Neutral Citation Number: [2006] IEHC 412

THE HIGH COURT

[2002 No. 499JR]

BETWEEN

JOHN J. BYRNE

APPLICANT

AND

HIS HONOUR JUDGE SEAN O'LEARY, NOREEN MACKEY, PAUL ROWAN AND MICHAEL CUSH (INSPECTORS APPOINTED BY ORDER OF THE HIGH COURT TO ANSBACHER (CAYMAN) LTD)

RESPONDENTS

Judgment of Mr. Justice Paul Gilligan delivered the 7th day of December, 2006.

1. This is an application to quash a number of conclusions reached by the respondents and outlined within their Report of the 6th day of July 2002 into the affairs of Ansbacher (Cayman) Limited (hereafter referred to as "the Report"). The respondents are Inspectors appointed pursuant to ss. 8 and 17 of the Companies Act, 1990 by order of the High Court of the 22nd September, 1999, as later amended by orders of the 5th October, 1999, and the 8th December, 2000. The order states:

> "It is ordered that the said Inspectors investigate and report to the Court on the affairs of the Company in the title hereof and in particular
>
> (a) to examine and define the nature and extent of the Company's Irish business from 1971 to date i.e. the business carried out in the State or any other business carried out on behalf of Irish residents whether in the State or elsewhere;
>
> (b) to identify as far as possible all of the parties who were either officers (including shadow directors) and agents of the Company, clients of the Company or who otherwise assisted in the carrying out of the business at the relevant time
>
> (c) to examine whether the Companies Acts, 1963-1990 were breached by the Company, its officers (including shadow directors), agents or third parties at the relevant time and if so to identify the provisions involved and the persons in default in each case;
>
> (d) to examine whether the affairs of the Company were conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose and if so to identify the statutory provisions involved and the persons in default in each case;
>
> (e) to report on any related matters."

2. This Court made a number of ancillary orders relating to the investigation to be carried out by the Inspectors as duly appointed and in particular made an order on 25th day of May, 2001 pursuant to a motion of counsel for the Inspectors which was made ***ex parte***, pursuant to which it was ordered that the motion be heard otherwise than in public and the motion resulted in an order being made ***inter alia*** that;

> "where it has not been found practical for all four Inspectors to be present at an interview at which a witness' evidence has been taken under oath or where that witness has been interviewed prior to the appointment of a particular Inspector the Inspector or Inspectors who was/were absent from that interview shall not be precluded from further examining that witness or reporting to the court on that witness subject to the following;
>
> that the veracity of the evidence given by that witness during the said interview is not in dispute or if the veracity of the evidence given by that witness during the said interview is in dispute that the said interview is conducted in full again with the said Inspector or Inspectors in attendance".

3. The Report lists five specific scenarios in which an individual is considered to be a client. At p. 272 of the Report it is stated that;

> "In particular, but without prejudice to the generality of the foregoing, a client shall include:
>
> (a) Any person who directly or indirectly maintains or has maintained all or part of any account with the Company [i.e. Ansbacher Cayman Ltd] or who has or had *de facto or de jure* control over all or part of any account with the company.
>
> (b) Any person who has or had *de jure or de facto* control of a body corporate which directly or indirectly maintains or has maintained an account with the Company or is or was administered by the Company or which has had borrowings directly or indirectly secured wholly or partly by the Company.
>
> (c) The Settlor of any trust administered by the Company or of which the Company is or was the trustee and/or any other person or persons who funded such a trust or caused such a trust to be funded.
>
> (d) The beneficiary of any trust administered by the Company or of which the Company is or was the trustee in circumstances where the beneficiary has or had de jure or de facto control over all or part of the trusts funds.
>
> (e) Any person who had an account relationship with a body corporate owned or managed by the Company."

4. Category A clients are stated in the Report at p. 275 to include:

> "persons who established trusts, and persons who deposited money in a simple account. The persons who established trusts tended to be larger clients. In these cases, the trust would have a name which would not immediately identify the beneficial owner of the funds. It also would have one or more companies, which would be used by the trust as a vehicle for the investments controlled."

5. The Report contains a list and description of all Category A clients as so found and the applicant is categorised as a Category A

client. The first reference in the Report to the applicant is to be found at p. 50 dealing with the guarantee of back-to-back loans which were provided by Guinness and Mahon Ltd to individuals who had deposited monies with Ansbacher Ltd., these loans being secured by the deposits placed in the Bank. The reference is as follows:

> "3.4 Knowledge of GMCT and Guinness and Mahon
>
> ... As already reported, GMCT had a number of deposit accounts in Guinness and Mahon, and, to an increasing extent over the years, these were used to provide funds for beneficiaries of trusts of which GMCT was trustee. No evidence has emerged that these payments were made as a result of decisions by trustees to make distributions to beneficiaries. Among files of over 50 trusts furnished to the Inspectors by Ansbacher (Cayman) Limited following litigation in the Grand Court of the Cayman Islands, not a single document exists minuting a decision of the trustees to make a distribution. On the contrary, all the evidence points to the request for payment originating with the client and being processed in Guinness and Mahon (and later in IIB) upon the instructions of Mr. Traynor. GMCT was not informed of the completed transaction until Mr. Collery (having posted the transaction in the secret Irish Memorandum accounts or otherwise processed it internally within Guinness and Mahon) sent a reconciliation statement to Cayman, which he did on a monthly basis. This is strong evidence that the trust structure was a sham – not in respect of its legal status at the time of establishment, but in the manner of its operation – and that GMCT exercised no effective control over the assets nominally under its control.
>
> The back-to-back loans, considered in more detail further on, are additional evidence that the trust structure was a legal fiction. One example will suffice to illustrate this. Mr. John Byrne (see Chapter 23) established two complex trust structures, one for Irish and one for UK business. These trusts were alleged to be completely separate from each other and from Mr. Byrne. All the liquid assets happened to be in one trust, but back-to-back loans were granted by Guinness and Mahon to a company owned by the trust which did not have cash, backed by the funds of the other 'independent' trust. No fee was charged for this financial service. To give what amounted to a cash guarantee to a stranger, without charge, would be a breach of the trustee's fiduciary duty. That an experienced trust company such as GMCT approved of such an irregular financial transaction and that Guinness and Mahon accepted this security suggests that both institutions viewed these trusts as legal fictions. It seems evident that both trusts were operated as one in the interest of Mr. Byrne with knowledge and approval of Guinness and Mahon and GMCT without reference to their legal status...

