Neutral Citation [2016] IEHC 689

THE HIGH COURT

[2011/219 MCA]

IN THE MATTER OF CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF AN APPLICATION PURSUANT TO REGULATION 166 OF THE EUROPEAN COMMUNITIES (MARKETS IN FINANCIAL INSTRUMENTS) REGULATIONS 2007 ON THE APPLICATION OF THE CENTRAL BANK OF IRELAND

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012 AND THE MATTER OF SECTIONS 150 AND 160(2) OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

KIERAN WALLACE

APPLICANT

and

HARRY CASSIDY, JOHN WHYTE and JOHN MULHOLLAND

RESPONDENTS

JUDGMENT of Mr. Justice David Keane delivered on the 2nd day of December 2016

Introduction

1. This is an application for a disqualification order under s. 160, sub-s. 2 of the Companies Act 1990 ('the 1990 Act') against each of the respondents because of the conduct alleged against each as a director of Custom House Capital Limited ('the company'). In the alternative, the applicant seeks a declaration of restriction against each under s. 150 of the 1990 Act. The company is now in liquidation and the applicant is its official liquidator.

Background

2. The company was incorporated on the 28th July 1997. It commenced trading on the 30th July of that year. Between the 15th January 1998 and the 1st November 2007, it was authorised to conduct business under the Investment Intermediaries Act 1995. From then on, the company was regulated under Regulation 11 of the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. No. 60 of 2007) ('the MiFID Regulations').

3. The company's principal activity was the provision of financial services, including investment fund management, and the setting up and managing of approved retirement funds, pension funds and personal retirement savings accounts. Investment vehicles established and managed by the company for collective investment by clients included exempt unit trusts, qualifying investor funds established under the laws of Ireland and companies (not being subsidiaries of the company) that were established under the laws of various European states, principally Luxembourg and Denmark, for holding property investments. The company provided property asset management services to such companies.

4. On the late evening of the 15th July 2011, on the *ex parte* application of the Central Bank of Ireland ('the Central Bank') under Regulation 166 (2) of the MiFID Regulations, the High Court (Hogan J.) appointed two senior officials of the Central Bank, George Treacy and Noel Thompson, as inspectors on an *ad interim* basis to investigate the affairs of the company. A final order to that effect was made on the 20th July 2011; see *Re Custom House Capital Ltd*. [2011] 3. I.R 323.

5. The inspectors produced their final report ('the report') to the High Court on the 19th October 2011. Two days later, after a full *inter partes* hearing, the Court made an order under Regulation 172 (1) of the MiFID Regulations for the winding up of the company with immediate effect; see *Re Custom House Capital Ltd. (No. 2)* [2011] IEHC 399. The applicant was appointed as official liquidator and, by operation of s. 33A of the Investor Compensation Act 1998, as amended, as administrator of the company.

6. In making that Order, Hogan J. described the inspectors' report as 'comprehensive and most impressive' before summarising the inspectors' findings in the following terms:

> '8. The Inspectors' findings make for grim and disturbing reading. They concluded that in almost every respect there has been systematic abuse of client funds for improper purposes and that this misconduct was pervasive within [the company]. [The company's] core activities related to the purchase of investment properties, principally in countries such as France, Switzerland and Germany. But many of the investors were unaware that their cash funds were being used for this purpose. In other cases, money was taken from accounts where there were positive cash balances in order to meet the redemption call amounts due on other accounts.
>
> 9. In fact, the reports describe a long litany of general misfeasance and wrong-doing, ranging from the systematic, deliberate misuse of funds, gross impropriety, corporate misfeasance and false accounting and trading in a fraudulent manner. Under ordinary circumstances the contents of this report would be regarded as deeply shocking, save that, sadly, our capacity to be shocked by nefarious conduct in the financial world has been diluted by incredible and remarkable events over the last three years both at home and abroad, of which the Madoff scandal is only perhaps the most notorious international example. It was, nevertheless, in its own way telling that Ms. McGrath, counsel for [the company], expressly stated that the company did not dispute the inspectors' findings and conclusions.'

