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2010/146713

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (COMPANIES)

IN THE MATTER OF THE PRESBYTERIAN MUTUAL SOCIETY LIMITED IN ADMINISTRATION

and

IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION (NORTHERN IRELAND) ORDER 2002

BETWEEN:

THE DEPARTMENT OF ENTERPRISE, TRADE & INVESTMENT

Applicant;

and

(1) PHILIP BLACK
(2) DAVID JAMES CLEMENTS
(3) DAVID McCONAGHY
(4) ALBERT McCORMICK
(5) SAMUEL SIDLOW McFARLAND
(6) DAVID HENRY COLIN FERGSUON

Respondents.

MASTER KELLY

[1] On 14th November 2011, the court heard an application for discovery brought by the above Respondents pursuant to Order 24 Rule 7 of the Rules of the Supreme Court (NI) 1980, in the course of Disqualification proceedings issued against them by the Applicant. The Disqualification proceedings commenced by way of

Originating Summons grounded on the affidavit of Mr David Bell, a Senior Examiner within the Applicant Department. In his affidavit, Mr Bell alleges that the Respondents are unfit to be involved in the management of a company and on behalf of the Applicant, seeks disqualification orders are made by the court against them. However, the Respondents are not prepared to file replying affidavits in defence of the disqualification proceedings prior to the Applicant providing discovery. The reasons for this will be dealt with in detail later.

[2] The Applicant was resisting the application for discovery on two main grounds. The first was that it was not its practice to provide discovery prior to the filing of a replying affidavit. It therefore contended that the Respondents' application was premature. The second ground was that the documents sought were either subject to legal privilege or part of a "fishing expedition". The second ground appears to be the primary basis for resisting the application as it would arise at whatever stage discovery was sought.

[3] The Applicant was represented by Mr Michael Humphries BL instructed by the Departmental Solicitors. The first and second Respondents were represented by Dr Tony McGleenan QC instructed by Kennedys Belfast LLP. The third, fourth and fifth Respondents were represented by Mr David Dunlop BL instructed by Napier & Sons Solicitors and the sixth Respondent was represented by Mr Chris Ringland BL instructed by Thompson Mitchell Solicitors. The hearing of the application was relatively short and as a consequence, the arguments of the parties were reasonably succinct. This judgment is reflective of that fact.

[4] However, before proceeding to deal with the issues of the hearing itself, I consider it would be appropriate to set the application in context given the exceptional nature of this particular case.

[5] The background to this case is that on 17th November 2008 the Presbyterian Mutual Society Ltd was placed into Administration pursuant to the provisions of the Insolvency (Northern Ireland) Order 1989, as amended by the Insolvency (Northern Ireland) Order 2005. Mr Arthur Boyd, a Licensed Insolvency Practitioner was appointed Administrator to manage the affairs of the company. The creditors of the company are largely members of the public.

[6] On 16th November 2010, the Department of Enterprise Trade and Investment ("the Applicant") filed an application for a disqualification order against the Respondents under Article 10 of the Company Directors Disqualification (Northern Ireland) Order 2002 ("the Order") for:-

> "1. A Disqualification Order under Article 9 of the Company Directors Disqualification (Northern Ireland) Order 2002 that the Respondents and each of them for a period specified in the Order -
>
> (a) shall not be a director of a company, act as a receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has leave of the High Court, or
>
> (b) shall not act as an insolvency practitioner. "

[7] Article 10 of the Order states:-

> **"**If it appears to the Department that it is expedient in the public interest that a disqualification order under Article 9 should be made against any person, an application for the making of such an order against that person may be made -
>
> (a) by the Department, or

(b) if the Department so directs in the case of a person who is or has been a director of a company which is being, or has been, wound up by the High Court, by the official receiver."

[8] Article 9 of the Order states:-

> **"9. -** (1) The High Court shall make a disqualification order against a person in any case where, on an application under this Article, it is satisfied—
>
> (a) that he is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently), and
>
> (b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company."

[9] Therefore it follows that the Applicant in bringing the application under Article 10 for an order under Article 9 has decided that it is expedient in the public interest that a disqualification order should be made against the Respondents.

