



**Judgment Title:** In re Bovale Developments DCE v Bailey & anor

**Neutral Citation:** [2011] IESC 24

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**Court:** Supreme Court

**Composition of Court:** Denham J., Hardiman J., Fennelly J., Macken J., Finnegan J.

**Judgment by:** Denham J.

**Status of Judgment:** Approved

**THE SUPREME COURT**

**[Appeal No: 25 & 26 of 2008]**

**Denham J.  
Hardiman J.  
Fennelly J.  
Macken J.  
Finnegan J.**

**In the matter of Bovale Developments**

**In the matter of the Companies Acts 1963 to 2006**

**In the matter of an application pursuant to s.160(2) of the Companies Act, 1990**

**Between/**

**The Director of Corporate Enforcement**

**Applicant/Respondent**

**and**

**Michael Bailey and Thomas Bailey**

**Respondents/Appellants**

**Judgment delivered on the 14th day of July, 2011 by Denham J.**

1. The Director of Corporate Enforcement, the applicant/respondent in this appeal, who is referred to as "the Director", brought a notice of motion dated the 8th August, 2006, seeking a disqualification order pursuant to s.160(2)(a) and/or s.160(2)(b) and/or s.160(2)(d) of the Companies Act, 1990, (as amended by s.14 and s.42 of the Company Law Enforcement Act, 2001) against Michael Bailey and Thomas Bailey, the respondents/appellants, referred to as "the appellants", on grounds set forth in affidavits deposed by Peter Lacy, a partner in PricewaterhouseCoopers, "PwC", and Dermot Madden, an accountant and officer of the Director, sworn on the 30th June, 2006 and the 8th August, 2006, respectively.

2. The appellants brought a notice of motion dated the 22nd November, 2006, seeking an order striking out paragraphs 9 to 10, 17, 27 to 28 and 32 of the said affidavit of Mr. Madden and paragraph 8 of the said affidavit of Mr. Lacy.

3. The motions were heard by the High Court and on the 1st November, 2007 Irvine J. delivered judgment. By order of 18th December, 2007, the High Court ordered that paragraphs 9, 10, 13, 17, 27 and 28 of the said affidavit of Mr. Madden be removed; that portion of paragraph 32 of the said affidavit of Mr. Madden be removed; and that paragraphs 17, 18 and 19 of the said affidavit of Mr. Lacy be removed.

4. The appellants appealed the order of the High Court, filing eight specific grounds of appeal, being:-

(i) The learned trial judge erred in law and/or in fact in finding that the documentation provided by the Director to PwC was lawfully in its possession.

(ii) The learned trial judge erred in law and/or in fact in finding that the Director lawfully delegated his functions under the Company Law Enforcement Act 2001 to PwC.

(iii) The learned trial judge erred in law and/or in fact in finding that the investigation by PwC of suspected offences under the Companies Acts did not involve the exercise by it of the powers of the Director.

(iv) The learned trial judge erred in law and/or in fact in finding that an instrument of delegation of the powers of the Director to PwC was not required.

(v) The learned trial judge erred in law and/or in fact in finding that PwC was an officer of the Director within the meaning of section 12(6) of the Company Law Enforcement Act 2001.

(vi) The learned trial judge erred in law and/or in fact in finding that PwC was a person within the meaning of section 3(1)(c) of the Company Law Enforcement Act 2001.

(vii) The learned trial judge erred in law and/or in fact in finding that it was lawful for persons other than the partners of PwC to have participated in the preparation of the reports.

(viii) The learned trial judge erred in law and/or in fact in that she misconstrued the provisions of sections 12 and 13 of the Company Law Enforcement Act 2001.

5. The Director filed a cross appeal from the part of the order of the High Court which ruled that:-

- (i) The challenge to the admissibility of evidence was not premature.
- (ii) The admissibility of evidence could be challenged before the appellants disqualification proceedings had put in any replying affidavits.
- (iii) The Director could place no reliance on hearsay evidence in its grounding affidavits in disqualification proceedings.
- (iv) The report of a tribunal has no evidential value in disqualification proceedings but can merely be used as a source to assist in the finding of other evidence.
- (v) The Director could place no reliance on the opinion of the Revenue Commissioners in its grounding affidavits in disqualification proceedings.
- (vi) The Director could place no reliance on the hand-written memos by the auditor of the company in its grounding affidavits in disqualification proceedings.

