THE HIGH COURT

RECORD NO. 1998/89 COS AND 1998/132 COS

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 1990 AND IN THE MATTER OF NATIONAL IRISH BANK LIMITED AND IN THE MATTER OF NATIONAL IRISH BANK FINANCIAL SERVICES LIMITED

JUDGMENT of Mr. Justice Kelly delivered the 23rd day of July, 2004

INTRODUCTION

In 1998, the Honourable John Blayney and Mr. Tom Grace were appointed by this Court, pursuant to s. 8 (1) of the Companies Act, 1990, as inspectors to investigate the affairs of National Irish Bank (the bank), and National Irish Bank Financial Services Limited (the company). During the last 6 years those inspectors have conducted an investigation into the affairs of the bank and the company as directed in the court orders appointing them.

On the 12th July, 2004, their final report, dated the 9th July, 2004 was delivered to me in open court. On that occasion I made an order in accordance with the provisions of s. 11 (3) of the Companies Act, 1990 (as amended), that a copy of the report be furnished to the Director of Corporate Enforcement (the Director). The report was given to an officer of the Director upon an undertaking being given that no disclosure or publication of its contents would be made pending further order of the court.

On the same day, I made an order that a hearing should take place on Wednesday 21st July, 2004, with a view to the court giving directions and making orders as envisaged under ss. 11, 12 and 13 of the Companies Act, 1990. Advance

notice of that hearing was advertised in the public press and any party with an interest in participating was advised to give notice in writing of his intention to do so to the solicitors for the inspectors.

THE HEARING

Nine parties gave notice of intention to appear and did in fact appear. They were as follows:-

1. The bank.
2. The company.
3. Irish Financial Services Regulatory Authority.
4. Office of the Director of Corporate Enforcement.
5. The Revenue Commissioners.
6. Ms. Beverley Flynn.
7. Mr. Barry Seymour.
8. Mr. Patrick Byrne.
9. Mr. Pat O'Donovan.

Messrs. Flynn, Seymour and Byrne appeared as parties who apprehended that the inspectors may have made adverse findings concerning them. Mr. O'Donovan appeared as a creditor of the bank.

A word of explanation is called for in the case of Ms. Flynn and Messrs. Seymour and Byrne. They were aware of the fact that adverse findings might be contained in the inspectors' final report as a result of the court approved procedures followed by the inspectors. Under those procedures the inspectors were obliged to furnish a draft of any adverse finding to any person affected by them. An opportunity was then given to such a person to be heard by the inspectors before the report was

put into final form. Each of these three persons were served with the inspectors draft findings and so were aware of the possibility of similar or lesser findings being contained in the inspectors' final report.

I turn now to a consideration of the statutory powers invested in the court following the delivery of a final report.

SECTION 11 (3) AND (4)

These sub-sections in their amended form read as follow:-

"(3) Where inspectors were appointed under ss. 7 or 8, the court shall furnish a copy of every report of theirs to the Office of the Directorate of Corporate Enforcement and the court may, if it thinks fit –

(a) Forward a copy of any report made by the inspectors to the companies registered office,

(b) Furnish a copy on request and payment of the prescribed fee to –

(i) any member of the company or other body corporate which is the subject of the report;

(ii) any person whose conduct is referred to in the report;

(iii) the auditors of that company or body corporate;

(iv) the applicants for the investigation;

(v) any other person (including an employee) whose financial interests appear to the court to be affected by the matters dealt with in the report,

whether as a creditor of the company or body corporate or otherwise;

(vi) the Central Bank, in any case in which the reports of the inspectors relates, wholly or partly, to the affairs of the holder of a licence under s. 9 of the Central Bank Act, 1971;

(ba) furnish a copy to-

(i) an appropriate authority in relation to any of the matters referred to in s. 21 (1a to fb);

(ii) a competent authority as defined in s. 21 (3) (a) to (i); and

(c) cause any such report to be printed and published.

(4) Where the court so thinks proper it may direct that a particular part of a report made by virtue of this section be omitted from a copy forwarded or furnished under sub-s. 3 (a) or (b) or (ba), or from the report as printed and published under sub-s. 3 (c)."