6. The second reference in the report to the applicant appears at pp. 290 - 294 wherein it is stated as follows:

> "Mr John Byrne is a well-known property developer. He has extensive property interests in Ireland and the United Kingdom.
>
> On the 9 August 1971, Mr Byrne put in place two structures each headed by a trust – namely the Tristan Settlement and the Prospect Settlement.

The Tristan Settlement
7. This related to Mr Byrne's UK business. The beneficiaries were to be identified by reference to a nominal payment to the British Red Cross. The settlor was Mr John Furze.

8. The Tristan Settlement had a structure that included a Cayman company, Tristan Securities Limited (TSL). This company had two subsidiaries, Danstar Holdings Pty (an Australian company) and Intramar Securities, a Cayman company. Danstar had an UK subsidiary, Tepbrook Properties Limited.

9. The Inspectors accept the evidence supplied by Mr Byrne on the structure of this group (see exhibit 2 of transcript of evidence). The Inspectors, however, looked at the element of control as relevant to their work. They are satisfied that the legal ownership of the group vested in the trust but that control remained with Mr Byrne.

The Prospect Settlement
10. This related to Mr Byrne's Irish business. The settlor was Mr Byrne. The beneficiaries were the wife and family of the settlor.

11. An unlimited Cayman company, Prospect Holdings, which in turn owned Carlisle Trust Limited, an Irish company, which held the assets on behalf of the trust. Carlisle had in turn a number of subsidiaries: Dublin City Estates Limited, Alstead Securities, Smithfield Property Development Limited (formerly Endcamp Limited), Goreville Limited, Pritco Limited and JEC properties. This is set out in Exhibit 2 ***ibid.***

12. These entities typically had various categories of shares, which vested ownership in the next highest corporate vehicle while retaining control in the hands of Mr Byrne.

13. That Prospect Holdings was a client of Ansbacher is clear. The Inspectors considered whether it could be said that Mr John Byrne and Tristan Securities Ltd were also clients. Other evidence must be considered to arrive at any conclusion on these matters.

General Findings on Structure
14. In the case of both the Tristan and Prospect Settlements, Mr Byrne funded the establishment of the trusts and retained the right to change the trustees. The trustees appointed were the Company now under investigation. The trustees are unchanged to date.

15. The two trust structures were established and remain separate. Notwithstanding this independence, the Tristan Settlement had provided back-to-back money to facilitate the borrowings of Irish companies with which it had no legal connection. The representation made on Mr Byrne's behalf, as an explanation for this unusual arrangement, was that money on deposit continues to earn interest while forming the basis of back-to-back loan is noted and accepted. Interest earned, however, would arise in any event. To provide cash backing for the borrowings of a third party, for no reward, in a commercial situation, is a very strange use of trust money. The Inspectors are of the view that it shows a closer connection between these entities than represented by Mr Byrne.

Other relevant matters
16. Mr Byrne personally guaranteed the borrowings of companies within the structure on many occasions. He was unable to explain, to the satisfaction of the Inspectors, why he should be called upon and/or agree to so do where he had no legal or beneficial interest in the trusts.

17. Ansbacher made a STG£3,500 payment to Mr Byrne through Guinness and Mahon in April 1990. No explanation has been received as to this transaction.

18. IIB advanced a loan in the sum of IR£212,000 in 1994 circa to Mrs Byrne (the wife of John Byrne), on behalf of Ballymadun Stud. This was cash backed by Hamilton Ross or Ansbacher. At that time, Hamilton Ross (which had in theory separated from Ansbacher `parent') continued to use Ansbacher's Cayman address and telephone number. Its business continued to be a matter on which the Inspectors were required to report and its activities continued to be interwoven with Ansbacher's Irish Business. The loan was repaid in September of the same year. The funds were raised to refund Mr Byrne for advances to the stud over the years. The repayment of the loan is reflected in Ansbacher's J6 account on 1 September 1994. The Inspectors have been informed by Mr Byrne that this account was relevant to Tristan Securities Ltd. The Ansbacher connection is confirmed by the IIB internal documentation attached hereto. Mr Byrne's explanation is rejected as failing to disclose the full extent of the terms and conditions under which the money was advanced. The Inspectors conclude that Mr Byrne was the real beneficiary of this transaction.

19. The Inspectors received a letter dated 28th February, 2001 from Mr Byrne's solicitor, which was considered by the Inspectors prior to their decision.

20. The Inspectors noted from documents supplied by Mr Byrne that Ansbacher, in contacting their clients recently in connection with the Cayman Island litigation concerning the disclosure of information, appears to include Mr. Byrne as one of their clients who were entitled to object.

21. The Inspectors considered all the matters dealt with at the interview, those items exhibited herewith and Mr Byrne's explanations, written and oral, in arriving at their conclusions.

22. The Inspectors note the matters set out herein above and further conclude:

> I. The trusts as established could have provided a legitimate vehicle for the apparent objective of transferring ownership to a trust while retaining control with Mr Byrne.
>
> II. The trusts as operated did not appear to the Inspectors to retain the legal separation necessary to achieve Mr Byrne's objective.
>
> III. Many loans were provided to the companies controlled by Mr Byrne and many of these had back-to-back security provided by the Tristan structure. These are described in the records of Guinness and Mahon as 'suitably secured'. Mr Byrne's true relationship with the operating companies is indicated by the personal guarantees given by him for these loans.
>
> IV. The funds held by the trusts in Ansbacher in Ireland were at all times available for any purpose to Mr Byrne who (subject to his duty to retain sufficient deposits to service the back-to-back facility) had power to apply these funds as he thought fit. No evidence has been received by the Inspectors (relevant to any period prior to the public controversies in Ireland), which tends to contradict the Inspectors' conclusions on control of the funds by Mr Byrne.
>
> V. As the Cayman records of the Company have been withheld from us, the Inspectors are unable to ascertain with certainty the extent to which other trust funds were available in Cayman, which never left a financial footprint in Ireland. Mr. Byrne assures the Inspectors that the company under investigation has refused him access to these records. It was open to Mr Byrne to change the trustees but he has chosen to accept advice that it is futile to so do.
>
> The Inspectors conclude that control of the trust funds rested with Mr Byrne at all times."

