Neutral Citation [2013] IEHC 42

THE HIGH COURT

[2013 No. 569 P]

BETWEEN:

PERMANENT TSB PLC, ALAN COOK, JEREMY MASDING, KEVIN MURPHY, DAVID MCCARTHY, BERNARD COLLINS, RAY MACSHARRY, MARGARET HAYES, EMER DALY, SANDY KIDNEY AND PAT RYAN

PLAINTIFFS,

AND

PIOTR SKOCZYLAS, SCOTCHSTONE CAPITAL FUND LIMITED, GERARD DOWLING, PADRAIG MCMANUS, GEORG HAUG, JOHN PAUL MCGANN, TIBOR NEUGEBAUER AND MURIEL SCORER

DEFENDANTS

JUDGMENT of Mr. Justice Cooke delivered the 4th day of February 2013

1. It is important at the outset to emphasise that what is before the Court on this motion is an application for an interlocutory injunction. The submissions made and the evidence put before the Court have ranged widely over extensive background facts and the litigation already brought by the defendants relating in different ways to the conduct of the affairs and the recapitalisation and restructuring of the first named plaintiff and its subsidiaries, the former Irish Life and Permanent plc (referred to as "the Bank") and the Bank's subsidiary, Irish Life Limited (referred to as the "Life Company"). (The first named plaintiff will be referred to as "the Group Holding Co" and the three companies collectively as the "Group".)

2. The defendants are shareholders in the Group Holding Co. who have been aggrieved at the steps taken since 2010, to recapitalise the Bank and to restructure the group and particularly at the steps taken and direction orders obtained under the Credit Institutions (Stabilisation) Act 2010. These include direction orders made by the High Court on the 26th July, 2011, (providing inter alia for the subscription by and the allotment to the Minister for Finance of new shares in the Group Holding Co, making him owner of 99.3% of the capital of that company,); and 28th March, 2012, (requiring the Bank to sell its shareholding in the Life Co to the Minister,) in respect of which legal challenges brought by some or all of the defendants together with other claimants, are said to be still outstanding.

3. The first named defendant is a shareholder in the Group Holding Co. and is a non-executive member of its board, having been elected at an EGM of that company in July 2011. He is the managing director of the second named defendant. He is aggrieved that he has not been appointed a director of the Bank, given that all other members of the board of the Group Holding Co. have been so appointed and he with some of the defendants have brought a further set of proceedings seeking to compel his appointment to the board of the Bank. Furthermore, on the 25th January, 2013, the defendants initiated proceedings by petition under s. 205 of the Companies Act 1963, seeking extensive reliefs based upon claims of oppression as minority shareholders in the Group Holding Co.

4. In these various proceedings potentially complex issues as to both national and European Union law are apparently to be raised and serious claims made as to the legality, propriety and probity of the manner in which the affairs of the group have been alledged mismanaged and misconducted by their boards. Challenges are made to the legality of the steps taken under the Act of 2010 by the Minister and the State and it is claimed that the abrogation of the pre-emption rights of shareholders in the allotment of capital to the Minister was unlawful as an infringement of constitutional rights and a breach of mandatory provisions of EU law including provisions of the Second Company Law Directive. In particular, a challenge is made to the way in which the Life Company as the most valuable subsidiary and asset of the group has been allegedly expropriated by the State to the detriment of the shareholders in the Group Company. Clearly, the defendants have taken on the task of pursuing serious claims and weighty litigation in their efforts to vindicate the grievances which they maintain.

5. On the 10th January, 2013, the defendants caused to be issued and served on the plaintiffs a series of notices headed "Notice pursuant to s. 160(7) of the Companies Act 1990". The body of the notice then read as follows:-

"Section 160(7) of the Companies Act 1990, states:-

> '(7) Where it is intended to make an application under subsection (2) in respect of any person, the applicant shall give not less than ten days' notice of his intention to that person.
>
> Take notice that, as part of the intended proceedings in the High Court, *inter alia*, against you as a former director, the undersigned members of Permanent TSB Group Holdings plc (formerly Irish Life and Permanent and Group Holdings plc) intend, *inter alia*, to seek a relief against you pursuant to subsection 160(2) of the Companies Act 1990."