7. Although it is not material to the application under s. 160, sub-s. 2 of the 1990 Act, the uncontroverted evidence before the Court is that each of the respondents was a director of the company at the date of, or within 12 months prior to, the commencement of its winding up; that, as the applicant certified on the 9th April 2014, the company was then, and has remained at all times since then, unable to pay its debts within the meaning of s. 214 of the Companies Act 1963; and that the Director of Corporate Enforcement has not relieved the applicant of the obligation under s. 56 of the Company Law Enforcement Act 2001 to make an application for a declaration of restriction against each of the respondents. Thus, the necessary proofs are in order to require the Court to make a declaration of restriction against each of the respondents under s. 150, sub-s. 1 of the 1990 Act, unless satisfied that one of the grounds of exemption under s. 150, sub-s 2 of that Act is made out.

8. Based on the evidence available to him, the applicant has chosen to seek s. 160 disqualification orders instead. As required by s. 160, sub-s. 7 of the 1990 Act, the applicant wrote to each of the respondents on the 14th October 2013, giving the requisite ten

days' notice of his intention to bring that application. Notice of the present motion issued on the 11th April 2014.

The respondents
9. Each of the respondents was appointed a director of the company on the 5th April 2001.

10. Mr Harry Cassidy was the chief executive officer of the company. He resigned on the 13th July 2011.

11. Mr John Whyte was an executive director variously described as 'investment director' and 'head of private clients.' He continued as a director until the company entered liquidation.

12. Mr John Mulholland was a non-executive director and also continued as a director until the company entered liquidation.

The inspector's report
13. The applicant relies on Regulation 175 of the MiFID Regulations. It provides:

> 'A document purporting to be a copy of a report of an inspector appointed under these Regulations shall be admissible in any civil proceedings as evidence-
>
> (a) of the facts set out in the document without further proof, unless the contrary is shown, and
>
> (b) of the opinion of the inspector in relation to any matter contained in the report.'

14. The inspectors found that there was a practice in the company of effecting transactions on behalf of clients in a way that those clients could not have envisaged and for which they had provided no mandate or authorisation to the company. In many cases those transactions were not only unauthorised but also improper. The inspectors identified improper transfers of client funds to the value of €56.15 million. Separately, the company invested the assets of clients in a so-called bond fund of its own creation, known as the Mezzanine Bond Fund, without proper authority from all of the relevant clients and without properly considering their interests or the suitability of that investment for them, while furnishing misleading information about the bond to both those clients and the Central Bank. Clients who invested in the Mezzanine Bond Fund were owed €10.4 million (exclusive of interest) when the inspectors produced their report. Thus, the potential losses to the pension holders and investors who were clients of the company then stood at €66.55 million.

15. How did this disgraceful situation come about? The concluding section of the inspectors' report explains (at p. 195):

> 'There was a systematic and deliberate misuse of assets and cash belonging directly or indirectly to clients of [the company]. This misuse was deliberately disguised by [the company] through the use of false accounting entries and the issue of false and misleading statements to clients.
>
> The origin and rationale behind the misuse of client funds would appear to be relatively straightforward. [The company] commenced promoting property investment to its clients around 2004. At first successful, [the company] committed to additional and bigger property projects and, in the view of Mr Cassidy, acquired a reputation in Europe as a good partner for such transactions. Mr Cassidy indicated that this was reflected in developers requiring a smaller initial deposit (down from 10% to 5%) from [the company] when setting up property deals.'

16. The company generated significant commissions from the property investments that it made on behalf of its clients. It typically charged a marketing or placement fee of 5% of the value of a property it acquired, an ongoing management fee (typically 5% of gross rental income of that property), and client account fees in due course.

17. The inspectors' report continues (at p. 195):

> 'However, [the company] committed itself to a number of property projects and placed deposits in advance of securing the required equity from prospective investors. When the property crisis emerged in 2007, [the company] found that expected investment from prospective investors was not forthcoming. As the flow of fresh investment into property projects ceased, in fear of loss of the initial deposit and damage to its reputation, [the company] sought to cover the investment shortfalls through the creation of products such as the Mezzanine Bond and eventually through the misuse of client holdings described in this report.'

