THE HIGH COURT

[Record No. 2004 490 COS]

IN THE MATTER OF BARNROE LIMITED AND IN THE MATTER OF THE COMPANIES ACTS, 1963 TO 2003 AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160(2) OF THE COMPANIES ACT, 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

PATRICK ROGERS AND PAUL ROGERS

RESPONDENTS

JUDGMENT delivered by The Honourable Mr Justice O'Leary on the 21st day of December 2005.

This is an application for an order pursuant to s. 160 (2) of the Companies Act 1990 seeking the disqualification of the respondent and ancillary relief. It is made on foot of a notice of motion dated 21st December, 2004, in the following terms;

1. An Order pursuant to ss. 160 (2) (a) – 160 (2) (b) and/or s. 160 (2) (d) of the Companies Act 1990 declaring each of the respondents to be disqualified from being appointed or acting as an auditor, director or

other officer, liquidator, receiver or examiner or being 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 – 1978 for such period as the Court sees fit.

2. If necessary an Order for directions as to pleadings and mode of trial.
3. Such further or other relief as the Court may deem meet.
4. An Order providing for the costs of the within applications.
5. An Order pursuant to s. 160 (9B) of the Act of 1990 providing for the costs of the investigation carried out by the applicant in respect of the matters grounding the within application.

GROUNDS UPON WHICH THE APPLICATION IS BROUGHT

The applicant alleged and submitted as follows

1. The respondents are directors of Barnoe Limited (hereafter "the Company").
2. Subsequent to receiving certain complaints in relation to the Company the applicant appointed George Maloney (hereafter "the Officer") as an officer of the Director of Corporate Enforcement to carry out certain enquiries in relation to the Company.
3. The Officer commenced an investigation into the affairs of the Company on 26th May, 2004. As part of such investigation a search of the Company's premises was carried out on 10th June, 2004, during the course of which the books and records of the Company were seized.

4. On foot of an examination of those books and records and subsequent enquiries of third parties a number of serious breaches of the Companies Acts came to light, to wit:

   (a) The respondents had failed to keep proper books of account within the meaning of s. 202 of the Companies Act 1990;

   (b) The respondents operated a bank account for the Company which was not recorded in the Company's books or records and failed to notify the Company's auditor of its existence.

   (c) The respondents misappropriated Company funds to personal bank accounts and used a Company bank account for the purposes of personal expenditure. Additionally the respondents caused the Company to expend monies in relation to property owned personally by them;

   (d) The respondents maintained or created twin sets of financial statements for the same accounting periods for the purpose of giving a false impression of the Company's position;

   (e) The Company failed to file revenue returns on a timely basis;

   (f) The respondents caused the Company to trade over an extended period of time when the Company was insolvent.

The said breaches are as more fully particularised in the affidavit of the Officer. The breaches as outlined above amount to breaches of the respondents' duties as directors of the Company. The breaches as outlined at (b), (c), (d) and (f) above amount to fraud on the part of the respondents in connection with the operation of the Company.

5. The applicant will rely upon the above breaches as evidence of the respondents being persons unfit to be concerned in the management of a company. The applicant will further rely upon the conduct of the second named respondent in relation to the manner in which he dealt with the creditors and customers of the Company as evidence of the second named respondent being a person unfit to be concerned in the management of a company.

An alternative application under s. 150 of the Companies Act 1990 seeking the restriction of the respondents is also before the Court.

Evidence

The following evidence has been submitted in relation to these proceedings.

1. Affidavit of George Maloney sworn 20th December, 2004.
2. Affidavit of Marc Dolan sworn 20th July, 2005. This affidavit exhibited documentation relating to the operation of the Company which originated from the respondents and on which the applicant relied in reaching certain of the conclusions in his affidavit. The Court has not considered it necessary to itself consider these documents in view of the uncontested nature of evidence in this case.

The respondents have been represented in these proceedings and have participated in the hearing but for reasons which will be later considered have not submitted any evidence in support of their submissions.

The Court, mindful that the onus of proof in this case rests with the applicant, has considered each of the allegations made in the affidavit of George Maloney and either accepted the matters set out as having been proved or in the alternative rejected any allegation not proved to its satisfaction.

Background to the application

This application must be considered in the context of the appointment of the deponent George Maloney as an 'Authorised Officer' capable of exercising the powers of the applicant under s. 19 of the Companies Act 1990. Those powers were exercised by Mr Maloney and a requirement for the production of documents made. These documents were in due course accessed on foot of a search warrant procured by the Authorised Officer. In related proceeding this Court has considered a challenge by the respondents to the right of the Authorised Officer to retain the documents (by reason of alleged deficiencies in the search warrant) and/or to make use of any information gained on foot of that warrant. For the reasons set out in the judgment in record number 638JR/2004, delivered immediately before this judgment, the Court has decided that the Authorised Officer was properly appointed, that the requirement made under s. 19 of the Companies Act 1990 was properly made and that, notwithstanding any alleged defect in the warrant or its execution, the documents covered by the s. 19 requirement should remain with the Authorised Officer. The Court further decided that these documents could be used for any legitimate reason arising from the fulfilment of a s. 19 request.

