Neutral Citation Number: [2010] IEHC 225

THE HIGH COURT

2008 45 COS

IN THE MATTER OF FAI FINANCE CORPORATION LIMITED

(IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2006

BETWEEN

WILLIAM O'RIORDAN

AND

SIMON GRANGER

APPLICANTS

AND

STEPHEN HARVEY

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 21st day of June, 2010

1. The applicants are the joint official liquidators of FAI Finance Corporation Ltd. ("the Company"), having been so appointed by order of the High Court of 25th February, 2008.

2. The respondent is the former managing director of the Company. The present application is for an order of disqualification of the respondent, pursuant to s. 160 of the Companies Act 1990. The manner in which it ultimately came on for hearing and the basis upon which the Court is to determine the application are unusual and require to be set out.

3. By notice of motion dated 23rd January, 2009, the applicants sought disqualification orders, pursuant to s. 160(2)(a) and (b) against Mr. Harvey and a Mr. Terence Youngman, who also had been an executive director of the Company. The application was grounded in the normal way on an affidavit of Mr. William O'Riordan, one of the joint official liquidators.

4. Mr. Youngman did not defend the motion and on 15th June, 2009, by order of the High Court (McGovern J.) it was ordered that, pursuant to s. 160 of the Companies Act 1990, Mr. Youngman be disqualified for a period of five years from that date.

5. Mr. Harvey did seek to defend the application. He filed affidavits in reply and, in particular, objected to the hearsay nature of certain of the evidence deposed to on behalf of the applicants. An issue was tried and by order of the High Court (McKechnie J.) of 20th May, 2009, it was directed that the motion of 23rd January, 2009, against Mr. Harvey proceed by way of plenary hearing and directions were given for the delivery of pleadings. A statement of claim and defence were exchanged.

6. By affidavit sworn on 12th January, 2010, Mr. Harvey stated that he was not objecting to an order being made for his disqualification, pursuant to s. 160(2)(d) of the Companies Act 1990, on the basis set out in that affidavit. In that affidavit, he also stated that he resolutely denied any allegation of fraud or dishonesty on his part at any time in relation to the conduct of the Company's affairs.

7. Mr. Harvey had also, by this time, agreed to make certain payments to the joint liquidators in respect of personal expenses discharged by the Company and a contribution towards the costs of the application brought pursuant to s. 160 of the Companies Act 1990. The total sum and schedule of staged payments were set out in a letter dated 21st January, 2010, from L.K. Shields, solicitors for Mr. Harvey, to Mason Hayes + Curran, solicitors for the joint liquidators. Those payments were intended to be in full and final settlement of all claims which might be brought against Mr. Harvey in the course of the liquidation.

8. On 22nd January, 2010, the joint liquidators made an application for approval of the monetary settlement reached with Mr. Harvey. The joint liquidators, recognising that the order for disqualification was a matter for the Court, did not seek to compromise that application, but did seek to ascertain whether the Court would deal with the application for disqualification upon the basis only of the facts set out in Mr. Harvey's affidavit of 12th January, 2010.

9. By order made on 22nd January, 2010, I granted liberty to the joint liquidators to compromise the monetary aspect of the claim and indicated a willingness to consider and determine the application for disqualification pursuant to s. 160(2)(d) alone, on the basis of the facts set out in the affidavit of Mr. Harvey of 12th January, 2010. I also adjourned the consideration of that application until 14th June, 2010, as the last of the payments due, pursuant to the monetary settlement, was to be made on 31st May, 2010. I also gave leave for the liquidators to apply in the event of any default in the agreed payment schedule.

10. In the course of the hearing on 22nd January, 2010, I was informed that, with the exception of one company which was in the course of being wound up, Mr. Harvey was not then a director of any company and was not intending to so act, pending the final determination of the application for the order of disqualification.

11. The approach taken by the joint liquidators requires the Court to ignore, in determining the outstanding application for an order of disqualification pursuant to s. 160(2)(d) of the Companies Act 1990, the facts disputed by Mr. Harvey upon which they sought to rely

to seek an order of disqualification, pursuant to s. 160(2)(a) (fraud in relation to the Company) or (b) (breach of duty in relation to the Company) of the Companies Act 1990. In circumstances where Mr. Harvey acknowledged that, on the uncontested facts, he would not oppose an application pursuant to s. 160(2)(d) of the Companies Act 1990, *i.e.* that he was unfit to be concerned in the management of a company, this appeared a reasonable and pragmatic approach by the joint liquidators which is in the interests of the creditors of the Company. There is no apparent benefit to the creditors of the Company in the joint liquidators pursuing a hotly contested application pursuant to s. 160(2)(a) and (b) of the Companies Act 1990. The approach taken highlights the difficulties and potential conflicts surrounding the effective imposition on liquidators of the obligation to make applications, pursuant to s. 150 and s. 160 of the Companies Act 1990, and their fundamental obligation to wind up the Company by the realisation of its assets and their distribution amongst the creditors in accordance with statutory priorities in an efficient and cost effective manner. Experience has shown that s. 150 and s. 160 applications (particularly contested ones) can be costly to a winding up with no financial benefit for the creditors.