23. After the Report was published, the applicant initiated these proceedings, seeking the following relief:

> 1. A declaration that the respondent's conclusions in relation to the Tristan Trust and the Prospect Trust were unreasonable and/or based on irrelevant considerations and/or failed to take into account relevant considerations and/or were unsupported by the evidence;
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> 2. A declaration that in arriving at these conclusions the respondents erred in law;
>
> 3. A declaration that in arriving at these conclusions the respondents acted *ultra vires*;
>
> 4. A declaration that in arriving at these conclusions the respondents acted contrary to natural and/or constitutional justice;
>
> 5. A declaration that the conclusions were made in breach of the High Court orders made pursuant to s. 7(4) of the Companies Act, 1990 and were therefore *ultra vires***;**
>
> 6. An order of certiorari quashing the conclusions reached by the respondents;
>
> 7. A declaration that the conclusion that the applicant was a client of Ansbacher Ltd is based solely on the finding that the applicant was a person who established the trusts;
>
> 8. A declaration that the conclusion that the applicant was a client of Ansbacher Ltd, to the extent that it is based on any other grounds other than that the applicant was a person who established the trusts, is unreasonable and/or based on irrelevant considerations and/or was unsupported by the evidence;
>
> 9. A declaration that insofar as the conclusion that the applicant was a client of Ansbacher Ltd is based on any grounds other than that the applicant was a person who established the trusts, said conclusion constitutes an error of law;
>
> 10. A declaration that insofar as the conclusion that the applicant was a client of Ansbacher Ltd is based on any grounds other than that the applicant was a person who established the trusts, said conclusion is ultra vires;
>
> 11. A declaration that insofar as the conclusion that the applicant was a client of Ansbacher Ltd is based on any grounds other than that the applicant was a person who established the trusts, said conclusion is contrary to natural and/or

constitutional justice;

12. A declaration that insofar as the conclusion that the applicant was a client of Ansbacher Ltd is based on any grounds other than that the applicant was a person who established the trusts, said conclusion was reached in breach of the s. 7(4) orders;

13. An order of certiorari quashing the conclusion that the applicant was a client of Ansbacher Ltd to the extent that it is based on any ground other than that the applicant was a person who established the trusts;

14. A declaration that the respondents' conclusions, including the conclusion that the applicant was a client of Ansbacher Ltd, were not adequately reasoned and/or lacked transparency;

15. An order of certiorari quashing the respondents' conclusions, including the conclusion that the applicant was a client of Ansbacher Ltd, by reason of inadequate reasoning and/or lack of transparency.

24. The grounds upon which this relief is sought are set out at paragraph (e) of the statement required to ground application for judicial review and as enumerated at paragraph 16-70 thereof.

25. McKechnie J. granted leave to the applicant to apply by way of judicial review in respect of the reliefs as sought herein on the grounds as set out pursuant to his order of 30th day of July, 2002.

Submissions

1. Whether the respondents adhered to the terms of the order of the High Court as made on 25th day of May 2001 pursuant to s. 7(4) of the Companies Act 1990

26. The applicant asserts that, having regard to the terms of the order made by the High Court on the 25th May, 2001, pursuant to s. 7(4) of the Companies Act, 1990, the respondents were not entitled to reach a conclusion in respect of the applicant in the absence of all four Inspectors having conducted the interview.

27. It is submitted on the applicant's behalf that all four Inspectors should have interviewed him as the respondents' call his evidence into question in the Report. In this regard, the applicant refers to the statement in the Report that when asked why he personally guaranteed the borrowings of companies within the trust structure on many separate occasions he was, "unable to explain, to the satisfaction of the Inspectors, why he should be called upon and/or agree to so do where he had no legal or beneficial interest in the trusts." The applicant argues that in order to reach this conclusion, given the fact he did in fact give an explanation for these guarantees, the respondents had to reject the veracity of his unequivocal statement to them that he had no legal or beneficial interest in the trusts and did not control them.

28. The applicant also refers to the respondents' conclusions in respect of the loan advanced in the sum of IR£212,000 to the applicant's wife on behalf of the Ballymadun stud. The applicant told the first and third named respondents that his wife was the full owner of the Stud but in the Report it is stated that the applicant's explanation of the transaction "is rejected as failing to disclose the full extent of the terms and conditions under which the money was advanced. The Inspectors conclude that Mr Byrne was the real beneficiary of this transaction." The applicant again submits that this illustrates a rejection of the veracity of his evidence as the conclusion that he was the "real beneficiary" of the transaction is in direct contradiction with his assertion to the contrary. In addition, having regard to the s. 7(4) order, the applicant argues that simply because the respondents are entitled to accept the applicant's evidence regarding the primary facts, that does not mean that they may also draw inferences from those facts which effectively question the veracity of his evidence. In light of this fact, the applicant submits that all four respondents should have interviewed him. The applicant argues that, having accepted his evidence, the respondents could not arrive at inferences which were contrary to it and, where they did so, their decision in that regard was arrived at by a process inconsistent with the terms of the s. 7(4) order and was therefore invalid.

29. The respondents argue that the veracity of the applicant was never in dispute during the interview process. The first named respondent has averred in his affidavit that both himself and the third named respondent found the applicant "to be a truthful and reliable witness" and that, in any event, he himself conceded during the interview that he controlled the trust structures in question. This averment arose in the context of a passage as recorded on the transcript of evidence during the interview on pp. 51 and 52 where questions were put directly to the applicant. The respondents maintained the questions related to the control of the two trusts. The particular passage of evidence ran as follows:

> "Q. Ultimately, Mr. Byrne, the position in your structure, in your Irish structure, is that you control the structure but you do not own the structure?
>
> A. That is correct.
>
> Q. I think that is your position?
>
> A. That is my position.
>
> Q. Is that a fair summary of the position?
>
> A. That is a fair summary, Judge.
>
> Q. Yes, you control it but according to the way you are looking at it you do now own it?
>
> A. Exactly.
>
> Q. Have I picked that up correctly?
>
> A. You have, indeed.
>
> Q. All right. Why should somebody who controls something but does not own it give a personal guarantee; as an experienced businessman I am asking you that question?

