Judgments

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Judgment by: Peart J.

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[2007] IEHC 1

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

AND

PATRICK McCANN

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 23rd day of January 2007:

In this application the applicant seeks a disqualification order under s. 160(b) and s. 160(d) of the Companies Act 1990 ("the 1990 Act") in respect of the respondent, such an order being defined in section 159 thereof, as far as is relevant to this application as being *"an order under this Part that the person against whom the*

order is made shall not be appointed or act as an auditor, director or other officer, receiver, liquidator or examiner or 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 and Provident Societies Acts, 1893 to 1978 ....".

The provisions of s. 160 relevant to the present application provide as follows:

"160. – (2) Where the court is satisfied in any proceedings or as a result of an application under this section that –

(a) ……
(b) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner; or
(c) ……., or
(d) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company; or
(e) ……., or
(f) ……

the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit."

The respondent qualified as an accountant around 1988, and has subsequently acted as an auditor and director of many companies as part of his employment by what is commonly referred to a company secretarial company or company formation company. In later years he acted, and continues to act, as an auditor to client companies following setting up his own accountancy practice. A disqualification order in such circumstances would have the gravest consequences for the respondent since it would prevent him earning his livelihood as an auditor to client companies, as well as attaching to him the inevitable and serious stigma which will attach to him professionally as an accountant and auditor against whom such an order has been made.

The application by the applicant is grounded upon a number of affidavits, and the respondent has filed two replying affidavits, upon which he was cross-examined at the hearing before me.

Background:

On the 9th June 1998, an authorised officer, Gerard Ryan, was appointed by the then Tánaiste and Minister for Enterprise, Trade and Employment to examine the books and documents of Kentford Securities Limited (hereinafter referred to as "Kentford").

Kentford had come to attention when the authorised officer appointed to examine the books and documents of Irish Intercontinental Bank Ltd reported that he was satisfied that officers or agents of the company may have committed unlawful acts relating to a certain scheme of tax evasion involving the so-called Ansbacher accounts, controlled by the late Des Traynor. It was the view of the authorised officer appointed to examine the affairs of Kentford that the company was one primarily used by Mr Traynor during the period 1989-1994 to facilitate cash withdrawals by his friends and business associates from the Ansbacher deposits held in Ireland for the benefit of a small number of persons here.

He reported also that the Kentford bank accounts appear to have formed part of the Ansbacher secret ledger maintained by Mr Traynor, and that during the relevant period a sum in excess of IR£2.27 million passed through these accounts.

It appears that shortly after his appointment as authorised officer, Mr Ryan wrote to the respondent seeking production of any books and records of Kentford which he may have in his possession and to state where the remainder might be located. The respondent was written to as the records showed the respondent to have been the auditor of Kentford and a former director. It appears that the respondent replied that he had no books and documents in his possession and suggested that these would have been held by the late Des Traynor.

The report of the authorised officer dated 16th September 2002, a very lengthy document, states at the outset on page 3 thereof:

"The available documentation, and the explanations offered by various former officers point to Mr Desmond Traynor as having had total control of Kentford Securities Ltd. The circumstances suggest that he used Kentford Securities Ltd as a vehicle for withdrawing monies from and paying monies into the Ansbacher deposits, on behalf of Irish resident individuals and companies thereby facilitating the evasion of taxes by those individuals and companies. In this he was assisted by Ms. Joan Williams. The circumstances suggest that Mr Des Traynor and Ms. Joan Williams were knowingly parties to the carrying on of the business of Kentford Securities Ltd with intent to defraud the creditors of other persons, namely the Revenue Commissioners, which constitutes an offence under Section 297 (as amended) of the Companies Act 1963."

There is no suggestion made on the present application that the respondent made any improper financial gain from his involvement with Kentford either as its auditor or as a director. But a number of matters are said by the applicant to constitute conduct as an auditor of such seriousness as to merit disqualification from holding such a position for such period as the Court would consider appropriate. The respondent has sworn in his affidavit dated 4th April 2006 that the first occasion on which he became aware that Kentford had any connection to the so-called Ansbacher accounts was when he heard it emerge at the Moriarty Tribunal, and that he was never part of any scheme to defraud the Revenue Commissioners and that at no time had he any intention of committing any wrongful act. I accept what he states in this regard.