All of the parties who appeared before the court sought copies of the report. Some asked the court to direct that copies be furnished to other entities.

Some parties requested that the court make an order directing that the report be printed and published. Others were neutral on that topic. Nobody opposed the printing and publication of the report.

No party sought to have the report either as circulated or as printed and published redacted as contemplated in sub-s. 4.

All of the powers in sub-ss. (a), (b), (ba) and (c) of s. 11 (3) and s. 11 (4) are discretionary. It is necessary that I deal with each application in turn.

1. I am quite satisfied that both the bank and the company should be furnished with a copy of the inspectors' final report. Both have a very material interest in its outcome.

Should the court direct the printing and publication of the report however, the bank and the company seek to be furnished with the report in advance of such publication. If I decide that the report should be published, I am not satisfied that either the bank or the company should be furnished with a report in advance of that event.

The only evidence put before the court in support of an advance copy being delivered to the bank is, curiously enough, not sworn by any official of the bank but rather by a solicitor in the firm acting on its behalf. I do not find any of the reasons advanced in that affidavit, or in the submissions of counsel, persuasive. That is particularly so having regard to the fact that as far back as the 1st August last year, the bank was furnished with a draft of the inspectors' report, setting out the findings against it. The bank ultimately responded to that draft in what is called a reaction paper dated 24th March, 2004, almost nine months later. The bank did not take issue with anything in the draft report, a fact reported upon by the inspectors in their final report. Such being the case, the bank must be aware of the content of the final report, insofar as it is adverse to the bank.

Five reasons are given in the affidavit of the solicitor as to why the bank should be entitled to an advance copy of the final report. They are sworn to as follows:-

(a) The banks "need to be aware of the content of the final report in order to take such steps are as appropriate, to have regard to

the interests of the bank, (including its employees), its customers and the protection of the banks market position."

(b) "The fact that the bank's staff will undoubtedly be concerned as to the findings, since the existence of the final report will undoubtedly result in customers raising queries with the bank."

(c) The "need for the bank to prepare appropriate responses to undoubted public (media) queries in respect of the final report."

(d) The management of the ongoing banking business, it is said, makes it necessary for the bank to be aware of the findings in the report.

(e) Because banking is a prudential business, speculation as to what the final report says, would it is said, be damaging to the bank. The bank, it is contended, needs to be equipped with the final report to "proactively manage its response in the market place".

Given the actual state of knowledge of the bank and the fact that it did not contest the findings of the inspectors in their draft report, I cannot see validity in any of these reasons. The bank is now, and has for some considerable time, been fully aware of the likely findings against it. Certainly the findings in the inspectors' final report cannot be more adverse than what was furnished to the bank in the draft report.

Whilst I am therefore satisfied that the bank and the company are, pursuant to s. 11 (3) (a), entitled to the report in final form, I refuse the application for a copy to be furnished to them in advance of any other entity or general publication should I so order it.

2. Any person whose conduct is referred to in the report is entitled, on request, to a copy of the report, [s. 11 (3) (b) (ii)]. A small number of the persons whose conduct is referred to in the report, namely Ms. Flynn, Mr. Seymour and Mr. Byrne, did appear and are clearly entitled to a copy of the report. Any of the other numerous persons whose conduct is referred to in the report should be furnished with a copy of it on request, even though they did not appear in court.

3. The auditors of the bank and the company should be furnished with a copy of the report, should they request it, [s. 11 (3) (b) (iii)]. The auditors are KPMG. They would also be entitled to a copy of the report under s. 11 (3) (b) (ii) since their conduct is referred to in the report.

4. I am also satisfied that under s. 11 (3) (b) (iv) the applicant for the investigation, the Minister for Enterprise, Trade and Employment, should be entitled to a copy of the report if requested.