A. Yes. Well, that is a question now that I would have to say I find difficulty in answering because there ... (interjection)

Q. Mr. Byrne, that is why I ask it because I find it difficult to understand it you see?

A. Yes, I almost find it difficult as well, Judge.

Q. Yes?

A. But there must be some good explanation for it.

Q. There must be. However, you appreciate the point?

A. I do indeed. I do indeed, yes.

Q. You control it I accept? A. Yes.

Q. Now whether you own it or not – you say you do not?

A. Yes.

Q. And for the purpose of this question I am accepting you do not own it?

A. Yes."

30. The respondents also argue that insofar as they differed from the applicant, it was only as to the conclusions to be drawn from the facts in evidence. In this regard, the first named respondent gave an example. He avers that, in relation to the borrowings of companies owned by the two trusts which were personally guaranteed by both the applicant and his wife, the applicant "stated in evidence that the giving of such guarantees did not strike him as odd. Whilst the Inspectors considered it to be odd, they did not dispute the fact that the view as articulated by Mr Byrne was genuinely held by him." Furthermore, the respondents argue that the applicant has failed to address the true meaning of the word "veracity". The respondents submit that the applicant's argument that a rejection of evidence necessarily involves a rejection of the veracity of the witness and his testimony is incorrect. They argue that the issue of whether the applicant honestly believed he was not in control of the trusts in question is distinct from the issue of whether he was in fact in control of said trusts. The respondents argue that a rejection of an honestly held belief does not involve a rejection of that witness's veracity. They further argue that they were entitled to draw inferences from the applicant's evidence and that drawing such inferences, even if adverse, was a valid exercise of their power as it did not involve impugning the applicant's veracity?

Whether there was a breach of natural justice and fair procedures
31. It is contended on the applicant's behalf that there was a breach of natural justice in that the respondents ought to have clarified what appeared to them to be the inconsistency in the sworn evidence of the applicant and further that the respondents were not entitled to select part of the evidence without clarifying the position particularly when Mr. Byrne had been repeatedly invited to clarify matters following the interview and had done so in the most unambiguous terms.

32. The applicant further contends that he was not afforded fair procedures and, in particular, that certain matters relied upon by the respondents in the Report were not put to him before its publication. The applicant asserts that in arriving at their conclusions the respondents relied, in particular, on Chapter 3 of the Report which seeks to analyse the use of discretionary trusts by Irish clients of Ansbacher Ltd. The applicant argues that this analysis refers to a document entitled "Note to John Furze" which sets out the method used to set up discretionary trusts. The applicant claims that none of these issues were ever put to him by the respondents nor was he ever afforded an opportunity to comment upon them. Nevertheless, the applicant is referred to within Chapter 3 of the Report by way of explaining the respondents' conclusions that these trusts were a legal fiction. The applicant argues that the issue of setting up discretionary trusts and the method by which they were created was never put to him by the respondents in their communications with him, nor was he ever afforded an opportunity to comment on them. As these were clearly matters relied upon by the respondents in reaching their conclusions in the Report, the applicant asserts that they should be set aside as they were obtained in breach of the rules of natural justice. The applicant also claims that fair procedures were breached as the respondents never suggested anything about a "sham" in their interviews with him and claims that the first time he heard the word "sham" was when it appeared in the Report.

33. The respondents argue that they have at all times rigorously adhered to fair procedures. These procedures included writing to all individuals requesting the production of relevant documents and the furnishing of witness statements, interviewing witnesses on oath, furnishing the witnesses with preliminary conclusions along with the evidence so far relied upon, inviting submissions from witnesses on foot on those preliminary conclusions and, where it was considered appropriate, altering preliminary conclusions on foot of these submissions. The respondents submit that all material matters were put to the applicant and he was given an opportunity to respond, both personally and through his solicitors, and to adduce additional evidence if he wished to.

34. The respondents also deny that the applicant was entitled to be served with Chapter 3 of the draft Report in advance of publication and they argue that they had no obligation to furnish the applicant with their findings in respect of GMCT, Ansbacher Ltd and John Furze as there were no findings made against the applicant within Chapter 3. The respondents submit that the fact that the applicant is mentioned at p. 50 of the Report does not entitle him to be served with a copy of that reference. In making this argument, the respondents rely on the fact that the reference to the applicant at p. 50 is consistent within what is set out at pp. 290-294 regarding the applicant. The respondents also argue that they did put forward the possibility of using the word "sham" in their Report and that this is evidenced at pp. 56 and 57 of the transcript of the interview. Further, the applicant's solicitor was aware of this possibility, as is evident from his letter of the 25th February, 2001.

Whether the respondents' findings flowed from the premises

35. The applicant contends that the respondents' conclusions in the Report do not flow from the premises identified by the respondents and are therefore unreasonable. He identifies these conclusions as:

(i) The apparent objective of the trusts was to transfer ownership from the applicant to a trust while at the same time ensuring that the applicant at all times controlled the trust;

(ii) The trusts did not retain the legal separation necessary to achieve the applicant's objective;

(iii) The funds held by these trusts in Ansbacher were at all times available for the applicant's use (subject to his duty to retain sufficient funds to service the back-to-back facility);

(iv) That control of the trusts funds rested with the applicant;

(v) That the trusts were "a sham";

(vi) That both trusts were operated in the applicant's interests.