6. According to the general endorsement of claim on the plenary summons in the present action, the plaintiffs will seek substantive reliefs in the form of declarations and an injunction, the effective purpose of which will be to forestall and prevent any steps being taken on foot of those notices. The interlocutory injunction is accordingly sought to restrain, pending the hearing of this action, the initiation by the defendants of applications under s. 160 for orders disqualifying the personal plaintiffs named in the proceedings as company directors, including, of course, as directors of the first named plaintiff and of the Bank. (In fact the fourth, fifth and sixth named defendants had ceased to be directors in the group on various dates in 2011 and 2012.)

7. Subject to one argument as to the correct test to be applied to which the Court will return shortly, the Court is here only concerned to decide if a case for the grant of such a temporary restraint has been made out. Because the application is for interlocutory relief, the Court is not concerned to express any definitive view or make any particular finding on any of the substantive disputes involved or on any of the issues which have been raised and contested on either side.

8. As confirmed by the grounding affidavit of Ciaran Long on the present motion and in the written and oral submissions advanced on behalf of the plaintiffs, those declarations and a permanent injunction are to sought upon a two-fold basis. First, it is contended that

no valid or adequate notices have been given as required by ss (7) of s.160. Secondly, it is argued that any application on the part of the defendants against the plaintiffs under that section would, in the circumstances, constitute an abuse of process and would be bound to fail because it would be brought with the ulterior motive of bringing pressure on the plaintiffs in pursuit of their campaign to obstruct the restructuring of the group and with the collateral purpose of obtaining indirect support for or rulings upon, matters already canvassed in their existing proceedings.

9. In the particular circumstances that arise on this motion, the Court does not consider that it is necessary to make any assessment of the substantive issue raised as to whether any future application under s. 160, if actually initiated, would amount to an abuse of process. In the judgement of the Court, the present application can and should be resolved on a narrower and more straightforward basis.

10. If the plaintiffs are entitled to injunctive relief on this motion, the only effect of the grant of the injunction will be to require the defendants to postpone pending the trial of this case, the actual introduction of any applications under s. 160. In the judgment of the Court, the imposition of such a temporary restraint does not, as the defendants have argued, constitute the denial of or interference with their rights under either Constitutional law or Article 6 of the ECHR of access to the Courts to assert or vindicate personal or civil rights. In the particular circumstances that prevail between the parties together with the other parties implicated in the other actions already in being, the effect of the injunction is to postpone temporarily the possible commencement of a particular statutory process under s. 160 so as to enable the plaintiffs to assert and the Court to decide whether such applications under s. 160 are a necessary, appropriate or justifiable further proceeding in circumstances where many if not all of the substantive disputes which the defendants propose to canvas in their applications under the section have already been raised for determination in the other pending proceedings.

11. Contrary to the argument advanced by the plaintiffs, it is not the intended purpose or function of of s.160 to provide individuals including shareholders or officers of company with a means of relief or remedy as a method of asserting or vindicating their personal or civil rights. The section establishes a special statutory procedure which complements the less severe provisions for restriction of directors under s. 150 and, together with various other provisions of the Companies Acts, attempts to secure good corporate governance by striking a balance between on the one hand, the public interest in the promotion of economic and commercial enterprise through the artificial construct of limited liability and, on the other hand, deterring fraud, dishonesty and other misconduct by the abuse of corporate status and limited liability. While the outcome of a successful application under s. 160 is the imposition of a sanction upon the respondent, it is well settled that the provision is not penal in character and has the objective of protecting the public interest by deterring dishonesty, fraud and misconduct in the management of corporate affairs. (See in that regard the judgments of the Supreme Court in *Director of Corporate Enforcement v Byrne* [2010] 1 I.R. 222: in which it was pointed out that the primary purpose of a disqualification order is not to punish the individual against whom the order is sought but to protect the public against the future running of companies by persons whose past records have shown them to be a danger to creditors and other having dealings with a company.)