6. By letter dated the 24th March, 2011 the Director informed the Court that he was proposing to restrict the ambit of his cross appeal to the extent set out. It was stated:-

- (i) The Director will no longer seek to rely upon paragraphs 14-43 to paragraphs 14-63 inclusive in the Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments as referred to in paragraph 10 of Mr. Madden's affidavit dated the 8th August, 2006.
- (ii) The Director will no longer seek to rely upon paragraphs 17-21 and 17-22 in the Second Interim Report of the Tribunal of Inquiry Into Certain Planning Matters and Payments as referred to in paragraph 27 of Mr. Madden's affidavit dated the 8th August, 2006.
- (iii) The Director will no longer seek to rely upon paragraphs 8.04 of the Third Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments as referred to in paragraph 28 of Mr. Madden's affidavit dated the 8th August 2006.
- (iv) The Director considers that the material at paragraph 18.09 of the Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments as referred to in paragraph 27 of Mr. Madden's affidavit dated the 8th August, 2006 are relevant to the Court's determination on the fitness of the appellants to be concerned in the management of a company and will seek to submit to the Supreme Court that such material should be admitted as prima facie evidence in the section 160 proceedings.
- (v) The Director considers that the material at paragraph 7.08 and 7.09 of the Third Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments as referred to in paragraph 28 of Mr. Madden's affidavit dated the 8th August, 2006 are relevant to the Court's determination on the fitness of the appellants to be concerned in the management of a company and will seek to submit to the Supreme Court that such material should likewise be admissible on a prima facie basis.

### **Issues**

7. There are thus two appeals before the Court: the appeal by the appellants and the cross appeal by the Director. The appellants' appeal is against that part of the High

Court's decision which rejected the submission that the Director impermissibly delegated his functions under the Company Law Enforcement Act 2001 to PwC. This will be referred to as the PwC issue. The Director has cross appealed the decision of the High Court which directed that portions of the affidavits relied upon by the Director be struck out on the basis that they contain inadmissible evidence, which substantially relates to the report of the Tribunal, and will be referred to as the Tribunal issue.

### **The PwC Issue**

8. The grounding affidavit of Mr. Lacy, sworn on the 30th June, 2006, exhibits two reports that were forwarded to the Director and which concern the books and records of Bovale Developments Limited, "Bovale", for the years ended the 30th June, 1997 and the 30th June, 1998, which are relied upon by the Director as a part of his case against the appellants. However, the appellants submit that these reports are inadmissible on the grounds that the Director impermissibly delegated his function of investigating the affairs of Bovale to PwC.

9. The High Court rejected all of the appellants' arguments regarding the lawfulness of the Director's actions in relation to PwC and s.12 of the Company Law Enforcement Act, 2001. The High Court was of the opinion that PwC was, at all times, acting as a lawfully appointed officer of the Director for the purposes of assisting him in carrying out his functions.

10. The Company Law Enforcement Act, 2001, will be referred to as "the Act of 2001". Section 12(6) of the Act of 2001 provides:-

*"The Director may perform such of his or her functions as he or she thinks fit through or by an officer of the Director and in the performance of those functions the officer shall be subject to the directions of the Director only."*

11. Section 3 of the Act of 2001 provides that:-

*" 'officer of the Director' means—*

*(a) an officer of the Minister assigned to the Director,*

*(b) a member of An Garda Síochána seconded to the Director, or*

*(c) a person employed by the Minister or the Director under a contract for service or otherwise,*

*to assist the Director in carrying out functions of the Director under the Companies Acts or any other Act;"*

12. Further, the term "functions" "includes powers and duties", as defined by the Act of 2001.

13. Section 13 of the Act of 2001, provides that:-

*"(1) Without prejudice to the generality of section 12(6), the Director may, in writing, delegate to an officer of the Director any of the Director's powers under this or any other Act, except this power of delegation.*

*(2) A power delegated under subsection (1) shall not be exercised by the delegate except in accordance with the instrument of delegation.*

