Neutral Citation No. [2009] NIQB 94 | *Ref:* **WEA7680**

Judgment: approved by the Court for handing down | *Delivered:* **24/11/2009**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Black & Clements' Application [2009] NIQB 94

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

PHILIP BLACK AND DAVID CLEMENTS

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WEATHERUP J

[1] This is an application for leave to apply for a Judicial Review of a decision of the Accountancy and Actuarial Discipline Board of the Institute of Chartered Accountants in Ireland made on 6 October 2009 to examine the applicants' role in the affairs of the Presbyterian Mutual Society (PMS) and the refusal to adjourn the examination. Mr McGleenan appeared for the applicants and Mr Maclean QC and Ms Gray for the proposed respondent.

[2] From the affidavit of the first applicant it appears that he is a Chartered Accountant and a member of the Institute of Chartered Accountants in Ireland (ICAI) and also a director of the Presbyterian Mutual Society (PMS) since 1998. The second applicant is also a Chartered Accountant and a director of PMS since 1990.

[3] An Administrator was appointed for the PMS in November 2008. At that time the ICAI referred the applicants' conduct as directors of the PMS to the Chartered Accountants Regulatory Board and the result was a proposed investigation and interview of the applicants under Accountancy Scheme.

[4] Further, the Financial Services Authority (FSA) undertook an investigation into whether the PMS was taking deposits and conducting unauthorised mortgage business. On 9 April 2009 the FSA issued a press release to the effect that it had concluded its investigation and had decided that regulated activities had been conducted without the necessary authorisation or exemption. However the FSA also decided that it would not

take a case against any of those involved in running the PMS but if further information came to light relating to the issues that had been investigated that information would be looked into. The applicants therefore state that there remains a prospect of an FSA investigation or a DETI investigation into the conduct of the directors of the PMS.

[5] In addition, the applicants have been contacted by solicitors acting for a group of PMS depositors indicating that consideration is being given to whether all or some of the directors have been negligent or acted in breach of their official duties owed to the PMS. The applicants therefore have a concern about the prospect of civil proceedings against the applicants in respect of their conduct as directors. Further, it is claimed that the insurance policies of the applicants may be affected if admissions were to be made in the course of interviews with the Board and this possibility is of particular concern in relation to the potential civil proceedings.

[6] At the leave hearing an additional matter was raised by the applicants that did not appear in the papers, namely that the Administrator had completed his report to the DETI in relation to directors disqualifications. That report has not been furnished to the applicants, although a request had been made for disclosure and a reply to that request is awaited. Thus the applicants contend that there may be a recommendation for proceedings for disqualification of the applicants as directors, a statutory process undertaken in Court proceedings against the applicants. By reason of the possible directors disqualification process the applicants applied for an adjournment of the application for leave to apply for judicial review for a period of two weeks so that it might be determined what recommendations have been made by the Administrator.

[7] The applicants contend that it would be unfair to proceed with the leave application for two reasons. The recommendations of the Administrator are not known at present. The Boards examination of the applicants may lead to disciplinary proceedings. If there is an Administrators recommendation for directors disqualification proceedings against the applicants there will be the prospect of the applicants being subject to multiple jeopardy in parallel proceedings. In addition to the directors disqualification process the applicants are concerned about the prospect of action by the FSA or the DETI and of civil proceedings all getting underway against the applicants. The immediate concern of the applicants is to establish whether there has been a recommendation for directors disqualification proceedings. The second basis on which the applicants say that it would be unfair to proceed with the leave application at present is that there is now a prospect of Court proceedings under the statutory scheme for directors' disqualifications and such proceedings should be the primary avenue of examination of the applicants rather than having parallel disciplinary proceedings.