12. Notwithstanding the non-penal character of the procedure and the protective purpose of the disqualification imposed, it is abundantly clear that it is a procedure which is not be casually invoked or lightly embarked upon. This too was pointed out by the Supreme Court in the *Byrne* case. The misconduct necessary to warrant the making of a disqualification order must be manifestly more blameworthy than that which can lead to restriction under s.150. Mere failure of commercial judgement or departure from ordinary standards of conduct is not sufficient: some lack of commercial probity on the part of the individual at least is required.

13. That the section 160 procedure does not provide a general remedy and is available only in cases of seriously balmeworthy misconduct is also evident from the fact that by virtue of subsections (4), (5), (6) and (6A), the procedure can only be initiated by a limited number of applicants and is not a process open to the public generally. It is further evident from the fact that subs. (4)(b) stipulates that where an application is sought be brought by a member, contributory, officer or employee of a company the Court, may require that security be provided for the costs of the application.

14. More importantly, however, having regard to the issues that arise on this motion, the deliberation with which an application is to be commenced is evident in the requirement of subs. (7) which provides:-

> "Where it is intended to make an application under subsection (2) in respect of any person, the applicant shall give not less than ten days' notice of his intention to that person."

15. It is clear that this is a mandatory and indispensable precondition to the commencement and admissibility of any application under subsection (2). It is obvious that it would be a complete answer for any director served with an application purported to have been issued under the section, to demonstrate that no ten-day notice had ever been given and to have any such an application struck out on that basis. It would also follow, in the view of the Court, that if an individual had good grounds for believing that an application was about to be launched against him or her under the section when no notice had been given, an injunction might be applied for to restrain the making of the application. Every proposed respondent to an application is entitled to know what the charge is to be and to be given at least 10 days' notice in order to consider the position.

16. Accordingly, in the judgment of the Court, the giving of not less than ten days notice in a form which is adequate and valid for the purposes of subs. (7) is a necessary precondition to the making of any admissible application under the section. That this is so is confirmed by the judgments of the Supreme Court in *Director of Corporate Enforcement v. Byrne* [2010] 1 I.R. p. 222. At para. 147 of his judgment (p. 257) Fennelly J. made the point as follows:-

> "One other procedural detail is important. Section 160(7) of the Act obliges the applicant to give at least ten days notice to the person of his intention to apply for a disqualification order. This provides him with an opportunity to respond, as he did in the present case. This provision illustrates the general principle that any person who is to be the subject of an application under the section must be given clear notice of that fact and of the grounds on which the application is to be made. I emphasise the matter here because it has a bearing on the finding of want of commercial probity made by the trial judge in the present case. The applicant, by his notice, stated that he intended to make the application pursuant to paras b), d) and e) of subsection (2) but also stated that the application was to be brought having regard to an inspectors' report. In fact, both the draft notice of motion sent with the applicant's prior notice and the notice of motion actually sent were based exclusively on the contents of the Inspector's Report." (Emphasis added.)

17. It is to be noted that in the case in question, the ten day notice under subs. (7) contained several detailed particulars as to the basis upon which the intended application was to be brought. It identified the paragraphs of subsection (2) which were to be invoked and referred to the report of court appointed inspectors into the affairs of the bank in question, upon which the Director proposed to rely. That is in stark contrast to the notices quoted above at para. 5 of this judgment. No grounds are set out and no indication is given as to which of paragraphs (a), (b), (c), or (d) of subs. (2) under which a member of a company can bring an application, were

to be relied upon or to form the basis of the charges against the director-plaintiffs. Having regard to the statement of Fennelly J. quoted above and to the importance attached by the Supreme Court to the serious nature of the misconduct required to justify making a disqualification order under the section, the Court is satisfied that it is strongly arguable that a notice under sub-section (2) must contain an accurate if minimal identification of the grounds of the proposed application if the mandatory precondition of ss(7) is to be fulfilled. In the judgment of the Court the different view expressed by a majority on the Court of Appeal of England and Wales is respect of an analogous provision of an English statute in *Secretary of State for Trade v Langridge*, [1991] Ch 402, cannot be taken as a correct approach to ss.(7) in this jurisdiction.

18. For this reason the Court is satisfied that the plaintiffs have demonstrated a fair issue to be considered in the action and a *prima facie* case that no valid notice for the purpose of subs. (7) has been given by the defendants. The defendants have however sought to argue that the notices were adequate and that it is not necessary to identify any particular one of those paragraphs. It is also submitted that the personal plaintiffs would have known well from extensive prior correspondence as well as from the grievances and claims that had been canvassed in all of the earlier litigation, what the basis of a disqualification application by them would be.

