THE HIGH COURT

[2023] IEHC 392

[2022 167 COS]

IN THE MATTER OF IRISH GOLD AND SILVER BULLION LIMITED

AND

IN THE MATTER OF SECTIONS 608, 610 AND 842 OF THE COMPANIES ACT 2014

BETWEEN

MILES KIRBY

APPLICANT

AND

NICHOLAS WICKHAM

AND

HAMDEN DEVELOPMENT HOMES UK LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 10th day of July 2023

1. This is my decision on an application brought by Miles Kirby, the liquidator of Irish Gold and Silver Bullion Limited ("the company"). A number of reliefs were sought in the originating notice of motion. However, the only matter for the court now to determine is the period (if any) for which disqualification orders (within the meaning of section 838 of the Companies Act 2014) are to be made against the first respondent, Mr. Wickham.

2. The judgment will be arranged under the following headings: -

(1) A brief history of these proceedings;

(2) The operation of the company;

(3) Submissions ;

(4) Decision.

A brief history of these proceedings

3. On the 14th of June 2021, the company was wound up by order of O'Regan J. Mr. Kirby was appointed as liquidator of the company. The petition to wind up the company was brought by a creditor of the company, Mr. Vincent McGowne. I will return to Mr. McGowne's experience when I describe the operation of the company.

4. On the 25th of July 2022, the originating notice of motion against Mr. Wickham and a company with whom he was associated, Hamden Development Homes UK Limited ("Hamden") was prepared on the instructions of the liquidator. In that originating notice of motion, the liquidator sought the following reliefs: -

"(1) An order pursuant to s. 610 (2) of the Companies Act 2014 declaring that the first named respondent be personally responsible, without any limitation of liability, for the debts of the company, or for such portion thereafter the court may direct.

(2) An order granting judgment in favour of the company as against the first named respondent in the sum of €1,038,892.27, plus which other sums as shall appear just.

(3) In the alternative, an order pursuant to s. 612 (2) of the Companies Act 2014 compelling the first named respondent to contribute the sum of €1,038,892.27 to the assets of the company, such other sum as shall appear just to the court, by way of compensation in respect of the misapplication, retainer, misfeasance, breach of duty and/or breach of trust by the first named respondent.

(4) An order pursuant to s. 608 of the Companies Act 2014 directing the second named respondent to pay the sums of (a) €164,674.62 and STG£88,756.34 to the applicant, or such other sums as shall appear just.

(5) A disqualification order as against the first named respondent….".

5. Other reliefs, which are not relevant to the current application, were also claimed.

6. While the originating notice of motion was dated the 25th of July 2022, it was issued through the Central Office the following day. Also, on the 26th of July 2022 an ex parte application was made on behalf of the liquidator seeking interim relief of a Mareva type against Mr. Wickham. On that day, I made an order pursuant to s. 798 of the Companies Act 2014 restraining Mr. Wickham until after the 5th of September 2022 from reducing the value of his assets within or outside the State below the sum of €1,038,892.27.

7. On the return date for the interlocutory motion, 25th of September 2022, Quinn J. granted leave to Mr. Wickham to bring an application to vary the interim order, which the

judge also continued. As it happens, the original order was continued until the interlocutory injunction motion was heard on the 26th of January 2023. An interlocutory was then made, in terms to which I will return.

8. Significantly, there was a great deal of activity between the hearing before Quinn J. on the 5th of September 2022 and the hearing of the interlocutory motion on the 26th of January 2023. This mainly concerned the application to vary the terms of the interim order, which was initiated by a motion issued on behalf of Mr. Wickham on the 26th of September 2022. It should be noted that the variation to the interim order, as sought by Mr. Wickham, was a mundane one seeking the payment out of monies for living and legal expenses from the funds frozen by the Mareva type order granted in favour of Mr. Kirby.