[8] The respondent opposes both the adjournment and the grant of leave on the basis that the adjournment is inappropriate and the leave application is unarguable. The respondent relies on the applicants being members of their professional association and subject to its regulatory scheme. The scheme includes provisions for examination of their activities in circumstances such as those prevailing in the present case and that exercise is based on the public interest in detecting malpractice, which the respondent contends should prevail over any private right against self-incrimination. In general that is not a proposition that is in issue in this case, although the applicants contend that the present circumstances are such that it is in the public interest that overall fairness to the applicants should prevail.

[9] Secondly the respondent contends that there should be no stay of the Board's examination of the applicants merely because of the prospect of other proceedings against the applicants relating to the same facts. In that regard the respondent relies on the approach that has been taken in England and Wales in R (Land) v The Executive Council of the Joint Disciplinary Scheme [2002} EWHC 2086 (Admin). The case arose out of the Equitable Life litigation and concerned accountants facing disciplinary proceedings by their professional body as well as civil proceedings that were pending in both England and Greece. In the circumstances of the case a stay of the disciplinary proceedings was refused. The general principles in relation to the grant of such a stay are set out in paragraph 22 of the decision of Stanley Burnton J, which I summarise as follows:-

> (i) The Court is not concerned with a Wednesbury review of the decision not to adjourn the proceedings. Rather the Court is required to exercise its original jurisdiction whether to grant a stay.
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> (ii) The jurisdiction to stay one of two concurrent sets of proceedings must be exercised sparingly and with great care.
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> (iii) Unless a party seeking a stay can show that if a stay is refused there is a real risk of serious prejudice which may lead to injustice in one or both of the proceedings, a stay must be refused.
>
> (iv) If the Court is satisfied that, absent a stay, there is a real risk of such prejudice then the Court has to balance the risk against the counterveiling considerations. Those considerations will almost always include the strong public interest in seeing that the disciplinary process is not impeded.
>
> (v) In a case where the balancing exercise is carried out, the Court will give great weight to the view of the person or body responsible for

the decision as to the factors militating against the stay and the weight to be given to them, but the court is the ultimate arbiter of what is fair.

(vi) Each case turns on its own facts. Accordingly, only limited assistance can be derived from comparing the facts of a particular case with those of other cases where a stay was granted or where a stay was refused.

[10] Thus the questions that have to be asked in the present case are -

(i) If there were to be no stay of the examination of the applicants, is there a real risk of serious prejudice which may lead to injustice?

(ii) If there is a real risk of such prejudice, what are the counterveiling considerations against the grant of a stay?

(iii) Does the balance of such prejudice and the countervailing considerations fall in favour of the grant of a stay or the refusal of a stay?

[11] In Land a stay was refused. The Court considered a number of 'heads of prejudice' before concluding that in the circumstances there was no real risk of prejudice. The heads of prejudice that were considered were first of all that the continuation of the inquiry would delay, impede and prejudice the claimants in their defence of the Commercial Court proceedings and of the inquiry itself; secondly, that there was inherent fairness in two tribunals contemporaneously considering the same issue; thirdly that Equitable Life could gain a substantial and unfair advantage in the Commercial Court proceedings from the generation of documents in the inquiry; fourthly the personal demands of the accountancy inquiry upon the applicant; fifthly the risk of a decision in the disciplinary proceedings influencing the Commercial Judge in the civil proceedings. In respect of all of those matters the Court concluded that the applicants had not established that there was then a real risk of serious prejudice in any of the proceedings to which the Court had been referred if the disciplinary inquiry were to continue. It followed that the applicants had not established the pre-condition for a stay and it was unnecessary to carry out a balancing exercise as between the risk of prejudice and the counterveiling considerations.