5. Mr. Pat O'Donovan, as a creditor, is entitled to a copy of the report pursuant to s. 11 (3) (b) (v).

6. There can be no doubt but that the Central Bank and the Irish Financial Services Regulatory Authority are entitled to a copy of the report, having regard to the provisions of s. 11 (3) (b) (vi). The bank is a licensed bank under the Central Bank Acts and the company, its subsidiary, carried on business in the financial area. I am of opinion that it would be appropriate that given the regulatory function of these entities and their lack of any knowledge as to the contents of the report in draft or final form, they ought to have it forthwith. The affidavit of the Deputy Head of the Regulatory Enforcement department of the regulator makes it clear that that body must obtain the report at the earliest moment so that it may consider what if any

regulatory implications it may have. I will therefore direct that a copy of the report be furnished to the Central Bank and IFSRA forthwith.

7. I am of opinion that the following authorities are entitled to copies of the report also, i.e.

1. The Revenue Commissioners.
2. The Director of Public Prosecutions.
3. The Minister for Finance.
4. The Institute of Chartered Accountants in Ireland.

Pursuant to s. 11 (3) (ba) I direct copies be furnished to them.

At the request of the bank itself and the Director, I order that the report be furnished to the Financial Services Authority in the United Kingdom, the Australian Prudential Regulatory Authority, the Reserve Bank of New Zealand, the Office of the Comptroller of the Currency in the United States of America, the Federal Reserve of the United States of America and the Financial Supervision Commission of the Isle of Man.

PUBLICATION

The next question which I must consider is whether under s. 11 (3) (c) I should direct that the report be printed and published. Should I so direct, printing and publication will be undertaken by the Director who will in addition to making printed copies available also publish the report on CD-Rom and on his office website.

None of the parties appearing before me sought to oppose publication and a number actively supported it. Nobody sought any redaction, save that in the case of Messrs. Seymour and Byrne, I was asked to adjourn over the question of publication

and redaction, until after an advance copy of the final report was furnished to them. For reasons which I gave during the course of the hearing, I rejected that application.

In considering this aspect of the matter I bear the following in mind. First, the bank and the company have themselves sought that the final report be published in full. Secondly, the inspectors recommend that the report be published in unredacted form. Thirdly, no party opposes publication. These are matters to be taken into account, but ultimately the decision has to be one for the court.

I have come to the conclusion that the public interest requires that this report be published in full. The matters that the inspectors were asked to enquire into were very serious, particularly in the context of the conduct of a banking business. The outcome of the enquiry is not merely of interest but of importance for the bank and company and also their customers, staff and shareholders as well as the various regulatory authorities to which the bank and the company are subject.

Prospective customers, staff and employees, as well as the general public are entitled to know the outcome of the investigation particularly where as counsel for the bank pointed out it forms part of the banking structure in the State.

My one hesitation on the question of publication arose from the fact that the D.P.P. is to be given a copy of the report. I am however satisfied that if he should decide to mount a prosecution it will not arise for some considerable time and, as the Director submits, appropriate directions from a trial judge will be sufficient to negative any possible prejudice arising from the reports publication.

As far as possible I do not wish to reveal the conclusions reached by the inspectors prior to publication of the report. It will, however, be necessary for me to do so to a limited extent in considering the powers conferred upon the court under s.

12. I also bear the matters to which I will allude in that part of the judgment in mind in deciding that there should be publication of the report in full.

CONCLUSIONS IN RESPECT OF SECTION 11

1. All of the parties whom I have identified in this part of the judgment as being entitled to a copy of the report, should be furnished with it upon request.

2. With the exception of the Central Bank and the Irish Financial Services Regulatory Authority, all parties should be furnished with the report at the same time. The Central Bank and the Financial Services Regulatory Authority should be furnished with a copy of the report forthwith.

3. The report should be printed and published. It should be made available through the Director at 10.00 am on Friday 30th July, 2004. The copies to all of the parties who are entitled to the report should be made available to them at that time.

4. I give no direction pursuant to s. 11 (4) concerning the report.

SECTION 12

Section 12 reads as follows:-

"1. Having considered a report made under s. 11, the court may make such order as it deems fit in relation to matters arising from that report including:-

(a) an order of its own motion for the winding up of a body corporate, or

(b) an order for the purpose of remedying any disability suffered by any person whose interests were adversely affected by the conduct of the affairs of the company provided that, in making

any such order, the court should have regard to the interests of any other person who may be adversely affected by the order.