*(3) A delegate shall, on request by a person affected by the exercise of a power delegated to him or her, produce the instrument of delegation under this section, or a copy of the instrument, for inspection.*

*(4) A delegation under this section is revocable at will and does not prevent the exercise by the Director of a power so delegated."*

14. Mr. Michael Cush, S.C., counsel for the appellants raised several matters in relation to the PwC issue. He queried who was on the PwC team. There was no evidence as to who was on the team but one would assume that there were staff acting on the team who were not partners. He argued that the term "person" could include a partnership but not the staff of PwC. He stated that this was a technical point, but that it was important. He argued that pursuant to s.3 of the Act of 2001 a "person" was an officer of the Minister, a member of An Garda Síochána, or an individual brought in under a contract.

Counsel submitted that, if anything, a delegation of power requires a greater degree of formality. In this case, he submitted, there should have been an instrument in writing and a delegation by the Director pursuant to s.13 of the Act of 2001.

He further argued that PwC's activities were more like the exercise of a power than the giving of advice such as a solicitor might give, for example.

#### **Decision on the PwC Issue**

15. In his affidavit deposed on the 30th June, 2006, Mr. Lacy deposed that PwC was appointed in August, 2004 to investigate and report on a number of matters. He deposed that he was the head of the PwC team comprising a further four professional staff who carried out, on behalf of the Director, an in-depth review and investigation of certain books and records relating to the affairs of Bovale. This inquiry included matters in relation to the accounts for years ended the 30th June, 1997 and the 30th June, 1998. Having completed the examination of Bovale's books and documents Mr. Lacy presented two reports to the Director on 20th June, 2006, detailing "my findings" for each of the two years. He deposed that PwC's two reports conclude, in summary, that:-

*"(i) [Bovale's] books of account were prepared in a manner which misstated in a material way the transactions of [Bovale] and in particular grossly understated the remuneration obtained by the [appellants] from [Bovale];*

*(ii) the recorded payments of remuneration to the [appellants] were supplemented in the main by a series of additional cheque payments which were not properly recorded in [Bovale's] Cheque Payments Book or payroll records.*

*Many of these cheques, when returned from [Bovale'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 [appellants]. It was subsequently necessary during the course of the company audit to re-classify these payments made to the [appellants] or on their behalf."*

He deposed that, based on the figures, PwC was of the opinion that Bovale and its directors failed in a material way to keep proper books of account contrary to s.202 of the Act of 1990 in respect of the years ended the 30 June, 1997 and the 30 June, 1998. Mr. Lacy concluded:-

*"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"*

16. As set out earlier, counsel for the appellants made submissions, including that PwC was not "a person" for the purpose of the Act of 2001.

17. In general, an unincorporated body, such as a partnership, may be regarded as a "person". PwC is an unincorporated body: a partnership.

18. Section 18 of the Interpretation Act, 2005, referred to as "the Act of 2005" states that "The following provisions apply to the construction of an enactment ..." and section 18(c) provides:-

*"Person. "Person" shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly;"*

I would construe this section as applying to PwC, and that PwC may be considered a "person".

19. Counsel for the appellants made submissions that the work had been done by a team in PwC and that the team in PwC could not be regarded as "a person". I do not agree with this submission. The fact that PwC established a team, led by Mr. Lacy, to undertake the contract, does not undermine the applicability of the term to the situation. PwC was the responsible person, and, within PwC, Mr. Lacy was the leader of the team and had responsibility. The fact that some members of the team may not have been partners of PwC does not invalidate its standing. PwC was accountable for the contract, and, within PwC, Mr. Lacy was accountable. The fact that some work may have been done by non-partners does not invalidate the situation.

20. In a specific submission on statutory interpretation, counsel for the appellants referred to s.3 of the Act of 2001 where "officer of the Director" is defined. The precise terms of the section are set out earlier in this judgment. Counsel submitted that paragraph (a) referred to "an officer" of the Minister; paragraph (b) referred to "a member of An Garda Síochána"; and paragraph (c) referred to "a person" employed by the Director, and, that this properly construed referred to an individual person only. I am satisfied that this is incorrect. While both paragraphs (a) and (b) refer to specific individual persons the term in paragraph (c) is to "a person". This term is universally recognised, as in the Act of 2005, to include both an incorporated company and an unincorporated body. I would draw no inferences from paragraphs (a) and (b) so as to limit the general meaning of the term "a person", in the absence of any express deviation from the general and usual meaning. Thus "a person" under the definition of "officer of the Director" in s.3 of the Act of 2001 may include an unincorporated body, such as PwC.