9. Mr. Kirby's affidavit in reply to the application to vary was sworn on the 3rd of October 2022. On the 5th of October 2022, Mr. Wickham was given time to file further affidavits in respect of the motion to vary, and that motion was listed for hearing on the 11th of November 2022. Subsequent to the hearing on the 5th of October 2022, Mr. Kirby caused a motion to be issued seeking to cross – examine Mr. Wickham on his affidavit sworn in support of the motion to vary. Further affidavits on behalf of Mr. Wickham in respect of the motion to vary were served 13 days late, and Mr. Wickham's legal submissions were also delivered late. As a result, the motion to vary was adjourned to list fixed dates on the 25th of November 2022. On that day, the solicitors acting for Mr. Wickham (Daly Khurshid) indicated that they could no longer act as they were not in funds to deal with the application to cross – examine Mr. Wickham. That firm was therefore given liberty to bring a motion to come off record, returnable to the 7th of December 2022 and (on that date) Daly Khurshid

were permitted to cease to act for Mr. Wickham. They did so in the context of a letter from Mr. Wickham consenting to that application.

10. Ultimately, the application to vary the interim order was never moved. The application for injunctive relief on the part of Mr. Kirby was successful. An interlocutory order was granted to the liquidator broadly mirroring the terms of the original interim order. Analogous orders were made against Hamden. These orders, which were unopposed, were made by me as I was satisfied that it was appropriate to do so in light of the criteria set down by Gilligan J in Kirby v Dowling [2016] IEHC 801. Given the evidence before me about the way the company had been run, it was clear that there was a real risk that Mr. Wickham's unsavory approach towards the stewardship of other people's money would extend to the dissipation and concealment of assets in order to defeat Mr. Kirby's claim.

11. After the interlocutory order was made, the claim advanced by Mr. Kirby against both Mr. Wickham and Hamden was compromised. The settlement left one matter to be decided by the court. As noted earlier in this judgment, the issue to be decided is the length of any disqualification order to be imposed upon Mr. Wickham.

The operation of the company

12. The only evidence before me as to the operation of the company is the grounding affidavit of Mr. Kirby, which supported both the application for ex parte relief and the original originating notice of motion in July of 2022. While Mr. Wickham did give evidence through affidavit in support of his application to vary the original Mareva type order, the most that was said on the merits (in his two affidavits) was that Mr. Wickham and Hamden had "a full defence to the [liquidator's"] claim". Nothing further is said by Mr. Wickham

about the nature of his defence or, indeed about the account of the operation of the company given by Mr. Kirby in his earlier affidavit. Accordingly, the only meaningful evidence available to the court on the liquidator's motion is to be found in Mr. Kirby's grounding affidavit. In settling these proceedings, Mr Wickham agreed that no further evidence would be put before the court at the disqualification hearing.

13. Describing the way in which the company operated, it is helpful to start with the experience of Mr. McGowne. As I have noted earlier, Mr. McGowne was ultimately the petitioner who success sought that the company be placed in liquidation. In his verifying affidavit supporting that petition, Mr. McGowne stated that in June 2019 and July 2019 he purchased a total of three 1-kilogram bars of gold through the company. As the name of the company indicates, its business (ostensibly at least) was the purchasing of gold or silver by the company on behalf of individual investors. Mr. McGowne was one such investor.

14. Mr. McGowne paid a total of €121,276 for the three gold bars which he bought in June and July of 2019. He also agreed that the company would store the gold bars at the company's vault at Harrods, the well known department store in London.

15. Following the purchase of the gold bars, Mr. McGowne was issued with a certificate by the company stating that it was holding bars on Mr. McGowne's behalf, in a Harrods safety deposit vault. The certificate bore Mr. Wickham's electronic signature, and certified Mr. McGowne's ownership of the gold bars.

16. In November 2020, Mr. McGowne asked the company for a price at which the gold bars could be sold. The following month, Mr. McGowne advised the company that he wished to sell the gold bars for a total amount of €142,617.

17. On the 3rd of December 2020, the company confirmed to Mr. McGowne that it had repurchased the gold bars at that agreed price. The company never paid the money it owed to Mr. McGowne.

18. Understandably, Mr. McGowne pursued the company for the payment of the monies owed to him. By email dated the 15th of December 2020, Mr. McGowne was told that the payment would be made to him "in day or two" (sic). As the money was not paid, Mr. McGowne again sought payment and was told in an email of the 17th of December 2020 (and sent by Mr. Wickham) that: -

> "We are just organising the cash for you. I normally don't have 150K spare in the account, so I have to wait for the funds to come in from the refinery. I will updated you later today".