2. If, in the case of any body corporate liable to be wound up under the Companies Acts, it appears to the Director of Corporate Enforcement from

(a) any report made under s. 11 as a result of an application under s. 8, or

(b) any report made by inspectors appointed by the director under this Act, or

(c) any information or document obtained by the director under this part, that a petition should be presented for the winding up of the body corporate, the director may, unless the body is already being wound up by the court, present a petition for it to be so wound up if the court thinks it just and equitable for it to be so wound up."

SECTION 12 (1) (a)

Three things are of note about this sub-section.

First, it confers an extraordinarily wide jurisdiction on the court. The court may make such order as it deems fit in relation to matters arising out of its consideration of a report made by inspectors pursuant to s. 11. The court appears to be at large as to what order it can make under this provision.

Secondly, the court is given an express power, unique to the company law of this jurisdiction, to order of its own motion the winding up of a body corporate having considered a report under s. 11. That power is given to the court, notwithstanding the express entitlement conferred upon the Director, to himself petition the court for a

winding up order as a result of matter disclosed in a report under s. 11. It was clearly the intention of the legislature that even in circumstances where the Director does not wish to present a petition for the winding up of a company that has been investigated nonetheless the court may order it to be liquidated.

In the present case the Director has, through counsel, indicated that it is not his intention to bring an application to wind up either the bank or the company.

The inspectors have indicated that they do not consider it necessary or appropriate that a winding up order be made, largely because of the adverse consequences which could follow and would be visited on both the banks customers and employees.

The bank and the company likewise oppose the making of a winding up order, on the same basis and also because it would disrupt banking business within the State.

Whilst the attitude of both the inspectors and the regulator must be borne in mind and given all due weight, nonetheless the decision of whether or not to make a winding up order under sub-s. (a) is one exclusively for the court.

As the power is unique and finds no echo in companies' legislation in other jurisdictions and as it has never been considered before, to my knowledge, I ought to express some views on its exercise. In this regard I gain some assistance from English authorities dealing with what are called 'public interest petitions' presented by the regulator for the winding up of companies on the grounds that it is in the public interest so to do. I find these decisions helpful because I am of opinion that if the court is to consider making an order under s. 12 (1) (a), the basis for such an order must be that it is in the public interest that such an order be made. Creditors and contributories have their own entitlements to petition for the winding up of a company. Section 12 (2) provides the regulator with an entitlement to petition for a

winding up order if the court considers it just and equitable to do so. The only basis therefore upon which the court should, of its own motion, in my view, make such an order is in circumstances where it is satisfied that the public interest requires it.

In *re Walter L. Jacob & Co. Ltd.* [1989] BCLC 345 Nicholls L.J., (as he then was), gave the leading judgment in a case where a petition had been presented by the Secretary of State for the winding up of a company. He made it clear that the approach adopted to such a petition does not involve the court abdicating to the petitioner, the courts role in considering whether or not it would be just and equitable to wind up the company. He said:-

> *"In respect of all such petitions, whoever may be the petitioner, the court has to weigh the factors which point to the conclusion that it would be just and equitable to wind up the company against those which point to the opposite conclusion. It is to the court that Parliament had entrusted this task, in all cases. Thus, where the reasons put forward by the petitioner are founded on considerations of public interest, the court, if it is to discharge its obligations to carry out the balancing exercise, must itself evaluate those reasons to the extent necessary for it to form a view on whether they do afford sufficient reason for making a winding up order in the particular case.*
>
> *In the case of 'public interest' petitions, the court will, of course, carry out that evaluation with the assistance of evidence and submissions from the Secretary of State and from other parties. When doing so the court will take note that the source of the submissions that the company should be wound up is a government department charged by*

Parliament with wide ranging responsibilities in relation to the affairs of companies. The department has considerable expertise in these matters and can be expected to act with the proper sense of responsibility when seeking a winding up order. But the cogency of the submissions made on behalf of the Secretary of State will fall to be considered and tested in the same way as any other submissions. His submissions are not ipso facto endowed with such weight that those resisting a winding up petition presented by him will find the scales loaded against them. At the end of the day the court must be able to identify for itself the aspect or aspects of the public interest which, in the view of the court, would be promoted by making a winding up order in the particular case. In many, perhaps most, cases that would be a simple exercise in which the answer would be self-evident. In other cases the answer may not be so obvious."