21. Counsel for the appellants submitted that the proper course to have taken was for the Director to have delegated the matter pursuant to s.13 of the Act of 2001. This was a route open to the Director, and, if taken, this choice would have required a formal instrument in writing. However, in this case such a document does not exist. Clearly evidence of a delegation in writing would be very relevant in certain types of inquiries. However, it is obvious from the papers that the Director and PwC both regarded the exercise as being undertaken pursuant to s.12(6) of the Act of 2001.

22. I am satisfied that it was open to the Director to use s.12(6) of the Act of 2001 as he did in this case. "Functions" in the Act of 2001 is defined very broadly, it includes both powers and duties. Thus it includes the task undertaken by PwC in this case. The Director did not impermissibly delegate his functions under the Act of 2001 to PwC. PwC was an officer of the Director, a person employed by the Director to assist him in carrying out functions. After receipt of the reports of PwC, it was for the Director to decide how to

proceed with the matter.

23. For these reasons I would dismiss the appeal of the appellants on this issue.

#### **The Tribunal Issue**

24. Counsel for the Director stated that there were three items in the Director's appeal, which raised the Tribunal issue. These related to:-

- (a) extracts from the Tribunal report;
- (b) two memoranda of the auditor; and
- (c) information from the Revenue Commissioners.

#### **Extracts from the Tribunal Report**

25. The Director wishes to put in evidence, pursuant to the affidavit of Mr. Madden, deposed on the 8th August, 2006, two extracts from the Tribunal report.

26. The first extract is from the second interim report, paragraph 18-09. It states:-

*"The Tribunal has pronounced upon the circumstances of the meeting at the home of Mr. Burke in June 1989 in which Mr. Bailey handed over an envelope to Mr. Burke, which approximated in size to that handed over to Mr. Burke by Joseph Murphy Junior. The Tribunal has been unable to establish the contents of this envelope but is satisfied that Mr. Bailey, either in this envelope or otherwise, provided a benefit or payment to Mr. Burke. The Tribunal is satisfied that such payment made or benefit conferred was given in anticipation of receiving Mr. Burke's assistance in progressing Mr. Bailey's plans for the Murphy's North Dublin lands, and that it was a corrupt payment."*

27. The second is an extract from the third interim report of the Tribunal, being paragraphs 7.08 and 7.09. These state:-

***7-08** The Tribunal is satisfied that Mr. Michael Bailey paid Mr. George Redmond three cash payments amounting to between £16,000 and £20,000 in the eighteen months prior to July 1989.*

***7-09** The Tribunal is satisfied that these payments were made to Mr. George Redmond in circumstances which give rise to a reasonable inference that such payments were made in order to influence him in the performance of his duties as an Assistant City and County Manager for Dublin and that they amounted to corrupt payments."*

28. This submission raised two issues of law: first is the decision in *Goodman International v. Mr. Justice Hamilton* [1992] 2 I.R. 542, referred to as "Goodman", and second is the hearsay rule.

29. Counsel for the Director submitted that the above cited paragraphs from the reports of the Tribunal are relevant to the issue of the fitness of the appellants and should be admitted in evidence.