36. The applicant argues that as he told the respondents under oath that he neither controlled the trusts nor received any income or benefit from them and as the respondents "fully accepted his evidence as to facts", there is no support for the respondents' conclusion that he controlled the trusts. He argues that all of the evidence before the respondents clearly establishes that the applicant merely established the trusts and does not provide support for the argument that he beneficially owned the assets of the trusts. The applicant asserts that as he has no shares in any of the companies making up the Tristan Settlement there is no evidence to show that he controlled them. Furthermore, the applicant argues that when he stated during the interview that he controlled the "Irish structure" (i.e. the Prospect Settlement), he was referring to control of the companies within the Irish structure (i.e. through his preference shares). In this regard, he points to the fact that he controlled category A voting shares in Carlisle Trust which is a company within the Prospect Settlement which controls the other Irish companies within that group. As a result, the finding that he "retained" control does not justify the trust conclusions.

37. The applicant contends that the respondents' finding that "the two trust structures were established and remain separate" is in direct contradiction with the statement in the Report that the "trusts as operated did not appear to the Inspectors to retain the legal separation necessary to achieve Mr Byrne's objective". Furthermore, he submits that the respondents' conclusion that the provision of cash backing was "in breach of the Trustees' fiduciary duty" does not provide any basis for the conclusion that the trusts were a sham and, in any event, the respondents did not obtain any advice on Cayman law as to whether this did in fact constitute a breach of fiduciary duty.

38. The applicant further contends that the mere fact that he was unable to explain why he personally guaranteed the borrowings of companies within the trust structure does not provide sufficient basis for the respondents' conclusions. In support of this assertion, he points in the first instance to the fact that he was a Director of these companies and in the second instance to the fact that he was not obtaining a benefit from providing his personal guarantee but rather was providing a benefit to others. He also submits that the payment of STG£3,500 to him does not justify the respondents' conclusions nor does the fact that his wife received cash backing in respect of a loan obtained by her from IIB. He goes on to assert that even if this loan was repaid into the Ansbacher Ltd J6 account, it was paid without his instruction and in error, but this fact does not justify he respondents' conclusions.

39. The applicant argues that the fact that a document supplied by him concerning Ansbacher Ltd, "appears to include him as one of their clients who were entitled to object", does not sustain the respondents' conclusions. He states that this is due to the fact that this document arose when the applicant, at the respondents request, had informed Ansbacher Ltd that he had no objection to providing information to the respondents. Furthermore, Ansbacher Ltd provided no explanation as to why they considered the applicant to be a client and their actions are inconsistent with any belief that he had any rights in respect of the trusts.

40. The respondents reply to these arguments by stressing to the Court the very purpose for which judicial review proceedings are brought. They submit that judicial review proceedings do not involve an appeal on the merits but rather are concerned with the manner in which a decision is reached and whether all procedures are properly adhered to. The respondents assert that the grounds upon which the applicant bases his claim for relief are, in reality, nothing more than an attempt to pursue an appeal on the merits. The respondents point to the fact that the applicant seeks to challenge the respondents' conclusions on the grounds that they are unsupported by the evidence and do not accord with the evidence. The respondent submits that it is well established that these are not grounds upon which judicial review proceedings may be pursued**.** *State (Power) v. Moran* [1976-1977] I.L.R.M. 20.

41. The respondents concede that judicial review proceedings may be brought where a body has jurisdiction to make a decision but makes such an unreasonable decision as to exceed its jurisdiction. However, in spite of the applicant's submissions, the respondents argue that this has not occurred in the instant case. The respondents submit that the applicant's arguments simply boil down to an assertion that the court may come to a different conclusion than the respondents would have in all the circumstances of the case. The respondents state that it has long been established that this does not constitute unreasonableness and that a court cannot simply substitute its own version of the facts for that of the administrative body statutorily charged with making the decision.

42. In defending the reasonableness of their conclusions, the respondents point to a number of different facts in support:

(i) The applicant admitted he had started "doing business with" Ansbacher in 1971;

(ii) The applicant admitted he was the settlor of the trusts;

(iii) The applicant admitted he had helped establish the trusts;

(iv) The applicant admitted he was the formal settlor of the Prospect Settlement and that he retained the right to appoint new trustees;

(v) The applicant admitted that although Mr. Furze was the formal settlor of the Tristan Settlement, the power to appoint new trustees had been transferred from him to the applicant;

(vi) The applicant accepted that his powers allowed him to replace trustees at any time with new trustees;

(vii) That, although the legal ownership of the companies comprising Prospect Holdings and its subsidiaries and Tristan Securities Ltd and its subsidiaries vested in the trusts, the applicant was at all material times in de facto control of the trusts;

(viii) The applicant did not offer any evidence that Ansbacher made any decisions on behalf of the trusts or that it exercised any de facto control over the trusts;

(ix) The applicant acknowledged directly his control of the trusts, although he denied ownership of them.

43. The respondents submit that the particular passage at pp. 51 and 52 of the transcript of evidence as previously referred to herein to the effect that the applicant controlled the "Irish structure" (i.e. the Prospect Settlement) is an admission which relates to control of the trusts and not, as the applicant is now suggesting, an admission to control of certain companies within the trust. In making this argument, the respondents rely on the fact that the document handed to the applicant's solicitor at the start of the interview specifically identified the Prospect Settlement as part of the "Irish Companies Structure" and identified the Tristan Settlement as part of the "UK Companies Structure". In addition, the respondents assert that the transcript illustrates that the word "structure" was at all times used in reference to the trusts.

44. Furthermore, even if the Court believes the applicant's version of events in this regard, the respondents submit that this is not a basis for intervention having regard to the high standard which must be satisfied in order to find the respondent's conclusion unreasonable.

45. In concluding that the applicant was in *de facto* control of the Tristan trust, the respondents also rely on a "Letter of Wishes", requesting the trustees to consult with the applicant in the usage of trust assets, as well as the applicant's own admission that he was able to get access to funds in the Tristan trust to use as back-to-back deposits to secure the borrowings of companies in the Irish structure and to secure borrowings of Mrs. Byrne's Ballymadun Stud.

46. The respondent submits that having regard to all of the evidence they were justified in reaching their conclusion that the applicant was in *de facto* control of the trusts and they assert that these conclusions are neither irrational nor unreasonable but take into account all relevant considerations.

