Neutral Citation Number: [2013] IEHC 561

THE HIGH COURT

[2006 No. 282 COS]

IN THE MATTER OF BOVALE DEVELOPMENTS

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2005

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160(2) OF THE COMPANIES ACT 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

MICHAEL BAILEY AND THOMAS BAILEY

RESPONDENTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 9th day of December 2013

1. The Director of Corporate Enforcement ("the Director") seeks an order of disqualification of each of the respondents pursuant to s. 160(2) of the Companies Act 1990.

2. The respondents are the only directors and shareholders of Bovale Developments ("Bovale"), a company incorporated in 1983 as a limited company and re-registered as an unlimited company in 2005. They are also directors of a number of other companies connected with Bovale. This application relates to their misconduct as directors of Bovale.

3. The Director submits that on the uncontested evidence before the Court, that:

> (i) the respondents, as officers of Bovale, have been guilty of fraud in relation to Bovale and a major creditor, namely, the Revenue Commissioners; and
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> (ii) the respondents, as officers of Bovale, have been guilty of breaches of duty as such officers; and
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> (iii) the conduct of the respondents, as officers of Bovale, make them unfit to be concerned in the management of a company

and that, accordingly, the Court should make a disqualification order in respect of each of the respondents being satisfied of matters set out in s. 160(2)(a), (b) and (d) of the 1990 Act.

4. The respondents do not dispute that the evidence adduced by the Director of misconduct by them as directors of Bovale is such that the Court should now be satisfied, for the purposes of s. 160(2)(a), (b) and (d), that they were, whilst a director, guilty of a fraud in relation to Bovale and the Revenue Commissioners; were guilty of breach of duty as officers of Bovale and their conduct as officers was such that it now makes them unfit to be concerned in the management of a company and that the Court must now exercise its discretion to make orders of disqualification in respect of each of them pursuant to section 160(2). However, the respondents seek to rely upon a number of mitigating factors set out below for the purpose of submitting to the Court that notwithstanding the gravity of the misconduct, now acknowledged by them and in respect of which they have offered apologies, the Court should only make disqualification orders for a relatively short period.

5. The application has a number of unusual features. These include the gravity of the misconduct; the fact that the wrongdoing in respect of which the application is brought relates to the two-year period ending 30th June, 1998; the respondents assertion (not disputed) that they have been company law and Revenue compliant since 2001, and that this application commenced in 2006, and by reason of interlocutory disputes relating to the admissibility of certain evidence sought to be relied upon by the Director, discovery disputes and, ultimately, an adjournment to facilitate the reorganisation of Bovale in NAMA, the application was only heard at the end of October 2013.

Evidence

6. The evidence before the Court on this application is contained in five affidavits and exhibits thereto:

> (i) affidavit of Mr. Peter Lacy sworn 30th June, 2006 (redacted by agreement between the parties);
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> (ii) affidavit of Mr. Dermot Madden sworn 8th August, 2006 (redacted by agreement between the parties);
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> (iii) affidavit of Mr. Ronan Barrett dated 21st January, 2013;
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> (iv) supplemental affidavit of Mr. Ronan Barrett sworn 17th October, 2013;
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> (v) joint affidavit of the respondents sworn 17th October, 2013.

7. Mr. Lacy is a chartered accountant who, at the date of swearing the affidavit, was the Managing Partner of PricewaterhouseCoopers ("PwC") and the head of the PwC team appointed by the Director to carry out an examination into the affairs of Bovale in respect of the years ended 30th June, 1997, and 30th June, 1998. Mr. Madden is an officer with the Director. Mr. Ronan

Barrett is an independent corporate finance adviser providing consultancy services to Bovale. The Court, in reaching the conclusions herein, has considered the entire of the evidence adduced and only proposes summarising in the judgment the facts essential to the reasons for the decision reached. As there is not dispute on the facts, the Court is relying on all the facts in evidence to make its findings and decision.

8. The respondents have been the only directors and shareholders of Bovale since its incorporation in 1983. Its business concerns land purchase, its development and the construction and sale of both commercial and residential properties.