#### **Goodman Case**

30. Counsel for the Director submitted that Finlay C.J. went further than was necessary in his judgment in *Goodman* in stating at p.590:-

*"With regard to the suggestion that the findings of the Tribunal, if not an impermissible administration of justice by a body other than a court, is a usurpation of the activities of courts in cases where either civil cases are pending or may be instituted, it seems to me that again this submission arises from a total misunderstanding of the function of the Tribunal. A finding by this Tribunal, either of the truth or the falsity of any particular allegation which may be the subject matter of existing or potential litigation, forms no part of the material which a court which has to decide that litigation could rely upon. It cannot either be used as a weapon of attack or defence by a litigant who in relation to the same matter is disputing with another party rights arising from some allegation of breach of contract or illegal contract or malpractice. I am, therefore, satisfied that the submission under Article 34 must fail."*

31. Counsel submitted that it was not necessary to overrule the judgment as a whole: but that it is possible to distinguish it as it is not sought to usurp the court's functions. Counsel submitted that the above cited extract from *Goodman* was an obiter dictum as it was not necessary to go that far to decide the case. However, counsel submitted that, if the Court was against him as to the words being an obiter dictum, he would seek to persuade the Court not to follow *Goodman* in its statement that no use could be made of the Tribunal reports.

32. In relation to Article 34 of the Constitution, the applicants in *Goodman* had submitted that in so far as the resolution of both Houses of the Oireachtas directed an inquiry into matters that were or could be the subject matter of civil litigation between the applicants and other parties, it was in breach of Article 34 of the Constitution in purporting to direct the administration of justice otherwise than by courts established by law, and by judges appointed in the manner provided by the Constitution. Secondly, it was submitted that, in so far as the matters to be inquired into by the resolution involved the determination of the truth or falsity of questions that were or could be the subject of civil litigation in the courts, the resolution was in breach of Article 34 in that it was directing a process that would inevitably usurp the functions of the courts established under the Constitution.

33. In the decision on the Article 34 aspect of the case, Finlay C.J. pointed out that the meaning of the constitutional concept of the administration of justice involved in Article 34 was identified in the tests set out in the judgment of Kenny J. in the High Court in *McDonald v. Bord na gCon* [1965] I.R. 217, which were later adopted by Walsh J. in the Supreme Court. Kenny J. stated that the administration of justice had five characteristics, being: (i) a dispute or controversy as to the existence of legal rights or a violation of the law; (ii) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty; (iii) the final determination (subject to appeal) of legal rights and liabilities or the imposition of penalties; (iv) the enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State, which is called in by the Court to enforce its judgment; and (v) the making of an order by the Court which as a matter of history is an order characteristic of courts in this country.

34. Finlay C.J. held in *Goodman* at p.589:-

*"I am satisfied that with the possible exception of the first clause in this statement of the characteristics of the administration of justice, where it speaks of a controversy as to the existence of a violation of the law, the activities of this Tribunal of Inquiry fulfils none of the other fundamental conditions or characteristics of the administration of justice as laid down in this case."*

35. Thus Article 34 and the issue of the administration of justice and whether or not it could be usurped by a tribunal was the kernel of the decision. Consequently, the determination by Finlay C.J. at p.590, as set out previously, is a ruling on the issue

holding that the tribunal was not administering justice, or usurping the activities of the courts. It distinguished the function of the tribunal from that of a court and held that the finding of a tribunal forms no part of the material a court can rely upon, and further that it cannot be used as a weapon of attack or a defence by a litigant when the same matter is before a court. These are findings at the core of the decision and are part of the ratio decidendi of the case.

36. This has been understood to be the jurisprudence arising from that case for many years and has been applied by the courts and in the tribunals.

37. The courts have used the term "sterile of legal effect" since that judgment. This comes from the judgment of Costello J. in *Goodman*. As stated by Hardiman J. in *Murphy & Ors v. Mr. Justice Flood & Ors* [2010] IESC 21:-

*"In the words of Costello J., or in the words of the judicial authorities cited with approval by him, the Tribunal of Inquiry is "not imposing any liabilities or affecting any rights" (at p.557); its conclusions have merely the status of opinion and "this opinion is devoid of legal consequences" (at p.557), its findings are "sterile of legal effect" (562 and its purpose is "merely" to inquire and report (at p.562). A Tribunal of Inquiry is "a simple fact-finding-operation" according to Finlay C.J. (at p.588). The Tribunal has no power to inflict a penalty and its determinations cannot "form any basis for the punishment by any other authority of that person" at p.588. Its function is to "make a finding of fact, in effect, in vacuo, and to report it to the Legislature." (at p.590)"*

38. I am satisfied that the terms of the judgment of Finlay C.J. in *Goodman*, as quoted above, at p.590, are not an obiter dictum, and may not be distinguished. Applying that law to this case, it is clear that the two extracts from the tribunal report may not be admitted in evidence by the Director. Thus I would dismiss the appeal on this issue.