19. In the judgment of the Court, those arguments are unfounded. First, as indicated by Fennelly J. in the passage cited in paragraph 16 above, the purpose of the statutory notice is to enable the recipient to tell from it the grounds he or she is likely to face and to have to answer. The defendants themselves have emphasised the serious nature of the allegations they propose to make and in both their prior correspondence, the replying affidavits and in oral submissions have pointed to the fact that some of the misconduct upon which they will rely can be characterised in Irish law as criminal offences. On that basis alone, it is clearly necessary that the ten day notice should particularise the grounds by, at the very least, referring to one or more the paragraph headings (a) – (d).

20. The defendants' reliance of previous correspondence is also misplaced and only serves to highlight the deficiency in the notices in question. The first named defendant refers for this purpose to and exhibits in his affidavit, four particular letters written by him. Of these the letter of 30 April 2012 is 20 pages in length and has appendices attached running to in excess of 140 pages. The letter of 18 December 2012 is 22 pages long and has 118 pages of appendices. The sheer volume of that material and the vast range of the issues raised and allegations made, rendered it more rather than less imperative that any notice given under ss(7) identify the actual grounds to be relied upon.

21. The submissions of the first named defendant designed to play down the significance or required effect of the ten day notice also fly in the face of another argument vigorously relied upon throughout this hearing. It was strongly urged that the plaintiffs' motion and indeed the entire proceeding was "absurd and logically incoherent" because it accused the defendants of an abuse of process when the plaintiffs could have no idea what the basis of the process was to be, given that the applications under s. 160 had yet to be made. There is, accordingly, a patent contradiction in the stance adopted by the defendants in arguing, on the one hand, that adequate and valid notice of the grounds to be relied on under s. 160 has been given, while at the same time asserting that the plaintiffs are precluded from seeking an injunction when they do not know the basis of the intended process they claim will be abusive.

22. This leads to the second reason why the Court is satisfied that the plaintiffs have made out a fair issue to be considered and a *prima facie* case as to why the mandatory precondition to the making of an application under s. 160 has not been satisfied. In the judgment of the Court, in requiring that at least ten days' notice of an application be given by an applicant of the intention to make the application, subsection (7) clearly requires that there be a genuine and fully formed or settled intention to initiate the statutory procedure and that the prospective applicant is in a position to substantiate that intention by stating the proposed grounds of the application. It is not enough that the applicant have some vague or even provisional idea that an application might be brought or might be appropriate and that the applicant will think furter about what grounds might be advanced in due course. What is remarkable in the present case is that the first named defendant with the support and agreement of the other defendants has, both in the replying affidavit and in written and oral submissions, repeatedly insisted that the making of the application mentioned in the notices by some or perhaps any of the defendants is by no means certain. Thus, in para. 8 of the affidavit he avers:-

> "The defendants have not yet completely formulated or launched the intended legal action that the plaintiffs attempt to prevent and in respect of which the plaintiffs applied for an injunction".
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> At para. 28 there is the averment:
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> "The plaintiffs' action is absurd and logically incoherent because the defendants have not yet completely formulated or launched the intended legal action which the plaintiffs attempt to prevent and in respect of which the plaintiffs applied for an injunction. . . . Furthermore, not all of the defendants have even yet decided to in fact launch the intended legal action which the plaintiffs attempt to prevent . . . Given that the plaintiffs plainly have no way of knowing what the facts, claims and evidence in the intended action by the defendants (or) some of them will be, the within proceedings and injunction were initiated under false and spurious pretences. The plaintiffs approach is nothing more than a pure farce and mockery of justice."
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> In para. 29:-
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> ". . . and the defendants of course have no obligation to share details of the proceedings that they intend to launch and may or may not have decided to launch."
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> Further, in para. 30 the first named defendant swears:-
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> "As is stated above, it is possible that some of the persons who informed the director plaintiffs about their intention to launch the said proceedings would decide in fact not to follow through on that communicated intention."