18. What were the general failings of the board of directors, including the respondents, and of the senior management of the company, including Mr Cassidy and Mr Whyte? The inspectors' report describes them in the following way (at pp. 197-8):

> '[The company] is authorised under Regulation 11 of [the MiFID Regulations]. Responsibility for the proper management and control of a MiFID investment firm, and the integrity of its systems, rests with the board of directors and its senior management. Ethical behaviour and transparency in business dealings are key values expected of the board and senior management of such a firm. An investment firm must ensure that particular attention is continually given to corporate governance, oversight arrangements and its internal controls. On a regular basis, an investment firm should evaluate and monitor the adequacy and effectiveness of its policies and procedures, systems, internal control mechanisms and arrangements in place (ensuring they are kept up to date) and take appropriate measures to address any deficiencies that may arise.
>
> The inspectors are satisfied based on the matters described in this report that [the company's] board of directors and its senior management failed in their duties to clients and allowed the company to operate with inadequate internal controls over a significant period of time. The following significant failures occurred regarding the operation of [the company's] business activities:
>
> (a) Inadequate resources and attention given to compliance matters;
>
> (b) Facilitating a culture of evasion of internal controls and override of such controls;
>
> (c) Inadequate skills, understanding, and challenge at board level regarding the business operations of [the company];
>
> (d) Inadequate control at board level of all business operations of [the company];

(e) Inadequate internal accounting systems and insufficient resources dedicated to maintaining these systems;

(f) A disregard for the interests of clients and the trust placed by clients in [the company];

(g) A disregard for the property rights of clients whose assets [the company] was managing and inadequate controls over the safeguarding of those assets from loss, damage or misappropriation;

(h) A failure to maintain appropriate standards of corporate governance and a failure to address the dominance and significant influence with which the CEO managed the business;

(i) A lack of ethical and responsible decision making;

(j) Provision of false and misleading information to the Central Bank;

(k) Concealment of information from the Central Bank;

(l) Misrepresentation of client holdings on client statements issued.

The inspectors are satisfied that [the company] deliberately adopted and pursued processes, policies, and procedures that facilitated misconduct of the nature and on the scale described in this report taking place.'

The applicant's evidence

19. The applicant avers that he has conducted his own investigation, part of which involved a review of the accounts of 10 sample clients of the companies, and that he has found evidence of large scale and deliberate misuse of client funds and breaches of directors' duties. The applicant presents that evidence under the following heads:

(i) Misrepresentation of client statements;

(ii) Misapplication of client funds;

(iii) Wrongful payments of 'commissions';

(iv) Failure to keep proper books of account;

(v) Non-compliance with MiFID;

(vi) Undisclosed profits earned through director roles;

(vii) Deliberate misleading of clients; and

(viii) Failure to co-operate with the liquidator.

i. misrepresentation of client statements

20. Client monies held in a particular pooled client account were improperly transferred from that account without the relevant clients' consent. The company concealed this by issuing client account statements containing falsified information about client holdings in that account. This deceit was maintained by placing a 'flag' or signal on the record of each such client's account on the client investment database maintained on the company's computer system. This 'flag' required any staff member accessing the database to contact Mr Cassidy or the company's financial controller before issuing a client account statement. When that occurred, the company would remove the improper transactions from the relevant client account, issue the relevant client account statement, and then reinstate the relevant transactions on the relevant client account to reflect the true position for its own records.

21. The applicant established that this had occurred in the case of each of the 10 sample clients whose accounts he reviewed. For instance, the valuation statement issued to one client on the 31st May 2011 showed the client to have funds of €25,002 in the relevant pooled account, whereas the actual value of the funds credited to that client in that account was €2. Similarly, another client's account statement issued to him on the 24th March 2011, showed the client to have funds of €85,929 in that account, whereas the true figure was €59,929.

ii. misapplication of client funds

22. Over a period of years prior to the inspectors' investigation in 2011, monies invested in an identified equity fund, an identified commodity bond and an identified pooled cash account were improperly transferred without the knowledge or authority of the company's clients. Those monies were used for a variety of purposes, including; the payment of unauthorised commissions; the repayment of monies due to other clients from whose accounts unauthorised transfers had previously been made; and the payment of outlay (such as land tax or property acquisition costs) on behalf of various special purpose companies that the company established as vehicles for its continental property projects. Such companies are known in the jargon of the financial services industry as special purpose vehicles or SPVs.

23. For example, on the 4th March 2011, €3,009,454 was withdrawn from a pooled equity account held with a firm of stockbrokers in Dublin. Even though client mandates required those monies to be used solely to invest in equities, the funds withdrawn were used to meet payments on behalf of two of the company's property holding SPVs, Holstein Retail S.A (€1,212,468) and Schleswig Retail S.A. (€1,797, 486). In his evidence to the inspectors on the 25th July 2011, Mr Mulholland acknowledged that, from the last quarter of 2010, client monies were taken from equity funds to cover shortfalls in property transactions.