In so far as any submission of the respondents relate to matters already decided this judgment will apply *mutatis mutandi* its conclusions in record no 638JR/2004 to such

issues. In so far as further consideration of discrete legal submissions is required these are separately considered in this judgment.

In so far as it is submitted that the evidence on which this application is based has been unlawfully obtained this issue has been decided in the related proceedings and need not be revisited again.

There are two further and separate points made by the respondents on which decisions are required. These are;

1. Whether, in view of the manner in which the evidence was obtained, permitting its use in a s. 160 application (or in a s.150 application) would amount to an abuse of process.
2. The proceedings, if brought to a conclusion on the basis of the information available, breaches the rule of law relating to self incrimination.

Abuse of Process

The submission of the respondents is that the evidence on which the s. 160 application is based was obtained by invoking a statutory power and the purpose of that power was to gather evidence for a possible criminal prosecution. In such circumstances the respndents submitted that use the material so obtained is not permissible for the purpose of a civil application such as s.160.

The respondents submitted that *R v Secretary for State for Trade and Industry ex parte McCormick* [1998] All E R 30; established that the nature of the application was civil rather than criminal and this submission is accepted by this court.

The basis of the requirement is a matter to be assessed in the light of the appropriate statutory provosions in this jurisdiction and the reasons given in this instance.

A close examination of the paper trail leading to the requirement on the company discloses the following:

(I) A number of reasons are given for the Requirement of production of documents. These include the following matters; s. 19 (2) (a) the necessity to examine books, s.19 (2) (b) (ii) affairs of the company been conducted with intent to defraud creditors and s. 19 (2) (f) unlawful acts of the company and or its officers.

(II) The Requirement of 27th May, 2004, is in the first place made of the Company. While the directors and secretary are notified, the Requirement to produce documents rests with the person who owns the documents i.e. the Company. It is however true that as officers of the Company the applicants were in possession of the books and were, in that capacity, under an obligation to produce.

The focus of the respondents on the validity of the search warrant has in the view of this Court obscured the prime purpose of the Director of Corporate Enforcement's application, which was to remedy a default both of the Company (through its officers) and the respondents own personal default in meeting the Requirement. The matter considered by the District Judge and recited in his order was the failure of the company to obey the Requirement to produce the documents on 31st May, 2004, which arose out of the communication of the 27th May, 2004. When the search warrant was issued it was to seize the company records not the personal property of the respondents. Their personal property could also be seized (if material). The status of any such personal material in the event of a criminal or civil action involving the respondents could be argued if necessary.

In this case the Court is assured that no material other than company records are used for the s. 160 application. These records are not the property of the respondents. Therefore there is no reason why they cannot be used in the s. 160 application. This application does not involve the company itself or expose the company to any adverse finding.

Self Incrimination

The basis of this submission appears to be that as the respondents may still be charged on indictment they should not be required to answer questions or render explanations such as would be required to defend these civil proceedings. That the respondents have (subject to such exceptions as are provided by law) a right to silence and a right not to be forced to make incriminating statements is beyond doubt. At issue is whether the inconvenience which these proceedings present to the respondents breaches the legal right against self incrimination.

It was submitted on behalf of the respondents that it did compromise the legal rights of the respondents.

This submission appears to this Court to be without merit. The processing of civil claims arising out of tort or civil wrongs of any kind does not await the commencement or determination of criminal proceeding where the wrong alleged is also potentially a crime. Many drivers must decide whether to give evidence in a civil action in circumstances where a criminal charge on indictment is still possible. The respondents in this case have exercised their right not to proffer evidence and so exercised in this civil matter their right to remain silent and question the extent to which the applicant has discharged the onus of proof.

Any decision to reject this application on the basis of 'the rule against self-incrimination' would render impossible any civil proceedings where criminal charges remained a possibility. As criminal charges on indictment have no statutory limit in this jurisdiction this would postpone actions beyond the Statute of Limitations and make civil remedy impossible in any case where there is the possibility of a charge on indictment.

Nature of alleged grounds for Disqualification

The application in this case is based on ss. 160 (2) (a) – s. 160 (2) (b) and/or s. 160 (2) (d) of the Act of 1990. Both s. 160 (2) (a) and s. 160 (2) (b) refer to the person to be disqualified as being 'guilty' of either a fraud or breach of his duty. It is submitted by the respondents that the meaning of 'guilty' in this context is 'guilty of a criminal charge' of fraud of breach of a company law duty. It is submitted by the applicant that the word should be given a meaning which includes 'civil guilt'. The Court will if necessary decide the issue but first the alternative of s. 160 (2) (d) will be considered.