Firstly, it is submitted by the applicant that the evidence is that the respondent acted as auditor of Kentford while still a director thereof – something which is prohibited by s. 163 of the Companies Act 1963.

Secondly, it is submitted that his resignation as a director of the company appearing to be as of the 14th March 1989 is a contrivance designed to mislead persons into believing that when he was acting as auditor of the company he was not doing so in breach of hat section. Put more bluntly, it is suggested that his resignation as a director was deliberately back-dated to make things appear in order. The Notice to the Companies Registrar notifying this resignation and change of director is dated 13th April 1992, and was filed in the Companies Registration Office on the 14th May 1992. The applicant maintains that the respondent was in fact a director until May 1992, and that the paperwork has been backdated in order to make things appear to be otherwise.

In relation to this, the applicant submits that even if the resignation is proper and valid, the respondent held himself out at various times after the 14th March 1989 to be a director, when he signed some bank mandates and other bank documents in which he has described himself alternately as director, authorised signatory, and Chairman.

Thirdly, it is submitted that the evidence is that the respondent as auditor issued unqualified auditor's reports on Kentford's financial statements for four successive years, namely the years ending 31st March 1990, 1991, 1992 and 1993, and that he knew or ought to have known, as auditor, prior to making those unqualified reports that the impression given by the statements that the company was a dormant company showing assets and share capital of IR£2 each was false and misleading since there were large transactions going through the company's bank accounts, and that there were balances held in those accounts. In issuing such unqualified reports in such circumstances, it is the view of the authorised officer that the respondent committed offences under s. 22(3) of the Companies (Amendment) Act 1986 and s. 242 of the Companies Act 1990, and that by so doing he facilitated the defrauding of the Revenue Commissioners.

This Report by the authorised officer states also that the respondent stated to him that he had at all times accepted Mr Des Traynor's assurances to him that Kentford was a trust company which did not trade and which had no assets or liabilities in its own right, that he is of the view that the accounts give a true picture, that his audits were of an acceptable standard at all times and that he had no knowledge that the company was being used as a vehicle for tax evasion. The authorised officer does not accept these assertions by the respondent.

Fourthly, it is believed that the respondent submitted to the authorised officer a forged document to support his assertion that he had been assured by Mr Des Traynor that Kentford was a trust company only with no assets or liabilities. The document itself is in the form of a letter on Mr Traynor's office note-paper addressed to The Directors, Kentford Securities Limited, 3 Trinity Street, Dublin 2, and is signed by Mr Traynor and bears the date 23rd January 1990. It states as follows:

"Re: Preparation of Annual Accounts

I understand that it is now necessary to file accounts with the Companies Office when making an annual return.

I would appreciate if you could arrange for accounts to be prepared in respect of the year ended 31st March 1990.

Kentford Securities Limited is a trust company and as such does not trade and does not hold any assets or liabilities in its own right. I would appreciate if you would instruct the auditor accordingly.

If the status of this company should change at any time in the future I will inform you.

Yours sincerely,
J.D.Traynor"

A fatal flaw in this letter, and which totally undermines its integrity, is the fact that the headed notepaper on which it is printed bears a seven digit telephone number, and it is an undisputed fact that the number in question was changed to seven digits only in April 1993, and accordingly this letter could not have come into existence until after that date. The respondent accepts this fact, but denies that he played any part in the creation of the letter, and that he relied upon it in good faith and handed it over to the authorised officer in good faith. The applicant herein is not alleging that the respondent created the document, but he does not accept that the respondent acted in good faith in relying upon it. The respondent on the other hand states that the letter in any event states in writing only what he himself had been assured of verbally by Mr Traynor, namely that Kentford was a trust company only. He has stated in his affidavits sworn on the 4th April 2006 that if the letter was indeed backdated, it was backdated by Mr Traynor and not by him.

