

Red Card for Directors

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A number of Government ministers have expressed impatience with the pace of the enquiries into recent events at Anglo-Irish Bank. In July the Supreme Court issued a Judgment in an appeal concerning one of a series of cases taken by the Director of Corporate Enforcement ("the Director") against various directors and other officers of National Irish Bank ("NIB"). As one set of enquiries into the affairs of a bank draws to a close, another is commencing. Can we draw any conclusions from the outcome of the various proceedings into NIB that may apply in the future to Anglo-Irish Bank?

Following publication of the Inspectors' Report into NIB, the Director sought disqualification orders against a number of directors and other officers of the bank in order to prevent them from acting as company directors. A disqualification order was made in the High Court against NIB's Head of Finance/Planning Mr. Patrick Byrne in July 2008. This order was appealed by both the Director and Mr. Byrne.

The Supreme Court in separate judgements from Mrs. Justice Denham and Mr. Justice Fennelly overturned the disqualification.

In his judgement, Mr. Justice Fennelly found that the disqualification order was based on the finding that Mr. Byrne lacked "commercial probity". However, he noted that both Mr. Byrne and the Director were *ad idem* that the Director had never imputed dishonesty to Mr. Byrne and that the Inspectors' Report made no such claim. In these circumstances it was difficult to stand over the finding of a lack of commercial probity.

Mr. Justice Fennelly also noted that the High Court had found "no evidence of gross negligence or total incompetence, nor a danger to the public". The High Court found that the behaviour of the appellant "would appear to be a departure from the ordinary standard of conduct of a professionally qualified Head of Finance".

Unfitness could not be determined merely on the basis of a departure from the ordinary standards of conduct of a person in the position of Mr. Byrne. In Mr. Justice Fennelly's opinion, the 'unfitness' flowed from his finding of lack of commercial probity. Since he did not believe that the finding of lack of probity could be allowed to stand, he allowed the appeal.

In a separate judgment, Mrs. Justice Denham listed eight factors which had to be considered in deciding to whether to make a disqualification order. They are:-

- the conduct necessary to justify the making of a disqualification order was "more grave and blameworthy" than conduct which would justify a restriction order;
- That incompetence, even when joined with irresponsibility, was not sufficient to ground a disqualification order;
- That the conduct had to be "manifestly more blameworthy" than merely failing to exercise the appropriate degree of responsibility. The conduct complained of had to present "a lack of commercial probity". Probity was used in the sense of "dishonesty or lack of integrity". In an extreme case gross negligence or total incompetence may be sufficient grounds for disqualification;
- The primary purpose of disqualification was not to punish the individual but "to protect the public" against companies being run by people who have been shown "to be a danger to creditors and others";
- The court should take into account the entire history of the person in question and not just the alleged acts of wrongdoing in isolation;
- The matter should not be judged with the benefit of hindsight;
- The court retained its discretion in deciding whether to make the order and could be informed by the fact that the effect of an order could be greater on a professional person; and
- That the substantial burden of establishing that a disqualification order was warranted rested with the Director.

Mrs. Justice Denham referred in detail to the findings of the Inspectors' Report and concluded that in effect, the appellant was criticised for not exercising a responsibility which he did not have and which he did not realise arose. "Commercial misjudgement is not sufficient." There was no question of the appellant acting dishonestly and consequently, the aspects of the tests set out in the third bullet point above were not met.

Conclusion

Whilst the specific case rested on findings of the Inspectors' Report, the tests set out by the Supreme Court represent the standard of proof required for a disqualification order to be made. It must be clearly demonstrated that the defendant was dishonest, grossly negligent or totally incompetent. They must be a danger to creditors and others so that the public must be protected from their being involved in running companies. Any future applications by the Director will have to meet the tests set out in this decision.



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Breaking News

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Failure to Produce Payslips Can Have Civil and Criminal Consequences

A construction company was recently convicted and fined €750 plus costs by Killarney District Court for failing to produce employee payslips as requested by the Pensions Ombudsman. The Ombudsman can require the production of documents and information relevant to his investigation of complaints concerning the maladministration of pension arrangements. The Ombudsman can enforce production through the Circuit Court and initiate criminal proceedings for the non-compliance with his initial request. This can result in criminal conviction, a fine, legal costs and bad publicity.

