Neutral Citation Number: [2006] IEHC 67

THE HIGH COURT

[Record No. 2006 27 COS]

**IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2005
AND IN THE MATTER OF PART II OF THE COMPANIES ACT, 1990,
AND SECTIONS 8 AND 17
AND IN THE MATTER OF ANSBACHER (CAYMAN) LIMITED
(FORMERLY GUINNESS MAHON CAYMAN TRUST LIMITED,
ANSBACHER LIMITED, AND CAYMAN INTERNATIONAL
BANK AND TRUST COMPANY LIMITED)**

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND
PADRAIG COLLERY

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan delivered the 9th day of March, 2006.

1. This is an application pursuant to s. 160(2)(e) of the Companies Act, 1990 brought by the Director of Corporate Enforcement ("the Director") seeking a disqualification order against the respondent, Mr. Collery.

2. Section 160(2)(e) provides:

> "160(2) Where the court is satisfied in any proceedings or as a result of an application under this section that –
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> …
>
> (e) in consequence of a report of inspectors appointed by the court or the Director under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company; or
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> …
>
> the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit."

3. The application arises in consequence of the Report of the Inspectors appointed to inquire into the affairs of Ansbacher (Cayman) Limited, published by order of the court made on 24th June, 2002.

4. The Director relies exclusively on the content of the Report and submits that certain of the findings and conclusions therein establish, as a matter of probability, that Mr. Collery was guilty of a serious lack of commercial probity in relation to the affairs of the company under investigation, such that it makes him unfit to be concerned in the management of a company within the meaning of s. 160(2)(e) of the Act of 1990.

5. Prior to the commencement of this application the Director gave notice to Mr. Collery as required by s. 160(7) of his intention to make the application. The Director also indicated he would consider any representations which Mr. Collery might wish to make within a period of ten days. No representations were made to the Director by or on behalf of Mr. Collery.

6. Mr. Collery has not sought to put any evidence before the court in response to this application. He was represented by solicitor and counsel. On his instructions, counsel on his behalf did not seek to contest any of the findings in the Inspectors' Report. Neither did he seek to dispute that the contents of the Report in relation to him are such that the Court should accede to the Director's submission that it evidences a lack of commercial probity on his part to an extent that it makes him unfit to be concerned in the management of a company within the meaning of s. 160(2)(e).

7. Notwithstanding such lack of opposition, counsel for the Director correctly submitted that the onus is on the Director to satisfy the court that the conduct of Mr. Collery referred to in the Inspectors' Report makes him unfit to be concerned in the management of a company.

8. The Inspectors' Report is relied upon by the Director in accordance with s. 22 of the Companies Act, 1990 which provides:

> "22. A document purporting to be a copy of a report of an inspector to be evidence, appointed under the provisions of this Part shall be admissible in any civil proceedings as evidence –
>
> (a) of the facts set out therein without further proof unless the contrary is shown, and
>
> (b) of the opinion of the inspector in relation to any matter contained in the report."

9. Counsel for both parties were in agreement that the principles to be applied by the Court in determining whether the conduct of Mr. Collery referred to in the Report makes him unfit to be concerned in the management of the company were those set out recently and comprehensively by Kelly J. in *The Director of Corporate Enforcement v. D'Arcy* (Unreported, the High Court, 26th October, 2005). In that judgment Kelly J. considered an application by the Director, *inter alia* under s. 160(2)(e) arising out of the Report of the Inspectors into the affairs of National Irish Bank and National Irish Bank Financial Services Limited, published by order of the court of 23rd July, 2004. In considering whether the findings in that Report made Mr. D'Arcy unfit to be concerned in the management of the company, Kelly J. referred to the well known dictum of Browne-Wilkinson V.C. (as he then was) in *re: Lo-Line Limited* [1988] Ch. 477 where he said:

> "What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the cases to which I have been referred is broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others. Therefore, the power is not

fundamentally penal. But, if the power to disqualify is exercised, disqualification does involve a substantial interference with the freedom of the individual. It follows that the rights of the individual must be fully protected. Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

10. As pointed out by Kelly J., this passage was cited with approval by Murphy J. in the Supreme Court in *re: Readymix Limited (in liquidation)* [2002] 1 I.R. 372 where he stated:

> "It is I believe a correct statement of the law and represents a proper approach to the application and interpretation of s. 160 of the Companies Act 1990."

