

THE HIGH COURT

2010 323 COS

IN THE MATTER OF ANGLO IRISH BANK CORPORATION LIMITED
AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

BETWEEN

DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

ANGLO IRISH BANK CORPORATION LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Kelly delivered on the 10th day of May, 2011**Introduction**

The collapse of Anglo Irish Bank Corporation Limited (Anglo) has had profound and serious consequences for the economic wellbeing of this State and its' citizens. It has caused much hardship to many small shareholders who invested in it in good faith. It played no small part in seriously damaging Ireland's business reputation throughout the world.

In such circumstances, one could reasonably expect that the relevant authorities in the State would carry out a comprehensive investigation so as to ascertain whether any breach or breaches of the criminal law might have occurred in respect of the activities of Anglo and those who were responsible for it.

The applicant (the Director) has indeed been carrying out an investigation together with the Garda Bureau of Fraud Investigation and it is that investigation which gives rise to the current application.

The application concerns the treatment of material which was obtained on foot of warrants granted by the District Court to the Director in February, March and September 2009. This involved the use of what is statutorily described as an "extended power of seizure".

In this application, the Director seeks orders pursuant to s. 20(2G)(a) of the Companies Act 1990 as inserted by s. 5 of the Companies (Amendment) Act 2009 to extend the period specified under s. 20(2I)(a)(i) to deal with such material for a further period of six months from the date specified in a similar order which I made on 9th November, 2010. A second order is sought in the same terms in respect of potentially legally privileged material.

This is the sixth time on which the Director has applied for orders of this type. The first occasion was in October 2009.

The Application

The statutory provision relied upon by the Director provides that an application may be made to the court by the Director or any person affected by the exercise of an extended power of seizure. An extended power of seizure was exercised in the present case and that is not in contest. In such circumstances, the Act provides that the court "may, if it thinks fit and having had regard, in particular, to any submissions made on behalf of the Director with regard to the progress of any investigation being carried on by the Director for the purpose of which the powers under this section had been exercised, give one or more" directions (my emphasis). The direction which is sought here is a further extension for a period of six months within which to deal with the material which has been the subject of the extended power of seizure.

At earlier hearings, I directed that if further extensions of time were to be sought, the court would have to be apprised of the progress being made in the various investigations which are being carried on.

The Investigation

Five issues have been identified which are the subject of investigation by the Director and the Garda Bureau of Fraud Investigation.

They concern:-

- (i) the provision of financial assistance by Anglo to a number of persons in 2008 to enable the purchase of Anglo's shares in circumstances which may have contravened s. 60 of the Companies Act 1963;
- (ii) the provision of loans by Anglo to its former directors and the regular "warehousing" in Irish Nationwide Building Society of certain loans made available by Anglo to some former directors at the end of Anglo's financial year thereby misleading the auditors in circumstances which may be contrary to provisions of the Companies Acts 1963 – 1990;
- (iii) a "back-to-back" deposit arrangement undertaken with Irish Life and Permanent Group for the benefit of Anglo at the end of Anglo's financial year in September 2008;
- (iv) the provision of a loan to a director of Anglo in circumstances which may be contrary to common law and s. 297 of the Companies Act 1963; and
- (v) the communication of possible false or misleading information in certain Anglo public statements in 2008 which may

I will consider each of these issues in turn.

Issue (i)

In sworn testimony which was put before me in November 2010, I was informed that insofar as this issue was concerned "substantial progress has been made, and the Director expects that the investigation of this item will be substantially completed at the end of the year". That was the Directors own time estimate and not one in any way imposed by the court.

In an affidavit dated 19th April, 2011, in support of this application, I was told that a report relating to certain aspects of this issue was forwarded to the D.P.P. on 24th December, 2010 and that a file was sent to the same officer on 14th March, 2011, following what was described as "the substantial completion of this investigation". The file was seventeen volumes in size and consisted of some eight thousand pages.

I am informed that the investigation file with the D.P.P. is about 90% complete. Despite the "substantial completion" of the investigation, there are a number of important interviews which have yet to be concluded and some other unspecified work which remains outstanding. Only when this is done will the Director be submitting this additional evidence to the D.P.P.

In December 2010, the Garda Bureau of Fraud Investigation furnished an investigation file in respect of market abuse matters in relation to this issue to the D.P.P. It is under consideration by that officer. I am not given any information as to what has happened to this since December 2010.

However, I am informed that further documentation is required to complete this investigation and this involves documents in respect of which the provisions of the Bankers' Books Evidence Acts will have to be called in aid. In addition, the investigation continues to involve the use of mutual assistance procedures in the United Kingdom in order to obtain evidence and statements from a number of persons.

