Neutral Citation Number: [2006] IEHC 57

THE HIGH COURT

RECORD NUMBER 2005 No. 101 Cos.

IN THE MATTER OF KENTFORD SECURITIES LIMITED (UNDER INVESTIGATION), AND IN THE MATTER OF THE COMPANIES ACTS 1963-2001, AND IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF CORPORATE ENFORCEMENT PURSUANT TO SECTION 160(2) OF THE COMPANIES ACT, 1990.

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT/RESPONDENT

AND
PATRICK McCANN

RESPONDENT/APPLICANT

Judgment of Mr Justice Michael Peart delivered on the 7th day of March 2006

1. For the purpose of this judgment I shall refer to the Director of Corporate Enforcement ("the Director") as the respondent, since the Court is dealing with a motion to dismiss the application by him to disqualify Mr McCann, and I shall refer to the latter as the applicant.

2. In the substantive application which is the subject of the within proceedings the respondent seeks an order pursuant to s. 160(2)(b) and/or s. 160(2)(d) of the Companies Act, 1990 declaring the applicant to be disqualified from being appointed or acting as an auditor, director or other officer, liquidator, receiver, examiner or to be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company or any society registered under the Industrial Societies Act 1893 – 1978 for such period as the Court may think fit.

3. Such an order is sought arising out of certain alleged acts and conduct by the applicant while he acted as auditor of Kentford Securities Limited ("the Company") during the years 1990, 1991, 1992 and 1993. In addition there is an allegation of forgery of a certain letter to which I shall refer in more detail at a later stage. I will come to all the allegations in more detail in due course.

4. The present matter requiring adjudication by the Court is an application by the applicant that the application for the order of disqualification against him be dismissed now on the grounds of excessive delay, and/or for want of prosecution on the basis that the delay has been inordinate and inexcusable. That is what appears in the Notice of Motion dated the 6th May 2005 in which the reliefs are set forth.

5. But Patrick Hunt BL on the applicant's behalf has conceded that he is not in fact in a position to put forward an argument that there has been inordinate and inexcusable delay by the respondent in the prosecution of these proceedings post-commencement, and confines his arguments to pre-commencement delay, and the prejudice which he submits has resulted to the applicant as a consequence thereof. It is therefore a case which comes, not within the well-known Primor principles as to delay post-commencement, but rather within principles in *O'Domhnaill v. Merrick* [1984] IR 151, and as followed in *Toal v. Duignan* [1991] ILRM 135.

Factual background

6. An authorised officer, Gerard Ryan, was appointed to exercise the powers conferred by s. 19 of the Companies Act, 1990, and having done so produced a Report into the affairs of the Company, which in due course came to the attention of the Director. It is stated in the first affidavit sworn to ground the substantive application for a disqualification order, that "*it is clear from the Report that the Company was used by Des Traynor during the period 1989 – 1994 to facilitate cash withdrawals by certain persons from Ansbacher (Cayman) Limited deposits … held in Ireland*".

7. It was reported also that although the financial statements and balance sheets of the Company for the period referred to disclosed only that the Cash in Hand was £2 and that the Called Up Share Capital was also £2, the reality is that approximately £2.75 million passed through the bank accounts of the company which were effectively controlled by the said Des Traynor, and that these accounts were used in order to facilitate the evasion of taxes by those persons for whom the Company was used as a vehicle to withdraw Ansbacher Deposits.

8. The applicant was appointed a director of the company on the 9th March 1988. There is some dispute as to the date on which the applicant resigned as a director of the company, but there is a return filed in the Companies Registration Office which shows him as having resigned as of March 1989. However, the respondent points to the fact that this return is dated 13th April 1992 and filed on the 14th May 1992 – this date being also the date on which annual returns were filed in respect of the years 1989-1991 and the date on which the abridged financial statements for the years ending 31st March 1990 and 1991 were filed. The clear implication to be drawn is that the respondent believes that the return has been completed so as to show a date of resignation which is earlier than the date on which the applicant actually resigned.

