

**THE HIGH COURT
DUBLIN**

1287P/2005

**TIM BROSNAN, PAUL MAGOWAN AND PATRICK
GLEESON**

PLAINTIFF

**AND
ANNE SOMMERVILLE**

DEFENDANT

Judgment of Mr. Justice T.C. Smyth, delivered on Tuesday, the 3rd day of October 2006.

1. By Notice of Motion dated 12th April 2005 the Plaintiffs seek orders that -

1) the Defendant be compelled to sign the bank enquiry letters furnished to her on behalf of the Plaintiffs for the purpose of allowing the Plaintiffs to obtain access to the bank accounts of

(a) Mars 2112 Group Ltd (the Group) and

(b) Mars 2112 Global Ltd ('Global') which is a wholly owned subsidiary of the Group pursuant to Section 202 of the Companies Act, 1990 and/or Section 371 of the Companies Act, 1963.

2) The Defendant be compelled to deliver up to the Plaintiffs and/or the Plaintiffs' nominated Accountant/s all books and records (to include invoices, receipts and all documentation) in relation to the operation of the bank accounts held by the Bank of Ireland Global Markets (formerly Bank of Ireland Treasury and International Banking) ('the Bank') in respect of the Group and Global.

3) The Defendant be ordered and directed to authorise the bank to provide the Plaintiffs and/or the Accountants with whatever bank details and documents they require in respect of the bank accounts of the Group and Global pursuant to the provisions of the statutes aforesaid. authorisations required by the Plaintiffs and/or the Accountants in respect of any other bank account(s) relating to the Group or Global.

The Facts

2. The Plaintiffs are directors of the Group of which Mr. Brosnan is Chairman of the Board of Directors. Global and a company called Mars 2112 Woodfield Corp. ('Woodfield') are both wholly owned subsidiaries of the Group. Mr. Gleeson is known as the 'Investor Director' in Global. Mr. McGowan is known as the 'Subscriber Director' in Global. Messrs. Gleeson and McGowan together respectively own approximately 63% of the shareholding of the Group.

3. All three Plaintiffs are in dispute with a brother of the Defendant, one Paschal Phelan who is a director of the Group, Global and Woodfield. He controls approximately 37% of the shares in the Group although it is through a nominee company Arkvale International Ltd. The Defendant, Mr. Phelan's sister was up until 31st August 2004 (when she resigned) Secretary to both the Group and Global prior to the institution of these proceedings.

4. A considerable amount of the material in the affidavits is taken up with the conduct of Mr. Phelan and the manner in which he is said to have constructed and managed a venture in Chicago in the United States of America. It went very seriously over budget and very substantial losses were incurred and apparently unaccounted for or not accounted for properly. The dispute of the Plaintiffs with Mr. Phelan is the subject of separate litigation (Record No. 2004/106968).

5. The accountant for the Plaintiff directors to both the Group and Global required certain books and documents to enable him to prepare a report for the directors and difficulties arose in the attempt to obtain and inspect the relevant books and records of the companies. The Defendant perceived herself as 'caught in the cross-fire' between the Plaintiffs and Mr. Phelan and further that their pernicious view of her was and is grounded on her relationship to Mr. Phelan and that she had been obstructive and acting in interests inimical to those of the Group and Global.

6. In the events she resigned both as company Secretary and director of both companies on 31st August 2004. Prior to that date she had been an authorised signatory in banks with which the companies had accounts. It would appear that both Mr. Phelan and herself, before the present directors became more actively involved, effectively ran the companies. However, notwithstanding her resignation both of the companies which are now effectively or in large measure the concern of the Plaintiffs appointed a new secretary. A Mr. Con Casey has been appointed as interim company Secretary. He is the accountant appointed by the Plaintiff directors to carry out the inspection they require. However, since his appointment there does not appear to have been any consequential advice to the banks with a view to changing banking mandates or the names on the accounts. However, notwithstanding her resignation, the Defendant at the request of the Plaintiff's solicitors signed two forms of authorisation to the Bank of Ireland, Baggot Street, Dublin enabling certain information to be given to the accountants to the companies.

7. No reason has been set out in the affidavit for the obvious omissions of notifying the banks of the change of company Secretary or changing the banking mandates, both or either of which could possibly have avoided the present application or why the requirements of alternative arrangements of the Plaintiffs and companies were not made well in advance of 31st August 2004. However, I think it fair to infer that the range of inquiries being made for and on behalf of the Plaintiffs was of a continuing nature over a period of time and at no stage was it indicated that the inquiries were at an end, nor was advance notice given of an intention to resign (by the Defendant).