Reserve Company Names Before Incorporating

It is now possible to apply to the Registrar of Companies to reserve a name for a company prior to the incorporation of the company under that name. If the CRO accepts the choice of name it will reserve it for up to 28 days (which can be extended). The €25 application fee may be offset against the incorporation fee if the application for a new company (Form A1) and the Reserve Company Name ('RCN') Certificate are submitted to the CRO before the expiry of the specified 28-day period.

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Do The Right Thing

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The Pensions Board is continuing its hard-line approach to ensure full compliance by pension schemes with their regulatory requirements. While it is the Board's policy to achieve compliance through co-operation, they are willing to prosecute breaches. This was evident recently when **the Board was successful in prosecuting an employer for failure to submit an actuarial funding certificate**, as required under the Funding Standard provisions of the Pensions Act 1990, as amended. The Court imposed a substantial fine of €2,500 on the company. In light of this judgment, all Trustees should be aware of their statutory obligations to submit an actuarial funding certificate or run the risk of heavy penalties being imposed for failing to do so.

The Pensions Board implemented the Funding Standards in 1991, the purpose of which was to set out the minimum level of assets for pension schemes. As a means of monitoring their assets all defined benefit schemes are required to prepare and submit an actuarial funding certificate. The purpose of the certificate is to certify that the assets of the scheme are sufficient to meet its specified liabilities in a statutory order of priority in the event of it being wound up. The Pensions Board views them as "important because they provide vital disclosure of how well the pension scheme meets funding standards".

The Trustees are obliged to submit actuarial funding certificates at 3 year intervals. It is open to the Trustees to choose the effective date for the certificate provided that the effective date for the initial certificates comply with the following:

- Schemes commenced before 1st January 1991 not later than 3 years after that date; and
- Schemes commenced after 1st January 1991 not later than 3½ years after commencement.

Subsequent certificates shall have an effective date not later than 3½ years after the effective date of the immediately preceding certificate. In all cases, the Trustees of the scheme must submit the certificates to the Board within nine months of the effective date of the certificate.

If the funding certificate states that the scheme does not satisfy the funding standard as at the effective date, a funding proposal must be submitted to the Board. The proposal should contain the opinion of

the actuary that on the effective date of the next actuarial funding certificate, being 3 years, the scheme could reasonably be expected to satisfy the funding standard. This recovery period of 3 years can be extended to 10 years where it is demonstrated that there are prevailing exceptional circumstances. Applications for extensions are treated on a case-by-case basis and at the discretion of the Pensions Board who may, when granting an extension, impose such terms as it deem necessary.

An important provision was introduced on the 1st July 2003 for schemes which have an actuarial funding certificate in place with an effective date after 1st January 2001. All Trustees Annual Reports prepared from the 1st July 2003 must contain a statement from the actuary that from the last day of the reporting period the scheme would have satisfied the funding standards.

If the actuary cannot certify that the scheme would satisfy the funding standards, then the scheme must prepare and submit an actuarial funding certificate to the Board within 12 months of the end of the reporting period. If the certificate shows the scheme is not in compliance with the funding standards, a proposal will also need to be submitted.

If there is a proposal in place at the time of submission of the annual report the actuary must certify whether or not the scheme is back on track. If the actuary cannot certify that the scheme is back on track, the scheme must prepare and submit a certificate and revised proposal to the board within 12 months of the end of the reporting period.

For Trustees the importance of furnishing an actuarial funding certificate cannot be overstated. With the fall in the investment markets in recent times pensions schemes have seen a diminution of value.

In 2008, 123 out of the 402 actuarial funding certificates submitted to the Board failed to satisfy the funding standard. In the same year the Board issued on the spot fine notices to Trustees of 23 defined benefit schemes for failure to submit certificates for their schemes. These statistics are a further testament as to how stringent the Pensions Board is when it comes to compliance with Funding Standards.

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No Honour, Even Among Thieves

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Since the passing of the Competition Act 1991, it has been a criminal offence to take part in a cartel which prevents, restricts or distorts competition. However, there have been almost no prosecutions under successive Competition Acts until recently.

This year the High Court gave judgment in a case concerning Mr. Patrick Duffy, a member of the 'Citroen Dealers Association' which was a price fixing cartel which operated for approximately ten years between 1995 and 2004. The judgment establishes the criteria to be considered by a Court when deciding whether to impose a custodial sentence on an individual who enters into or implements an agreement with the object or effect of interfering with competition.