[10] As stated earlier, the Applicant's application is grounded on the affidavit of Mr David Bell Senior Examiner within the Applicant Department, who summarises the allegations of unfitness against the Respondents at paragraph 333 of his affidavit thus:-

> "The following are, in summary and as set out in more detail above, the matters by reference to which the Respondents, and each of them are in my opinion unfit to be concerned in the management of a company:-
>
> (a) they caused or allowed the Presbyterian Mutual Society Limited to carry on the business of banking contrary to section 7 of the Industrial and Provident Societies Act (Northern Ireland) 1969;
>
> (b) they caused or allowed the Presbyterian Mutual Society Limited to accept deposits in the course of carrying on a deposit taking business, without being authorised by the Bank of England or

exempt in relation to those deposits, in breach of the Banking Act 1987 and in breach of the Society's Rules;

(c) they caused or allowed the Presbyterian Mutual Society Limited to carry on a regulated activity (namely, accepting deposits within Article 5 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2011) without being an authorised person or an exempt person in relation to those deposits, in breach of section 19 of the Financial Services and Markets Act 2000 and in breach of the Society's Rules;

(d) they caused or allowed the Presbyterian Mutual Society Limited to enter into regulated mortgage contracts as a lender (being a regulated activity within Article 61 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001) without being an authorised person, in breach of section 19 of the Financial Services and Markets Act 2000;

(e) they failed to cause the Presbyterian Mutual Society Limited to seek any professional or legal advice as to the impact of the coming into force of the Financial Services and Markets Act 2000 on the Presbyterian Mutual Society Limited;

(f) they caused or allowed the Presbyterian Mutual Society Limited to make loans to non-members in the sum of at least £52,690,776 in breach of the Society's Rules;

(g) they failed to adequately monitor and/or control the affairs of the Presbyterian Mutual Society Limited, in particular in that they;

(h) failed to ensure that the Board of Directors met sufficiently frequently to enable the directors to keep abreast of and control of the Society's affairs;

(i) caused or allowed the Presbyterian Mutual Society Limited to pursue investment and/or lending policies that were not consistent with the Rules of the Society or with its status as a co-operative society within section 1(2) of the Industrial and Provident Societies Act (Northern Ireland) 1969, and which were to the risk of members of the Society, in that, amongst other things, (i) such policies were pursued with the object of making profits for the payment of interest, dividends and bonuses on money invested with PMS, (ii) insufficient controls were put in place in relation to the loans , and (iii) the making of such investments and loans reduced the liquid funds of PMS below a prudent level and increased the risk that monies invested or loaned to PMS by members could not be repaid on demand;

(j) they caused or allowed the Presbyterian Mutual Society Limited to act in breach of its own rules and in breach of the Industrial and Provident Societies Act (Northern Ireland) 1969."

[11] Additional allegations are made against the First to the Fifth Respondent inclusive at paragraph 334 of Mr Bell's affidavit namely:-

(a) they caused or allowed the Sixth Respondent to act as a de facto director of the Presbyterian Mutual Society Limited.

(b) they caused or allowed the delegation of excessive authority to the Company Secretary and failed to exercise sufficient supervision and control over the exercise of that authority."

At paragraph 335 of his affidavit Mr Bell makes an additional allegation against the Sixth Respondent:-

"he acted as a de facto director of the Presbyterian Mutual Society Limited, approving loans and lending monies without due authority."

[12] At the date of the Administration the Presbyterian Mutual had a total of 20 directors, including the Respondents. The directors were from various professional backgrounds. The Applicant has decided that it is expedient in the public interest only to seek disqualification orders in the case of the Respondents and not in the public interest to seek disqualification orders in the case of the other 15 directors. Its application is silent on this discrete issue.

[13] The first Respondent is a practising accountant. The second Respondent is a retired accountant. The third Respondent is a 73 year old retired clergyman with significant health problems. The fourth Respondent is also in his 70s with significant health problems. The fifth Respondent is a 70 year old retired clergyman also with significant health problems. The third, fourth and fifth Respondents have served

medical evidence on the Department with regard to their health problems. The Applicant has not raised any issues with this evidence. The sixth Respondent is the Chief Executive of the Presbyterian Mutual Society Limited who it is alleged by the Applicant acted as a de facto director.