Here of course I am not presented with a petition by anybody but I am conferred with a statutory power which I can exercise of my own motion. I, of course, attach considerable weight to the views expressed by both the regulator and the inspectors.

The real question is whether or not it is in the public interest that these companies be wound up. It is not possible for me to give cogent reasons in support of my decision, whether in favour or against the making of a winding up order without at least touching upon the findings made by the inspectors. I do so to the minimal extent possible and with the caveat given by the inspectors themselves, that in order to form a balanced view of their findings, the report, together with the appendices should be read in its entirety.

In attempting to carrying out the balancing exercise alluded to in the judgment of Nicholls L.J. I have to bear in mind that the inspectors have reached the following conclusions in respect of improper practices carried on by the bank and the company. They have concluded:-

(a) that bogus non-resident accounts were opened and maintained in the bank's branches, enabling customers to evade tax through concealment of funds from the Revenue Commissioners,

(b) fictitiously named accounts were opened and maintained in the bank's branches, enabling customers to evade tax through concealment of funds from the Revenue Commissioners,

(c) CMI policies were produced as a secure investment for funds undisclosed to the Revenue Commissioners,

(d) special savings accounts had DIRT deducted at the reduced rate, notwithstanding that the applicable statutory conditions were not observed;

(e) there was improper charging of interest to customers;

(f) there was improper charging of fees to customers,

(g) at no time prior to the appointment of the inspectors did the bank address the issue of a potential retrospective liability to the Revenue Commissioners for tax arising from the irregularities in the operation of DIRT.

I have also to bear in mind that these activities were widespread throughout the bank and were carried on for a long period of time. The inspectors have also made findings against a substantial number of senior bank personnel who carry or

share responsibility for some or all of these activities. Such findings have been made against well in excess of a dozen persons, over and above three who were represented at the hearing before me on Wednesday last.

The inspectors' findings are of the utmost gravity. That is not my description, but rather the banks. It so described the findings in the draft report furnished to it last year.

Therefore, on one side of the balance, I have findings of utmost gravity made against a licensed bank and financial institution. On the other side of the scales, I think I ought to bear in mind the attitude and approach of the bank as well as the consequences of a winding up order, not merely for it, but also for its customers and staff.

The attitude of the bank is best encapsulated in an extract from a letter written by the chief operating officer and project director of the 24th March, 2004. He said as follows:-

> *"It is a matter of the deepest regret to the bank that during the period under investigation, events took place which fell short of the standards customers and third parties dealing with the bank were entitled to expect. The bank is profoundly sorry that these events could have occurred and apologises to all those who have been affected by these events. The bank believes that the programmes put in place for those affected by reason of the practices described by the inspectors have remedied or will remedy any disability that they may have unfairly suffered as a result of the events described. The changes made in the operational structures of the bank, which have been explained to the inspectors, are designed to ensure that the bank operates at all times to*

high standards of governance. The bank considers that it is also appropriate to mark the debt it owes to its employees who have had to work under the shadow of the investigation. Their dedication has been an essential building block in creating a new bank and maintaining customer confidence".

I bear in mind also that the bank told the inspectors that it was determined to review the retail banking operations and financial services and advice operations that were affected by the allegations to ensure that its business was equipped to operate as a fully functioning member of the Irish financial community and that it had systems in place which were in line with the appropriate standards.

The bank estimates that its commitment to addressing the issues identified in the investigation will run to some €64 million. The largest part of that, which has already been paid, is a sum of €28.7 million being what are described as legal and bank costs relating to the investigations and programmes which have been put in place to deal with the matters, the subject of the inspectors report. There has also been paid a sum of €6.7 million in respect of the Revenue audit, DIRT and special savings account settlement. A fees and interest refund programme to customers has cost €1.9 million to date. It is estimated that it will cost a further €10.6 million. These refunds are to be made in three tranches. The first of these will be completed by the 30th September this year and a further year will be required to complete tranches two and three. There has also been set up an offshore investors settlement programme, which to date had offers totalling €8.9 million accepted, and a further €1.9 million has been offered.