9. The then auditor of Bovale, Mr. Joseph O'Toole of McGrath & Company, in 2000 filed a notice with the Registrar of Companies pursuant to s. 194 of the 1990 Act ("H4 notice") as a direct result of proceedings before the Tribunal of Inquiry into Certain Planning Matters and Payments. Subsequent to the preparation in 1998 of draft accounts for 1997, matters came to the attention of the auditor which required significant further work and correction to the draft financial statements. Final accounts for the year ended 30th June, 1997, were not signed until 26th July, 2000. The H4 notice contained the auditor's opinion that Bovale had failed to keep proper books of account and related to the financial years ending 30th June, 1997, and 30th June, 1998.

10. The Director, in 2004, appointed PwC to conduct an examination of Bovale's books and documents in relation to the financial years ended 30th June, 1997, and 30th June, 1998. PwC completed two reports for the years ended 30th June, 1997, and 30th June, 1998, respectively. Mr. Lacy exhibits the reports to his affidavit and deposes that PwC's two reports conclude in summary that:

> "(i) The Company's books of account were prepared in a manner which misstated in a material way the transactions of the Company, and in particular grossly understated the remuneration obtained by the Respondents from the Company;
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> (ii) the recorded payments of remuneration to the Respondents were supplemented in the main by a series of additional cheque payments which were not properly recorded in the Company's Cheque Payments Book or payroll records. Many of these cheques, when returned from the Company's Bank, showed that they were made out to cash or to financial institutions and that they were signed by one or other of the Respondents. It was subsequently necessary during the course of the company audit to reclassify these payments made to the Respondents or on their behalf."

11. The respondents subsequently made disclosure to the Revenue in 2000. From the figures disclosed to the Revenue and the revised Cheque Payments Book, Mr. Lacy deposes to the differences in the directors' net remuneration, the PAYE/PRSI figures and the directors' gross remuneration as in the original Cheque Payments Book and payroll records with the figures ultimately included in the financial statements and disclosed to the Revenue Commissioners. Included is that the directors' gross remuneration in the payroll records for the y/e 30/6/1997 was IR£137,384 and the additional understated gross remuneration in the financial statements was IR£2,467,408. The analogous figures for y/e 30/6/1998 are IR£200,000 and IR£3,683,226. In total the understated directors' gross remuneration for the two years exceeded IR£6m.

12. The investigation conducted by PwC included an examination of the work done by the auditor to Bovale subsequent to his obtaining, in the course of the 1997 audit, a materially different version of the company's Cheque Payments Book which had been made available to the Tribunal. The audit file for 1997, made available to PwC, contained a trail of the initial analysis of cheques and the corrections needed to reflect the amended Cheque Payments Book. Mr. Lacy deposes that of the "141 cheques noted by the auditor to be incorrectly recorded or omitted from the Cheque Payments Book initially presented to him in respect of the y/e 30th June 1997, 129 were properly reclassified as directors' remuneration in the audited financial statements for that year". The equivalent figures deposed to by Mr. Lacy in respect of the year ended 30th June, 1998, are the reclassification of 167 out of 189 cheques as directors' remuneration.

13. Over the two-year period, Mr. Lacy deposes that Bovale's net liabilities were understated by more than IR£4m due to the failure to account for the PAYE/PRSI and related interest.

14. Mr. Lacy, in conclusion, avers:

> "During my career in public accounting in Ireland over the last 35 years, I have not encountered a failure to maintain proper books of account that compares with the extent and gravity of the failures in respect of Bovale for the two years ended 30 June 1998."

15. Following disclosure in December 2000, Bovale and the respondents reached a tax settlement with the Revenue Commissioners. The respondents depose that in 2006, Bovale paid to the Revenue Commissioners €14,162,580 in taxes due and €8,050,784 in interest and €4,138,345 in penalties. They also paid penalties in respect of their personal liabilities in the sums of €439,588 and €347,491.

16. The respondents also depose that since what they term "voluntary disclosure" in December 2000 that Bovale has been fully tax compliant and has paid €61,494,559.73 in PAYE in respect of monies paid out to the respondents as directors for the period from 2001 to 2012.