8. A request was made dated 22nd December 2004 that the Defendant do sign two further forms of authorisation in relation to accounts held by the companies with the Bank of Ireland, Treasury and International Banking Division, Colville House, Talbot Street, Dublin. The stated purpose of the request was so as to allow the accountant mandated by the Plaintiff directors to access the financial records of the companies, as they are entitled to do pursuant to the Companies Acts. It is common case that the Defendant refused to sign the particular documents. It is essentially on this point that the parties joined issue.

9. The contentions of the Plaintiffs were as follows: -

- 1) The refusal of the Defendant to sign/the documents on the basis that she had resigned as Company Secretary and Director did not inhibit her from signing other like documents on 15th December 2004 (after she had resigned); therefore to advance her resignation as inhibiting her from signing the second set of documents is not a genuine reason to tender for her refusal.
- 2) That the bank would not provide any details or information to the Plaintiffs or the accountant (Mr. Con Casey) until such time as letters of authorisation are obtained from the authorised signatories to the account for which information is sought. In the circumstances where the Defendant is refusing to execute the documents she is effectively frustrating the Plaintiff's ability to exercise their statutory rights under the sections referred to in the Notice of Motion.
- 3) The Defendant is well aware that the board of the company cannot, pending an expert determination of the composition of the Board of Directors, take steps which would involve the substitution of another signatory for the Defendant in respect of those accounts. In the circumstances the failure, refusal and neglect by the Defendant to execute the documents, she must know has the effect of frustrating the ability of the Plaintiffs to exercise their statutory rights of access to information in respect of both companies. [Paragraphs 20 - 22 (inclusive) of Mr. Brosnan's grounding affidavit].
- 4) Mr. Phelan has signed documents, similar to those the Defendant refuses to sign, but without both signatures the probability is that the bank will not make the information available. In effect her refusal is a support to Mr. Phelan in his dispute with the Plaintiffs.

10. The contentions of the Defendant were as follows:

- 1) The information being sought is for the purpose of enabling Mr. Con Casey of Casey McGrath & Associates, Chartered Accountants to finalise a report commissioned in 2003, not by the companies as such, but by a number of directors (the Plaintiffs) to review certain transactions entered into by the Group and its subsidiaries since their formation. The real focus of the report was the Chicago Venture of which the Defendant never was a director and not involved at all.

- 2) She gave all the information available to her to Mr. Casey. In an e-mail of 3rd June 2004 she stated: -

"The build out of Chicago was completed from an admin and financial point of view in the US. As I remember at the time the funds were transferred directly at the time by the shareholders to the USA."

- 3) I read paragraph (7) of the Defendant's affidavit sworn on 13th June 2005 as meaning that other than the accounts in the Bank of Ireland (in respect of which she signed an authority on 15th December 2004) and those held by the Bank of Ireland, Treasury and Internal Banking Division (in respect of which she refused to sign an authority on 5th January 2005) she is not aware of any accounts held by any bank within the State.

- 4) The court ought not to grant the Plaintiffs relief unless and until the Plaintiffs seek the information from the banks that would have been available to Mr. Con Casey had she (the Defendant) signed the documentation submitted to her on 22nd December 2004. While there are several matters of concern raised in the affidavits it is inappropriate at this stage, in my opinion, to seek to make specific findings on them. It is trite to note that a company has an independent legal personality, that with the benefits conferred by limited liability comes a duty of directors to creditors and shareholders and to each other.

The Statutory Framework

11. Section 202 of the Act of 1990 imposes a duty on every company to cause to be kept proper books of account, whether in the form of documents or otherwise which will (*inter alia*) enable the accounts of the company to be readily and properly audited. What the make up of the information may be is indicated by the type of underlying documentation referred to in subsection (3) of the Section.

12. Subsection 4 provides that: -

"For the purposes of subsections (1), (2) and (3), proper books of account shall be deemed to be kept if they comply with those subsections and give a true and fair view of the state of affairs of the company and its transactions." (Emphasis added)

13. It is not sufficient to provide minimal information -

It must be such as to render the companies' transactions explicable. Thus if (as was referred to in paragraph (9) of Mr. Brosnan's affidavit sworn on 28th May 2005) "payments were made out of company funds through the intermingling of a company credit card and the Defendant's brother's personal credit card" the credit card and the credit card accounts of both the company and the Defendant or Mr. Phelan, if it be him, as well as the docket, invoice, statement, VAT statement, VAT returns and receipt of payment of VAT would all be embraced to enable a true and fair view of the affairs of the company to be obtained and explain its transactions.