11. I would respectfully agree with the view expressed by Kelly J. that, whilst the observations of Browne-Wilkinson V.C. were related to the unfitness of a director and dealt with an insolvent company, that a similar line of reasoning is applicable to the question of the disqualification of a person whose conduct is alleged to have made him unfit to be concerned in the management of a company.

12. On the facts of this application the Director submits that the findings in the Report in relation to Mr. Collery show a lack of commercial probity.

13. An issue raised by the Court in the course of the hearing was the date from which the Court should have regard to the conduct of Mr. Collery as found in the Inspector's Report. Section 160 of the Act of 1990 came into force on 1st August, 1991. The Court raised the issue as to whether it was permissible to take into account findings in respect of conduct prior to that date having regard to the decision of Carroll J. in *re: Dunleckney Limited* (Unreported, the High Court, 18th February, 1999) applying the principles set out by Murphy J. in *re: Hefferon Kearns Limited (No. 1)* [1993] 3 I.R. 177. The concern expressed by the Court was whether if the Court were to take such conduct into account it would be applying retrospectively s. 160(2)(e) of the Act of 1990. The Court gave counsel the opportunity of taking instructions on the point overnight.

14. At the resumed hearing no submissions were made on behalf of the respondent. Counsel for the Director informed the Court, that whilst the Director contends that the Court is entitled to take into account conduct prior to the coming into force of s. 160(2)(e), that having regard to the absence of opposition from Mr. Collery to this application and having regard to the findings made in the Inspectors' Report for periods after 1st August, 1991, the Director was not asking the Court in this application to consider any findings adverse to Mr. Collery in respect of conduct prior to that date.

15. Accordingly, the Court is not expressing any view on the applicability of s. 160(2)(e) to conduct prior to the date of coming into force of the section and with consent of the parties is only considering those findings in the report adverse to Mr. Collery in respect of conduct after 1st August, 1991. There is, of course, no objection to the Court having regard to the personal history of Mr. Collery prior to 1991 and even his involvement in the companies, the subject matter of the investigation, by way of background to the findings in respect of his conduct in the period after 1st August, 1991.

16. The Inspectors set out their findings in respect of Mr. Collery principally in chapter 17 in volume 1 of the Report. From this it appears that Mr. Collery at the time of the Report had had a lengthy career in banking, commencing in Lloyds Bank in London in 1968. From 1974 to 1989 he was a senior official in Guinness and Mahon with responsibility for accounts and computer operations. It was the computer skills which brought him into contact with the parallel accounting system developed within Guinness and Mahon for the then GMCT (and subsequently Ansbacher) records which became known as the memorandum accounts. These were records of the beneficial owners of money held in accounts in Guinness and Mahon in the names of GMCT/Ansbacher. The decision maker on the accounts in Dublin was Mr. Desmond Traynor. Prior to 1984 he was Vice-Chairman of Guinness and Mahon and a board member of Guinness and Mahon London. He left Guinness and Mahon in 1986 and became Chairman of CRH Plc. in May, 1987. The memorandum accounts were moved to the CRH office and Mr. Collery continued to update those records. He was at this time still employed by Guinness and Mahon but carried out his Cayman function separately from his other work. In 1988 a consortium which included Mr. Taynor purchased GMCT from Guinness and Mahon and sold on 75% of the company to Henry Ansbacher Limited. Mr. Collery continued to do the memorandum accounts.

17. In 1989 an internal audit report within the Guinness and Mahon Group raised issues concerning the Dublin deposits and memorandum accounts and highlighted Mr. Collery's role. Mr. Collery left Guinness and Mahon and obtained employment elsewhere. After his departure he continued to update the memorandum accounts for Mr. Traynor and Ansbacher. In late 1990 and early 1991 most Ansbacher accounts were closed in Guinness and Mahon and moved to IIB. The memorandum accounts were amongst those moved. Mr. Collery continued to provide the same service. From September, 1992 certain accounts in the name of Ansbacher in IIB were re-designated Hamilton Ross. All memorandum accounts were in the name of Hamilton Ross from January, 1993 and Mr. Collery participated in the change.