39. Counsel for the Director asked the court, in the alternative to distinguishing the decision of Finlay C.J., to overrule that judgment. However, this submission was not pressed. Indeed, counsel did not open any of the case law on the rule of stare decisis to the Court. No submissions were made as to the applicability of the decided case law to this appeal. In all the circumstances of the case, I would not consider departing from the decision in *Goodman* as expressed by Finlay C.J.. It has been part of the law on tribunals for nearly twenty years, it has been relied upon during that time by parties before tribunals, and has been viewed as the law by tribunals and by the courts.

40. For the reasons given, the judgment of Finlay C.J. in *Goodman* is well settled law in this jurisdiction on the stature of a tribunal report and should be applied in this case. I would apply the *Goodman* decision to the appeal in this case, and, on this issue, I would dismiss the appeal. As a consequence of this decision, the paragraphs referred to in the second and third interim reports of the Tribunal may not be received in evidence, prima facie or otherwise, in the High Court.

41. In the circumstances, it is not necessary to consider the second ground, that of hearsay, in relation to the reports, as the reports may not be admitted in evidence under the law as stated in *Goodman*.

### **Hearsay**

42. The issue of hearsay was raised in relation to other matters also. Counsel for the Director submitted that there is a clear line of authority in England that hearsay evidence should be admissible in disqualification proceedings in the initial stages of the application, and if the application is contested it may then be necessary to adjourn for a plenary hearing. Counsel urged this Court to follow this approach.

43. As set out in the written submissions on behalf of the Director, it was submitted that the learned trial judge erred in not applying the practical good sense of the line of English authority to the effect that it would be absurd to expect the Secretary of State to construct a case for the disqualification of directors based exclusively on evidence within his personal knowledge and in addition there are sound reasons of procedure and economy that justified the Secretary of State's reliance on hearsay evidence. The facts of the present case are a perfect example of the need for this practicality, it was submitted that information came to the Director from a variety of sources and when placed all together would entitle any rational decision-maker to institute disqualification proceedings. Instead of permitting those proceedings to proceed to a hearing, the appellants have been permitted to fillet the grounding affidavits of the Director, in circumstances where they have not indicated which, if any, of the underlying facts they are disputing. It was submitted that such an approach amounts to an ultra-formalistic application of the rule against hearsay which places it above the practical realities of the situation.

44. English authorities were referred to which stated that hearsay evidence is admissible at this stage in disqualification proceedings. It was submitted that these were persuasive authority for this Court. Reference was made to *In Re Williams Leisure Plc* [1994] Ch 1, where Nicholls V.C. held that there were sound reasons of procedure and economy that justified the Secretary of State's reliance on hearsay evidence. This was followed by *Secretary of State v. Ashcroft* [1998] Ch 71, where Millett L.J. stated that it would be nonsensical if the court could not take, at least, hearsay evidence into account unless and until it was challenged by direct evidence to the contrary. *In Re Barings plc & Ors (in administration) (No.2)*, [1998] 1 CLC 590 in the Chancery Division (Companies Court) Evans-Lombe J. reviewed the cases and appears to have expanded this exception to the hearsay rule. He considered that he had to accept that the hearsay rule does not apply to evidence sought to be adduced by the Secretary of State in support of an application under the Act. He held that at the stage when the application is presented to court, the Secretary of State is entitled to rely on all the evidence, including hearsay evidence, which was taken into account in coming to the decision to proceed. However, a cautionary note was struck in *Secretary of State v. Aaron* by the Court of Appeal [2008] EWCA 1146, where Thomas L.J. stated:-

*"The basis of the decision in **Secretary of State for Trade and Industry v. Ashcroft** [1997] 3 All ER, [1998] Ch 71 was that it was not sensible to make a distinction as to the admissibility of evidence between the two different powers under the 1986 Act; that that is a proper and correct conclusion is underlined by the fact that in this case an application could have been made under s8. It would make little sense if the evidence was admissible if the application was made under s6, but not under s8. Furthermore the whole basis for the rationalisation in the cases is the statutory scheme. I cannot see any reason to hold that anything relied on by the Secretary of State is admissible in disqualification proceedings; the rationale for relying on the reports and other material fits into the statutory scheme, but there is nothing to suggest that the Secretary of State can go outside this scheme. If he could, it would difficult to see what limit there could be to the materials relied on. There is also good sense in restricting the material relied upon to material produced through the statutory scheme for investigation; this is understood by everyone and the procedure clear.*

...

