THE HIGH COURT

[2006 No. 81 COS]

IN THE MATTER OF THE COMPANIES ACTS, 1963 – 1990

AND IN THE MATTER OF PART II OF THE COMPANIES ACT, 1990,

AND SECTIONS 8 AND 17.

AND IN THE MATTER OF ANSBACHER (CAYMAN) LIMITED

(FORMALLY GUINESS MAHON CAYMAN TRUST LIMITED,

ANSBACHER LIMITED, AND CAYMAN INTERNATIONAL BANK AND

TRUST COMPANY LIMITED)

BETWEEN

DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

JOHN J. (AKA JACK) STAKELUM

RESPONDENT

JUDGMENT of Mr. Justice Brian McGovern delivered on Tuesday 31st July, 2007.

1. This is an application brought by the Director of Corporate Enforcement ("the Director") seeking an order of disqualification pursuant to s. 160(2)(e) of the Companies Act, 1990 against the respondent.

2. On the 22nd September, 1999 the High Court appointed Inspectors to investigate the nature and extent of the Irish business of Ansbacher (Caymen) Limited ("Ansbacher") from 1971 up to that date and to report on related matters.

3. The Inspectors published their report on the 24th June, 2002 and the Director brings this application on foot of the report and the findings contained therein. The applicant contends that the conduct of the respondent makes him unfit to be concerned in the management of a company.

4. The Inspectors found *inter alia* that there was evidence tending to show that the affairs of Ansbacher were conducted with intent to defraud the Revenue authorities and that Ansbacher may have committed a number of criminal offences namely:-

(a) The common law offence of conspiracy to defraud, and

(b) The offence of knowingly, aiding, abating, assisting, inciting or inducing another person to maker or deliver knowingly or wilfully any incorrect return, statements or accounts in connection with their tax contrary to the provisions of the appropriate tax legislation then consolidated in Sections 1056 and 1078(2) of the Taxes Consolidation Act, 1997. The Inspectors also found that there was evidence tending to show that Ansbacher committed other offences such as the failure to pay corporation tax lawfully due.

5. The Inspectors concluded that the Respondent gave assistance to Ansbacher in the carrying out of its Irish business but that, as his detailed knowledge of this business was sparse, such assistance was not knowing assistance. They made a number of express findings against the respondent arising from the evidence considered by them namely:

"(i) That Mr. Stakelum provided a deposit taking service;

(ii) That some of the deposits were held off-shore;

(iii) That Mr. Stakelum provided a withdrawal service in Ireland;

(iv) That Mr. Stakelum made use of a non-interest bearing account for the purposes of hiding the business in question from the Revenue authorities;

(v) That the service was carried out in secrecy;

(vi) That Mr. Stakelum was a Chartered Accountant and experienced business advisor.

6. The Inspectors also concluded that the Respondent, acting through Clyde Enterprises (formerly Business Enterprises), operated a current account in an AIB branch. The account did not attract interest. When the Respondent received an Irish pounds deposit from a client he lodged it into the Clyde Enterprises account where it was incorporated into a float of funds until some other client wished to withdraw money from an offshore account. The Respondent would give funds to Mr. Traynor who moved them offshore. The withdrawal would be funded out of the float. The Inspectors found that there was evidence tending to show that he provided a mechanism whereby Irish residents could withdraw their off-shore funds in Ireland and concluded that he carried out this business with intent to defraud creditors of the depositors, namely, the Revenue authorities. See chapter 20.10 and chapter 20.11 of Report.

7. The Inspectors concluded there was evidence tending to show that the respondent may have committed a number of criminal offences such as conspiracy to defraud, breaches of the Taxes Consolidation Act, 1997 and breaches of the Central Bank Act, 1971 and 1989 in carrying out a banking business without the requisite licence.

8. **Test for Disqualification.**

In Re: *Readymix Limited* (in liquidation): *Cahill v. Grimes* [2002] 1 I.R. 372 the appropriate test for disqualification under s. 160 of the Companies Act, 1990 was considered by the Supreme Court. Murphy J. quoted "with approval the statement of Brown Wilkonson V.C. in Re: *Lo-line Limited* [1988] Ch 477, at pp 485-486.

> "What is the proper approach to deciding whether someone is unfit to be a Director? The approach adopted in all cases to which I have been referred is broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as Directors of insolvent companies have shown them to be a danger to creditors and others. Therefore, the power is not fundamentally penal. But, if the power to disqualify is exercised, disqualification does involve a substantial interference with the freedom of the individual. It follows that the rights of the individual must be fully protected. Ordinarily commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

9. This case has also been cited with approval in a number of High Court decisions. In *Director of Corporate Enforcement v. Seymour* (Unreported, High Court, Murphy J., 20th March, 2007) the judge referred to the cases of *Director of Corporate Enforcement v. D'arcy* [2005] I.E.HC. 333 and *Director of Corporate Enforcement v. Collery* [2006] I.E.H.C. 67. He said:-

"It is clear from the decisions in *D 'arcy* and *Collery*...that a failure to comply with legislation by a person who had responsibility and who could have resolved issues of non-compliance, is sufficient to justify disqualification."