[14] The first to the fifth Respondents inclusive filed statements pursuant to Rule 6 of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules (NI) 2003 which states:-

> **"6.**—(1) The respondent shall within 14 days from the date of service of the summons file in court a statement indicating –
>
> (a) whether he contests the application on the grounds, that in the case of any particular company –
>
> (i) he was not a director or shadow director of the company at a time when conduct of his, or of other persons, in relation to that company is in question, or
>
> (ii) his conduct as director or shadow director of that company was not as alleged in support of the application for a disqualification order,
>
> (b) whether, in the case of any conduct of his, he disputes the allegation that such conduct makes him unfit to be concerned in the management of a company, and
>
> (c) whether he, while not resisting the application for a disqualification order, intends to adduce mitigating factors with a view to justifying only a short period of disqualification.
>
> (2) The respondent shall forthwith after filing such statement serve a copy upon the applicant."

[15] The Respondents statements indicate that they intend to defend the proceedings and deny unfit conduct.

[16] The Respondents in defending the disqualification proceedings make various allegations against the Applicant. These allegations are almost identical. They may be summarised as follows:-

(i) The alleged grounds for unfitness could apply to all of the directors of the company.

(ii) In seeking disqualification orders against some directors but not others, the Applicant has acted with apparent bias and unfairness, that its apportioning of responsibility discriminates against the Respondents and is misconceived.

(iii) That the Respondents have been selected as "soft targets".

(iv) There is a conflict of interest in that the Applicant bringing the disqualification proceedings itself failed in its own regulatory responsibility to the company and was criticised for doing so by the House of Commons Treasury Committee report on the failure of the company.

(v) That the Applicant may have been subject to pressure from elected representatives to bring disqualification proceedings.

[17] The Respondents had been actively seeking discovery from the Applicant for some time. Not only was this in order to defend the disqualification proceedings, but it was also in consideration of a potential application to strike out the proceedings as abuse of process. However, the Applicant remained unmoved on the issue of discovery, maintaining its position that the Respondents' request for discovery was premature in the absence of a replying affidavit. This resulted in an impasse between the parties preventing further prosecution and defence of the case prior to the resolution of the discovery issue.

[18] Returning to the hearing of 14th November 2011, it was common case between the parties that the burden of proof in a contested application for discovery lay with

the party objecting, to satisfy the court that the discovery sought was not necessary in order to dispose fairly of the case, or for the purposes of saving costs. It was therefore for the Applicant to satisfy the court that the orders for discovery should be refused.

[19] The Respondents were seeking discovery of 8 classes of documents :-

(i) The Report of the Administrator or the "D" report.

(ii) All documents relating to the decision that it was not in the public interest to initiate proceedings against the remaining directors.

(iii) All documents passing between the Applicant and the Administrator.

(iv) All documents, notes and records relating to correspondence between the Directors Disqualification Unit and DETI regarding the issue of public interest.

(v) All documentation, notes and records relating to correspondence to DETI and/or the Insolvency Service from any elected representative either of the Northern Ireland Assembly or Her Majesty's Government, any member of the House of Commons Treasury Select Committee, seeking information or making comment on the Presbyterian Mutual Society Ltd.

The following additional 3 classes of documents were sought by the sixth Respondent.

(vi) All files prepared by the sixth Respondent for the Loans Committee.

(vii) All documents pertaining to enquiries made to the Applicant by persons potentially interested in registering bodies similar to the

Presbyterian Mutual Fund under the Industrial and Provident Societies Act (Northern Ireland) 1969.

(viii) All documents relating to the oversight of mutual societies by the Applicant.

[20] Mr Humphries for the Applicant accepted that in actions commenced by Originating Summons, the procedure is that of exchange of affidavits rather than pleadings, and there is no fixed point when the issue of discovery naturally occurs. Thus he accepted that an application for discovery can be brought at any stage. Nevertheless he argued that the absence of discovery did not prevent the Respondents from responding to the allegations. He submitted that none of the Respondents have denied being unfit, only that they allege it is unfair that they have been "singled out". This is not the case, however. The first to the fifth Respondent inclusive has filed a Rule 6 Statement in which unfitness is clearly denied. I accept the position with regard to the sixth Respondent is not clear on this point.