Additionally both individuals and companies convicted of entering into such agreements **may be fined a sum of up to €3,000,000 or 10% of turnover in the last financial year whichever is the greater.**

Cartels are groups of competitors who agree to restrict their individual business freedom and follow an agreed course of conduct in their market. The 'hard-core' infringements include price fixing, restricting output or production, market allocation and bid rigging.

In considering any sentence, factors such as the seriousness of the offence, the circumstances in which it is committed and the prescribed punishment must be reviewed, as well as any aggravating or mitigating circumstances. The latter would include matters such as a guilty plea, co-operation, absence of previous convictions, good character and unlikely to re-offend etc.

As Mr. Justice McKechnie noted "cartels are conspiracies...inflicting the most harm on customers, consumers and the public alike"

First Offence/Unlikely to Re-offend

It was submitted that the absence of previous convictions against Mr. Duffy indicated that the offence was out of character and unlikely to be repeated. In dismissing this submission, the Court stated;

"the ongoing and continuous nature of cartel crimes would tend to suggest that the acts complained of were not, in fact, out of character. The accused was not a man of generally good character who committed an unfortunate, foolish or impulsive act. [He was] deliberately engaging in wanton criminal conspiracy against the greater public with the intention of defrauding them for financial gain."

He went on to note that operating a cartel is not a once-off criminal act. It continues for a number of years and requires planning and organisation. A person who successfully implements a price fixing agreement is usually well educated, either owns a business or has risen to senior management and almost certainly will have done a value benefit/detection appraisal. In his opinion, it is very difficult to say that the cartel behaviour is out of character.

In the Judge's view, factors such as the conduct concerned was a first offence or that the offender is unlikely to re-offend are of limited application in cartel cases. Cartel crimes are pernicious in nature requiring detailed planning and concealment in both the network and the activity. The perpetrators know their conduct is illegal and therefore, the absence of recidivism is not a weighty factor.

Cheating on the Cheaters

There must be clear and cogent evidence of a direct infringement of the rules of the cartel in order for a Court to give the defendant credit for such conduct. It is not satisfied by mere generalisation or by giving partial or selective data. Infringements against the cartel which have no positive effect on consumer welfare or no negative impact on cartel activities will be of little interest to a Court.

In Mr. Duffy's case, he had held the position of treasurer of the association for over three years and was responsible for paying for the mystery shoppers who carried out checks on Citroen dealers to confirm that they were maintaining prices. In Mr. Justice McKechnie's opinion, the position of responsibility held by Duffy and the discharge of those functions were reflective of an active and supporting cartelier.

Co-operation with Authorities

Co-operation must be judged by its utility in the investigation or otherwise. How useful has it been to prevent, detect, halt or disrupt the illegal activity? The Court must also consider whether the defendant was subject to coercion or distress and his guilty plea.

In this case, the sentences imposed by the Court were suspended for five years. In addition, Mr. Duffy was disqualified from acting as a director of a company for a period of five years, pursuant to Section 160 of the Companies Act 1990 and fines were imposed on both Duffy and his company.

Conclusion

The Court indicated that future sentences for cartel activity will not be suspended and a period of custody will be imposed.

The EU Services Directive

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The purpose of the Services Directive (Directive 2006/123/EC) is to create a single market for services, similar to the single market for goods that has existed in the EU for the past 15 years. It aims to eliminate obstacles to the freedom to establish businesses for service providers and to the free movement of services between Member States.

The Services Directive will give both providers and recipients of those services the legal certainty they need in order to exercise their fundamental freedoms under the EC Treaty. Indeed the Services Directive requires the Member States to 'screen' legislation in order to harmonise and simplify the procedures laid down, as well as to avoid discrimination between national and foreign service providers.

The Department of Enterprise, Trade and Employment has published a Consultation Document explaining the implementation of this important directive in Ireland. 'The Directive' says the Department 'sets out general rules about the right to establish, exercise or receive a service which Ireland must give effect to under our legislation'. Transposition of this legislation is to be finalised before 28 December 2009: inevitably some Irish rules are being changed to bring them into line with the Directive.

The Member States are also required to provide information to each other, such as qualifications, references or documents required to establish a new service undertaking in their country.

The last 12 months has seen a marked increase in the number of failed applications for the appointment of an examiner. The higher failure rate is due mainly to companies who are unsuitable for the process seeking protection and their inability to attract investment during the process.