19. Inexorably, matters moved on towards the delivery by Mr. McGowne's solicitors of a 21 day demand for payment on the 22nd of April 2021. The petition then followed, and it was presented on the 25th of May 2021. On the 10th of June 2021, the week before Mr. Kirby was appointed liquidator by O'Regan J., Mr. Wickham emailed Mr. McGowne stating: -

> "I will not be unable (sic) to attend the petition hearing due to credible death threats against myself and family . . .. I respectively request a halt to proceedings to be held on 14th June…."

20. While Mr. McGowne did attempt to act on foot of this communication and to resolve matters between the company and himself, this proved fruitless. The winding up order was made by this Court as previously noted in this judgment.

21. After Mr. Kirby's appointment as liquidator, he wrote to Harrods to inquire as to whether the company still had "any bullion or precious metals" stored in the Harrods safe as of the 16th of June 2021. Ultimately, Harrods respondent by email which included: -

> "We don't have any correspondence as such between us and Nick Wickham / Irish Gold and Silver Bullion Ltd., except a letter for the renewal of the box and a reminder letter when payment was overdue, both sent from Harrods safe deposit. We have had no dealings with Nick Wickham / Irish Gold and Silver Bullion Ltd. since 17th of October 2016, when the account was closed. We don't hold records of the contents of individual safe deposit boxes and therefore would be unable to verify its contents at any point in time".

22. This communication from Harrods is clearly at odds (to put it mildly) with the assurances given to Mr. McGowne by Mr. Wickham, and the certificate provided to that investor by the company. The conclusion which Mr. Kirby reaches about this episode is set out at para. 78 of his grounding affidavit, in these terms: -

> "Therefore, the certificate that was provided by the company to Mr. McGowne stating that his purchased gold is being held in a security box in Harrods was a fabrication".

23. It is impossible for the court to disagree with this conclusion, and this evidence of the liquidator is not rebutted anywhere by Mr. Wickham either in affidavit or submissions.

24. Mr. McGowne's experience with the company and Mr. Wickham in itself suggests that the company was run by Mr. Wickham in a dishonest way. However, it is not the only evidence provided by Mr. Kirby. In assessing this evidence, it is important to keep in mind that Mr. Wickham seems to have been the driving force in the operation of the company. The company was incorporated in Ireland on the 27th of July 2011, with a registered office at 24, the Crescent, Monkstown, Co. Dublin. The original directors of the company were Mr. Wickham and his father. Mr. Wickham senior is now deceased. The company secretary was a Mr. Richard Collins, who Mr. Kirby describes as the brother-in-law of Mr. Wickham. The sole shareholder of the company, according to the most recent annual return prior to the liquidation, is Mr. Wickham.

25. The business of the company is described by Mr. Kirby (at para. 9 of his affidavit) as follows: -

> "The company's customers transferred money to the company to purchase gold and silver on their behalf. The company intended to purchase the gold and silver at a lower price thereby generating a profit on the transactions. The company also purchased gold and silver from customers and then (at least in theory) sold that gold and silver at a higher price, thereby generating a profit. The company also offered store purchase gold and silver including storage facilities at Harrods, Ellerton Knight and Sentinel vaults".

26. It is now clear that the storage facilities offered by the company in respect of Harrods were illusory (at least from 2016 onwards).

27. As Mr. Kirby observes, the business model which he describes should never have led to the customer suffering a financial shortfall. When a customer paid monies into the company, there should either have been stock of precious metal on hand for delivery to the customer, or alternatively these monies should have been more than enough to acquire such precious metal. The company's operation should have been funded from the profit generated on these transactions. Monies provided by clients should have been treated as client funds, but no segregated client account was maintained by the company. Mr. Kirby is of the view that this should have been the case.

28. Instead of segregating client funds, Mr. Wickham pooled customer funds with company monies. This pooling enabled Mr. Wickham to operate what Mr. Kirby describes as a Ponzi scheme over several years. This allowed the company to pay out returns to customers if they were fortunate enough to look for their money at the right time. However, in doing so, the company was using monies paid in by less fortunate customers who were either not lucky enough or not demanding enough to ensure that they were paid what the company told them their investments in bullion were worth. Consequently, for a company that should never have left its customers short, the situation at the time Mr. Kirby was appointed was a bleak one. At the date of his appointment "there was no stock of metal". There were funds totalling €3,903.41 in the company bank account. The company's deficit on the same day was €1,038,892.27. As Mr. Kirby puts it pithily (at para. 10 of his grounding affidavit): -

> "The extent of the deficit crystallised when Mr. Wickham was unable to raise new funds to repay older customers".