18. Mr. Traynor died in May, 1994. Prior to Mr. Traynor's death, Mr. Collery appears to have been paid by Mr. Traynor for work done in relation to the Ansbacher and Hamilton Ross business. Subsequent to Mr. Traynor's death, Mr. Collery appears to have been retained by Ansbacher and paid by them. Whilst the Report indicates some dispute as to the precise extent of his involvement, the Inspectors accepted Mr. Collery's account that his work, at that time, was to "tidy up and wind up". However, the Inspectors also conclude that Mr. Collery continued to process certain Ansbacher memorandum accounts. During this period he was paid Stg.£750 per month by Ansbacher up to January, 1995 and a final payment of Stg.£12,000 in April, 1996.

19. The Inspectors' findings in relation to Mr. Collery are divided into four periods, the latter two of which are only relevant to the Court:

- from 1989 to death of Mr. Traynor in May, 1994;

- after 1994.

20. In relation to the first of these periods, for the reasons already explained, the Court is only considering findings in relation to a period from August, 1991. From a consideration of the Inspectors' findings at para. 17.6 in relation to Mr. Collery's involvement with the Ansbacher business in Ireland between 1989 and May, 1994, it appears that those findings include the period after August, 1991. The principal findings are set out at p. 206 as follows:

> "In view of the information available to Mr. Collery from his previous position in Guinness and Mahon, the Inspectors have concluded that there is evidence tending to show that Mr. Collery was during this period assisting Ansbacher in:

(a) Carrying on an unlicensed banking business;

(b) Failing to furnish to the Registrar of companies the information required by sections 352, 353, 355 and 357 of Part XI of the Companies Act, 1963

(c) Evading tax due on its own activities;

(d) Assisting others to evade tax

The extent to which this assistance was the moral responsibility of Mr. Collery was still limited to some extent in respect of some of the above wrongs. Mr. Collery was working under the direction of a strong personality, Mr. Traynor, who had been, in one way or another, his boss for nearly twenty years. Because he was continuing the work of Ansbacher's memorandum accounts, that company's role in assisting the evasion of tax should also have been plain to him even if he lacked any control over the operation. As he was in secure employment elsewhere, he had one right, which he refused to exercise, the right to refuse to participate. There is therefore at this time, in the opinion of the Inspectors, evidence tending to show that he knowingly assisting (*sic*) Ansbacher to conduct its affairs in this jurisdiction in such a manner as to defraud creditors (that is the Revenue authorities) of other persons (those Ansbacher clients whose accounts he serviced)."

21. The Inspectors separately consider Mr. Collery's role in Hamilton Ross up to the death of Mr. Traynor. Hamilton Ross was a limited company within the Ansbacher Group used in connection with the Irish business from late 1992. The conclusions of the Inspectors set out at p. 207 are:

"The Inspectors have concluded that there is evidence tending to show that after Hamilton Ross took over the memorandum accounts in late 1992/early 1993 Mr. Collery:

(a) Knowingly assisted Hamilton Ross in its unlicensed banking activities in Ireland;

(b) Knowingly assisted Hamilton Ross in its breaches of sections 352, 353, 355 and 357 of Part XI of the Companies Act, 1963

(c) Knowingly assisted Hamilton Ross in evading tax due on its own activities;

(d) Knowingly assisted Hamilton Ross in carrying on business in this jurisdiction in such a manner as to defraud creditors (that is, the Revenue authorities) of other persons."

22. In relation to the Ansbacher business after the death of Mr. Traynor, it appears that the Inspectors conclude that the Ansbacher business was reducing at that stage but concluded as p. 209:

"To the extent that Ansbacher continued to act illegally during this period, Mr. Collery has a residual responsibility. The Inspectors are mindful of the difficult circumstances created by the death of Mr. Traynor in this period of running down of the Ansbacher operation. Mr. Collery in this period, in view of his experience, was or ought to have been fully aware of all the wrongs of Ansbacher's Irish operation."

23. The Inspectors state that Mr. Collery received the following substantial sums from Hamilton Ross after the death of Mr. Traynor:

"1. A sum of STG£176,101.67 on 28 February 1995

2. A sum of STG£35,000 on 25 April 1995

3. A sum of STG£55,000 on 30 April 1996."

24. The Inspectors also conclude that Mr. Collery, as an experienced banker and businessman, must have been aware of the nature of the business being carried on by Hamilton Ross after the death of Mr. Traynor and state at p. 212:

"The Inspectors are therefore satisfied that there is evidence tending to show that in the period after the death of Mr. Traynor Mr. Collery knowingly assisted Hamilton Ross in:

(e) Operating a bank without a licence;

(f) Breaching the provisions of sections 352, 353, 355 and 357 of Part XI of the Companies Act, 1963 by failing to provide the Registrar of Companies with the information required of foreign companies by those sections

(g) Conducting its business so as to defraud creditors of other persons;

(h) Failing to make proper tax returns and payments."