To qualify for examinership it must be demonstrated that the company is suitable, worth saving and has a reasonable prospect of survival as a going concern. However, the Court retains a wide discretion on whether to grant its protection.

The failure of Liam Carroll's Zoe group to obtain protection has raised some interesting points.

Independent Objective Evidence

Zoe's first petition for the appointment of an examiner followed demands made by ACC Bank, one of Zoe's principal lenders, for the repayment of sums owed by two companies controlled by Mr. Carroll. In refusing Zoe's first petition, both the High Court and the Supreme Court criticised the lack of evidence produced to support the assertion that the group had a reasonable prospect of survival.

This first petition was based on a strategy for the development of existing sites and an orderly disposal of key company assets over a period of 3 years. The Independent Accountant's Report, a prerequisite to the appointment of an examiner, was of no assistance to the Court as it was based on a number of assumptions, which were not verified by evidence. Zoe did not put in evidence its 3-year business plan, up-to-date property valuations or support for its assertions as to the viability of the group.

The judgments delivered dismissing the petition illustrate that the assumptions underpinning a proposed rescue plan and the Independent Accountant's Report must be supported with up-to-date, objective professional evidence that takes a realistic view of market conditions and the likelihood of survival.

Forensic Analysis

Zoe's failed appeal in the Supreme Court led to a second High Court petition, which sought to introduce a new Independent Accountant's Report and certain materials, including the 3-year business plan and updated property valuations, which had been withheld during the first application.

The second application was based on a 3-year plan to bring the group to a position where it would have sufficient income to meet its liabilities, including interest payments, at the end of a proposed two-year partial moratorium on the group's debt repayments.

In assessing the companies' prospects of survival at the end of the interest payment moratorium, Mr. Justice Clarke forensically analysed the petitioners' evidence. He criticised how certain projected figures were presented which exaggerated forecasted rental income and property values and relied on interest rates remaining unchanged over the next two years. The petition was dismissed.

Mr. Justice Clarke's judgment highlights the forensic attention given to the materials and information supporting a petition. Reports of independent accountants will be thoroughly reviewed and auditors must employ realistic accounting and business projections.

Abuse of Process

Before the hearing of the second petition could take place, Mr. Justice Cooke was asked to decide whether Zoe should be allowed a second bite of the cherry, particularly where it sought to introduce information intentionally withheld from its first application.

In allowing the petition to proceed, Mr. Justice Cooke could find no statutory prohibition against making a second petition and held that the "overriding consideration" is to assess whether the company has a reasonable prospect of survival. Mr. Justice Cooke found there were good grounds for a second hearing and that it would not constitute an abuse of court process.

In the circumstances where Zoe brought an appeal against the High Court decision rejecting the group's second bid for court protection, ACC Bank appealed Mr. Justice Cooke's earlier decision to allow the hearing of the second petition.

On the ACC Bank appeal, the Supreme Court disagreed with Mr. Justice Cooke's view that the "overriding consideration" is to investigate whether a petitioner has a reasonable prospect of survival, regardless of the petitioner's conduct. If this were the case, then multiple petitions for examinership could be brought irrespective of the petitioner's actions.

The Supreme Court found that a "conscious and deliberate strategic decision" was taken, contrary to financial and legal advice, to withhold crucial information from the first petition. Zoe's second application, which was fundamentally the same petition, was found to be a breach of court process and a bar to a second petition. The Court held that the petitioner had an opportunity to present its case at the first hearing and had to live with the consequences of its decision to exclude crucial information.

Liquidators & Receivers

The ruling of the Supreme Court means that Zoe cannot appeal Mr. Justice Clarke's dismissal of the second petition. An official liquidator has been appointed to the two main financial companies in the group and at the time of writing, seven banks have appointed receivers to take control of either properties or companies within the group.

Conclusion

Zoe's failed attempts to appoint an examiner shows that a petitioner must present all relevant information to the Court from the outset. Although there is no statutory bar against making a second application, it must be justified and it cannot be because the applicant now wishes to introduce deliberately withheld information.

Independent objective evidence must be presented to support the assumptions and projections as to the petitioner's prospects of survival. The Court will forensically review the financial evidence and projections in order to eliminate unsuitable companies, which do not have reasonable prospects of survival.

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