*It may be that in a diverse regulatory system within the UK and in a globalised financial and banking services industry, it is necessary to rely on investigative reports carried out by other regulators or under statutory authority in other states and that by analogy, such material can be relied on in disqualification proceedings. That was the effect of the decision in *Barings* and, although the point does not arise on the present appeal, I accept that an argument can be*

*made along those lines and the merits of the argument can be decided when it arises, unless Parliament takes the preferable course of amending the 1986 Act."*

45. Clearly, there is considerable law in the U.K. on the subject. However, it appears to be grounded on a statutory nexus, which does not apply here. Further, the law appears to contain a hesitation expressed by Thomas L.J.. The law in the United Kingdom relates to a statutory report made within the Company Law Scheme of that jurisdiction. What is in issue here is entirely different, it is a report of a tribunal established under the Tribunals of Inquiry (Evidence) Acts, 1921, as amended. Thus the reports are not comparable. The issue of such reports established under a company law scheme may arise for consideration and decision in another case.

#### **Information from the Revenue Commissioners**

46. The High Court ruled that the information from the Revenue Commissioners, referred to in the grounding affidavits, was inadmissible. It was submitted on behalf of the Director that this should not have been excluded from the affidavits in a preliminary motion. The Director based his argument on the law of the U.K.. However, the case has been remitted to plenary hearing in and by the High Court and therefore the Director will be required to prove his case in that plenary hearing. As the matter is proceeding to plenary hearing the excision from the affidavits of the information from the Revenue Commissioners is not a live issue and is moot. Thus, in accordance with the well established jurisprudence of this Court, I express no opinion on a moot issue.

#### **Two Memoranda of the Auditor**

47. The High Court held that memoranda by the Auditor were not admissible. Once again this raises the issue of hearsay. However, as the matter has been sent for plenary hearing in and by the High Court this issue is also now moot. Consequently, I express no opinion on the matter.

#### **Prematurity Issue**

48. Counsel for the Director submitted that the challenge in the High Court to the admissibility in evidence of parts of the affidavits filed on behalf of the Director, prior to the respondents to the disqualification proceedings filing replying affidavits, was premature.

49. It was submitted that if the High Court was correct, then the scenario will arise whereby every trial of a disqualification case could potentially be split into several parts. First, there would be a trial based solely on questions of admissibility in circumstances where there were no agreed facts and no defence; and secondly, there might be an appeal to this Court from whatever rulings on admissibility were made in respect of the grounding affidavits. Only after the disposal of these issues would the respondent put in his defence and there would be a trial on the merits. It was submitted that this would not be conducive to the proper or effective litigation of issues.

50. Indeed it was submitted that the position is even more complicated as the right to challenge hearsay is not limited. Every time an affidavit is served there is the possibility of a High Court hearing and a Supreme Court appeal on admissibility. This pushes the possibility of a substantive hearing of the application by the Director further and further into the distance.

51. In this case, the issue of the stature of *Goodman* and its application to the several paragraphs of the Tribunal reports, which the Director wished to be admitted into evidence, was raised. It is a matter of law and there are no disputed facts. While it could have been determined in the run of the High Court hearing, there is merit in having it determined as a preliminary issue.

52. The other matters raised, i.e. the issue of U.K. law, and the hearsay rule, are now

rendered moot as the case has been ordered, by the High Court, to plenary hearing in the High Court.

53. This is an area of litigation where careful case management by the learned trial judge is appropriate. It is important that cases proceed in a fair and efficient manner and within a reasonable time. It is also important that applications are not brought so that proceedings are delayed, with cases spending many years in the courts.

**Conclusion**

54. For the reasons given, I would dismiss the appeal and the cross appeal.

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