Factual Matters

Facts found by the Court based on the evidence submitted (references are to George Maloney's affidavit 20th December, 2004, but the complete affidavit is relevant under many headings).

1. The respondents failed to keep proper books of accounts: pp.7 – 10, 12 & 14.
2. The respondents operated a bank account not recorded in the company's books: p.11.
3. The respondents failed to disclose the aforementioned account to the Company's auditor: p.11
4. The respondents appropriated funds of the Company for personal use: p.13.

5. The Company failed to file revenue returns as required by law: p.15.
6. The respondents caused the company to trade while insolvent for a considerable length of time: pp.17 – 30.

The Court is not satisfied that the figures set out in para. 16 are accurate but is satisfied that there is some evidence of the existence of two sets of books. However, on the basis of the affidavit as filed and bearing in mind the onus of proof on the applicant the court is not willing to include this heading in its assessment.

Whether to apply s. 150 or s. 160 of the Companies Act 1990?

Section 160 deals with disqualification while s. 150 refers to the lesser order of restriction. On the basis of the facts as found the Court is satisfied that an order of one kind or the other should be made. The matters set out in paras. 2, 3 and 4 above are of the utmost seriousness. They are qualitatively different to the serious but more frequently occurring complaints at paras. 1, 5 & 6.

In order to decide if in all the circumstances the matters proved merit a s. 160 disqualification the purpose of that order must be considered.

Law Relating to s. 160 of the Companies Act 1990

The leading case on the purpose of disqualification, which has formed the basis of many decision in this jurisdiction and elsewhere, is *Re Lo-line Electric Motors Ltd* [1988] 2 All E R 692. The purpose is set out at p.696 in the following terms:

> "What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the 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 has 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. Ordinary commercial misjudgment 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."

This was confirmed as a correct statement of law in this jurisdiction by Murphy J. in *The Matter of CB Readymix Cahill v Grimes* (Unreported, Supreme Court, 1st March, 2002).

The Court is satisfied that the matters set out above, in particular the operating of a bank account in the company's name outside the books and records of the company, the failure to disclose this account to the auditor and the appropriation of company funds, each are evidence of a lack of commercial probity. Taken together they represent a formidable body of evidence on the lack of commercial probity of the respondents. For these reasons the Court is satisfied that the protection of the public from the respondents' future misuse of the company law structure requires a lengthy period of disqualification. The Court has considered the alternative s. 150 restriction and is of the view that it would be an inadequate protection in this case

Period of disqualification

The period of disqualification has been considered in *The Director of Corporate Enforcement and Martin Forristal and Linda Forristal* (Unreported, High Court, Finlay Geoghegan J., 15th March, 2005). In the course of a comprehensive judgment the learned judge concluded in respect of the length of disqualification orders as follows;

"4. The scheme of s. 160 (2) (h) is such that the Director may satisfy the court that the circumstances for the making of a disqualification order exist without the court having any evidence of the extent of the liabilities of the company in question or any information as to the role of the respondent directors in the affairs of the company or leading up to the striking off of the company other than that such person was a director of the company. It appears appropriate that the court should attempt to apply a consistent period of disqualification in such cases.

5. In determining a period of disqualification the court must have regard to the fact that the Oireachtas intended such order as a more serious sanction than a declaration of restriction under s. 150 of the Act of 1990. This follows from the express wording of s.160 (9A) of the Act of 1990.

6. The mandatory period for the declaration of restriction under s. 150 is five years.

7. Whilst a full disqualification order is in terms more restrictive than a declaration of restriction in practice that latter may operate to prevent certain respondents from acting as directors. This depends upon the particular circumstances of a respondent director. In the absence of a respondent putting before the court any relevant evidence, it is difficult to conclude that a disqualification order for any period less than five years will be a more onerous sanction for the respondent than a declaration of a restriction which must be for five years.

8. If a respondent by failing to offer any evidence to the court has over looked putting before the court evidence which might have persuaded the court to either make a disqualification order for a lesser period or grant a declaration of restriction there is available an application for relief under s.160 (8).
9. Hence in the absence of any relevant evidence in relation to a respondent, other that the minimum proofs to satisfy s.160 (2) (h) of the Act of 1990, a period of disqualification for 5 years appears appropriate."

This Court is conscious of the logic of this decision which may well be a correct interpretation of the law. If required the Court would also have to give some weight to its own view that a disqualification, no matter for how short a period, will be seen in the business community as a far greater sanction than a restriction. The balancing of these two approaches can however await another case as in this case the court has arrived at a period of disqualification independently of any perceived minimum. This issue is mentioned only because the Court wants to make clear that the length chosen in this case was independently arrived at and did not depend on the *"Director of Corporate Enforcement and Martin Forristal and Linda Forristal"* formula.

The Court is of the view that a period of 5 years is appropriate. The period will commence from today's date save that the respondent will have a period of one month during which they can take actions necessary to divest themselves of any company involvement inconsistent with this order.

Costs to follow the event.