9. The significance of that dispute as to the date on which the applicant resigned is that the applicant has asserted at all times that he was first appointed as auditor of the Company for the year ended 31st March 1990. In order to be the auditor to the Company, the applicant would have had to have ceased to be a director. In support of his submission in the substantive application that the applicant herein has not been truthful about the date of his resignation as a director, the respondent has exhibited a number of documents which postdate the applicant's appointment as auditor, and in some of which he is described as "director", and others as either "authorised signatory", "Chairman" or "Chairperson". These documents comprise bank mandates and facility letters. It is alleged that all but one of these documents was signed on a date which precedes the date of filing of the return in the Companies Office on the 14th May 1992.

10. The respondent alleges also that the auditor's reports attached to the financial statements do not give a true and fair view of the state of the company, despite a statement by the auditor therein that they do. The respondent points also to the fact that even though the applicant has stated when interviewed that he saw no books of the company, the auditor's report states that proper books of accounts had been kept by the Company and that financial statements were in agreement with the books.

11. It is also alleged that the applicant has been guilty of forgery in that he produced to the authorised officer appointed under s. 19 of the Companies Act 1990 a letter from the said Des Traynor, purporting to be signed by him and to be dated 23rd January 1990, but which contained at the top of the letterhead thereof a telephone number which has been shown to be a number which came into existence only after the date appearing on that letter. The letter purports to assure the directors of the company that the company was a trust company and that, as such, did not trade and did not hold any assets or liabilities in its own right. This letter is said by

the applicant to be the basis for the financial statements and balance sheets filed showing it to be a £2 company, rather than a trading company with £2.75 million passing through its bank accounts, and that he at all times relied upon the assurances of Mr Traynor that the company was a trust company. The allegation that the applicant has fabricated this letter is hotly denied by the applicant. It is the respondent's belief that this letter could not have come into existence until after the financial statements were filed in the Companies Registration Office for the year ended 31st March 1991.

12. It is also alleged by the respondent that apart altogether from the question of reliance upon assurances from Mr Traynor as to the status of the Company, the audit of the company's as carried out by the applicant for the years in question was clearly deficient in a number of ways, including arising from the fact that the applicant has stated to him that there was a possibility that the auditor's report on the financial statements for the year ended 31st March 1990 was not signed until 24th October 1991 which is the date on which the financial statements for the year ended 31st March 1991 were signed. This is in spite of the fact that the financial statements themselves show that they were signed on the 26th October 1990. There is also a question mark about the date of signing of other such financial statements. The financial statements for the years 1990 – 1993 are said therefore to be inaccurate, and it is contended, in addition, that in a number of respects which I need not detail, the applicant failed to comply with proper auditing standards by not obtaining evidence for his conclusions.

13. The above summarises adequately for the purpose of this present application the allegations made against the applicant in the substantive application for disqualification, save to refer perhaps to the fact that the applicant has exhibited letters from his professional body purporting to show that he is a member of that professional body who is regarded by it as being of good standing, and who has successfully dealt with practice reviews carried out by that body. The respondent on the other hand, in this regard, suggests that the professional body may not have been appraised by the applicant, of the existence of the report on the applicant on foot of which the present proceedings are based. The applicant on the other hand says in his second affidavit in this application that he has made that body aware of the Report.

The applicant's submissions as to delay/prejudice

14. In his grounding affidavit, the applicant states that he is a Certified Public Accountant having qualified as such in 1987, and that he is therefore qualified to act as an auditor, and has done so since that date deriving a substantial portion from that occupation. He practices under the title McCann and Associates. In his practice he employs two qualified accountants, a company secretary, a trainee accountant and a secretary/receptionist, and he states that he supports both himself, his wife and family from his income from the practice.

15. He states that the substantive application for his disqualification is "grossly prejudicial" since it is being sought over fifteen years after the alleged first complaint relating to his actions in 1990, and he maintains that the delay is both inordinate and inexcusable, and that it would be unjust to allow the application to proceed. Brian Murray SC on the other hand submits on behalf of the respondent that the first complaint as such made against the applicant was after November 2002 when the Report of the authorised officer was provided to the Office of the Director of Corporate Enforcement, even if the complaints themselves relate back to the early 1990s. He also points to the fact that some of the allegations relate to events occurring in the context of the investigation, such as the production of the said letter dated 23rd January 1990.