An important fact in the overall background to the present application is that Mr Des Traynor died in the month of May 1994.

The respondent is now aged forty eight years. He qualified as an accountant in about 1988 and had been employed in 1987/1988 in a junior capacity by Mr Sam Field Corbett in a company called Chartered Secretarial Company ("CSC). He remained with CSC in an employed capacity, but also had his own accountancy firm which he registered as a business at that time. He has stated that it was part of his business plan that persons who dealt with CSC for company secretarial matters might be approached by him so that he could act as auditor and provide accountancy services. This would appear to me to be an obvious opportunity to acquire clients for his new practice.

CSC provided company secretarial services to Kentford at all times, according to the respondent's affidavit dated 6th April 2006. The respondent would have been in his late twenties at this stage. He has stated in his affidavit that Kentford was just

one of a very large number of companies to which CSC provided secretarial services.

It is well known to me that at this time it was customary for the staff of companies such as CSC to be named as shareholders and directors of companies which were formed by them, many of which I suspect, as was common at the time, were held as so-called "shelf-companies", and which could be bought 'off the shelf' by individuals wishing to form incorporate themselves, rather than starting from scratch the process of forming a company themselves, completing all the paperwork and so forth. Upon such a purchase, the staff members would sign a form of resignation as director, and would sign also a share transfer form in respect of the two subscriber shares normally held in such cases by them. The new owners of the company would then have to file a Notice of Change of Directors in the Companies Office, and the first Annual Return would reflect the transfer of shares from the subscribing shareholders to the new owners of those shares. This was a useful service to the legal profession and the business community at the time, and, for all I know, remains so. But it undoubtedly involved and had to involve a scant regard for strict compliance with the statutory obligations regarding returns and forms generally. I have no doubt that the respondent is correct when he swears, as he has done, that *"it was the practice of Mr Field Corbett to obtain and maintain on file undated signed letters of resignation and share transfer forms for members of staff who acted as nominee directors"*, and that *"this was done in order to avoid a situation where a member of staff might leave his employment without such documentation being available."*

I mention this feature of those times because there is no doubt in my mind that the respondent finds himself facing an application for his disqualification at least partly because of the fact that it was, as he has stated in his evidence, commonplace for staff to be appointed as directors and to resign as required, and I have no doubt that this culture of signing perhaps in advance or perhaps in arrears by backdating, whatever forms were required or requested to be signed by their employer so that the business of selling shelf companies could function speedily and conveniently, spread beyond documents such as appointment and resignation of directors and share transfer forms, and included in the case of the respondent such forms as he was asked to sign by either Mr Field Corbett, his employer, or indeed Mr Traynor directly. It seems uncontroverted that these two men enjoyed a close working relationship. The respondent has stated in his evidence that he was always aware that Kentford was a Traynor company. He has stated also that Mr Traynor was in the offices of CSC on a regular basis and that he was a man of great standing and importance in the office, and I am satisfied that a person such as the respondent, a junior figure in the organisation, would certainly do as he was asked to do by either of these men and without asking questions. I also accept having heard his evidence in cross-examination and having considered his affidavit that he never was aware that anything illegal was taking place in relation to Kentford, or even what the nature of the company's business activity.

Having said this, I am not for one moment saying that such a practice of signing blank forms and/or backdating documentation is or was acceptable practice. It never

was, but it was a feature of the time, and the respondent was caught up in it as a result of his employment in such a company. It accounts for the fact that it has come about that the respondent has signed auditor's reports for years during which he also still remained a director – at least on paper. I believe that, perhaps unwittingly on account of the matters to which I have adverted in the previous paragraphs, the respondent acted as an auditor at a time before he had in fact resigned as a director, and I am satisfied that the resignation as of the 14th March 1989 has been contrived by the filing in 1992 of a Notice of resignation retrospective to the 14th March 1989. This is fully in keeping with the sort of practices to which I have referred earlier, and I have very little doubt that this is what has happened. The respondent during the course of this application has corresponded with Mr Field Corbett and his daughter who are residing now in the Isle of Man, and he has sought from them and obtained letters which he has exhibited and in which each confirms that he resigned in March 1989. I do not accept that such letters enable the respondent to escape the conclusion that he failed to resign when he says he did. I have no reason to place any faith in the corroborative value of such letters.