25. I have concluded that the conclusions of the Inspectors in relation to the wrongdoing of Hamilton Ross are set out in more detail in chapter 24 of the Report, from which it also appears that it ceased its Irish business in early 1997. The Ansbacher Irish business also appears to have ceased in 1997.

26. The conduct of Mr. Collery in the period from 1991 to 1997, in relation both to Ansbacher and Hamilton Ross, as found by the Inspectors is such as to make him unfit to be concerned in the management of a company.

27. The remaining issue is the appropriate period for the disqualification order. Section 160(2)(e) simply requires the court to make the order "for such period as it sees fit".

28. Counsel were also in agreement that the appropriate principles to be applied in fixing the period are those set out by Kelly J. in

The Director of Corporate Enforcement v. D'Arcy.

29. The starting point of Kelly J.'s consideration was the brackets identified by the English Court of Appeal in the judgment of Dillon L.J. in *re: Sevenoaks Stationers (Retail) Limited* [1991] Ch. 164. I also agree with Kelly J. that whilst the English approach provides some guidance it must be approached with caution by reason of the differences in the statutory regime in this country. In particular, there is an absence of minimum and maximum periods; the disqualification at issue is not mandatory and s. 160(9)(a) enables the court, as an alternative "where it adjudges that disqualification is not justified" to make a declaration of restriction under s. 150. The latter is, of course, for a mandatory five-year period.

30. Notwithstanding the above differences, the observations of Lord Woolf M.R. (as he then was) in *re: Westmid Packing Services Limited* [1998] 2 All E.R. 124 cited by Kelly J. at p. 29 are relevant and helpful:

> "…other factors come into play in the wider interests of protecting the public, i.e. a deterrent element in relation to the director himself and a deterrent element as far as other directors are concerned. Despite the fact that the courts have said disqualification is not a 'punishment', in truth the exercise that is being engaged in is little different from any sentencing exercise. The period of disqualification must reflect the gravity of the offence. It must contain deterrent elements. That is what sentencing is all about, and that is what fixing the appropriate period of the disqualification is all about. What Vinelott J. (in *re: Pamstock Limited* [1994] 1 B.C.L.C. 716 at 737) called 'tunnel vision', i.e. concentration on the facts of the offence, is necessary when considering whether a director is unfit. In relation to the period of disqualification the facts of the offence are still obviously important but many other factors ought and (in reality do) come into play'.

31. Later in the judgment Lord Woolf said:

> 'We do not consider that it would send out a wrong message to fix the period of disqualification by starting with an assessment of the correct period to fit the gravity of the conduct, and then allowing for the mitigating factors, in much the same way as a sentencing court would do".

32. With the assistance of the above, the principles applicable to determining the appropriate period in this case appear to be the following:

> (1) The primary purpose of an order of disqualification is not to punish the individual but to protect the public against future conduct of companies by persons whose past record has shown them to be a danger to creditors and others.
>
> (2) The period of disqualification should reflect (in relation to and order under s. 160(2)(e)) the gravity of the conduct as found by the Inspectors which makes the respondent unfit to be concerned in the management of a company.
>
> (3) The period of disqualification should contain deterrent elements.
>
> (4) A period of disqualification in excess of ten years should be reserved for particularly serious cases.
>
> (5) The court should firstly assess the correct period in accordance with the foregoing and then take into account mitigating factors prior to fixing the actual period of disqualification

33. Applying the above principles to the facts of this case I have concluded that the appropriate period of disqualification before taking into account any mitigating factors should be one of twelve years. The conduct of Mr. Collery as found by the Inspectors was of a particularly serious nature. By 1991 he had considerable experience in a senior position in banking. He had ceased to be in an employment relationship with Mr. Traynor for approximately five years and had ceased to be employed by Guinness and Mahon for approximately two years. He had independent employment. He had, as the Inspectors pointed out, a right to refuse to participate and did not do so. Further, in the subsequent years he received considerable sums in remuneration for the work done both in connection with the Ansbacher business and Hamilton Ross.