16. The gravamen of the applicant's claim that he is prejudiced by the delay since 1990 to the date of commencement of the substantive application is that because Des Traynor died in May 1994, he has been deprived of the opportunity to call evidence from him to confirm that the applicant did in fact resign as a director of the Company before he commenced to act as auditor to the Company, and that Mr Traynor was, before he died, in possession of his original letter of resignation as a director. In addition he states that Mr Traynor would have been able to confirm that the applicant had discussions with him on several occasions as to the nature of the Company and that he was assured by him that it was a trust company, holding no assets and having no liabilities. He also submits that Mr Traynor would have been able to verify that he had issued and signed the said letter dated 23rd January 1990, and could have given his reasons for backdating same. He makes the point also that it was Mr Traynor who maintained and had possession of the books of the Company.

17. Mr Murray, however, submits that the applicant is simply speculating as to what Mr Traynor might have said if he were available to be called as a witness by the applicant. He makes the point also that even if Mr Traynor were to say what the applicant says he would be able to say, this would still not be sufficient to enable the applicant to avoid an order for his disqualification, given the entirety of the complaints and allegations made about how he conducted himself as the auditor to the Company. Mr Murray also makes the point in the context of the delay point that even if the application for disqualification had been launched in, say, 1995, the applicant would still be in the same position as he is today in as much as even then he would have been without the possible benefit of Mr Traynor's evidence since he unfortunately had died in 1995.

18. The applicant also submits that it would be unfair to allow the substantive application to proceed in circumstances where the office which the respondent holds, and the functions which he performs, did not come into existence until some ten years after the date of the complaints made against the applicant, namely by virtue of the Companies Act. Mr Murray on the other hand submits that it is not accurate to suggest that the office of the Director did not exist at the relevant time since the date upon which the applicant sought to rely on the said letter dated 23rd January 1990 was February 2002, which is after the date on which that office came into existence pursuant to the 2001 Act. He also relies on the fact that the disqualification sought by the respondent is sought on the basis of statutory provisions in force at the time that the applicant acted in the manner in which the respondent now complains, and he submits that while the respondent himself was not empowered to make the application pursuant to s. 160 of the Act until the entry into force of the 2001 Act, the former Act conferred an entitlement on other entities, such as the Director of Public Prosecution to make such an application. He submits that there is no question of the respondent seeking to apply s. 160 retrospectively to the applicant, or in respect of events pre-dating the coming into force of the 1990 Act.

19. The applicant states that the effect of an order of disqualification being made in the substantive application would be disastrous for him since he is an accountant in private practice and that he gains much of his annual income from auditing, and the matters to which this particular matter relate go back many years, and against a backdrop where his auditing practice generally has been examined by his professional body in recent times and has been found to be satisfactory.

Conclusion

20. As I have already stated, the applicant herein submits that there has been inordinate and inexcusable delay in the commencement of the application for his disqualification, and that he is prejudiced as a result in his capacity to defend the application, and that the consequences of such an order being granted by the Court would be very serious for him given the nature of his practice from which he derives a substantial amount of his annual income from acting as an auditor. It is important that in my conclusions I do not reach any conclusive findings of fact or express views on the facts which might stray into an area to be dealt with on the substantive application. For that reason alone I do not propose to deal in any detail with a number of matters raised on this present application.

21. I am however satisfied that even though the respondent did not commence his application to have the applicant disqualified under s. 160 of the Act until the 18th March 2005, the Report on foot of which he is proceeding did not come to his attention until November 2002, and that it is only from that date that the Court should consider whether there has been any excessive or unreasonable delay which has resulted in an unfair prejudice to the applicant's ability to meet the application. It is worth noting that the Act provides no time limit within such an application must be brought. That of course cannot mean that in no circumstances could a person against whom such an application is brought, seek a stay or similar relief such as the present applicant seeks on the grounds of excessive delay, especially where a sufficient case of prejudice to the ability to defend against the application is made out. There must be implied an obligation on the part of an applicant for such an order to proceed with a degree of expedition which in all the circumstances is reasonable. Many factors may interfere with the capacity of the Director to proceed with the application forthwith upon receipt of the necessary information which would ground the application. In the present case, the Director has stated that after the Report of the authorised officer was received, it had to be considered and a decision as to how best to proceed had to be taken. As part of that process it was necessary for him to take legal advice, as well as to commission a report from an auditing expert. That was done and there is an affidavit in this case from such an expert whose extensive report is dated 5th February 2005. The Director commenced his application by way of Notice of Motion dated and issued on the 18th March 2005. That report sets out the work undertaken by that expert before he could arrive at his opinion on the manner in which the applicant herein carried out his duties as an auditor.