[21] In arguing that the Respondents' application for discovery was premature, Mr Humphries relied on the case of **R.H.M. Foods Ltd. and Another –v-Bovril Ltd. [1982] 1 W.L.R. 661**. In that case the plaintiff issued a writ against the defendant alleging it had passed off its product as the plaintiff's product Bisto. The plaintiff also gave notice that it intended to seek an injunction restraining the defendants from continuing to pass off its product. Prior to applying for its injunction, and before a statement of claim had been delivered in the writ action, the plaintiff sought discovery from the defendant. The judge at first instance granted the order for discovery and the defendant appealed that decision. In allowing the appeal Lawton LJ stated:-

> "In my judgment, it would be unfair to the defendants to allow the plaintiffs to have discovery before they have set out in a statement of claim such allegations of deliberate deception as they feel justified in making. Discovery under R.S.C., Ord.24, r.1, has to relate to matters in question in the action" and so does discovery under rule 7: see rule 7 (3). Until at least a statement of claim has been delivered the court can seldom know what are the matters in question in the action."

[22] In my view a distinction should be drawn between an application for discovery in civil proceedings in an action begun by Writ where, (i) the pleadings are at an early stage and, (ii) the case is not yet fully pleaded by the plaintiff; and quasi-criminal proceedings in an action commenced by Originating Summons where there is no prescribed series of pleadings. In disqualification proceedings, the Applicant pleads its case against a Respondent by way of specific allegations in its grounding affidavit. In so doing, the court knows at the outset what the matters in question in the action are.

[23] While the next step in the Originating Summons process in disqualification proceedings may be the filing of a replying affidavit, this is not merely a routine procedural step. It is sworn evidence. Specifically it is the opening of the Respondent's evidence in defence of the allegations made against him. Therefore, it seems to me that with regard to disqualification proceedings, once the Applicant has filed the Originating Summons and grounding affidavit, it has pleaded its case and opened its evidence. Once the Respondent has filed a Rule 6 Statement, the next step is the opening of the evidence in defence and the trial of the action is not far behind. To insist that a respondent give his evidence in defence of the allegations before being entitled to seek and obtain discovery, seems to me to be inequitable. The potential

prejudice to that respondent could be such as to deprive him of evidence which may be necessary for the proper defence of his case.

[24] The consequences of a disqualification order are serious. For the first Respondent, a practising accountant, such an order could bring about the end of his professional career. He could find it difficult if not impossible to obtain employment in the accountancy profession or indeed in many professions, for the foreseeable future. This alone engages European Convention rights.

[25] In the circumstances, I consider that the Respondents' request for discovery in this case should not be dismissed as premature simply because they have not filed a replying affidavit, or that the discovery may facilitate an action not yet commenced but intended by them. I also consider that the Respondents' application for discovery in this case in any event further differs from the party seeking the discovery in the **RHM Ltd** case. In that case the Plaintiff was both the moving party in the Writ action and the proposed moving party in the intended injunction application.

[26] In the instant case, central to the Respondents' defence of the disqualification proceedings are their allegations that (1) the alleged grounds for unfitness could apply to all of the directors of the company; (2) in seeking disqualification orders against some directors but not others, the Applicant has acted with apparent bias and unfairness;(3) that its apportioning of responsibility discriminates against the Respondents and is misconceived and (4) that they have been selected as "soft targets".

[27] There is good authority for defending disqualification proceedings on the basis of discrimination against directors. The court was referred to the case of **Official**

Receiver –v-Key – [2009] 1 BCLC 22 by Mr Dunlop BL with the support of Dr McGleenan QC and Mr Ringland BL on behalf of all the Respondents.

[28] That case, heard by His Honour Judge Mithani, involved a company in which there had been only two directors. The company had traded for only 15 months before going into liquidation. Disqualification proceedings were issued against only one of the two directors. The allegations upon which the proceedings were founded were that the company operated a policy of discrimination against two particular creditors namely by way of Crown retention (failing to make PAYE and NIC payments) and failing to pay a debt of £21,000 to a supplier. It was contended that notwithstanding the issue of discrimination against the director, the allegations, which were denied, did not in any event constitute unfitness.