[12] Conscious as I am that the facts of one case are of limited assistance in deciding another case, as the factual matrix is always different, I refer to R (Ranson & Oths) v Institute of Actuaries [2004] EWHC 3087 Admin) which also concerned the Equitable Life litigation. Again there were parallel proceedings against the applicants, being disciplinary proceedings by the professional body as well as two parallel actions which were due to start in the High Court. The Court granted a stay of the disciplinary proceedings. At

paragraph 51 Moses J stated that the situation in the case was considered to be wholly different from what normally arose in such applications because the claimants faced charges, as a result of which they might be struck off, and at the same time they faced mammoth civil litigation that was due to start in less than a year's time, when they were not represented or only to a limited extent represented in the civil proceedings. At paragraph 50 it was stated that the cases that are customarily referred to in such applications involved the essential submission on behalf of the respondents that the applications to the Court were premature. Thus the general position had been found to be that civil proceedings had not even been launched or the claimants were seeking to prevent an investigation that had not yet started or the claimants were seeking to prevent interviews being conducted. In the present case the respondents regard the application as, at best, premature.

[13] In Ranson Moses J concluded that there was a real risk of serious prejudice which might lead to injustice and he gave three reasons for that finding. First, the difficulty that the applicants would have had with representation at both sets of proceedings at the same time. Second, the applicants would have been required to spend time on the disciplinary proceedings which would prejudice their preparation of the civil proceedings. Third, the applicants had undertaken not to practice until the resolution of the disciplinary proceedings and further, if there was to be an appeal in the civil proceedings they would not any longer delay the disciplinary proceedings.

[14] The first question in the present proceedings is whether there is a real risk of serious prejudice if there is no stay of the examination of the applicants. The applicants say there is the prospect of action by the FSA and the DETI and the respondent says that at the present time this is 'fanciful speculation'. Such action against the applicants is a possibility but it has not materialised at present and may never materialise. Further the applicants say that there is the prospect of a class action against the applicants by the disappointed investors in the PMS. Again that is indeed a possibility but again no such action has been commenced. In addition the applicants say that the record of the examination of the applicants may be used against them in other proceedings. That is certainly so if the examination were to reveal matters that were adverse to the applicants. Further, the applicants refer to the prospect of the loss of insurance cover if they are to make admissions in the examination. The respondent's decision letter states that they could not believe that the terms of the insurance policy were such that it would be vitiated because of truthful co-operation with the examination, as a provision that would deny the applicants insurance cover in those circumstances would be entirely contrary to public policy. This is an issue I raised with Counsel for the applicants as I was struck by the contention as it appeared in the papers. Counsel did not press the point or elaborate on the basis for the point and in the absence of further evidence on the matter I do not proceed on the basis that there would be the prospect of the loss of insurance cover. Also under

the applicants' heads of prejudice is the Administrator's report in relation to directors disqualification proceedings. The applicants put this in terms that there is a statutory scheme for Court proceedings to inquire into the conduct of the applicants as directors and that statutory scheme should be the preferred form of examination of the applicants in the public interest. Again there is speculation about the contents of the Administrators report and whether it will be disclosed to the applicants at this stage and what action might be taken on foot of the report.

[15] I am not satisfied that there is a risk of serious prejudice that may lead to injustice to the applicants. I consider the application to be premature. None of the other proceedings referred to has actually commenced. Even if any of those other proceedings had commenced that would not of itself give rise to the risk of serious prejudice. One would have to examine the circumstances and consequences of the particular inquiries and proceedings in order to determine whether or not there was the risk of serious prejudice. Nor have I been satisfied that there are grounds to adjourn the application for leave to apply for judicial review pending a response to the request for disclosure of the Administrator's report. The report may or may not be disclosed at this stage. The report may or may not recommend proceedings against the applicants for directors disqualification. Any recommendation in the Administrator's report in relation to directors disqualification may or may not be accepted. Any parallel examination and directors disqualification proceedings may or may not give rise to the risk of serious prejudice depending upon the circumstances that then arise. All of these are possibilities they may or may not arise. I do not accept that there is any purpose in adjourning this application for leave to apply for judicial review at this stage with this list of possibilities that may or may not arise.

[16] In all of the circumstances discussed above I am satisfied that the leave application should not be adjourned. For all the reasons set out above I am satisfied that there is no risk of serious prejudice to the applicants at this stage and the application for leave to apply for judicial review should be refused.