

THE HIGH COURT

RECORD No. 1998/89/COS
RECORD No. 1998/132/COS**IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2003
AND IN THE MATTER OF THE NATIONAL IRISH BANK LIMITED
AND IN THE MATTER OF NATIONAL IRISH BANK FINANCIAL SERVICES LIMITED****Judgment of Mr. Justice Kelly delivered on the 19th day of April, 2005****The Order Sought**

1. The Director of Corporate Enforcement (the Director) seeks an order pursuant to s. 12 of the Companies Act, 1990, granting inspectors who were appointed to investigate the affairs of the two companies named in the title to these proceedings liberty to release details of the identities of certain persons referred to in the report prepared by those inspectors.

2. The application is an unusual one and whilst the inspectors are happy to comply with any direction which the court might give they raise a number of issues which they believe have implications not merely for the inspection carried out by them but for other inspections which might be carried out under the companies legislation.

Background

3. The inspectors were appointed to investigate and report on the affairs of National Irish Bank Limited (the bank) on 30th March, 1998. On 15th June, 1998, they were appointed to investigate and report on the affairs of National Irish Bank Financial Services Limited (the company).

4. Following the delivery of a number of interim reports the inspectors delivered their final report dated 9th July, 2004, to me in open court on 12th July, 2004.

5. On that occasion I made an order in accordance with the provisions of s. 11(3) of the Companies Act, 1990 (as amended), that a copy of the report be furnished to the Director. On the same day I made an order that a hearing should take place on 21st July, 2004, with a view to the court giving directions and making orders as envisaged under ss. 11, 12 and 13 of the Companies Act, 1990. I heard that application on 21st July, 2004 and delivered judgment two days later. In the course of that judgment I directed that the inspectors report be published in its entirety on 30th July, 2004. It was so published.

The Report

6. The inspectors report made serious findings in relation to improper practices at both the bank and the company. Those improper practices *inter alia* had the effect of facilitating tax evasion and the levying of unwarranted fees and interest charges on some customers.

7. The inspectors analysed the knowledge and responsibility of senior officers within both the bank and the company and concluded that certain of them bore responsibility for the improper practices identified.

8. The area of the report which is relevant for consideration on this application is that which dealt with the audit committee of the board of the bank.

9. The inspectors said (at pgs. 168 and 169 of the final report) as follows:-

"The Audit Committee of the Board.

General

The inspectors have considered the operation of the Board Audit Committee and have concluded that the Committee:

- afforded to Internal Audit access to Board level in the Bank, independent of senior management;*
- ensured that no limitation was placed on the scope of operation of the internal audit function;*
- met regularly and received presentations from Internal Audit*

and dealt satisfactorily with matters the subject of the Inspectors' investigation which were raised by Internal Audit, save in relation to DIRT.

DIRT

The management summary in the quarterly audit report to the Audit Committee in respect of the quarter ended February, 1995, stated that, in the quarter under review, Internal Audit had completed its first theme audit, which was concerned with DIRT. The audit was rated 'unsatisfactory'.

The report noted three major audit findings in relation to DIRT, each with a 4 star significance rating (i.e. the second most serious rating on a scale of 1 to 5). It was clear from the findings that both in regard to non-resident accounts and Special Savings Accounts there had been a significant failure on the part of the Bank to observe the relevant statutory requirements.

The corrective action proposed by Internal Audit and accepted by management did not include any proposal to deal with the issue of the Bank's liability for such arrears of DIRT as might be due in the circumstances. Because of this, the Audit Committee ought not to have accepted the corrective action proposed as being adequate, but should have sought further information as to how management intended to deal with the issue of a potential retrospective liability for DIRT."

10. The above is the totality of the criticisms made by the inspectors in respect of the Audit Committee. It is to be noted that the inspectors did not name the members of the Audit Committee.

The Director

11. The role of the Director is, in general, to encourage compliance with the Companies Acts and to bring to account those who disregard their duties and obligations under those Acts.

12. The Director takes the view that the directors of the bank who constituted its Audit Committee have serious questions to answer as a result of the findings made by the inspectors. He wishes to consider applying to the court for an order under s. 160 of the Companies Act, 1990, in regard to the members of the Audit Committee. He is therefore concerned to identify the persons who were the members of the Audit Committee of the Board of the bank in February, 1995. To that end he contacted the inspectors requesting them to furnish details of the identities of the members of the Audit Committee of the Board. They responded that they had been advised not to add to their report and that they should not furnish details of the identities of the members of the Audit Committee of the Board of the bank to the director without leave of the High Court.