24. As another example, two of the ten sample clients had funds invested in a particular pooled client savings account, in accordance with the mandate or instructions each had provided. On the 23rd July 2009, €35,000 was transferred out of the account of one of those clients and €70,000 out of the account of the other, although neither had provided any such instruction. This occurred after the financial controller of the company had e-mailed Mr Cassidy on the 21st July 2009, seeking directions about what monies were to be used to make the repayments that had been sought by two other clients of the company from whose accounts funds had already

been improperly transferred. On the 23rd July 2009, the financial controller e-mailed Mr Cassidy again with confirmation that the client funds already described were among the monies that had been used to repay those other clients.

25. A further example concerns 51 of the company's clients who invested a total sum of approximately €5.9 million in certain commodity bonds promoted by the company. In November 2009, those bonds were redeemed, realising proceeds of more than €7.3 million. The clients were not told that this had occurred, nor were they repaid. Thus, they could not, and did not, provide instructions concerning the application of the proceeds. The company used over €1.1 million of that sum to repay monies due to other clients who had not invested in those bonds. A further sum of over €700,000 was transferred to various European property funds. In December 2009, the company loaned €2.5 million of those monies on a very short term (6 day) basis to a property development company operating in Abu Dhabi, which needed to show evidence of its ability to access substantial funds in order to secure a contract there.

26. Ultimately, €5.6 million was placed on deposit with a German private bank as collateral for a new loan to the company of €7 million. The loan proceeds were used for the purpose of the company's property projects. The German bank required the company to furnish a formal resolution of its board, recording the company's decision to open the relevant account and to pledge the funds that were to be placed in it on fixed term deposit as security for the proposed loan. The board of the company duly provided that resolution, signed by Mr Cassidy, Mr Whyte and Mr Mulholland on the 30th November 2009.

iii. wrongful payment of commissions

27. The property development company operating in Abu Dhabi paid a fee of €25,000 for the short term (6 day) loan of €2. 5 million that it received from the company, as described above. Although the loan was made by the company and the monies that the company improperly used for that purpose were client monies, the fee of €25,000 was paid to Mr Cassidy personally. Mr Cassidy acknowledged that he received that payment when interviewed by the inspectors.

28. The inspectors identified a Luxembourg bank account held jointly in the names of Mr Cassidy and Mr Mulholland. Further investigation revealed that at least 12 payments were made from one or more pooled client accounts either directly or indirectly into that joint account. Any such payment that was accompanied by a reference was described as a 'commission.' The applicant has prepared a table summarising 'commissions' totalling €2.317 million, of which €2.292 million was paid from pooled client accounts. The liquidator has tracked an unauthorised transfer of €75,000 on the 23rd December 2009 from one of the ten sample client accounts into the bank account in the joint names of Mr Cassidy and Mr Mulholland, and has established that no commissions were due from the client concerned either to the company or to Mr Cassidy or Mr Mulholland.

29. When interviewed by the inspectors, Mr Cassidy admitted knowledge of those payments but expressed surprise that they came from pooled client accounts, rather than the company's own fees. E-mails have been produced in evidence that show that Mr Cassidy and Mr Whyte were aware of the source, description and destination of at least some of those payments.

iv. failure to keep proper books or records

30. In the course of their investigations, the inspectors became aware of an account referred to within the company as the 'stockbroker capital account.' It is not a bank account but, rather, a suspense account. A suspense account is one for book-keeping purposes, used temporarily to carry receipts and disbursements or discrepancies that have not yet been analysed, explained or properly classified. The company used the 'stockbroker capital account' as a suspense account to facilitate some of the unauthorised and improper transactions already described. On the date that the company entered liquidation, a balance of €48.2 million stood to the credit of the 'stockbroker capital account' in the company's nominal ledger. Due to the volume of transactions recorded in that account, the applicant has been unable to explain what many of them relate to.

31. The 'commissions' paid to Mr Cassidy and Mr Mulholland are not recorded in the company's books and records. In particular, they were not disclosed in the company's audited financial statements for the years ended the 31st March 2008 to the 31st March 2010. Both Mr Cassidy and Mr Mulholland signed these statements for the years ended the 31st March 2008 and 2009 in their capacity as directors of the company, whilst Mr Cassidy and Mr Whyte signed the financial statement for the year ended the 31st March 2010.