Whether the respondents' failure to have regard to Cayman Law rendered their findings unreasonable
47. The applicant argues that in reaching the conclusions already outlined, the respondents gave no regard to Cayman law and as a result, their conclusions are unreasonable and irrational. The applicant submits that the respondents' conclusions on the legal position of the trustees, the legal status of the trusts and the validity of the use of trusts funds could only be judged by reference to Cayman law. In particular, the conclusion that the use of trust funds as cash backing constituted a breach of fiduciary duty can only be decided with regard to Cayman law. In addition, the applicant argues that if anything done with regard to the trust funds was valid under Cayman law this cannot constitute a basis for a finding that the trusts were a sham. The applicant also submits that issues arise under Irish law as to what constitutes a sham and as no consideration was given to Irish law, the respondents' conclusions in this regard are invalid.

48. The respondents argue that they do not dispute the validity of the trusts as a matter of Cayman law nor was that part of their remit. They submit that having regard to their terms of reference they were only obliged to inquire into the operation of Ansbacher Ltd. in Ireland. The respondents submit that they were not concerned with the issue of whether the operation of the trusts amounted to a breach of Cayman law. Rather they assert that their role was to establish the manner in which the trusts operated and whether that gave rise to de facto control on the applicant's part. In essence, the respondents argue that at no stage have they ever alleged that the trusts failed to comply with Cayman law. They contend that any reference to Cayman law is irrelevant as the trusts could be perfectly legitimate under Cayman law while nevertheless being in the *de facto* control of the applicant.

Conclusion

1. Whether the respondents adhered to the terms of the High Court Order as made on the 25th May, 2001, pursuant to s. 7(4) of the Companies Act 1990.
49. The first issue is whether the respondents acted *ultra vires* the directions of the High Court Order of 25th May 2001. Inter alia the order directed that where it has not been found practical for all four Inspectors to be present at an interview at which a witness's evidence is being taken under oath and an Inspector or Inspectors who are absent from the interview shall not be precluded from reporting to the court on that witness, subject to the following:

> "that the veracity of the evidence given by that witness during the said interview is not in dispute or if the veracity of the evidence given by that witness in the said interview is in dispute, that the said interview is conducted in full again with the said Inspector or Inspectors in attendance."

50. The manner in which the order of this Court of 25th day May, 2001 was framed clearly sets out that if the veracity of the applicant's evidence was in dispute then the applicant was entitled to have all four Inspectors present at the interview.

51. Since it is accepted that only two of the respondent Inspectors interviewed the applicant, the only issue is as to whether the veracity of the applicant's evidence is in dispute. The respondents concede that they found the applicant to be a truthful and reliable witness and that they fully accepted his evidence as to the facts. The respondent's claim that they only differed from the applicant as to the conclusions to be drawn from those facts and that accordingly they are not in breach of the order of 25th May 2001.

52. The veracity of evidence means the truthfulness of the evidence. The applicant contends that a number of conclusions were reached by the respondents which were inconsistent with the evidence the applicant gave during the interview. The applicant argues that this goes to prove that the veracity of his evidence was in dispute and therefore the interview should have been conducted with all four Inspectors present.

53. It must be understood that judicial review is not an appeal on the facts and is only concerned with the decision making process. As Lord Brightman said in *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155 and which was endorsed in *State (Keegan) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642 at p. 661:-

> "Judicial Review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power is observed, the court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.
>
> Judicial Review as the words imply is not an appeal from a decision but a review in the manner in which the decision was made."

54. Therefore these proceedings do not involve an appeal on the merits of the conclusions reached by the respondents. The adverse finding against the applicant is not in dispute but rather if the respondents in reaching such conclusions disputed the veracity of the applicant's evidence.

55. In my view the respondent did not dispute the veracity of the applicant's evidence as to the facts. The first named respondent in his affidavit, at paragraph 24 thereof avers that:

> "Both Mr. Rowan and I found Mr. Byrne to be a truthful and reliable witness. We fully accepted his evidence as to facts. Insofar as we differed from him it was only as to conclusions to be drawn from those facts. So for example, pages 45 and 46 of the transcript of evidence deals with borrowings by companies owned by the two trusts which were in turn personally guaranteed by Mr. and Mrs. Byrne. Mr. Byrne stated in evidence that the giving of such guarantees did not strike him as odd. Whilst the Inspectors considered it to be odd they did not dispute the fact that the view as articulated by Mr. Byrne was genuinely held by him."

56. In essence there is no doubt but that the applicant adamantly maintained that he did not control the two trusts and did not have power to enjoy income from either. It is clear however that this is an expression of belief by the applicant and that the respondents did not doubt the truthfulness of that evidence as believed in by the applicant. In my view the respondents were not prevented from taking into account other factual evidence and drawing an inference which was adverse to the applicant's interest. For example the applicant claims that as regards the conclusion that the trusts were controlled by the applicant the respondent could not have come to this conclusion if they accepted that the applicant did not own the trust or that they were lawfully established. However, it is clear that the respondents never disputed that the trusts were lawfully established or the validity of the trusts as a matter of Cayman law, the focus of the respondents' investigation being whether the manner of the operation of the trusts had given rise to *de facto* control on the part of the applicant. I do not consider that in coming to the conclusions that the trusts were controlled by the applicant the respondents must necessarily have rejected the applicant's evidence on these matters.

57. It has to be borne in mind that the respondents considered all the matters dealt with at the interview with the applicant, the relevant items that were exhibited therewith, and the applicant's explanations written and oral in arriving at their conclusion. In assessing the evidence and the facts before them the respondents were satisfied that the two trusts as established could have provided a legitimate vehicle for the apparent objective of transferring ownership to a trust while retaining control with the applicant. However, but the trust as operated did not appear to the respondents to retain the legal separation necessary to achieve the applicant's objectives, bearing in mind ***inter alia*** that the applicant gave personal guarantees in respect of various back- to-back loans, the funds held by the trusts in Ansbacher were at all times available for any purpose to the applicant and it was at all times open to the applicant to change the trustees.