[29] The Respondent in defending the proceedings, argued that the other director was at least equally blameworthy and that the same allegations could also have been made against him. He contended that he was unfairly singled out for unfitness proceedings by the Official Receiver and that he was legitimately entitled to feel aggrieved by that action. His Honour Judge Mithani in dismissing the Official Receiver's application, stated at paragraphs [69-71]:-

> "[69] **In Re Dawson print Group Ltd [1987] BCLC at 604** Hoffman J considered, in the context of an application made to disqualify a director under the discretionary power to disqualify contained in the previous legislation on the subject, s300 of the Companies Act 1985, that, to use his words-
>
> > "the Official receiver tries to deal with each case on its merits. Nevertheless, looking at it from the point of view of the director on the receiving end of such an application, I think that justice requires that he should have some grounds for feeling that he has not simply been picked on."
>
> [70] Of course, the provisions of s 6 are vastly different from those of s300. For a start, under s 6 there is a duty to disqualify a

> defendant is his conduct is found to be unfit. The court does not have a discretion. Under s300, the court had a discretion to disqualify and could always refuse to exercise its discretion where the circumstances justified its taking that course of action.
>
> [71] It follows, therefore, that ordinarily the decision to leave out from proceedings a director whose conduct is at least as culpable as one against whom proceedings are taken will be of little consequence to the value judgment that the court needs to make about the fitness or otherwise of the director against whom proceedings have been taken. However, I see no reason why in an appropriate case- and this is such a case-the court should not take into account the deliberate exclusion from proceedings of a director against whom there is at least an equally compelling case in coming to its value judgment about the defendants' fitness to be involved in the management of the company. In the present case , the Official Receiver has chosen to bring proceedings against one director only in circumstances where:(a) there was clear evidence available to him that the conduct of the other director was at least as-if not more-blameworthy; (b) the evidence against the defendant was based almost entirely on information provided to the Official Receiver by the other director, which the Official Receiver accepted at face value and took few steps to investigate independently; and (c) the basis upon which the Official Receiver sought to apportion the responsibility between the two directors in the allegations made by him was misconceived.
>
> I consider that, in the circumstances, the court should be careful before concluding that the director against whom proceedings have been taken was unfit. If the possibility of the conduct of the other director being unfit never entered into the claimant's mind or if having considered it, he nevertheless thought that there was no evidence to justify a finding of unfitness against them, the court should carefully consider whether the claimant could properly have taken the view that the conduct of the director against whom proceedings were taken was unfit. In the present case, the basis upon and the circumstances in which the Official Receiver decided to proceed against the defendant would leave the defendant legitimately aggrieved that he was being unfairly singled out for action by the Official Receiver. He is entitled to invite the court, in the circumstances, to consider whether the Official Receiver could properly have formed the view that he was unfit when he had formed the opposite view with regard to the other creditor. In the present case, it is difficult to see how he formed that view."

[30] I therefore consider that the Respondents' defence of the disqualification proceedings on the basis of unfair discrimination is a legitimate one and their

application for discovery and the documents sought essentially flow from that defence. I am satisfied that the Respondents' application for discovery has been made appropriately and that the documentation sought is relevant to their defence of the disqualification proceedings. I will now turn to the specific documents sought by the Respondents on foot of their applications. At the hearing, much of the argument was focussed on the contentious issue of the Administrator's report which the Applicant contends is protected by legal privilege. The Applicant had disclosed the report but in redacted form. The remaining documents sought were the subject of shorter and more general submissions.

(i) THE ADMINISTRATOR'S REPORT (THE "D" REPORT)

[31] Article 10 (4) of the Company Directors Disqualification (Northern Ireland) Order 2002 states:-

> "(4) If it appears to the office-holder responsible under this Article, that is to say —
>
> (a) in the case of a company which is being wound up by the High Court, the official receiver,
>
> (b) in the case of a company which is being wound up otherwise, the liquidator,
>
> (c) in the case of a company which is in administration, the administrator, or
>
> (d) in the case of a company of which there is an administrative receiver, that receiver,
>
> that the conditions mentioned in Article 9(1) are satisfied as respects a person who is or has been a director of that company, the office-holder shall forthwith report the matter to the Department."