13. The Director also wrote to the solicitors for the bank and the company requesting them to furnish him with the names and addresses of the persons referred to in the inspectors report as the Audit Committee of the Board. The solicitors acting for the bank responded telling the director that the bank had identified three persons as having being members of the Board Audit Committee in 1995. The identities of those persons were disclosed to the director. However, the letter from the bank's solicitors went on to state as follows:-

"Due to the process by which the inspectors conducted their investigation, the bank was not privy to the inspectors' decisions or the opinions in respect of individuals. In the circumstances, it is inappropriate for the bank to express any views as to whether all or any of the three persons named actually were the persons who should be described in the terms of the third paragraph of your letter of 23rd December, 2004."

14. The third paragraph of that letter of 23rd December, 2004, read:-

"My client wishes to consider applying to the High Court for an order pursuant to s. 160 of the Companies Act, 1990, in respect of the unidentified members of the Audit Committee as referred to in the inspectors' report. Having taken legal advice to that end, the director is concerned to identify the persons who were the members of the Audit Committee of the Board in 1995 that considered the corrective action proposed by Internal Audit and accepted by management and who failed to pursue the issue of the banks potential retrospective liability for DIRT."

Subsequent Events

15. Following the issue of this motion the Director, through an authorised officer, served a notice on the bank pursuant to the provisions of s. 145(3A) of the Companies Acts, 1963, as inserted by s. 19 of the Company Law Enforcement Act, 2001, requiring the bank and its officers to produce for inspection books kept in accordance with s. 145 and to provide facilities for inspecting and taking copies of such books. That notice was complied with by the bank.

16. As a result of that compliance the Director has been furnished with minutes of the relevant meetings of the Audit Committee of the Board.

17. These minutes demonstrate that the Audit Committee met four times in 1995. Those meetings took place on January 26th, April 7th, June 23rd and October 27th, 1995.

18. The criticisms made by the inspectors of the Audit Committee relate to the failure on the part of that committee to consider how the bank would address its potential retrospective liability for DIRT. The Director is satisfied that the criticisms made by the inspectors must relate to the manner in which the Audit Committee of the Board in its meetings in 1995 dealt with that issue. That issue came before that committee by way of a management summary in the quarterly audit report to it in respect of the quarter ended February, 1995.

19. The minutes of the meetings of the Audit Committee show that on 26th January, 1995, there were present three members of that Committee. I will refer to them as A, B and C respectively. C was welcomed by the Chairman (A) to his first Board Audit Committee meeting. There is needless to say no reference to the DIRT theme audit report since it had not been completed.

20. The issue was dealt with at the meeting of 7th April, 1995. That meeting was attended by two members of the Committee namely A and B. An apology was tendered for the non-attendance of C.

21. The DIRT theme audit was also dealt with at the meeting of the Audit Committee held on 23rd June, 1995. Again that meeting was attended by A and B and C was absent.

22. The minutes of the meeting of 27th October record the meeting as having approved the minutes of the preceding meeting and reference was made to *inter alia* internal controls review and a brief report on issues dealt with at the previous meeting. Two members of the Audit Committee were present at this meeting namely A and C with B being absent.

The Director's State of Knowledge

23. As a result of information received from the bank and by the exercise of the statutory powers to which I have referred the Director has now without any assistance from this court been able to identify:

- (a) the composition of the Audit Committee of the Board in 1995,
- (b) the meetings held by that Audit Committee which gave rise to the inspectors criticism,
- (c) the identity of the members of the Committee who were present at those meetings, and
- (d) the business transacted at those meetings as recorded in the minutes.

24. Despite being in possession of this information he nonetheless seeks this order. In the affidavit of Ms. Keating sworn on his behalf on 21st February, 2005, she says the Director wishes to ascertain whether the inspectors sought to criticise:

"(a) The member of the Audit Committee of the Board in attendance at the meetings of the Audit Committee of the Board which took place on April 7th, 1995, June 23rd, 1995 and on October 27th, 1995 and

(b) the member who was present at the meetings of the Audit Committee of the Board which took place on April 7th, 1995 and June 23rd, 1995 and

(c) the member who was present at the meetings of the Audit Committee of the Board which took place on October 27th, 1995."