23. In the judgment of the Court, it is clearly arguable that such evidence so undermines the expression of any intention given in the notices as to put the validity of the notices seriously in question as a genuine or valid discharge of the statutory obligation of subs. (7). As stated by Fennelly J. in the passage quoted at paragraph above, what the subsection requires is that the proposed respondent be given clear notice of the fact that there is an intention to make the application. The averments cited above make it manifestly arguable that on 10 January 2013 the signatories of the notices had not in fact formed the intention they purported to assert. They admit that they were then unable then to "completely formulate" the grounds the notice requires be given or to decide which of them might eventually bring any application.

24. Accordingly, if it is correct in the circumstances of this application to apply the well settled principles laid down in the case of *Campus Oil Limited v. Minister for Industry and Energy* [1983] I.R. 88, the Court is satisfied that the plaintiffs have made out both a

fair issue and a prima facie case that the mandatory precondition of s. 160(7) had not been complied with and, on that basis at least, the plaintiffs are entitled to seek to restrain the defendants from the formal lodging of any application under s.160(2) until that issue and their claim that the making of such an application would amount to an abuse of process, can be determined.

25. In applying the *Campus Oil* principles, therefore, the next issue is whether damages would be an adequate remedy on either side depending upon whether the injunction is refused or granted in these circumstances. In the judgment of the Court this aspect of the test presents no difficulty. If the injunction is granted, the only effect upon the defendants is to postpone the introduction of any application under s. 160 until the trial of the present action. As already pointed out, that is not a denial of access to the courts but a postponement of the excerise of the right until it can be decided whether such exercise would involve an abuse of process. That would appear to be an effect of minimal if any consequence for the defendants given that they profess not to have yet decided whether they or some of them will actually make an application. Furthermore, an interlocutory injunction in no way inhibits the defendants prosecuting any or all of the other actions they have launched including the petition under section 205. The defendants insist that their purpose in making an application under s. 160 is the purely altruistic one of securing the public interest of protection from the alleged misconduct of the personal plaintiffs. They recognise and accept that disqualification orders against the personal plaintiffs will not secure for them any personal redress or necessarily establish any of the substantive claims of illegality or oppression they make against the State or the Minister for Finance; nor will it procure for the first named defendant his appointment to the board of the Bank.

26. If an injunction is refused, however, there is a clear and obvious risk of real damage being sustained by the plaintiffs. The defendants do not seriously contest the fact that the mere publicising of an application for disqualification orders would bring about potentially serious injury to the commercial interest of the first named plaintiff and to the professional reputations of the personal plaintiffs. If confirmation of that consequence were needed it can be found again in the observations of the Supreme Court as to the high level of blameworthy misconduct which is the necessary subject matter of proceedings against individuals under the section. More importantly, however, it is obvious that the launching of such an application will necessarily cause considerable difficulty for the first named plaintiff. This is evident from the fact that on the 15th January, 2003, after the notices had been served but before any application had been made under subs. (2), the first named defendant wrote a letter to the second, fourth, fifth and sixth named plaintiffs, saying: "You were duly notified last week pursuant to s. 160(7) of the Companies Act 1990, about the pending High Court proceedings to *inter alia*, disqualify you as directors pursuant to s. 160(2) of the Companies Act 1990". The letter then added: "I am copying the executives from Canada Life on this letter so they are adequately informed in the light of the pending legal proceedings and in the context of the reported discussions regarding the resale of Irish Life Group Limited to Canada Life". The face of the letter indicated that it had been immediately copied by email to Mr. D. Alen Loney, President and Chief Executive Officer of Great-West Lifeco (the parent company of Canada Life,) and Mr. Ian Gilmour, CEO of Canada Life and Chairman of Canada Life International Limited. As the clear purpose of copying that letter to the prospective purchaser of the Life Company was to seek to deter Canada Life from proceeding with any purchase of the Life Company, it cannot seriously be suggested that one of the effects intended by the defendants in making an application under s. 160 is to interfere in and obstruct the commercial operations of the Group Holding Co. No evidence or information has been placed before the Court as to the ability of any of the defendants to discharge an award of damages that might be made should an injunction be refused and applications are initiated which transpire to be invalidly brought or to be an abuse of process.