[32] The Administrator Mr Boyd filed a report with the Applicant in discharge of his Article 10 obligations. Mr Boyd is a Licensed Insolvency Practitioner. The

Applicant in resisting the Respondents' application for discovery contends that the report, known as the "D" report, is not relevant and is subject to legal privilege. It is on the latter basis that the Applicant is resistant to its disclosure. Ms McGrady, Departmental solicitor, in her affidavit in reply to the discovery application, stated at paragraph 7:-

> "In this Report, Mr Boyd expressed his opinion that it appeared to him that the Respondents' conduct as directors made them unfit to be concerned in the management of a company. This is merely his opinion. The Department launched a separate investigation into the conduct of the directors of the company and made a decision to bring these proceedings. Ultimately, the question of unfit conduct and the making of disqualification orders is a matter for the Court. I therefore do not believe that the Administrator's Report is relevant to the issues in dispute in these proceedings."

[33] In my view, Ms McGrady's reference to the Administrator's report as a mere "opinion" understates its significance. The "D" report requires the office-holder of a company, in this case the Administrator, to:-

> "list those matters which, in your opinion, make the Director/Shadow Director unfit to be concerned in the management of a company."

The office-holder is then asked to provide details of the unfit conduct and more importantly, to state the "Nature of Supporting Evidence". Therefore, it is not merely a report expressing an opinion. It is a statutory report furnished to the Applicant expressing an informed professional opinion supported by evidence. Therefore, it seems to me that the "D report" is itself an evidential document whether the Applicant relies on it or not.

[34] In arguing that the "D" report was protected by legal privilege Mr Humphries argued that there are two types of legal privilege. The first is legal professional privilege and the second is litigation privilege. He referred the court to the case of

Three Rivers District Council and others (Respondents) –v- Governor and Company of the Bank of England (Appellants) [2004] UKHL 48. At paragraph 65 Lord Carswell stated:-

> "The present appeal concerns documents in the control of the Bank, in circumstances to which I shall refer in more detail, and raises fundamental questions concerning the nature and ambit of legal professional privilege. That privilege is commonly classified in modern usage under the two sub-headings of legal advice privilege and litigation privilege (terminology which appears to owe its origin to the submission of counsel in Re Highgrade Traders Ltd [1984] BCLC 151, adopted by Oliver LJ at page 161h). The former covers communications passing between lawyer and client for the purpose of seeking and furnishing legal advice, whether or not in the context of litigation. The latter, which is available when legal proceedings are in existence or contemplated, embraces a wider class of communication, such as those passing between the legal adviser and potential witnesses."

Lord Rodger of Earlsferry states at paragraph 51:-

> "It is common ground between the parties that legal advice privilege has to be distinguished from litigation privilege. As Lord Edmund-Davies noted in **Waugh v British Railways Board [1980] AC 521, 541-542**, in the past the need to make that distinction was sometimes overlooked:-
>
> It is for the party refusing disclosure to establish his right to refuse. It may well be that in some cases where that right has in the past been upheld the courts have failed to keep clear the distinction between (a) communications between client and legal adviser, and (b) communications between the client and third parties, made (as the Law Reform Committee put it) 'for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice upon pending or contemplated litigation.
>
> 52. Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner."

[35] Mr Humphries' argument for the Applicant's right to refuse disclosure of the Administrator's report on the grounds of legal privilege was essentially three-fold;

(a) Litigation is contemplated by the Applicant when it commences its investigations.

(b) The "D" report would contain evidence given by other officers of the company.

(c) None of the Respondents has challenged the legal and professional privilege principle.

[36] I consider none of these arguments to be persuasive. Firstly, the Applicant's refusal to provide discovery on the basis of legal privilege arose prior to the Respondents' applications for discovery. Therefore the applications are themselves a challenge to the legal privilege principle. Secondly, Mr Dunlop on behalf of all the Respondents argued that in any case whether the legal privilege sought is in relation to legal advice privilege or litigation privilege; it is still confined to the lawyer and client relationship. In other words, it cannot extend to the Administrator's report.