I regard these as concrete manifestations of a purpose of amendment in support of the contrition expressed in the letter from which I have just quoted. I am

also conscious of the fact that a winding up order would jeopardise, or at least delay, implementation of the repayment programmes which I have just outlined. Whilst I am satisfied that the cessation of improper conduct is not necessarily a ground for not winding up a company, it is a factor which must be taken into account.

Given the attitude of the bank as manifested, not merely by word but also by deed, the adverse consequences which a winding up would have on the repayment programmes outlined, to say nothing of the consequences for the bank's customers and the banking system and giving due weight to the views of the Director and the inspectors, I have concluded that it would not be in the public interest to order the winding up of either the bank or the company. I therefore do not propose to exercise the power given to me under s. 12 (1) (a).

SECTION 12 (1) (b)

I am not satisfied that it would be appropriate to make an order under sub-s. (b) either. The inspectors do not wish me to do so for the very good reason that such an order would be logistically extremely difficult to give effect to in the context of a bank. Moreover, I am satisfied that the bank has attempted to put in place structures which are aimed at remedying any disability or loss suffered by any person as a result of the activities, the subject of the investigation. I make no adjudication upon the efficacy of such structures. If, however, they should prove to be insufficient, a person who is allegedly wronged is not deprived of access to the courts in order to press for a remedy. Moreover, such a person will have available to him the report of the inspectors which, pursuant to s. 22 of the Act, are admissible in any civil proceedings as evidence of both the facts set out therein (without further proof unless the contrary

is shown) and of the opinion of the inspector in relation to any matter contained in the report.

In these circumstances, I am of opinion that it is not necessary for the court to make an order as contemplated in sub-s (b). There will however be liberty to any party including the regulatory authorities to make an application for such an order should it appear necessary to do so in the future.

DOCUMENTS

The inspectors seek a direction from the court pursuant to s. 7 (4) concerning what is to become of the documents which have been generated by this inspection. The documents fall into one of three categories. They are:-

(a) copy documents,

(b) transcripts of interviews,

(c) working papers of the inspectors.

As suggested by the inspectors, I propose making an order directing that these papers be retained by the firm of PricewaterhouseCooper for a period of three years from today's date. In the absence of any application being made prior to that date for further directions from the court, I direct that the documents be then destroyed.

Any applications in the meantime concerning access to these documents are to be made to the court. I have been told by counsel for the Director that he will be seeking access to these documents and I give liberty to him to make such an application to the court on notice to the bank and the company and the inspectors. Likewise, if any other interested parties wish to apply for access to these documents, e.g. the Revenue Commissioners or the Irish Financial Services Regulatory Authority, they must do so in like manner.

I note that the Director intends to bring an application against the bank and the company, seeking to restrain them from disposing of, or destroying, any material documents touching upon matters dealt with in the investigation. I give liberty for such a motion to be brought and note that in the meantime an undertaking has been given to the court by the bank and the company through counsel that there will be neither destruction or disposal of the these documents pending the hearing of the Director's application.

COSTS

The bank, both through its counsel in court and indeed, in its letter of 24th March, 2004, from which I have already quoted, expressed the view that the taxpayer should not be liable for the inspectors' costs. I entirely agree.

It seems to me that these costs fall under two categories. First, there is the actual cost of the investigation itself and I will make an order directing the bank and the company to discharge the costs of the inspectors in that regard. Obviously it would be preferable that the quantum of those costs be the subject of agreement. If, however, they cannot be agreed upon, then it would be appropriate that the matter be brought before the court so that it can make an adjudication on that issue.

Insofar as legal costs of the inspectors are concerned, I am going to make an order that the bank and the company pay those costs to include all reserved costs. In the light of the bank's attitude that the taxpayer should not be liable for such costs, I will not make a normal order for costs. That would only cover party and party costs. That never amounts to a full indemnity. Rather I will order costs to be paid on the highest possible scale, namely, solicitor and own client costs. I do this to

accommodate the banks view that the taxpayer should not be liable for any of the inspectors' costs.