17. In 2010, Bovale's loans were transferred to NAMA which is now its sole secured creditor. Since that date, the respondents aver that they and Bovale have cooperated extensively with NAMA. They have appointed Mr. Barrett to assist Bovale in delivery of and compliance with terms and conditions set down by NAMA in 2011. In relation to corporate governance, they point to the appointment by Bovale in 2013 of KPMG as its auditor and the appointment of a new Chief Financial Officer in 2012 and exhibit a corporate governance proposal prepared by KPMG.

18. The respondents also depose to the work done by Bovale and them, as directors of Bovale, in the community and developments which benefit local communities. They also aver that despite the collapse of the property market and recession, they have managed to maintain their business and to continue to give employment.

Findings

19. On the evidence before the Court, and in particular that contained in the reports of PwC, I make the following findings:

> (i) The respondents, as officers of Bovale, have been guilty of fraud in relation to Bovale and a creditor, namely, the Revenue Commissioners, by reason of the systematic scheme of false accounting and failure to account in its payroll records for remuneration to the respondents and associated PAYE/PRSI liabilities in respect of the two years ended 30th June, 1998. The understated gross remuneration in the two years exceeded IR£6m.
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> (ii) The respondents, as officers of Bovale, have been guilty of breaches of duty as such officers, in particular in relation

to their failure to ensure that Bovale kept proper books of account contrary to s. 202 of the Companies Act 1990, in respect of the two years ended 30th June, 1998;

(iii) the conduct of the respondents, as officers of Bovale, during the two years ended 30th June 1998, as disclosed by the facts set out in the two reports from PricewaterhouseCoopers exhibited to the affidavit of Mr. Lacy makes them unfit to be concerned in the management of a company within the meaning of s.160(2)(d) of the 1990 Act.

20. The Court finds that the above conduct is conduct falling within s. 160(2) paras. (a), (b) and (d), respectively of the 1990 Act.

The Law and Conclusions

21. The general principles upon which the Court should reach its relevant decisions on this application are now well established and not in dispute. Counsel for the Director and the respondents both primarily referred to the judgment of O'Donnell J. in *Re Kentford Securities Ltd*. : *Director of Corporate Enforcement v. McCann* [2010] IESC 59, [2011] 1 I.R. 585 (with which Fennelly J. and Finnegan J. agreed). They also referred to the judgment of this Court in *Re Ansbacher: Director of Corporate Enforcement v. Collery* [2007] 1 I.R. 580, in relation to the approach to determining to the period of disqualification which was considered in *Kentford*.

22. In *Kentford*, O'Donnell J. at p. 603, emphasises that s. 160(2) poses a two-stage test for the making of an order of disqualification: "[f]irstly, whether conduct falling within any of the categories of s. 160(2) has been established as a matter of fact. Secondly, whether the Court, in the exercise of its discretion, should proceed to disqualify".

23. Notwithstanding that the respondents have indicated that they are not opposing an order for disqualification, the Court has made findings of fact of the relevant conduct which falls within paras. (a), (b) and (d) of s. 160(2) of the 1990 Act. Having regard to the gravity of the conduct concerned, it follows that the Court should now exercise its discretion to make an order pursuant to s. 160(2) to disqualify the respondents.

24. The real issue in dispute in this application is the period for which the orders of disqualification should be made. In *Ansbacher,* having considered the then authorities, which did not include *Kentford* but did include many of the authorities referred to by O'Donnell J. in *Kentford,* I concluded that the principles next set out were applicable in that case (which related to findings in a report of an Inspector appointed by the Court under the Companies Acts) to determining the period of disqualification:

"(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."

25. Neither counsel submitted that I should depart from the further two-stage approach to determining the period of disqualification in accordance with (5) above. Both counsel made submissions on the judgment of O'Donnell J. in *Kentford,* particularly in relation to the purposes of an order of disqualification pursuant to section 160(2) and emphasised different aspects. The judgment in *Kentford* is, of course, primarily concerned with the proper approach to determining whether or not to make an order of disqualification pursuant to s. 160(2) as distinct from determining the period for such an order of disqualification. Nevertheless, having regard to the submissions made I have concluded that the discussion by O'Donnell J. of the purposes of an order of disqualification and his reconsideration of the earlier authorities necessitates some reformulation of the principles I set out in *Ansbacher* in order that they be clearly consistent with *Kentford.*

26. Accordingly, consistent with *Kentford,* the principles I propose applying in this case are:

(i) A primary but not the only purpose of an order of disqualification is 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.