25. In the course of the hearing, counsel on behalf of the Director sensibly accepted that there could be no doubt but that members A and B of the Audit Committee who attended the meetings in April and June 1995 must be the subject of the inspectors criticisms since those meetings dealt specifically with the matters in respect of which the inspectors were critical. There could be some doubt as to whether the inspectors criticism was directed at C since he attended just the one meeting in October where it could be said that the issue was dealt with in a less detailed or more oblique way. Counsel also accepted that in the light of the information which is now in the possession of the Director the only purpose that could be achieved by the court making the order sought would be to put the Director's mind at ease before launching s. 160 proceedings against C.

The Statutory Provisions

26. The order is sought pursuant to s. 12 of the Companies Act 1990. That section insofar as it is relevant reads as follows:

"1. Having considered a report made under s. 11, the court may make such order as it deems fit in relation to matters arising from that report including:-

(a) an order of its own motion for the winding up of a body corporate, or

(b) an order for the purpose of remedying any disability suffered by any person whose interests were adversely affected by the conduct of the affairs of the company, provided that, in making any such order, the court shall have regard to the interests of any other person who may be adversely affected by the order."

27. Whilst it was initially contended that the present application might fall within the scope of s. 12(1)(b) that argument was effectively abandoned since it was conceded that the Director was not a person who suffered any disability or whose interests were adversely affected by the conduct of the affairs of the company. To that extent this case differs from that which was dealt with by Finnegan P. on 25th May, 2004, in respect of an application by the Revenue Commissioners where they sought an order granting them access to and copies of all documents related to an inspectors report into the affairs of Ansbacher Cayman (Limited) and which were not contained in the report or the appendices to it. He specifically held that the Revenue Commissioners fell squarely within the ambit of s. 12(1)(b).

28. This application falls to be dealt with exclusively under the power which is contained in the introductory part of s. 12(1). That provides that the court *"may make such order as it deems fit in relation to matters arising from"* a report made under s. 11.

29. In the course of his judgment in the *Ansbacher* case, Finnegan P. said of s. 12(1):

"The section gives the court a wide discretion – it may make such order as it deems fit.... It is to be noted that the discretion conferred upon the court is not limited to the circumstances mentioned in s. 12(1)(a) and (b) in that these provisions are regulated by the word 'including' so that the discretion of the court may be exercised in cases falling outside these provisions."

30. I expressed similar views myself in the judgment which I delivered in the present case of the 23rd July, 2004, where I pointed out that s. 12(1) confers a wide jurisdiction on the court. I said:

"The court may make such order as it deems fit in relation to matters arising out of its consideration of a report made by inspectors pursuant to section 11. The court appears to be at large as to what order it can make under this provision."

31. It is this wide jurisdiction which is relied upon by the Director to ground this application.

The Inspectors Concerns

32. The concerns of the inspectors are threefold. They arise from

- (a) the nature of the report,
- (b) the position of third parties, and
- (c) costs.

(a) The nature of the Report

33. The report which was presented to the court on the 12th July, 2004 was the inspectors final one. It was intended by them to be a comprehensive and final document and was published as such. They are concerned that if the present motion were to be acceded to, there would be no finality about their or any other inspectors reports and the inspection process could continue indefinitely.

34. They draw attention to the mandatory obligation imposed upon them under s. 11(1) of the Act which states that "inspectors appointed under s. 7 or 8 may, and if so directed by the Court shall, make interim reports to the Court and on the conclusion of the investigation, shall make a final report to the Court".

35. The report made at the conclusion of the investigation is intended by the legislature to be final in nature. They argue that the statute does not envisage a form of rolling process whereby notwithstanding the fact that a final report has been presented the inspectors may nonetheless be asked to go behind it or beyond it.

(b) The position of third parties

36. One of the reasons why the Inspectors took so long in producing their final report was because of the necessity to respect the rights and entitlements of any persons who were animadverted upon in it.

37. The inspectors were scrupulous in ensuring that fair procedures were adhered to and that the rights of any persons whom they ultimately criticised were fully respected.

38. If the inspectors are now required to consider matters which they did not deem appropriate or necessary to incorporate into their report the rights of third parties could be prejudiced. In order to ensure that that did not occur the inspectors would have to re-engage in a time consuming process which would involve, *inter alia*, an opportunity being given to the persons involved to comment on any conclusions reached by the inspectors before the information sought could be released.