32. The company did purport to record, as a debt due and owing, management fees of €105,000 which had already been paid to the company. This had the effect of overstating the company's assets by that amount.

v. non-compliance with MiFID

33. The applicant has exhibited the Financial Regulator *Instructions Paper on Client Asset Requirements under the MiFID Regulations*, November 2007. The applicant relies on the evidence already described in submitting that the company failed to comply with those requirements in the following respects:

> (a) failing to make adequate arrangements to safeguard clients' ownership rights when holding financial instruments belonging to clients, especially in the event of the firm's insolvency;
>
> (b) failing to keep such records and accounts as are necessary to enable it at any time and without delay to distinguish assets held for one client from assets held for any other client and from its own assets;
>
> (c) failing to introduce adequate organisational arrangements to minimise the risk of loss or diminution of client assets or of rights in connection with those assets as a result of misuse of the assets, fraud, poor administration, inadequate record-keeping or negligence; and
>
> (d) causing or permitting one client's assets to be used to fund another client's transactions or positions.

34. The applicant submits that the findings in the inspector's report and the results of his own investigations indicate that the directors, including the respondents, facilitated a culture of wholesale breaches of the requirements of MiFID, the direct consequence of which was large scale and catastrophic losses of savings and investments by many clients who reposed their trust in the company.

vi. undisclosed profits of directors

35. Mr Cassidy and Mr Mulholland made undisclosed profits in the form of unauthorised 'commission' payments from client funds totalling €2,317,030. The 'commission' of €25,000 received by Mr Cassidy in respect of the improper loan of client funds by the company to a property development company operating in Abu Dhabi was also an undisclosed profit. None of those 'commission'

payments was disclosed in the company's audited financial statements for the years ended the 31st March 2008 through to the 31st March 2010, although all of those payments were made during one or other of those periods. As already noted, both Mr Cassidy and Mr Mulholland signed the company's audited financial statements for the years ended the 31st March 2008 and the 31st March 2009, whilst Mr Cassidy and Mr Whyte signed the financial statement for the year ended the 31st March 2010.

vii. deliberately misleading clients

36. On the 13th October 2010, Mr Whyte conducted a meeting on behalf of the company with Ms Tressan Scott, a client of the company, at her home. Against the background of the matters already described, Mr Whyte represented to Ms Scott on behalf of the company that a subordinated loan which she had been prevailed upon to make to it was safe. In doing so, Mr Whyte knew that representation to be untrue, or did not believe in its truth, or was reckless or careless as to whether it was true or false, such that it amounted to fraudulent conduct on the part of the company. That was the finding of this Court (*per* Finlay Geoghegan J.) in *Scott v Wallace* [2013] IEHC 559. While Mr Whyte was not a party to that action, he was on notice that the applicant relies on that judgment. In an affidavit that he swore for the purpose of the present application, Mr Whyte denies that he deliberately misled Ms. Scott, in effect suggesting that he was himself misled as to the truth of the representation that he made to her. I will return to that issue later.

viii. failure to co-operate with the liquidator

37. Mr. Cassidy did not co-operate with the applicant as liquidator of the company. Having queried whether there was any statutory obligation upon him to complete a director's questionnaire, and having been informed that there was not, he declined to do so, even though it was clearly explained to him that this would demonstrate a failure on his part to co-operate with the liquidator in his investigation of the affairs of the company.

38. Although the company's books and records purport to show that Mr Cassidy has an outstanding director's loan of €166,000 and although the applicant, as liquidator, has written to Mr Cassidy to demand the repayment of that loan, no response has been received from him.

The basis for the application
39. The applicant seeks a disqualification order against each of the respondents pursuant to the provisions of s. 160, sub-s. 2 (a), (b) and (d) of the 1990 Act.

40. S. 160, sub-s. 2 provides in material part:

> 'Where the court is satisfied in any proceedings or as a result of an application under this section that-
>
> (a) A person has been guilty, while …[an] officer…of a company, of any fraud in relation to the company, its members or creditors; or
>
> (b) A person has been guilty, while…[an] officer…of a company, of any breach of his duty as such…officer; or
>
> (c) …
>
> (d) the conduct of any person as…officer…of a company, makes him unfit to be concerned in the management of a company…
>
> the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit.'