27. In the light of those considerations it is clear that, so far as it is relevant, the third limb of the *Campus Oil* principles, namely, the balance of convenience, lies in the plaintiffs' favour. If an injunction is refused and the plaintiffs' claims are later upheld, there is a clear risk that commercial damage will be done to the first named plaintiff and that reputational damage would be done to the personal plaintiffs which would be difficult to quantify and undo. If an interlocutory injunction is granted and the plaintiffs'claims are not upheld, on the other hand, the only effect is to delay until the issue of abuse of process has been determined, the bringing of any application under section 160(2). If any such application was to be made and treated as a stand- alone proceeding independent of the other actions launched by the defendants including, in particular, the s. 205 petition, it is clear that the applicants would be put on proof of the many allegations of misconduct and illegality, lack of probity and mismanagement which have been extensively canvassed in the present application. However, as already pointed out, all of those claims and allegations have already been raised and put in issue in the various other proceedings and are capable of being determined in those proceedings. Accordingly, insofar as the defendants grievances are based upon complaints that their interests as shareholders (and the first named defendant's interest as a director,) have been interfered with, damaged or denied, the grant of an interlocutory injunction does not in fact obstruct their access to an appropriate Court for the purpose of asserting and vindicating those alleged rights.

28. Accordingly, the Court is satisfied that if the well settled principles of the *Campus Oil* case are to applied, the plaintiffs have made out a clear and even compelling case for the grant of an interlocutory injunction in this instance.

29. It is argued on behalf of the defendants, however, as mentioned above, that this approach to the consideration of the plaintiffs' application for an injunction does not apply the correct test and that the Court is bound to adopt the approach evident in the judgment of Keane J. in *Truck and Machinery Sales Limited v. Marubeni Komatsu Limited* [1996] 1 I.R. 12.

30. In that case the plaintiff (TMS) sought an interlocutory injunction to restrain the defendant presenting a petition under s. 213(e) of the Companies Act 1963, following the service by the defendant of a 21 day notice demanding payment of a debt in accordance with s. 214(a) of that Act. The plaintiff claimed that the presentation of the petition would be an abuse of process because it had substantial grounds, in good faith, to dispute the debt. No issue arose as to whether the demand notice had been adequate or valid.

31. It is perhaps true that there are, at first sight, some aspects of that case which bear analogy to the circumstances of the present case in that the interlocutory injunction was sought after the service of a form of statutory notice and, as here, arguments were advanced that the grant of an injunction involved an interference with the constitutional entitlement of the defendant of access to the Court. It is also the case that Keane J. accepted that in the particular circumstances "it would not be appropriate to apply the principles laid down by the Supreme Court in Campus Oil Limited in cases of this nature where it is the creditors right to have recourse to the Courts, rather than any right of the plaintiff company, which is under threat". It is important, however, in the view of the Court, to note a number of important features which formed the basis for the conclusion reached by Keane J.

32. First, he accepted that the Court had a jurisdiction and an equitable discretion to restrain by injunction the presentation of a winding up petition by a creditor. He said

> "It is clear that where the company in good faith and on substantial grounds, disputes any liability in respect of the alleged debt, the petition will be dismissed, or if the matter is brought before the Court before the petition is issued, its presentation will in normal circumstances be restrained. This is on the ground that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed".

33. He also held that while the jurisdiction to restrain presentation of a petition is one to be exercised only with great caution, it was nevertheless clear that "even where the company appears to be insolvent, the Court may nonetheless, in the exercise of its equitable discretion, restrain the presentation of the petition where is it satisfied that the petition is being presented for an ulterior or collateral purpose and not in good faith by a creditor forming a part of a class of creditors which seeks the administration of the assets of the company for the benefit of that class in an orderly manner under the supervision of the Court". In addressing the issue as to the test to be applied where the issue of proceedings is sought to be retrained on grounds of abuse of process, he held:-

> "It is also clear that, while the form of the relief sought in such eases is normally, as here, interlocutory in nature, the principles laid down by the Supreme Court in *Campus Oil Ltd. v. Minister for Industry and Energy* (No. 2) . . . as to the factors to which the court must have regard in granting or withholding interlocutory injunctive relief are not necessarily applicable. Typically in an application for an interlocutory injunction, the court is invited to restrain an action which is alleged to be a violation of the plaintiff's rights where there is a fair question to be tried, where damages will not be an adequate remedy and where the balance of convenience (including the desirability of preserving the status quo pending the determination of the action) points to the granting of such relief. Different considerations entirely apply where, as here, the object of the application is to prevent the respondent from exercising his right of access to the courts, whether by way of ordinary process or a winding-up petition."