29. This is an overall view of the operation of the company. There are other individual examples given by Mr. Kirby and, again not denied by Mr. Wickham other than in the very general terms I set out earlier in this judgment.

30. The first example is, once again, Mr. McGowne. The sums paid in by Mr. McGowne to acquire the gold bars he was told were being stored at Harrods was in fact used to repay funds to two other (named) investors. No form of precious metal, let alone three gold bars, were purchased using Mr. McGowne's money.

31. Another investor paid €30,709 to the company on the 30th of July 2020. At that time, the bank account of the company was overdrawn by €15,970.66. Mr. Wickham used this investor's money to make payment to two other (named) investors.

32. A third customer invested "what she described as her life savings" of €26,700 with the company on the 21st of October 2020. This investor's money was used to make payments to a different (named) investor and to fund repayment to Veale Wosbrough Vizzards LLP (VWV), a firm of solicitors who appear to have provided legal services to the company. However, by their own account, VWV solicitors acted not just for the company but also Mr. Wickham personally in relation to a civil claim and criminal proceedings. Mr. Kirby concludes that the criminal proceedings affected Mr. Wickham solely, and not the company. In addition, VWV were instructed by an email from Mr. Wickham on the 27th of May 2020 to apply a payment of approximately STG£15,000 to pay VWV's invoices in relation to "Hamden Properties". Hamden was a property investment company owned and controlled by Mr. Wickham. It is unnecessary to go further into the use to which this sum of €26,700 was put. It is, in my view, sufficient to say that the customer who invested her life savings with

the company (believing that this money was being used to buy gold or silver bullion) can hardly have imagined that any of it would be applied to the payment of the fees of an English firm of solicitors.

33. Leaving aside the individual examples of the misleading of customers, Mr. Kirby gives evidence of misappropriation of company funds by Mr. Wickham. At para. 47 of his affidavit, the liquidator states that Mr. Wickham has used customer funds "for improper purposes". While he exhibits a breakdown of these payments, it is worth noting that the payments include: -

> "(i) Payments totalling €4,415.04 and STG£7,574.49 paid directly to Hamden in April and May 2020.
>
> (ii) The payment of STG£14,508.85 made from the company's GBP account to Iceni Projects with reference "Hamden Developments" on 27th of April 2020. I believe this to be a payment to planning/building consultants for the benefit of Hamden UK.
>
> (iii) Payments totalling €76,009.32 made to "MT Finance Limited" between June 2019 and October 2020. As set out below, MT Finance Limited was the holder of a charge registered against properties belonging to Mr. Wickham and Hamden Finance.
>
> (iv) Payments totalling €84,250.27 and STG£66,673 paid to VWV between June 2019 and September 2020 which I believe were paid for the benefit of Mr. Wickham and/or Hamden UK for the reasons stated below".

34. Obviously, the most forceful evidence by Mr. Kirby against Mr. Wickham relates to these improper payments, and the earlier examples of what the liquidator describes as "investment fraud". In addition, however, the liquidator identifies the following further serious failings on the part of Mr. Wickham: -

(a) Mr. Wickham did not comply with the Order that he prepare and file a statement of affairs.

(b) Mr. Wickham did not cooperate with the liquidator by completing a questionnaire sent to him and relating to "the company and its affairs". The reason he refused to do so was because of "security reasons" and a claim that "there were credible threats to my life and my family" and "all documents of the company were at a secure location in Ireland". Of course, these explanations, if one can describe them as such, are reminiscent of the reasons given by Mr. Wickham to Mr. McGowne as to why the money due to Mr. McGowne was not being paid. Mr. Wickham then went on to tell the liquidator, in subsequent communication on the 24th of August 2021, that "he has instructed a legal representative in Dublin would forward details shortly". This never happened.