I am satisfied that the reality is that at the time that the respondent signed the auditor's report for the years 1990, 1991, 1992 and 1993, he had not in fact signed any form of resignation as a director, but on the balance of probability this was not a deliberate or conscious breach of the law. I am satisfied that in line with the lack of attention to the importance of form filling which was a feature of the firm with which he was employed, he did not pay attention or attach importance to the requirement that he should not do any act as auditor of the company while not having formally resigned as a director. I have no doubt that he arranged for some backdating of documentation in order to correct the paper record. He certainly signed bank documentation for Kentford in his capacity as a director, chairman and authorised signatory during the years for which he acted as auditor. His explanations and attempts to explain this away are unconvincing. It occurred as a consequence of the culture in which he was immersed during these years where anything required to be signed by him, or that he was requested to sign by his employer or Mr Traynor was signed without any consideration being given to such documents by him. This would have been so commonplace in his working life at the time that I doubt very much if he was always aware of what he was signing.

I do not intend to set out all the detail of the complaint made by the applicant and the authorised officer in his report as to the many ways in which the respondent failed in his duty as an auditor. Nor do I intend to set out in any detail what the respondent says in response both in his affidavit or under cross-examination. These matters are set out in those affidavits and in the transcript of the cross-examination before this Court. But I am also satisfied that the respondent failed in his duty as an auditor of Kentford by signing unqualified reports on the financial statements for the years in question. He has stated that he accepted assurances given to him by Mr Traynor that Kentford was a trust company, but even if that is true he ought not to have simply accepted that assurance as the basis for his audit. He was required to do more, and to pro-actively satisfy himself from an examination of the bank accounts and books and records of the company that what he was told was in fact the situation. The purpose and obligations of an auditor are not fulfilled by the mere

going through the motions of signing off on a company's financial statements in the same manner as he may have signed blank forms of resignation as director already referred to, without actually doing anything to verify the true position.

In relation to the letter from Mr Traynor dated 23rd January 1990 which manifestly was backdated so as to support the respondent's assertion that he was at all times made aware that Kentford was a trust company, I am satisfied that this fabrication was not perpetrated by the respondent. That is not the allegation made by the applicant. The allegation is that he submitted it to the authorised officer knowing that it was a fabrication, and that his assertion that he acted in a bona fide way in relation to this document is false. I am satisfied on the balance of probability that the respondent must have been aware that this letter was backdated. For such a thing to happen would have been nothing unusual in the working life of the respondent. It was commonplace for documents of all kinds to be backdated, signed in blank and so forth, and this document would have been no different. I cannot accept that the respondent acted bona fide in relation to this letter when he handed over a copy of it to the authorised officer. But I would accept, again as a matter of probability, that he was never aware of the illegal nature of Kentford's activity. As I have already referred to, I am satisfied that he failed in his duty as an auditor by not looking behind whatever assurances that he was given as to the trust nature of the company.

In respect of all the matters about which the applicant makes complaint against the respondent, I find against the respondent. But central to the Court's decision not to make the order sought is the fact that the matters complained of occurred so long ago between 1988 and 1994 and when the respondent was an employee in CSC, and starting when he was a very recently qualified accountant. It is also important to bear in mind that the respondent made no financial gain from the illegal activity of Kentford, even if his failure to observe proper standards as an auditor facilitated the scheme of tax evasion of which he was not aware. One cannot escape the conclusion that the respondent was at the time a very small and insignificant cog in the larger wheel being turned by Mr Des Traynor. It is he and his friends and acquaintances involved in the tax evasion scheme who were the beneficiaries of the respondent's undoubted naivety, lack of attention to his responsibilities, and carelessness at the time.