58. I am satisfied that the applicant's indication that he did not control the two trusts and did not derive any benefit therefrom were expressions of a belief honestly held by him. I am further satisfied that the respondents accepted that this was the applicant's genuinely held belief but in their view on the totality of the evidence they were entitled to draw an inference that concluded that control of the trust funds rested with the applicant at all times. I further take the view that it was at all times open to the respondents to accept the applicant's evidence as to primary facts as being truthful but to draw inferences from the totality of the evidence and facts before them which were adverse to the applicant and not be in breach of the order of this Court as made on the 25th day of May, 2001.

59. A somewhat unusual situation arises in respect of the exchange at interview as set out on pages 51 and 52 of the transcript of the evidence wherein on the respondent's behalf it is indicated that it was being accepted by the applicant that as a matter of law he did not own the two trusts, but he had control over them and he repeatedly accepted that this was so. This particular passage, which was previously referred to in the submissions herein, was not set out or discussed in either the preliminary conclusions of the respondents or in the Report.

60. Mr. Shipsey, who represented the applicant during the course of the interview, handed in two charts to the interviewing respondents which detailed the Irish company structure and the U.K. company structure. The applicant never appears to have denied that he controlled the Irish structure through the preference voting shares as held in Carlisle Trust Limited and that these shares outside of the Trust gave control of the Irish companies to the applicant and his wife. A dispute has however arisen as between the applicant and the respondents as regards the subject matter of the relevant series of questions in that the applicant adamantly maintains that the evidence he gave was to the effect that he controlled the Irish structure under Carlisle Trust Limited because he and his wife owned the preference voting shares, but did not accept that he controlled the two trust structures.

61. In my view that there was a genuine misunderstanding as between the applicant and the respondents on this issue and accordingly in reaching my conclusions herein, I have had regard to the totality of the position as pertaining to both the applicant and the respondents.

62. I conclude that the veracity of the applicant's evidence was not in fact in dispute and thus the respondents did not act ultra vires the order of the High Court as made on 25th May 2001.

2. Whether there was a breach of natural justice and fair procedures

63. I do not accept that there is any basis to the claim as made on the applicant's behalf that the respondents ought to have clarified what appeared to them to be inconsistencies in the sworn evidence of the applicant. It is quite clear that the applicant was given full opportunity to make any submissions and raise any issues as considered appropriate with the respondents prior to publication of the report.

64. As regards the issue of the respondents not having furnished that part of the report at Chapter 3.4 which specifically referred to the applicant prior to the publication of the report so as to enable him to comment thereon, I am satisfied that the failure to refer the relevant passage was not a breach of the specific procedures to be followed by the inspectors as set out in appendix D of the letter from the Inspectors to the applicant as dated 26th October 2000. Reference to the applicant in Chapter 3.4 was by way of an example in the context of the knowledge of GMCT and Guinness and Mahon and Chapter 3.4 dealt specifically with that aspect and not with the applicant, despite the reference to him. The context of the reference to the applicant in Chapter 3.4 was to do with guarantees, in respect of back-to-back loans and in this regard the applicant was, prior to the publication of the report, informed of the proposed findings or inference against him in this regard, informed of the nature of the evidence which was thought to justify the proposed findings or inference and was afforded a full opportunity to prepare a written reply to the proposed findings or inference, had the opportunity if necessary on oath to introduce rebutting evidence and/or address the various factors with which he took issue. The details of the findings that were going to affect the applicant's interest, character and good name were all set out for him and dealt with extensively and in my view the applicant could not have been under any misapprehension as regards the nature and reasoning for the proposed findings and I do not accept that the reference by way of an example to the applicant in Chapter 3.4 added or indeed subtracted from the details as forwarded to the applicant and made known to him.

65. The final drafts of the report were entirely consistent with the material published in the report at pp. 290 - 292 expressly referring

to the applicant and it was further stated that the information relied upon by the inspectors was the information as set out at appendix XV(8).

66. There were no findings made against the applicant in Chapter 3.4 and the very fact that he was mentioned does not entitle the plaintiff to a legal right to be served with a copy of that reference.

67. In my view the respondents gave the applicant a fair opportunity for correcting or contradicting what was said against him and as per Lord Denning in re. *Pergamon Pres* [1971] 1 C.H. 388, it is not necessary to quote chapter and verse, an outline of the charge will usually suffice. In my view in the particular circumstances of this case there was much more than an outline of the charge contained in the draft report as referred to the applicant for his comment. I am satisfied that the applicant was given a reasonable opportunity to know the matters which were likely to affect the judgment of the respondents.

68. The applicant contends that the first he knew about the word "sham" was when it appeared in the report. This is not correct in that in the transcript of interview at pages 56 and 57 the respondents did canvas the possibility that they might consider using the word "sham" in their conclusions and the applicant's solicitor was aware of this possibility and the matter arose in correspondence in a letter of 25th February 2001. Counsel for the respondents has pointed out that the Report does not specifically refer to either the Tristan or Prospect Settlements being shams and it appears appropriate that this aspect be clarified for the applicant's benefit. The respondents concede that the content of Chapter 3.4 is not relevant to the applicant, does not represent evidence either for or against him and does not form the basis of any evidence taken into account in respect of their findings relative to the applicant. It is accepted that the relevant findings in respect of the applicant appear as set out between pp. 290 and 294 and nowhere in those findings is it alleged directly against the applicant that either the Tristan or Prospect Settlements were shams.

3. Issue as to Unreasonableness

69. The applicant argues that the respondents' findings as outlined in the Report are unreasonable as they do not flow from the premises and furthermore, that in reaching these findings the respondents failed to take into account Cayman law. The law in relation to unreasonableness is well established and sets a very high standard to be satisfied. This issue was addressed in *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642. Henchy J., in interpreting the test as laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, stated at page 657 of his judgment:

> "For my part, I would be slow to test unreasonableness by seeing if the decision accords with logic. Many examples could be given of reputable decisions and of substantive laws which reject logic in favour of other considerations. I think in any event that it is only a particular aspect of logic that could be applicable in testing the validity of a decision when it is subjected to judicial review on the ground of unreasonableness, namely, whether the conclusion reached in the decision can be said to flow from the premises. If it plainly does not, it stands to be condemned on the less technical and more understandable test of whether it is fundamentally at variance with reason and common sense ..... I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

70. Thus, according to Henchy J. the only circumstances in which logic comes into play in applying the test for unreasonableness is if the conclusion reached does not flow from the premises, in which case the decision could be "condemned on the less technical and more understandable test of whether it is fundamentally at variance with reason and common sense".