41. The present application was brought before the equivalent provisions of the Companies Act 2014 ('the 2014 Act') came into force on the 1st June 2015. S. 842 (a), (b) and (d) of the 2014 Act in substance re-enact s. 160, sub-s. 2 (a), (b) and (d) of the 1990 Act. Under paragraph 7 (4) of *Schedule 6* to the 2014 Act, the powers of the court under s. 842 of the 2014 Act are exercisable by reference to matters or things done or omitted to be done under the prior Companies Acts as they are exercisable by reference to things done or omitted to be done under that Act. Paragraph 8(1) of *Schedule 6* to the 2014 Act provides that any thing commenced under a provision of the prior Companies Acts, before the repeal by the 2014 Act of that provision, and not completed before that repeal, may be continued and completed under the corresponding provision of the 2014 Act.

The test for disqualification
42. The logical application of the provisions of s. 160, sub-s. 2 of the 1990 Act (or of the provisions of s. 842 of the 2014 Act), involves a two stage enquiry; *Dir. of Corp. Enforcement v. Seymour* [2012] 1 I.R. 82 at 119-120, following *Re Kentford Securities Ltd: Dir. Of Corp. Enforcement v. McCann* [2011] 1 I.R. 585 at 599, and *Re Wood Products Ltd; Dir. Of Corp. Enforcement v. McGowan* [2008] 4 I.R. 598 at 607 and, later, at 610.

43. The first stage is whether one or more of the 'jurisdictional triggers' has been established or, differently put, whether one or more of the jurisdictional 'gateways' has been reached. These 'triggers' or 'gateways' are the matters specified in paragraphs (a) to (i) of s. 160, sub-s. 2. In this case, they are whether each respondent has been guilty, while an officer of the company, of any fraud in relation to the company, its members or creditors (s. 160, sub-s. 2 (a)), or of any breach of duty as an officer of the company (s. 160, sub-s. 2 (b)), and whether the conduct of each respondent as an officer of the company makes him unfit to be concerned in the management of a company (s. 160, sub-s. 2 (d)). This is a matter of 'objective forensic enquiry'; *Dir. of Corp. Enforcement v. Seymour* [2012] 1 I.R. 82 at 119-120, following *Re Wood Products Ltd; Dir. Of Corp. Enforcement v. McGowan* [2008] 4 I.R. 598. The applicant bears the onus of establishing conduct, or misconduct, within the parameters of one or more of the gateway provisions; *Re CB Concrete Readymix Ltd* [2002] 1 I.R. 372 at 381, affirming *Re Newcastle Timber Ltd (In liquidation)* [2001] 4 I.R. 586

44. The second stage is the exercise of the court's discretion to disqualify or not.

45. In the event that the court should exercise its discretion to disqualify at the second stage, there is, of course, a third stage and that is the determination of the appropriate penalty.

Fraud
46. The first question I must consider in respect of each of the respondents is whether he has been guilty, while a director of the company, of any fraud in relation to the company, its members or creditors.

47. Fraud in civil cases requires no higher degree of proof than that required for the proof of other issues in civil claims*, i.e.,* the allegation(s) must be established on the balance of probabilities; *Banco Ambrosiano S.P.A. v Ansbacher & Co. Ltd. [*1987] I.L.R.M. 669 at 701. However, as Henchy J. stated in that case (at 702):

> 'Proof of fraud is frequently not so much a matter of establishing primary facts as of raising an inference from the facts admitted or proved. The required inference must, of course, not be drawn lightly or without due regard to all of the relevant circumstances, including the consequences of a finding of fraud. But that finding should not be shirked because it is not a conclusion of absolute certainty. If the court is satisfied, on balancing the possible inferences open on the facts, that fraud is the rational and cogent conclusion to be drawn, it should so find.'

48. From the uncontroverted evidence that I have endeavoured to summarise at paragraphs 14 to 38 above, I am quite satisfied, on the balance of probabilities, that the company was run on a basis that permitted widespread, deliberate and systematic defalcation of client funds, in large part to shore up the company's floundering property business and in part to enable Mr Cassidy and Mr Mulholland to wrongly apply client funds, disguised as 'commissions', for their own purposes or benefit.

i. Harry Cassidy

49. I am satisfied that Mr Cassidy controlled and directed the misuse of client funds and the cover-up, whereby false client account statements were produced and furnished to clients. I am also satisfied that Mr Cassidy personally benefitted from the payment to him of wrongful 'commissions', in most instances directly from client accounts. Those commissions were unauthorised and unwarranted, and were not disclosed in the company's financial statements, including the financial statements that Mr Cassidy signed as a director for the years ending the 31st March 2008, 2009 and 2010.

