent to defraud creditors of the Company or for other fraudulent purposes within the meaning of s.610 of the Act;

(5) a declaration pursuant to s.610(2) of the Act that each of the first, second and third respondents be personally liable, on a joint and several basis, for the Company's debts and liabilities in the sum of US$30,800,238.92;

(6) judgment in the sum of US$30,800,238.92 against each of the first, second and third named respondents on a joint and several basis in favour of the third named applicant;

(7) a declaration pursuant to s.609 of the Act that, by reason of the acts and omissions of the first, second and third named respondents, adequate accounting records were not kept by the Company in contravention of s.281 to s.285 of the Act and that those contraventions have contributed to the Company's inability to pay all of its debts and resulted in substantial uncertainty as to the assets and liabilities of the Company;

(8) a declaration pursuant to s.612 that each of the first, second and third named respondents has, within the meaning of s.612 of the Act,

(a) misapplied money or property of the Company;

(b) become liable or accountable for money or property of the Company;

(c) been guilty of misfeasance in relation to the Company;

(d) been guilty of breach of duty in relation to the Company;

(e) been guilty of breach of trust in relation to the Company;

(9) a declaration pursuant to s.210 of the Act that the first, second and third named respondents made a declaration of solvency without reasonable grounds for the opinion referred to in that section.

141. In the circumstances, it is appropriate that I make an order that the first, second and third respondents pay the applicants' costs of the proceedings to include all reserved costs, to be adjudicated in default of agreement. I will grant the applicants liberty to apply in case any issue arises in relation to the proposed terms of the order.