(c) At the time of Mr. Kirby's grounding affidavit (July 2022) Mr. Wickham had not cooperated in any way with the liquidator in respect of the liquidation, and he failed to supply Mr. Kirby with company documents which Mr. Wickham accepted was in his possession.

(d) The company did not maintain adequate books and records. Certain of these records were misleading. At para. 38 of his affidavit, Mr. Kirby swears: -

> "From my review of the most recent accounts filed in the CRO, I say and believe that the financial statement does not reflect the actual financial position of the company at that time. I believe Mr. Wickham understated the number and amount of creditors that existed at that date".

(e) Separately, at para. 42 of his affidavit, Mr. Kirby avers: -

> "…there was a complete failure on the part of Mr. Wickham to maintain adequate books and records. Any records that are available have only become

available through third parties. Clearly there was a total derogation of duty on the part of the director to maintain books and records recording the transactions of the company or to enable the financial position of the company to be determined".

35. Unsurprisingly, Mr. Kirby concludes that his ability to conduct the wind up in an orderly fashion, and his capacity to recover assets for the benefit of any creditors (should such assets exist) have been seriously compromised by the failure on the part of Mr. Wickham to maintain any proper accounting system or company records.

36. Mr. Kirby does record that sums were apparently paid back into the company by Mr. Wickham. In this regard, at para. 18 of his affidavit, Mr. Kirby states that €116,470.89 appears to have been lodged into bank accounts maintained by the company, and this lodgement was "attributed to Mr. Wickham". Mr. Kirby states that he cannot be sure whether or not these are "genuine lodgements by Mr. Wickham or whether he is taking credit for funds lodged from other sources such as company customers". Even if these are lodgements made by Mr. Wickham in order to offset the losses which he inflicted on the company, Mr. Kirby notes accurately that the sum is "very modest in the context of the total deficit incurred under Mr. Wickham's stewardship".

Submissions

37. The liquidator's written submissions address the disqualification period primarily by reference to the judgment of Finlay Geoghegan in DCE v Bailey [2013] IEHC 561, my judgment in Kirby v Rabbitte [2020] IEHC 703 and the judgment of Sanfey J in Kirby v Conlon [2021] IEHC 475. The touchstone remains the principles set out by Finlay Geoghegan J in Bailey, where she held;

"i. A primary but not the only purpose of an order of disqualification is to protect the public against future conduct of companies by persons whose past record has shown them to be a danger to creditors and others.

ii. It is also a purpose of an order of disqualification to improve corporate governance.

iii. A further purpose of an order of disqualification is that it act as a deterrent, both in respect of the respondent director and other directors of companies. Hence, the period of disqualification should contain deterrent element.

iv. The period of disqualification should reflect the gravity of the conduct or wrongdoing as found by the court in relation to the relevant sub-paragraphs of [s.842] in respect of which the order of disqualification is being made.

v. A period of disqualification in excess of ten years should be reserved for particularly serious cases.

vi. The court should firstly assess the correct period in accordance with the foregoing and then take into account mitigating factors prior to fixing the actual period of disqualification"

38. Mr. Wickham put forward submissions in mitigation which read;

"1. This case had attracted wide spread media coverage both in written print and Social media with the effect of me be unable to gain employment. It's normal practice of any employer to carry out Google or social media search for a potential employee. I know particle of one employment position which was withdrawn on a Sunday evening when I was due to start on Monday after been asked did I have any connection to

Ireland. These media posts will be available for ever with some factually in correct so disqualify me from any meaningful employment.

2. I will be 61 years old in a few weeks' time. I have a very short working life left do any Disqualification period will have a big impact. My ability to support my Son for his University place in September 2024 will be impacted without Financial support from myself. Due to my age and the media coverage, I don't expect to gain any employment unless I'm free to start a new business myself.

3. I have willingly forwarded all my assets available to the Liquidator in support of the company and I have behaved in a constructive manner with my dealings with the Liquidator and the Courts."

39. Mr. Wickham then concludes by asking that these points be considered, in the context of his request that no disqualification period be imposed on him.

DECISION

40. The very least that anyone dealing with a company is entitled to expect is honesty. Mr. Wickham was not honest with those investing money with the company. His business model involved repeated misrepresentation to the company's customers as to the use to which their funds were being put. In addition to this basic failing on Mr. Wickham's part, the wholly inadequate books and records maintained by the company and made available to the liquidator, the concealing of the extent of the company's deficit , and the diversion of company funds would in themselves establish that a period of disqualification should be imposed on him. The deterrent purpose of section would be set at nought if Mr. Wickham was not disqualified at all.