71. In *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. Finlay C.J. (at p. 70) addressed the standard to be satisfied in establishing unreasonableness in the following terms:

> "The question arising on this issue falls to be decided in accordance with the principles laid down by this Court in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 which are set out in the judgment of Henchy J. in that case, with which in respect of the legal principles applicable, all the other members of the Court specifically agreed.

72. In dealing with the circumstances under which the Court could intervene to quash the decision of an administrative officer or tribunal on grounds of unreasonableness or irrationality, Henchy J. in that judgment set out a number of such circumstances in different terms.

73. They are:

> '1. It is fundamentally at variance with reason and common sense.
>
> 2. It is indefensible for being in the teeth of plain reason and common sense.
>
> 3. Because the court is satisfied that the decision-maker has breached his obligation whereby he 'must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.'

74. I am satisfied that these three different methods of expressing the circumstances under which a court can intervene are not in any way inconsistent one with the other, but rather complement each other and constitute not only a correct but a comprehensive description of the circumstances under which a court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality.

75. In setting out these principles, Henchy J., in the course of that judgment, quoted with approval the statement of Lord Greene M.R. in A*ssociated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223 where, at p. 230, he stated:

> 'It is true to say that, if a decision on a competent matter is sounreasonable that no reasonable authority could ever have come to it, then the courts can interfere ... but to prove a case of that kind would require something overwhelming.'"

76. Finlay C.J. went on to say that it was clear from the above that the circumstances under which a court could intervene on the basis of irrationality with the decision-maker involved in an administrative function were limited and rare. He concluded (at p. 72) that:

> "I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

77. Thus, although Henchy J. stated in *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 that the only circumstances in which logic came into play in applying the test for unreasonableness was if the conclusion reached did not flow from the premises, the decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1973] 1 I.R. 39 qualifies this to some extent and requires that in order to satisfy the court of this fact the applicant must show that the decision-making authority had no relevant material before it which would support its decision.

78. It should also be noted that the unreasonableness standard has been heightened even further in recent times, arising from the decision of O'Sullivan J. in *Aer Rianta Cpt v. Commissioner of Aviation Regulation* (Unreported, High Court, 16th January, 2003):

> "... the kind of error that produces invalidity is one which no rational or sane decision maker, no matter how misguided, could essay. To be reviewably irrational it is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and in inexplicably mad; taken leave of his senses and come to an absurd conclusion. It is only when this last situation arises or something akin to it that a court will review the decision for irrationality."

79. Thus, it is clear that in the instant case the applicant has a very high hurdle to surmount. In arguing that the respondent's findings are unreasonable the applicant has adopted a two-pronged approach. In the first instance, he argues that the respondent's findings do not flow from the premises and secondly, that the respondents failed to have regard to Cayman Island law.

80. In relation to the first argument, having regard in particular to Finlay C.J.'s statement in *O'Keeffe v. An Bord Pleanála* (supra) [1993] 1 I.R. 39, I am satisfied that in order to show that the respondents' conclusions are unreasonable for not flowing from the premises the applicant must show that there was no evidence to support these conclusions. It is not enough to argue that simply because the applicant told the respondents that he neither controlled the trusts nor received any income from them that the conclusions outlined in the Report to the contrary are unreasonable. Nor will the applicant succeed by arguing that certain conclusions outlined in the Report seem to contradict others. Those arguments may be made but in order to succeed the applicant must show a complete dearth of evidence in support of the respondents' conclusions.

81. It cannot in my view be said that there was *no evidence* upon which the respondents could rely in reaching their conclusions that the applicant did control the trusts. There was *inter alia* the entire question of the guaranteeing of the borrowings of companies within the structure on many occasions, the inability of the applicant to explain to the satisfaction of the respondents why he should be called upon and/or to give guarantees in situations where he had no legal or beneficial interest in the trusts, the fact that the applicant had started doing business with Ansbacher in 1971, that he was the settlor of the trusts, that he had helped to establish the trusts, that he was the formal settlor of the Prospect Settlement and that he retained the right to appoint new trustees, that although Mr. Furze was the formal settlor of the Tristan Settlement the power to appoint new trustees had been transferred by him to the applicant, the fact that the applicant accepted that his powers allowed him to replace trustees at any time with new trustees, the circumstances surrounding the STG £3,500 payment to the applicant through Guinness and Mahon in April 1990 and the IIB loan in the sum of IR £212,000 that was advanced in 1994 to the applicant's wife on behalf of Ballymadun Stud.

82. In my view there is no basis to suggest that the respondents herein acted irrationally or that they had before them no relevant material to support the decision arrived at, and accordingly the applicant's contention that the respondents' findings are unreasonable is rejected.

83. The second aspect to this argument, as adopted by the applicant, is that the respondents failed to have regard to Cayman Island law and accordingly their findings are unreasonable. I take the view that it is important to point out that there is no finding or indeed even a suggestion that the manner in which the trusts were set up and executed was in anyway wrong. The findings of the respondents affecting the applicant relate to the manner in which the trusts were operated. No allegation was ever made and could not be so found that the trust structures failed to comply with the laws of the Cayman Islands and in such circumstances I cannot see how the laws of the Cayman Islands can have any relevance particularly as the respondents as duly appointed Inspectors were being asked to determine, as a matter of Irish law, who the clients of Ansbacher were and in performing this task the respondents, in their capacity as Inspectors, were looking at who had *de facto* rather than *de jure* control over the trust funds. In essence the respondents, in their capacity as Inspectors, have come to the conclusion that the applicant had *de facto* control over the trust monies. In these circumstances I am satisfied that the trust law of the Cayman Islands is not a relevant factor which the respondents ought to have taken into consideration in the course of their deliberation.

84. Accordingly I refuse the relief as sought.