[37] In my opinion, the "D" report is a reporting requirement imposed on the Administrator by statute. He furnishes the report to the Applicant in discharge of that statutory reporting obligation. That is its dominant purpose. The evidence it contains is evidence obtained by him as office-holder of the company. I cannot accept that it is furnished by the Administrator to the Applicant in contemplation of litigation by the Applicant. Furthermore, until the Report is furnished *to* the Applicant, I do not see how litigation can be contemplated *by* the Applicant. In any case Ms McGrady's own averment at paragraph 7 of her affidavit suggests that the disqualification proceedings in this case were as a result of the Applicant's own "separate investigations" not the Administrator's report. This is somewhat perplexing given that both the Applicant

Department and the Administrator appear to have expressed an opinion that disqualification proceedings against the Respondents were appropriate. This would suggest either that there was some issue with the "D" report with which the Applicant did not agree and/or that the act of launching a separate investigation into the conduct of the directors is itself proof that the "D" report cannot be argued to have been obtained in contemplation of litigation.

[38] Therefore, it seems to me that the actual purpose of the Applicant's investigations is to gather evidence to enable a decision to be made as to (a) whether a director's conduct makes him unfit to be concerned in the management of a company and (b) whether it is expedient in the public interest to seek a disqualification order against him. I do not see how litigation can be contemplated by the Applicant until after its investigations are complete and there is sufficient evidence of unfitness.

[39] Taking all matters into account, I cannot find that the "D report" is subject to legal privilege. The Applicant produced no authority other than the **Three Rivers Case**, to justify its non-disclosure of the report. I accept that the **Three Rivers Case** is the leading authority on the issue of legal privilege. However, I consider that when applied to the facts of this case it does not support the Applicant's argument in relation to the Administrator's report. The Respondents however, produced authority that "D" reports were not protected by legal privilege in the case of **Re Barings plc [1998] Ch 356, [1998] 1BCLC 16** referred to at **para [110] Mithani Directors' Disqualification** which states:

> "There is no doubt but that orders for disclosure may be made against the Secretary of State and the Official Receiver. Such orders

> can apparently extend to "D" reports submitted to the Secretary of State by office-holders in accordance with CDDA 1986, s 7(3). It was held in **Secretary of State for Trade and Industry –v- Houston (No 2)**….and **Secretary of State for Trade and Industry –v- Sananes**…that such reports attracted legal professional privilege. However, in **Re Barings plc**, Scott V-C refused to follow these decisions and decided that "D" reports could not be withheld from disclosure on the ground of legal professional privilege. Even so, disclosure will not be ordered as a matter of course."

(Emphasis added)

While I am satisfied that the report is relevant and discoverable in unredacted form, nevertheless it is to be treated as confidential and its contents are not to be disclosed by or to any party other than those to the proceedings and their professional legal advisors.

(ii). **ALL DOCUMENTS RELATING TO THE DECISION THAT IT WAS NOT IN THE PUBLIC INTEREST TO INITIATE PROCEEDINGS AGAINST THE REMAINING DIRECTORS.**

[40] The Applicant also objected to this class of document on the basis of legal privilege. There was however, no authority to support this objection. In my view it is not sufficient merely to assert legal privilege without much more in order to refuse disclosure. The court must be satisfied that the documents involved genuinely attract legal privilege. It is difficult to see how this can be when the issue at hand is the Applicant's own decision not to initiate proceedings against the remaining 15 directors. Having not been satisfied therefore that these documents attract legal privilege, I consider that they are relevant to the issue of unfair discrimination and necessary for the Respondents' defence of the proceedings and therefore the disposal of the action.

(iii). **ALL DOCUMENTS PASSING BETWEEN THE APPLICANT AND THE ADMINISTRATOR.**

[41] Again the Applicant objects to the production of these documents on the basis of legal privilege. Other than asserting by way of Counsel's submissions that these documents were obtained in contemplation of litigation, there was no persuasive evidence to support that assertion. In any case, it seems to me that the above documents are in any event covered by the provisions of Article 10 (5) which states:-

> "(5) The Department or the official receiver may require the liquidator, administrator or administrative receiver of a company, or the former liquidator, administrator or administrative receiver of a company—
>
> (a) to furnish the Department or, as the case may be, the official receiver with such information with respect to any person's conduct as a director of the company, and
>
> (b) to produce and permit inspection of such books, papers and other records relevant to that person's conduct as such a director,
>
> as the Department or the official receiver may reasonably require for the purpose of determining whether to exercise, or of exercising, any function under this Article".