I confess that when the affidavit evidence of last November was put before me and I was told that this investigation would be "substantially completed" by the end of 2010, I took that to mean that papers in final form would be placed before the Director of Public Prosecutions for his decisions at that juncture. That clearly is not the case.

Issue (ii)

In November 2010, I was told under oath concerning this issue that "substantial progress has been made and the Director envisages that the investigation of this item will be substantially completed by the end of March 2011".

In an affidavit dated 19th April, 2011, I am told that the position concerning this issue is that:-

"Further analysis of documents will be required and a significant number of witnesses (approximately fifty) remain to be interviewed. The ODCE investigation is progressing well and every effort is being made for its completion by the end of 2011".

This is remarkably different to what I was told last November. Instead of the investigation being "substantially completed by the end of March 2011" there is now no more than an assertion that every effort will be made for its completion by the end of 2011.

I am at a loss to know how the original time estimate could have been given, as even now, in May 2011, fifty witnesses have yet to be interviewed.

Issue (iii)

In November of last year, I was told that it was anticipated that this investigation would be substantially completed at the end of that year. A file was indeed furnished to the D.P.P. on this topic in December 2010. However, I have been given no information as to what has occurred since then. I do not know whether the D.P.P. is still considering the matter, whether he has issued directions or has made any decision at all on the topic.

Issue (iv)

In this case a file was also sent to the D.P.P. at Christmas 2010. No further information has been furnished as to what has been happening since then.

Issue (v)

I am told that a report was furnished to the D.P.P. on this matter in December 2010. However, as the investigation is largely interconnected with the events which are the subject of the issues at (i) – (iv) above, this investigation apparently cannot be completed until those investigations are at an end.

Discussion

I accept, as I have done before, that the task of conducting these investigations is a difficult one. It involves consideration of large numbers of documents both in hardcopy and electronic form. The electronic documentation has to be processed and that is complicated and time consuming. Some people have been uncooperative in making statements. Others have made commitments to give statements but have not yet done so. Other individuals have simply refused to cooperate at all. I also accept matters may arise during an investigation which put time estimates out of kilter.

Very considerable resources have been made available with a view to making progress on these inquiries.

Notwithstanding all of this, however, it has to be borne in mind that the genesis for this application was the execution of search warrants issued by the District Court as far back as 23rd February, 2009.

Now, more than two years after that event, the investigation is still continuing and I have been unable to obtain anything like a firm estimate as to when it is going to be brought to an end.

The self-selected estimates of time which were the subject of the testimony given to me in November of last year have proven to be inaccurate to a substantial degree. For example, I simply do not understand how in relation to Issue (ii), I was told that the

investigation would be substantially completed by the end of March 2011 when now in May 2011, fifty witnesses remain to be interviewed. The best that I can be told by way of estimate is that every effort is being made for the completion of the investigation of this issue by the end of 2011.

This case may be unique as to its complexity and the volume of material that has to be assimilated but it is certainly not unique in its speed, or rather lack of it. Over the last few years, I have sent papers for consideration by the relevant investigation and prosecution authorities in a number of Commercial Court cases where judgments for many millions and indeed tens of millions of euros were given against individuals where there was *prima facie* evidence of criminal wrongdoing on their part. In some such cases admissions of wrongdoing were made. Despite the fact that years have passed since the papers were referred to the authorities, no prosecutions have ensued and little appears to have been done. I am not alone in my sense of disquiet in this regard. In his judgment of 13th April, 2011, in *Kelly v. Byrne*, Clarke J. said in respect of the defendant in that case:-

"It is of some relevance to note that Mr. Byrne made full and frank admissions in the witness box as to the practices in which he was engaged and his acceptance that those practices were unlawful under many headings. I do have to comment that, in the light of those admissions, it is very surprising indeed that no further action against Mr. Byrne seems, as yet, to have been taken."

This is not a desirable state of affairs. An apparent failure to investigate thoroughly yet efficiently and expeditiously possible criminal wrongdoing in the commercial/ corporate sector does nothing to instil confidence in the criminal justice system as applicable to that sector.

Conclusion

I acknowledge again the huge volume of material that has to be considered in the present case and I do not underestimate the complexities involved. Despite that, in excess of two years investigation without any appreciable result is not at all satisfactory.

I am prepared to exercise the discretion which is vested in me under the statutory provisions in favour of the Director on this occasion. I am not, however, prepared to grant an extension of six further months as sought. I will grant an extension until Thursday, 28th July, 2011. On that occasion, I expect much progress to have been achieved. If a further extension is to be sought, I expect to be furnished with much more detailed information as to the progress of the investigation of these various issues. In particular, I will require to know what progress has been made in respect of the material sent to the D.P.P. in December 2010. I will also expect more accurate estimates of time as to the completion of these investigations than have been furnished to date.