12. Whilst not expressly referred to in Mr. Harvey's affidavit of 12th January, 2010, there are certain background facts which are not in dispute and which are relevant. The Company was engaged in the provision of consumer finance and loans to individuals in the United Kingdom. In particular, it provided products known as Right to Buy ("RTB") loans and Industrial Diseases ("ID") loans. Prior to liquidation, investigations were carried out into the recoverability of the RTB and ID loan portfolios and serious concerns were raised in relation to the recoverability of such loan portfolios.

13. The total deficit on the date of the liquidation was in the order of Stg. £39.7m (€52.9m).

14. Mr. Harvey had been suspended from the Company following concerns identified in relation to the recoverability of the RTB and ID loans. He resigned on 12th December, 2007, approximately two months prior to the date of liquidation.

15. In his affidavit of 12th January, 2010, Mr. Harvey identifies four principal reasons for the insolvency of the Company. In summary, these are:

> (a) A decision made by the board of the Company to authorise the advance of funds to finance RTB loans at what was known as the RTB 1 stage, as opposed to the RTB 2 stage. He states he opposed the decision to permit RTB funding at the earlier stage.
>
> (b) The ineffectiveness of the default insurance the Company has put in place in relation to the RTB loans.
>
> (c) The failure of the Company to diversify its lending portfolio.
>
> (d) Fraud, which, he contends, was perpetrated primarily by the agents engaged by the Company to sell the RTB product. He states it is likely that these agents were assisted or facilitated by elements within the Company. He states he had nothing whatever to do with the fraud and that as a result of his employment and the failure of the Company, in which he was an investor, he considers himself to be a victim of the fraud.

16. At para. 11 of the affidavit, Mr. Harvey then states:

> "I do not consider myself responsible for causing the difficulties outlined above which, in my view, lead to the insolvency of the Company. Nonetheless, I must accept that I was an Executive Director of the Company and that, in that capacity, I failed to prevent these matters occurring. For that reason, should the Court consider on that basis that my conduct renders me unfit to be concerned in the management of a Company, I do not object to an Order of Disqualification being made pursuant to Section 160(2)(d) of the Companies Act 1990."

17. Section 160(2)(d) of the Companies Act 1990, insofar as relevant, provides:

> "(2) Where the court is satisfied . . . as a result of an application under this section that-
>
> . . .
>
> > (d) the conduct of any person as . . . officer . . . of a company, makes him unfit to be concerned in the management of a company; …
>
> 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."

18. On the limited acknowledgement made by Mr. Harvey that, as an executive director, he failed to prevent the matters occurring which he identifies as being the four principal reasons for the insolvency of the Company, which led to a winding up with a deficit in the order of €50m, I have concluded that I am satisfied that such conduct makes Mr. Harvey unfit to be concerned in the management of a company.

19. The further issue is the period for which the order of disqualification should be made. Counsel for the joint liquidators referred me to the decision I gave in *Re Clawhammer Ltd.: Director of Corporate Enforcement v. McDonnell* [2005] 1 I.R. 503 and, in particular, my observations at pp. 511-512 in relation to the absence of any direct guidance from the Companies Acts as to the period of disqualification, but some indirect guidance by reason of the apparent view taken by the Oireachtas by reason of the wording of s. 160(9)A that a declaration of restriction is a lesser sanction as it permits the Court to make such a declaration on an application "where it adjudges that disqualification is not justified". The Court has no discretion in the period of a declaration of restriction under section 150. The Act provides that it be for five years. However, as pointed out more extensively in that judgment, there are differences between disqualification and declarations of restriction which may, depending upon the factual circumstances of the respondent, mean that disqualification for a lesser period than five years may still be more onerous on a respondent. At pp. 513-514, I stated:

> "Whilst a full disqualification order is in its terms more restrictive than a declaration of restriction, in practice the latter may operate to prevent certain respondents from acting as directors. This depends upon the particular circumstances of a respondent director. In the absence of a respondent putting before the court any relevant evidence, it is difficult to conclude that a disqualification order for any period less than five years will be a more onerous sanction for the respondent than a declaration of restriction which must be for five years."

The above decision was given on an application brought by the Director of Corporate Enforcement pursuant to s. 160(2)(h), which includes as a ground for an order of disqualification that a person was a director of a company which was struck off the Register of Companies pursuant to s. 12(3) of the Companies (Amendment) Act 1982. However, as s. 160(9A) applies to all considerations under s. 160, the general principle stated in *Re Clawhammer* applies equally to the present application.