39. During the course of the inspection, parties that were to be the subject of adverse comment were furnished with a draft of the relevant section of the report and were given the opportunity to make submissions, bring further evidence and examine witnesses. If the inspectors are now required to supplement their report, it is likely that that process would have to be embarked upon.

(c) Costs

40. The inspectors are concerned at the fact that whilst the costs of the inspectors were, up to the time of the publication of the report, discharged by the Minister for Justice, Equality and Law Reform (and pursuant to the order made by this Court will now be recovered from the Bank), there is no provision for the payment of any subsequent costs. At the time of swearing their affidavit no assurance had been provided by any party in relation thereto.

41. The costs question has been resolved in the present case by the Director accepting liability in respect of any costs which might be incurred as a result of the making of the order sought.

Statutory Power

42. I will decide this application on the merits and the assumption that there is power to make the order sought. As I have serious doubts that there is in fact such a power, I ought to say a few words on that topic.

43. Section 12(1) confers an extremely wide discretion upon the Court. It is, as I have already said, at large as to what order it can make. However, any order which it might make on foot of the discretion given by this section would have to be consistent with other provisions of the same Act.

44. The order sought by the Director under this general discretionary provision would not be consistent with the provisions of s. 11 which requires the inspectors to produce a final report. That is what the Inspectors were asked to do and that is what they did. A final report means just that.

45. I do not believe that the legislature in investing the Court with the wide discretion afforded to it under s. 12(1) intended that an order of the type sought might be made subsequent to the delivery of the final report.

46. This case is to be distinguished from the *Ansbacher* decision of Finnegan P. It differs in two important respects. First, his order was made specifically pursuant to the provisions of s. 12(1)(b) and not the general discretion relied on here. Secondly, he was not asked to send the inspectors back to the drawing board but merely to provide access to copies of documents related to the Inspectors report which were not contained in it or its appendices.

47. In my view it is very doubtful that there is power under the relevant statutory provision to make an order of the type sought.

Criteria to be Met

48. If there is power to make an order of the type sought, it should only be made when certain conditions are met.

49. An order of the type sought should not be granted unless (a) there is a real and pressing need for it and (b) a substantial benefit is to be gained by it.

50. In general, the Court should leave it to the inspectors appointed by it to decide how and in what manner they present their report to the Court. If they choose not to name individuals (as they did in respect of the Audit Committee) they should not, save in exceptional circumstances, be asked to reconsider that approach. They have a wide discretion.

51. In *Maxwell v. Department of Trade* [1974] 1 Q.B. 523 Lord Denning M.R. said of inspectors:

"Fourth: The inspectors have to make their report. They should state their findings on the evidence and their opinions on the matters referred to them. If their report is to be of value, they should make it with courage and frankness, keeping nothing back. The public interest demands it. It may on occasion be necessary for them to condemn or criticise a man. Before doing so, they must act fairly by him. But what does fairness demand. That is the question."

52. The same judge said in *In Re Pergamon Press* [1971] 1 Ch. 388 at 399 of inspectors –

"they have to make a report that may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers".

53. Likewise, if they chose not to name individuals then that is a matter for them and save in exceptional cases their discretion in that regard should not be interfered with.

54. It is against that general approach that the Court has to examine the circumstances of an individual case to see if there is a real and pressing need for an order of the type sought and a benefit of substance to be gained by it.

55. I am quite satisfied on the facts of this case that there is no real and pressing need for the order sought.

56. At this stage the Director has all of the information which I have set forth in this judgment under the heading "The Director's State of Knowledge". Putting his mind at ease before deciding upon whether proceedings under s. 160 should be commenced against director C does not constitute a real and pressing need.

57. I am also satisfied that the order sought would not provide any real benefit to the Director.

58. Under s. 22 of the Companies Act, 1990 certain evidential value is given to a report of an inspector. That section provides as

follows:

"22.— A document purporting to be a copy of a report of an inspector 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."

59. It is accepted by counsel for the Director that if the order sought were made the material which would be produced on foot of it would not constitute a report for the purposes of this section. Consequently, it would be of no evidential value in the prosecution of any case against the members of the Audit Committee. In the absence of such evidential value it is difficult to see what other benefit the Director could glean from this exercise.

Conclusion

60. On the assumption that there is power to make the order, I am quite satisfied that none of the conditions which would have to be met before it could be made have been satisfied.

61. The application is refused.