34. Having referred to a number of English cases on the point in which the analogous principles of *American Cyanamid Co. v. Ethicon Limited* were not applied, Keane J. then stated:-

> "I am satisfied that this is the approach which should also be adopted in this jurisdiction. The constitutional right of recourse to the courts should not be inhibited, save in exceptional circumstances, and this applies as much to the presentation of a petition for the winding-up of a company by a person with the appropriate *locus standi* as it does to any other form of proceedings. The undoubted power of the courts to restrain proceedings which are an abuse of process is one which should not be lightly exercised. In the context of winding-up petitions, I have no doubt that it should be exercised only where the plaintiff company has established at least a *prima facie* case that its presentation would constitute an abuse of process. In many cases, a *prima facie* case will be established where the plaintiff adduces evidence which satisfies the court that the petition is bound to fail or, at the least, that there is a suitable alternative remedy. It would not be appropriate to apply the principles laid down by the Supreme Court in *Campus Oil* . . . in cases of this nature where it is the creditor's right to have recourse to the courts, rather than any right of the plaintiff company, which is under threat."

35. In the judgment of the Court, there is an important distinction to be made between the issue considered there by Keane J. and the circumstances before this Court upon the present application. Where a creditor of a company has failed to obtain payment of an outstanding debt it has a clear entitlement to invoke the statutory process of s. 213 of the Act of 1963, and to have access to the High Court for that purpose. The creditor has in his debt a legitimate right of property which he is entitled to pursue. If the company cannot pay because it is insolvent, the creditor is entitled to take steps to ensure that the assets of the company are properly administered in insolvency in the hope that at least part of the debt will ultimately be recovered. It is only where there are genuine grounds for a dispute as to whether the debt is owed that the presentation of a petition becomes a possible abuse of process because winding up is not a legitimate means for the enforcement of the payment of debts.

36. The position in the present case is materially different in that regard. Unlike the creditor who has legitimate property interest in the assets of an insolvent company, the defendants have no equivalent personal interest in obtaining the disqualification of the personal plaintiffs. As already pointed out above, section 160 does not have as its objective or function, the provision of a remedy or relief to applicants and this is so whether the applicants are public officers such as the Director of Corporate Enforcement, official liquidators or individual members or contributories. The essential function of the statutory process is that of protecting the public interest by excluding individuals from involvement in the offices or management of companies in the future by reason of misconduct, fraud or other dishonesty for which they have been responsible in the past.

37. There is the further important distinction in the circumstances of the present case that the grant of the injunction sought does not in fact deprive the defendants of access to the Court for the assertion or vindication of the rights and claims which they profess to pursue. To the extent that the defendants have civil rights as shareholders, directors or investors which they seek to assert and vindicate, alternative remedies and courses of redress are not only open to them but have in fact been invoked by them already. The matters which the defendants canvas as the proposed basis for the applications under s. 160 are also the matters which form the basis of their claims that their personal interests have been abrogated and denied and are they capable of being determined in the other actions they have launched and probably, most appropriately, determined in the s. 205 petition.

38. Accordingly, the Court is not satisfied that the approach adopted in the judgment of Keane J. is applicable in the present case. The well settled principles of the *Campus Oil* case applicable to claims for interlocutory relief are applicable here. As the Court has indicated above, it is not necessary to come to any view as to whether the making of the application would amount to an abuse of process in circumstances where a clear *prima facie* case has been made out that the statutory pre- condition of a valid ten day notice in accordance with subs. (7) has not been fulfilled.

39. Accordingly, the Court will grant an interlocutory injunction restraining the defendants until the trial of this action from issuing proceedings or presenting any application under s. 160 of the Companies Act 1990, (as amended) against any or all of the plaintiffs.