Since those times, the respondent has been engaged upon developing his accountancy practice. A great deal of his work involves acting as an auditor to company clients. His professional body has conducted audits of his practice and for all practical purposes he has a clean bill of health from that body in respect of the years for which he has been audited by that body. There are also testimonials from worthy individuals who are clients of his.

As I have already referred to, the consequences of a disqualification order being made against an accountant in private practice are devastating. The effect is worse even that the restriction of a director under s. 150 of the Act. In that case the director restricted can still pursue his livelihood by trading other than with the benefit of limited liability. In the case of the respondent, being an accountant in private practice, this is not the case, certainly as far as audit work is concerned. His capacity to earn his living from his chosen profession would be seriously

compromised, and the Court must balance such consequences against the legislative intention that the public should be protected from auditors who have fallen short of the standards expected of such an important profession in the commercial life of the country.

The purpose of an order under s. 160 of the Act is not punitive in nature, but rather protective of the community. The fact that the Court is satisfied that the respondent during the years in question failed to conduct himself in a manner that was proper and responsible, is not something for which the Court must inflict a punishment. That is not the Court's function under the section. The only function of the Court is to, where necessary, and for such period as the Court might consider necessary, prevent a respondent from acting as an auditor or other officer of a company, where the evidence is sufficient to demonstrate that as a matter of probability that the person in question would present a current risk to members of the public who may be adversely affected.

Under s. 160 the Court has a discretion whether or not to grant the order, even where findings of fact are made which are consistent with the respondent being guilty of a breach of his duty as auditor, and/or that his conduct makes him unfit to be concerned in the management of a company. It is important to note the use of the present tense in relation to unfitness to be involved in the management of a company. That is relevant in the present case where the conduct complained of and found to have occurred, did so between twelve and eighteen years ago. The question to be considered is whether at the time of this application the past conduct makes him presently unfit to be so involved. The reason for this being so is, as I have just referred to, that the section's purpose is not to punish the respondent, but rather to ensure as far as possible that members of the public are protected from harm. If the respondent is not now somebody against who the public should be protected, then the Court ought not to make the order sought, even if the matters alleged to give rise to disqualification have been established, as they have in this case.

I have had the undoubted benefit of observing the respondent in the witness box. I have listened carefully to the manner in which he dealt with a close and exacting cross-examination by Mr Murray. I have re-read the transcript of that cross-examination, and considered it carefully. I have concluded that whatever shortcomings there may have been, and there were many in my view, in the manner in which the respondent dealt with questions asked of him by the authorised officer at interviews conducted in March 1999, September 2001 and February 2002, he was at last forthcoming as to the reality in which he finds himself facing an application of this kind. His answering of some of the questions put to him during these interviews could be characterised as vague and even at times evasive, and did not display the same candour which was evident to me during his cross-examination on his affidavits. Some of his answers during interview attempted to answer the unanswerable or justify the unjustifiable, but what emerged during his cross-examination was a situation which I am satisfied represents the reality, and that is the scenario where it was accepted and normal practice in an office of the kind in which he was employed that forms of all kinds would simply be filled in and signed as required, and without thought as to the sort of consequences which have become

apparent. It would in my view have served the respondent better if at interview he had been more open in that respect, rather than try and justify what had happened.

I have concluded that whatever irregular and improper conduct he was mixed up in all those years ago at the behest of his employer and Mr Traynor is a thing of the past, and that the experience of being caught up in other peoples' deceptions and illegality has been a chastening one for him and one to which he will never risk returning. His activity as an auditor and accountant since those days has been the subject of scrutiny by his professional body and he has been found to be of good standing, and has a clean bill of health, albeit that some fairly minor shortcomings were identified at audit, and which have been addressed by him. I believe that he does not currently present a danger from which the public ought to be protected, and in such circumstances it is appropriate that inspite of the findings of fact against the respondent the Court should exercise its discretion in favour of refusing the order sought. The position would be completely different if it were found that in more recent times he had engaged in or was engaging in the sort of unacceptable behaviour which was part and parcel of his working life in the years referable to this application.

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