(ii) It is also a purpose of an order of disqualification to improve corporate governance (Re *Kentford,* O'Donnell J. para. 27 and *Re Wood Products Ltd.: Director of Corporate Enforcement v. McGowan* [2008] IESC 28, [2008] 4 I.R. 498 *per* Fennelly J. at para. 46).

(iii) A further purpose of an order of disqualification is that it act as a deterrent, both in respect of the respondent director and other directors of companies (Re *Kentford,* O'Donnell J. at para. 27, quoting with approval Lord Woolf M.R. in *Re Westmid Packing Ltd*. [1998] 2 All E.R. 124 at pp. 131 to 132). Hence, the period of disqualification should contain deterrent elements.

(iv) The period of disqualification should reflect the gravity of the conduct or wrongdoing as found by the Court in relation to the relevant sub-paragraphs of s. 160(2) in respect of which the order of disqualification is being made;

(v) a period of disqualification in excess of ten years should be reserved for particularly serious cases;

(vi) 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.

27. Applying the above principle to the facts in evidence before the Court, I have concluded that prior to consideration of mitigating circumstances, the appropriate period for the orders of disqualification is fourteen years. The systematic falsification of the books of account and understatement of the respondents' gross remuneration in the magnitude and scale set out in the reports of PwC is particularly serious misconduct by the respondents as directors of Bovale during the two years ended 30th June 1998.

Mitigating Factors

28. The evidence, primarily of the respondents but not disputed and certain objective facts, which may cumulatively be relied upon as

relevant mitigating factors are:

(i) The fact that the conduct upon which the Court's findings is based took place during the two years ending June 1998 *i.e.* in excess of 15 years ago.

(ii) In 2000, the respondents made what they term "voluntary disclosure" to the Revenue Commissioners as a consequence of which they paid tax then due plus interest plus penalties in significant amounts. Whilst counsel for the Director, I think with some justification, queries to what extent this disclosure should be regarded as "voluntary", nevertheless, it was disclosure then made by the respondents, even if in practice they had no option.

(iii) More importantly, they depose that since 2001, they have been Revenue compliant and this is not disputed.

(iv) In respect of corporate governance, they again aver that since 2001, they have ensured that Bovale has kept proper books and records.

(v) There is some objective support for the averments in relation to Revenue and corporate governance compliance. Firstly PwC conducted a forensic review of Bovale's accounts from 2007 to 2009 and the respondents aver without contradiction that they did not raise any issues thereon. Second Bovale has been in NAMA since 2010, and has cooperated with NAMA and has made new appointments in furtherance of corporate governance.

(vi) The joint affidavit sworn by the respondents contains an acknowledgement of the wrongful past conduct as does their attitude to this application. They also aver to having learnt from their mistakes and their intention to set matters right.

29. In considering the above mitigating factors, the most significant are the period which has elapsed since the wrongful conduct of the respondents and the positive evidence of both corporate governance and Revenue compliance since approximately 2001. The reason for which the periods are so important is that on the facts of this application, the Court not only has the acknowledgment by the respondents of wrongdoing and statements of intent as to future compliance but by reason of the subsequent twelve years approximately, during which they state (without contradiction) they were compliant, they have been able to demonstrate that the expressed intent has already been put into practice. This is relevant to the purpose of protecting the public. The position would be very different if this application were being heard within a short period of the year 2000.

30. Nevertheless, by reason of the gravity of the conduct and the deterrent purpose of orders of disqualification not confined to the respondents alone, I have concluded that there must still be orders of disqualification of a significant period. I have concluded that the appropriate period for which the respondents should be disqualified in accordance with the above principles and taking into account the identified mitigating factors is seven years.

Relief
31. There will be an order of disqualification of each of the respondents for a period of seven years.

Stay on Section 160(8)
32. I indicated at the end of the hearing that I would place a stay on the orders of disqualification when made for a short period of time to enable an intended application pursuant to s. 160(8) be brought. I will hear counsel as to the appropriate period.