20. Mr. Harvey has not put any evidence before the Court as to the true impact on him of an order of disqualification.

21. Counsel for both parties referred me also to a judgment given on an application, pursuant to s. 160(2)(e) of the Companies Act 1990 in *Re Ansbacher (Cayman) Ltd.: Director of Corporate Enforcement v. Collery* [2007] 1 I.R. 580, [2006] I.E.H.C. 67. Section 160(2)(e) permits the Court to make an order of disqualification where, in consequence of a report of inspectors, the conduct of any person makes him unfit in the management of the company. The judgment concerned an application brought by the Director of Corporate Enforcement in respect of Mr. Collery arising out of the report of the inspectors appointed to enquire into the affairs of Ansbacher (Cayman) Limited. In that judgment, having considered the principles set out comprehensively by Kelly J. in *Re N.I.B. Ltd.: Director of Corporate Enforcement v. D'Arcy* [2006] 2 I.R. 163 and certain other authorities, I concluded at p. 589 that the principles applicable to determining the appropriate period in that case appeared 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 an 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."

22. It appears to me that the above principles apply equally to an application such as this under s. 160(2)(d), save, of course, that it is either the gravity of the conduct as found by the Court or, on the unusual facts of this application, it is the gravity of the conduct acknowledged by Mr. Harvey.

23. Counsel for Mr. Harvey relies upon one further matter which he submits the Court should take into account on the facts of this case. He submits that the Court should take into account the fact that McGovern J. made an order of disqualification of Mr. Youngman for a period of five years in circumstances where the application brought by the joint liquidators against Mr. Youngman was based upon alleged fraud and alleged breach of duty and Mr. Youngman did not seek to defend the application. Counsel submits that as Mr. Harvey and Mr. Youngman were both executive directors of the Company, and Mr. Harvey has repeatedly denied all allegations of fraud and the joint liquidators have not proceeded with the application on that basis, that any like treatment of the two directors which would be just and equitable requires a lesser period of disqualification for Mr. Harvey.

24. Whilst counsel made that submission, he also properly drew attention to the order made by McGovern J., and I was informed by counsel for the liquidator that there is no record of the reasons for his decision, other than what is contained in the order. The order records:

> "And the COURT BEING SATISFIED pursuant to s. 160(2)(d) of the said Act that the conduct of the said Terence Youngman as an officer of the Company makes him unfit to be concerned in the management of a Company."

It then goes on to make the order for disqualification for five years, pursuant to s. 160 of the Act. Having regard to the terms of the order, it does not appear that the Court made any findings of fraud or breach of duty on the part of Mr. Youngman for the purposes of s. 160 (2)(a) or (b). In such circumstances, it does not appear that there is a basis for any clear comparison between Mr. Youngman and Mr. Harvey by me on this application. I have, however, taken the period of disqualification into account.

25. In relation to mitigation, counsel for Mr. Harvey relied upon Mr. Harvey's approach to this application, the payment of the monies for the purpose of reimbursing certain personal expenses discharged, notwithstanding that, in accordance with Mr. Harvey's affidavit, these payments were made as part of an arrangement whereby he would refund the Company for personal expenses and had been told on leaving the Company that there were no further payments outstanding, and his agreement to make a contribution to the costs of the proceedings. He also drew attention to the fact that, whilst the order for disqualification would now be made in June 2010, Mr. Harvey had confirmed to the Court at the hearing in January, 2010 that, with the exception of a company either then being wound up or to be wound up, he was not and would not be a director of a company thereafter. He submitted that Mr. Harvey had effectively been disqualified already for approximately six months.

26. Applying the principles already identified in *Re Ansbacher (Cayman) Ltd*. to the conduct acknowledged by Mr. Harvey in relation to the Company, I have concluded that, were it not for mitigating factors, the period of disqualification should be in the order of six years. As managing director, he accepts that he failed to prevent multiple matters identified by him occurring which led to an insolvency with a deficit in the order of €50,000,000. I have concluded that the mitigating factors referred to by counsel on his behalf, in particular, Mr. Harvey's approach to this application, *i.e*. his recognition and acknowledgement of the failings in his role as a director of the Company and his repayment of the monies and contribution to the costs in accordance with the agreed schedule, are significant mitigating factors, having regard to the purpose of an order for disqualification. They demonstrate a recognition by Mr. Harvey of his obligations as a director of the Company, and probably of any company to which he may in the future be appointed, and consequently lessen the risk he now presents to the public . It also appears to me appropriate, on the unusual facts of this case, to take into account the fact that this acknowledgement was made in January 2010 and there was, I am satisfied, effective disqualification of Mr. Harvey since that date.

27. In all the foregoing circumstances, I have concluded that there should be an order of disqualification of Mr. Harvey for a period of four years from today's date.