14. Subsection 6 emphasises the position or entitlements of directors, thus: -

"If books of account are kept at a place outside the State, there shall be sent to and kept at a place in the State and be at all reasonable times open to information by the directors such accounts and returns relating to the business dealt with in the books of account so kept as will disclose with reasonable accuracy the financial position of that business at intervals not exceeding six months and will enable to be prepared in accordance with the Companies Acts, the company's balance sheet, its profit and loss account or income and expenditure account and any document annexed to any of those documents giving information which is required by the said Acts and is thereby allowed to be so given."

15. The failure to comply with the terms of the section attracts serious legal sanctions, not only for the company but also for a

director. Subsection 10 provides: -

"(10) A company that contravenes this section and a person who, being a director of a company, fails to take all reasonable steps to secure compliance by the company with the requirements of this section or has by his own willful act been the cause of any default by the company thereunder, shall be guilty of an offence." (Emphasis added).

16. The enforcement of the duty to comply with the provisions of the Companies Acts is provided for in Section 371 of the Act of 1963 as follows: -

"(1) If a company or any officer of a company having made default in complying with any provision of this Act fails to make good the default within 14 days after the service of a notice on the company or officer requiring it or him to do so, the court may, on an application made to the court by any member or creditor of the company or by the registrar of companies, make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order." (Emphasis added).

17. Section 2 of the Act of 1963 defines "officer" in relation to a body corporate as including a director or secretary. Section 31 of the Act of 1963 defines a member by reference to the subscribers to the memorandum and then -

"(2) Every other person who agrees to become a member of a company, and whose name is entered on its register of members, shall be a member of the company."

The Case Law

18. A director's right of access to books of account may be enforced by injunction: *Healy -v- Healy Homes Ltd.* [1973] IR 309. Furthermore a director is entitled to be accompanied by his/her accountant for the purpose of inspecting the books of account, and to make copies thereof. This action was based on the provisions of Section 147(3) of the Act of 1963 which was amended in the terms of the Act of 1990, the provisions of which I have already referred to.

19. Mr. Howard, SC for the Plaintiffs also relied on the authority of *Burn -v- The London and South Wales Coal Company and the Risca Investment Company*, TLR (1890) vol. 7 p.118 which considered the right of a director to inspect and take copies of documents in the custody of a Mr. Flux, who was the solicitor of both companies. It was considered immaterial, so far as the principle of the decision is concerned, for whom he held the documents. The constitution of the Risca Company and the relationship between the two companies were of a peculiar and intimate character. The members of the two companies were to a large extent the same. The Plaintiff was the holder of a large stake in the Risca Company.

20. The Plaintiff had made an application as a director of the coal company to see the documents in question, but his co-directors passed a formal resolution that he should not see them. North J. held that a director has a right to see and take copies of documents belonging to his company. With regard to the Risca Company, he considered that the Plaintiff had no right, independently of the Conveyancing Act of 1881, Section 16 to see their documents and the title deeds. [This latter refinement has no relevance to the instant case].

21. It is possible for a director, whether he or she has retired from office to be guilty of misfeasance committed even after they have retired from office (*Curtis's Furnishing Stores Ltd. (in liquidation) -v- Freedman* [1966] 1 WLR 1219).

Applying the Law to the Facts

22. On the basis of the undisputed relevant facts the Defendant as of 5th January 2005 ceased to be the Company Secretary and a Director and therefore was no longer an officer (as defined in Section 2 of the Act of 1963) and accordingly is *prima facie* not a person against whom an order under Section 371 of the Act can be made. However, as the nature of the inquiries was ongoing since 2003 and the request in December 2004 was a mere continuum of same, notwithstanding that it had not been an enumerated document earlier sought, as of the date of the request of the Plaintiffs first made the Defendant was an officer and she then had a statutory duty under the provisions of Section 202(10) of the Act of 1963 as a person who being a director of a company was obliged to take all reasonable steps to secure compliance by the company with the requirements of Section 202(6) to enable inspection by the directors of such proper books of account as would give a true and fair view of the state of affairs of the company and explain its transactions.

23. The question arises can that duty be terminated by a form of resignation so as to render compliance with the obligation continuing.