34. The mitigating factors to be taken into account by the Court appear to include the fact that the conduct which is the subject matter of the Report and which leads him to being considered unfit to be concerned in the management of a company took place between 1991 and 1997, i.e. between approximately 8/9 and 14/15 years ago and that no complaint is made in respect of any conduct of Mr. Collery in a subsequent period. On the contrary, the Inspectors in their Report at p. 22 state: "Mr. Padraig Collery assisted the Inspectors with promptness and courtesy in difficult circumstances". Having regard to the statutory purpose of protecting the public, where, as in this application, there is a long period between the conduct giving rise to the order for disqualification and the commencement of the application to the Court and there is no complaint or, indeed, positive evidence in relation to relevant conduct of the respondent in the intervening period, this appears to be something for which he should be given credit.

35. Mr. Collery has not sought to dispute this application. The application only commenced by a motion issued on 25th January, 2006, returnable for 13th February, 2006 and has been capable of determination following a hearing on 26th February, 2006. This is indicative of Mr. Collery recognising and taking responsibility for the conduct as found by the Inspectors for which he should also be given credit. Mr. Collery has not sought to put any evidence before the Court as to the impact of an order for disqualification on him, save that counsel informed the Court (without objection) that Mr. Collery was now working in the commercial sector and is aged 57.

36. Taking the foregoing mitigating factors into account I have decided that the proposed disqualification period should be reduced by three years.

37. Accordingly, there will be a disqualification order against Mr. Collery pursuant to s. 160(2)(e) of the Act of 1990 for a period of nine years from today's date. Counsel for the Director informed the Court that no order for costs is being sought against Mr. Collery.

38. I would add one additional observation by way of explanation to the approach taken by the Court in this judgment. The Director wrote at the request of the Court to Mr. Collery's solicitor in advance of the hearing date, setting out the period of disqualification which he would propose to the Court and the reasons for it. The Director, through his counsel, very properly at all times made it clear that the period of disqualification was a matter for the Court. However, in the letter sent he did seek to analyse and compare the findings of the NIB Inspectors in relation to Mr. D'Arcy with those of the Ansbacher Inspectors in relation to Mr. Collery. This was done in the context of the ten-year disqualification period ordered by Kelly J. in the decision referred to above. I have not carried out a similar exercise in this judgment. I would respectfully agree with the approach of Lord Woolf M.R. in *Re Westmid Packing Services*

Limited [1998] 2 ALL E.R. 124, where he stated, at p. 234:

> "(8) This court was referred to the decision of Nourse J in *Re Civica Investments Ltd.* [1983] BCLC 456 at 457-458, in which he said:
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> > 'It might be thought that [the appropriate period of disqualification] is something which, like the passing of sentence in a criminal case, ought to be dealt with comparatively briefly and without elaborate reasoning. In general I think that that must be the correct approach. More important, as more of these cases come before the court, it is obviously undesirable for the judge to be taken through the facts of previous cases in order to guide him as to the course he should take in the particular case before him. No doubt in this, as in other areas, it is possible that there will emerge a broad and undefined system of tariffs for defaults of varying degrees of blame, but there must come a point when it is no longer either necessary or desirable to go through the facts of previous cases. For my part I think that the point has now been reached.'
>
> That was one of the earliest cases under s 28 of the Companies Act 1976, under which disqualification was not mandatory and there was no minimum period. However Nourse J's approach should be adopted in all cases involving disqualification. Nourse J's expectation about 'a broad and undefined system of tariffs' has been fulfilled by the decision of this court in *Re Sevenoaks Stationers (Retail) Ltd.* [1991] 3 All ER 578, [1991] Ch 164. Nourse J may not have foreseen how (with the advent of new and specialised law reports) large numbers of disqualification cases would continue to be the subject of detailed reports but their existence makes his remarks all the more important. The principles applicable to the court's jurisdiction under the Act are now reasonably clear. The application of those principles to the facts of the particular case is a matter for the trial judge. The citation of cases as to the period of disqualification will, in the great majority of cases, be unnecessary and inappropriate."

39. I would respectfully agree that the approach of this Court to the appropriate period of disqualification should be the application of the principles now established to the facts of the particular case and that the citation of the facts of other cases and periods of disqualification is unnecessary and inappropriate.