41. Equally, the disqualification provisions seek to protect members of the public from people whose conduct has shown them to be a danger to creditors. Indeed, Finlay Geoghegan identifies this as a 'primary but not the only purpose' of disqualification. Mr. Wickham's behaviour has made it clear that he presents such a danger to creditors. He states an intention to set up a new business himself. Yet in his submission to the court, Mr. Wickham nowhere expresses regret for his actions, or any resolution to avoid such practices in the future. He nowhere says that he empathizes with those who have lost money as a result of the Ponzi scheme he operated. Instead, the thrust of Mr. Wickham's submission is that he is left in a very difficult position as a result of the discovery of his dishonesty, and that his ability to support his son at college "will be impacted". While I have no evidence about the effect that the loss of their money had on individual investors, it would be unreal to believe that all of them could shrug off their losses without a second thought. The likelihood is that these investors suffered some adverse impact on their lifestyle, whether this was the inability to take a holiday, to change a car or support a relative in third level education. Indeed, it could well be that some investors (such as the individual who lost their life savings) are now subject to real grinding hardship because of the behaviour of Mr. Wickham.

42. In Rabbitte, I emphasised the importance of a failure on the part of the director to say to the court that they had learned from their mistakes. Unless a director persuades the court that they will not repeat the past behaviour that has led to their disqualification, the court is entitled to measure the period on the basis that the impugned activities may well recur. While one might take (from the terms of settlement) the view that Mr. Wickham is now chastened by his experience, it is notable that he has not expressly said this.

43. Without fulminating about the nature of Mr. Wickham's conduct, it can safely be said that his behaviour falls within the class of "particularly serious cases" which warrant consideration of a disqualification period of more than 10 years.

44. Given all the facts set out in the judgment, the headline period of disqualification is 14 years. The mitigating factors are the belated settlement of these proceedings (in February 2023) after a large number of court appearances, the acceptance of a disqualification order, and the payment by Mr. Wickham to the liquidator of a sum of STG 310,000. I also note the fact that Mr. Wickham has reversed his original policy of non cooperation with Mr. Kirby, though this was described by the liquidator's counsel as a work in progress.

45. Of these factors, and those put forward by Mr. Wickham, far and away the most important is the payment of a substantial amount of money into the liquidation. The amount, while significant, is nonetheless inadequate. The deficit in the company is over €1 million. These proceedings have been intense, and will therefore be costly for the liquidator. The payment made by Mr. Wickham on foot of the settlement could well be the best that the liquidator could realistically obtain, but goes nowhere near making good the losses to the company (and its creditors) which have resulted from the way the business was run. It is also slightly arch of Mr. Wickham to claim that he has "willingly" forwarded all his assets to the liquidator. The settlement of this claim occurred after six months of litigation pursued strongly by Mr. Kirby.

46. As I have already observed, one purpose of disqualification is to deter others from behaving badly. As a matter of logic, the period of disqualification should be reduced when

there is a payment by the errant director as this will encourage such payments in future cases. Ultimately, the creditors of a company are likely to be most interested in the extent to which their losses are to be reduced. On the basis of the principles set out in Bailey, a disqualification order can and should be made even if the losses of a company are completely made good by the relevant director. The deterrent purpose would be diluted were a director to be able to behave improperly (or even dishonesty) secure in the knowledge that they would escape disqualification if they simply paid enough to cover the company's loss. However, a real reduction in the headline period should be made where there is a material payment made into the company's coffers by the miscreant director.

47. The submission of Mr. Wickham, and the fact that Mr. Kirby ultimately accepted the settlement sum, suggest that the amount paid was pretty much all that could have been recovered. While this does not take away from the fact that the company remains in serious deficit, the amount paid is a material one.

48. Taking into account all mitigating factors, I will reduce to 7 years the period of disqualification to be imposed on Mr. Wickham.

49. As I understand the settlement, the question of costs is already resolved. I will nonetheless give the parties liberty to apply in the event that there is any outstanding issue to be addressed.