10. Having reviewed the evidence in this case I am quite satisfied that the Inspectors were entitled to reach the conclusions they did concerning the respondent. The respondent was a Chartered Accountant with some years experience prior to setting up Business Enterprises Limited in 1975. This company offered a range of consultancy services up until 1998. The business involved giving commercial and financial advice to the respondent's clients. The respondent had worked as a Chartered Accountant with the late Mr. Desmond Traynor in the firm of Haughey Boland during the 1960's. He became a partner of that firm in 1967 and worked there until 1975. He was a close personal friend of Mr. Traynor. Among the papers which have been exhibited with the applicant's affidavit sworn on the 2nd August, 2006 is a transcript of evidence taken by the Inspectors. These transcripts formed appendices to the Inspectors report. Appendix XV (121)(1)(a) is a transcript of a private examination of Mr. Jack Stakelum under oath on Wednesday 8th November, 2000. Pages 30-34 of that transcript are quite revealing. It shows how the respondent took part in activities concerning his clients funds which were secretive and designed to ensure that the movement of the funds could not be traced. In referring to his clients he said in answer to question 157:

"It means that they might not want to correspond directly with whatever foreign bank they were using. They might not want to get mail received from foreign banks on the basis of monthly statements."

He also referred to Mr. Traynor giving accounts coded references (answer 162) and seemed to have difficulty in recalling the financial institution in which his clients funds were going to be placed.

11. Appendix XV (121)(1)(b) contained the transcript of a private examination of the respondent under oath on Wednesday the 6th December, 2000. He described how clients money would not be put on deposit but into a current account. When he was asked why he would not put it on deposit he said at answer 364:

> "Very simple if I put that on deposit I would have to explain where it came from and that would not be part of the confidentiality of the funds.
>
> **365:**
>
> **Q.** Because you had it in a current account you wouldn't have to explain it?
>
> **A.** I wouldn't, who would I have to explain it to? If it was on a deposit account it would earn interest and attract attention.
>
> **366.**
>
> **Q.** Attract attention?
>
> **A.** Yes.
>
> **367.**
>
> **Q.** Just explain that to me?
>
> **A.** Well the Revenue would be aware of it for a start off, of the funds, that there would have been deposit interest earned and there would be returns of that made by the banks at those stages."

12. It is clear from the evidence before the Inspectors that the respondent never gave a receipt to his clients and that everything was based, as he put it, "on trust". This he said was to maintain confidentiality.

13. I accept the submission of Mr. O'Moore S.C. for the applicant that the respondent operated a system that was inexplicable on any normal basis and can only have been designed to hide funds from the Revenue authorities. I simply do not accept that the respondent, as a Chartered Accountant, was not aware of the implications of what he was doing and there is ample evidence in this case to show that the respondent was engaged in activity designed to conceal funds from the Revenue Commissioners. On that ground alone it seems to me that his conduct displayed "a lack of commercial probity" as referred in Re: *Lo-line Limited.*

14. In this case the applicant relies on s. 160(2)(e) of the 1990 Act which allows for a disqualification order where the court is satisfied in any proceedings or as a result of an application under this section that…

> "In consequence of a report of Inspectors appointed by the court or the Director under the Companies Act, the conduct of any person makes him unfit to be concerned in the management of a company…"

15. The respondent argues that the Inspectors into Ansbacher made no application to extend their investigation into the affairs of the companies owned and controlled by the respondent. However, the Inspectors were appointed by the High Court to examine the affairs of Ansbacher and to "report on any related matter". The observations made by the Inspectors in relation to the respondent were, in my view, well within their terms of reference.

16. Section 22 of the Companies Act, 1990 provides:

> "A document purporting to be a copy of a report of an Inspector appointed under the provisions of this Part shall be admissible in any civil proceedings as evidence –

(a) Of the facts set out therein without further proof unless the contrary is shown, and

(b) Of the opinion of the Inspector in relation to any matter contained in the report."

This section was considered by Laffoy J. in Countyglen .v. Carway[1998] 2 I.R. 540. The learned judge held that the word "facts" in s. 22 meant only findings of primary fact clearly established as such and the words "without further proof" indicated that only facts which would provable by witnesses in the ordinary way and not deductions from facts found or admitted should acquire the status of proven facts under s. 22. In my view it is open to the court in this application to look at the report and the primary facts and reach its own conclusion as to whether or not the primary facts support the conclusions of the Inspector. I have already expressed the view that, in my opinion, the views expressed by the Inspectors are reasonable having regard to the facts established by them.