22. The fact that the application by the Director for disqualification relies on matters which are alleged to have taken place many years ago is not something for which the respondent can be held culpable. However, the fact that matters go back many years would, in my view, give rise to a greater need, in the interests of justice, to proceed with all reasonable and possible haste from whatever moment a decision to proceed could be made, and of course from the date of commencement to actual determination. But there is no suggestion in the present case that the application, once commenced on the 18th March 2005 did not proceed other than with reasonable expedition.

23. In *Toal v. Duignan* [1991] ILRM 135, there was undoubtedly in the exceptional circumstances of that case an inordinate delay of 25 years or more, though given the circumstances of that case, that delay may well have been regarded as excusable or understandable. Nonetheless the injustice to the defendants of allowing the claim to proceed against them was found by Finlay CJ to be "absolute and obvious" given the length of time since the aged events giving rise to the plaintiff's claim. In his said judgment, the learned Chief Justice referred to the judgment in *O'Domhnaill v. Merrick* [1984] IR 151 and stated at p. 139 in that regard:

> *"In the High Court it was held by Keane J. that the case was governed by O'Domhnaill v. Merrick [1984] IR 151. I am in agreement with that view of the law. It is unnecessary for me to repeat here the principles laid down by this Court in that case, but they may be summarised in their application to the present appeal as being that where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action."*

24. In relation to the present case I am satisfied that the Director has not contributed to the delay, and in fact I am satisfied that there has been no inordinate or excessive delay in the first place. Therefore there is none to be excused or explained by him, although he has explained how it took from November 2002 until March 2005 to commence the application. Even if I am wrong in deciding that the delay in question from November 2002 to March 2005 is not inordinate, I am satisfied that it is explained sufficiently. Furthermore, I am satisfied in any event that the applicant has not discharged the onus, which is undoubtedly upon him, to demonstrate a real prejudice to the extent that it would be unjust to require him to defend himself against the application which is brought, as a result of any delay. Even if one were to count the delay as going back as far as the date of the first alleged act of complaint back in the 1989 -1993 period, I am satisfied that if there is any difficulty presented to the applicant in the matter of resisting the application, it has not been caused by the delay between then and now, since in reality it is the death of Des Traynor in May 1994 which is the source of the alleged prejudice on account of the fact that the latter cannot give evidence which the applicant says would assist him, and because the books of account belonging to the company are said to have been in the possession of Mr Traynor up to the date of his sudden death. In my view, even if one was to conclude that there was inordinate delay to be included in the reckoning back to the early 1990s, there is little or no reality to the suggestion that the death of Mr Traynor has caused the prejudice alleged. There is also the point made by Mr Murray that there could be no circumstances in which the applicant could have reasonably expected that an application could, or even should, have been brought against him prior to May 1994 and that therefore one way or the other the applicant was always going to be without the benefit of whatever evidence of assistance the late Mr Traynor may have been in a position to offer to the applicant facing the present type application. But I emphasise again that in my view the only possible delay in this case which can be laid at the door of the applicant is that from November 2002 until March 2005 and I do not in the circumstances of this case regard that as inordinate or excessive and requiring explanation or excuse, but in so far as an explanation has in fact been provided it is a valid and reasonable explanation.

25. In his judgment in *O'Domhnaill v. Merrick*, Henchy J. stated at p. 158:

> *"While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial."*

26. In my view the same cannot be said in this case. Justice is not being put to the hazard. The applicant is in a position to resist the application made in these proceedings without injustice or unfairness.

27. I therefore refuse the application to dismiss the proceedings.