Therefore the documents sought are documents furnished by the Administrator to the Applicant in discharge of a statutory duty to do so. Such documents are "for the purpose of determining whether to exercise, or of exercising, any function under this Article." In my view such documents are furnished by and to the Applicant for the purpose of gathering evidence of unfitness. The documentation could be relevant to any or all of the allegations made by the Respondents in their defence, including the issue of public interest. In any case I consider it likely that such documents could include correspondence consequent upon or with reference to the "D report" and the information therein. In the circumstances I find that these documents are relevant, discoverable and necessary for the proper disposal of the action.

(iv). **ALL DOCUMENTS, NOTES AND RECORDS RELATING TO CORRESPONDENCE BETWEEN THE DIRECTORS DISQUALIFICATION UNIT AND DETI REGARDING THE ISSUE OF PUBLIC INTEREST.**

[42] These documents relate to the Respondents' legitimate defence of unfair discrimination. There is no evidence that they are protected by legal privilege. It is merely asserted that they do. I consider that they are relevant and necessary for the Respondents' defence of the action.

(v). **ALL DOCUMENTS, NOTES AND RECORDS RELATING TO CORRESPONDENCE TO THE DEPARTMENT FROM ANY ELECTED REPRESENTATIVE MAKING COMMENT ON THE PRESBYTERIAN MUTUAL SOCIETY LTD**

[43] The Applicant opposes this class of documents on the basis that it is a "fishing expedition". However, one of the specific allegations made by the Respondents is that of conflict of interest. It is contended by the Respondents that the Applicant Department moving the disqualification proceedings is also responsible for regulating the Society. It is submitted that in the House of Commons Treasury Committee Report on the failure of the Presbyterian Mutual, the Applicant was the subject of criticism. The Applicant does not appear to deny the conflict of interest issue or that it was the subject of criticism. I do not consider these documents to be part of a "fishing expedition" In my view the issue of conflict of interest is an serious one which the Respondents are entitled to argue. Furthermore, I consider it likely that this class of document may include correspondence from elected representatives on behalf of constituents who are creditors, and may touch on the issue of accountability. I

therefore consider that these documents are discoverable and necessary for the proper defence of the proceedings.

(vi). **FILES PREPARED BY THE SIXTH RESPONDENT FOR THE LOANS COMMITTEE.**

[44] It is not denied by the Applicant that these documents are discoverable. However, it has been stated on oath that they are not in the custody, possession or control of the Applicant but rather in the custody, possession or control of the Administrator. I accept that averment. It is therefore appropriate to request this discovery from the Administrator including an application to the court if necessary.

(vii). **DOCUMENTS PERTAINING TO ENQUIRIES MADE BY PERSONS INTERESTED IN REGISTERING BODIES SIMILAR TO THE PRESBYTERIAN MUTUAL SOCIETY LIMITED.**

[45] The Applicant has stated on oath that no such documents exist and I accept that averment.

(viii). **DOCUMENTS RELATING TO THE OVERSIGHT OF MUTUAL SOCIETIES BY THE APPLICANT.**

[46] It is not denied by the Applicant that this class of document is discoverable. Or even that it amounts to a "fishing expedition". The Applicant's response is merely to direct the Respondents to the Registrar of Industrial and Provident Societies where they can obtain it for themselves. This class of documents is clearly relevant to the Respondents' defence and is discoverable.

CONCLUSION

[47] On the grounds and for the reasons above, I conclude that the Applicant has failed to satisfy the court that the Respondents' applications for discovery should be refused. I therefore direct that within 28 days from the date hereof, the Applicant shall provide to the first to the fifth Respondent inclusive discovery of the documents listed in the schedule to their respective applications. In the case of the sixth Respondent the Applicant shall on the same basis provide discovery of the documents listed in the schedule to his application with the exception of those numbered 3 and 4. I direct that the Applicant pay the Respondents' costs of these applications such costs to be taxed in default of agreement. I further hereby certify for Counsel and in the case of the first and second Respondent, Senior Counsel.