17. Section 160 of the Act came into effect on the 1st August, 1991. The respondent argues that the court cannot take into account the conduct of the applicant prior to that date. The applicant says that the sanction of disqualification was one which existed prior to the enactment of the 1990 Act and that the Act did not create a new sanction but rather extended the circumstances in which a court might impose a disqualification order to include a case such as the present. The issue of retrospectivity was considered by Murphy J. in *Chestvale Properties v. Glackin* [1993] 3 I.R. 35. At page 44 of the judgment Murphy J. said:

"Of course, Part II of the Act of 1990 is clearly and exclusively prospective in the sense that Inspectors can be appointed thereunder only after the relevant

> provisions of that Part came into operation. The issue between the parties to the present proceedings is whether an Inspector thus appointed could exercise the powers apparently vested in him under the Act of 1990 so as to procure documents or obtain information relating to events which pre-dated the coming into operation of the Act. Whilst the Act does not state in express terms whether it should operate in that manner, I have no doubt at all that this was, indeed, the intention of a legislature."

Murphy J. was influenced by the fact that the previous provisions dealing with the appointment of Inspectors had been repealed by s. 6 of the 1990 Act. He added at page 44:

> "If the former powers of investigation were no longer available to an Inspector appointed under the Act of 1990, how could he possibly discharge the obligations imposed upon him to investigate and report on any of the matters referred to in Part II of the Act of 1990 unless the code created by Part II thereof was intended to be available to him to enable him to explore matters which are of their nature historic in their origins and which would entail, at least in the years immediately following the enactment of the Act of 1990, a review of facts and documents pre-dating the coming into operation of the Act. It does seem to me that in this way and to this extent pre 1990 transactions are exposed to the post 1990 regime."

Murphy J. went on to hold that this section of the act was not an unjust attack on the applicant's property rights or a failure to vindicate them as far as practicable. He said that minimal interference is fully justifiable as a means of reconciling the exercise of property rights with the exigencies of the common good as provided by Article 43, s.2, sub-s. 1 of Bunreacht na hÉireann." Accordingly he held it was not

unconstitutional. It seems to me that this is a correct interpretation of the law. In any event I am satisfied in the present case that there is evidence that at least some of the activities of the respondent which are relied on by the applicant as justifying a restriction order occurred after the 1st August, 1991. Accordingly I reject the respondent's submissions based on the retrospectively of s. 160 of the Act. Even if the respondents argument that s. 184 of the Companies Act, 1963 and s. 160 of the 1990 Act, are significantly different the conduct of the respondent which is complained of continued for a period both before and after 1st August, 1991.

18. Ms. Costello on behalf of the respondent has argued that even if the court is of the view that there is evidence to support the allegation that he is presently unfit to be concerned in the management of a company that the court should exercise its discretion in favour of the respondent and refuse to make the order. She argues this on a number of grounds. She says that the events took place a long time ago and the respondent did not benefit by the activities complained of. She says that the respondent retired in 1998 and is no longer engaged in business and she says he will not be engaged as a director of a company at any time in the future. Accordingly an order is not necessary for the protection of the public. She also says that he is currently suffering from ill health.

19. It is clear from the authorities to which I have been referred that in most cases the conduct complained of must display a lack of commercial probity before a disqualification order should be made. See in *Re Lo-Line Limited* [1988] Ch. 477. But in certain circumstances a deterrent element may be necessary in deciding whether or not to make a disqualification order. In *Re Westmid Packing Services Limited* [1998] 2 All E.R. 124. The Court of Appeal (Lord Woolf M.R.) stated:

"...there are occasions when disqualification must be ordered even though, by reason of the Directors recognition of his previous failing and the way he has conducted himself since the conduct complained of, he is in fact no longer a danger to the public at all. In such cases it is no longer necessary for the Director to be held 'off the road' for the protection of the public, but other factors come into play in the wider interest of protecting the public, i.e. a deterrent element in relation to the Director himself and a deterrent element as far as other Directors are concerned. Despite the fact that the Courts have said disqualification is not a 'punishment', in truth the exercise that is being engaged in is little different from any sentencing exercise. A period of disqualification must reflect the gravity of the offence. It must contain deterrent elements."

20. In this case the respondent who is Chartered Accountant engaged in activities which, on any objective view facilitated the evasion of tax. This activity was done in a calculated way and by means of elaborate scheme to conceal monies from the Revenue Authorities. The respondent even went so far as to destroy all records when he retired in 1998. The court cannot ignore these facts. While it seems to me that the Inspectors were entitled to conclude that there was evidence tending to suggest that the respondent was guilty of other matters such as carrying on the business of banking without a licence it is not necessary for me to deal with those matters here in view of my finding that the respondent facilitated the evasion of tax. I am quite satisfied that in consequence of the report of the Inspectors appointed by the court there is evidence that the conduct of the respondent makes him unfit to be concerned in the management of a company and accordingly I make a disqualification order in respect of the respondent for a period of five years.