24. The letters of Mr. Con Casey to the Defendant of 25th May 2004 and 17th June 2004 clearly indicate the concern of Mr. Casey to have available to him within the State for inspections the documentation referable to the Chicago Venture per Section 202(6). The documentation sought (which would include banking records) may or may not have been in the name of the Group or Global, but if accounts or records are not in the names of the companies or either of them, that is not the end of the matter. If accounts are opened, maintained or conducted in the name or names of a person or persons in relation to the business of a company and as such would assist in giving a true and fair view of the state of affairs of the company and explain its transactions then it seems to me such documentation is within the contemplation of the sections.

25. At first sight this may appear as an unwarranted intrusion into the private affairs of a director or other person. In my judgment it is not. It is the consequence of a director or person's intermingling their own affairs or funds and those of the company.

26. In small family companies such practice, however undesirable may occur as a matter of convenience, but it can and often has serious consequences.

27. I express no view given the limited form of relief sought under statute as to whether the Defendant might not on the state of the evidence as disclosed in the affidavits be open to an action for misfeasance notwithstanding her resignation on 31st August 2004.

28. When the Defendant resigned as a Company Secretary and Director on 31st August 2004 she ceased to be an officer of the companies but notwithstanding which she signed the forms for the Bank of Ireland on 15th December 2004. She refused to sign the forms submitted to her on notice of 22nd December 2004, essentially not because of her resignation but because she considered the tenor of the request overbearing and was apprehensive that it would lead to further requests which were referable to extraneous matters.

29. The Defendant explained her position in paragraph (20) of her affidavit sworn on 9th May 2005. Further in paragraph (4) of the Defendant's affidavit of 8th July 2005 she avers as follows: -

"It appears that no letter has been sent to the Bank of Ireland requesting the release of the documentation and that, in making the assertions which they have, the Plaintiffs are in fact relying upon something that Mr. Casey has experienced in the past. It does not appear to have occurred to the Plaintiff or the Plaintiff's advisors to undertake the very simple expedient of writing to the bank as Secretary and actually making a particular request. This establishes in my mind two things, one that the Plaintiffs has (sic) sought to contrive a dispute and, secondly, that the Plaintiff is not being entirely frank as to what documentation it is seeking".

30. In my judgment the Plaintiffs are, on a legalistic view of the facts, not entitled to an order under Section 371(1) of the Act of 1963. However, the form of inquiries being made in this instance have been of a continuing nature over a period from 2003 onwards. The Companies Acts are to be construed together and Section 371 is to be construed as a whole.

31. It is clear from the provisions of subsection (3) of Section 371, which provides as follows:

"Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on a company or its officers in respect of any such default as aforesaid".

32. The provisions of Section 202(10) of the Act of 2000 are clearly of a penalty character. It seems to me that the provisions of subsection 3 of Section 371 are to protect against a position where a duty is imposed and that duty has to be viewed in the light of Section 202, which is the dominant provision as between the two sections.

33. There is certainly no express waiver by the Defendant in having signed the first of the two sets of documentations submitted to her in more recent times. It nonetheless is indicative in my judgment that the point was only secondly taken on the basis that she was concerned that the Plaintiffs or the company would seek to rely on her signatures as entitling them to seek her authority to investigate any accounts not only of the companies but also relating to the companies.

34. The Acts are quite clear as to the entitlements of directors. The Defendant by her own willful act in resigning has effectively sought to deliberately disable herself from being capable to take all reasonable steps to secure compliance with the requirements of Section 202(6). In my judgment a director's fiduciary duty is coextensive with his or her function of promoting the business interests of the company which are not to be evaded by escape through resignation. The business interests of the company are not protected by the avoidance of a duty through motives that inhibit the compliance with the provisions of Section 202(6).

35. This, however, is not to say that if a person who is an officer of a company has resigned for some appreciable time that they can many years afterwards be asked and obliged to comply with the provisions of Section 371 without more. On the particular facts as I find them in this case, the inquiries were and are of a continuing nature and it behoved the Defendant in my judgment to have executed all such documents as were necessary to clearly give the information being sought by the accountant for and on behalf of the other directors which had begun as far back as 2003.

36. The Defendant having resigned as Company Secretary and Director is obliged nonetheless to deliver and make available to the Secretary of the companies for the time being the documentation referred to in paragraph (2) of the Notice of Motion so as to permit the Plaintiffs to inspect same in the terms of Section 202(6) of the Act of 1990. Therefore, until the Plaintiffs seek to meet the challenge of the Defendant to seek to alter the authority and mandates at the bank no determination will be made under the provisions of Section 371(2).