50. I am also satisfied that Mr Cassidy, together with Mr Mulholland and Mr Whyte, signed the board resolution for the back to back loan that the company obtained from a private German bank by improperly pledging misappropriated client funds as collateral, in circumstances where each must have been aware that that was the position.

51. I conclude that Mr Cassidy has been guilty, while a director of the company, of a fraud on the company or on its creditors, or both.

ii. John Whyte

52. Mr Whyte provided a signed voluntary statement to the inspectors and was examined on oath by them, as recorded in their report. From that evidence, it is clear that Mr Whyte was aware that, from 2007, shortfalls in the funds that the company required for its property business transactions were being met by diverting monies out of client accounts. It is also clear that Mr Whyte knew about this very early on, if not from the beginning, because he was at pains in his evidence to emphasise that, 'over a period of four or five years', he tried to challenge Mr Cassidy 'on repeated occasions' to return monies improperly diverted from a particular client investment cash fund. The relevant extracts from the inspectors' report are set out in full in the judgment of Finlay Geoghegan J. in *Scott v Wallace* [2013] IEHC 559.

53. Mr Whyte swore an affidavit on 23rd December 2014 in opposition to the present application. In that affidavit, he avers that Mr Cassidy 'went ahead with deals in property using client money.' Later, Mr Whyte acknowledges under oath that whenever Mr Cassidy instructed him to release or transfer client funds for that purpose, he complied with those directions, albeit reluctantly, though he did challenge Mr Cassidy face to face on a number of occasions between 2008 and 2010 concerning when the properties acquired by the company would be sold and the proceeds applied to replenish the client accounts from which those monies had been misappropriated. In short, Mr Whyte acknowledges that, while a director of the company, he was aware of Mr Cassidy's depredations and, for a number of years, was complicit in them.

54. In his defence, Mr Whyte asserts that Mr Cassidy had a domineering personality. While that might, if established, provide some mitigation for Mr Whyte, it cannot exculpate him. He also contends that he was between Scylla and Charybdis, in that if he exposed Mr Cassidy, a panic might ensue, leading to a run on the company and a greater loss of client deposits. He does not appear to have contemplated the countervailing possibility – the one that came to pass – that his complicity and inaction might permit the misappropriation from client funds of ever larger sums. Again, while this asserted predicament might, if accepted, provide some mitigation for Mr Whyte, it cannot excuse his failure to halt, much less his active complicity in, Mr Cassidy's fraudulent conduct.

55. Mr Whyte's response to the evidence that he made a fraudulent representation on behalf of the company to Ms Tressan Scott is even less convincing. He avers that he was entitled to accept, and did accept, the expressed opinion of the company's board, the company's finance department, and certain of the company's professional advisers that the company was solvent, so that, when he represented to Ms. Scott that her subordinated loan to the company was safe, it was not a fraudulent misrepresentation.

56. Mr Whyte does not explain how any such statement could have been reconciled with his own knowledge that ever larger sums of money were being misappropriated from client funds on the direction of Mr Cassidy or his knowledge that Mr Cassidy and Mr Mulholland were being paid substantial unauthorised 'commissions' from client funds. One moment, Mr Whyte is asking the Court to accept his averments concerning 'the daily stresses and strains of anxiety and worry over client monies' and the fear of a run on the company that he claims to have experienced throughout the period of these events and, the next, he is asserting that when he told Ms. Scott that the monies she had lent to the company, and which she was relying on for her pension, were safe, it could not have been a fraudulent misrepresentation because he had heard other persons express the view that the company was solvent.

57. In making the argument that it was reasonable for him to believe that the company was solvent when he spoke to Ms. Scott, Mr Whyte relies on the 'statement of affairs' of the company that each of its remaining three directors was required to swear when the company was ordered to be wound up. Mr Whyte points out that each of the three directors, himself included, averred that the company's assets exceeded its liabilities in amounts between €471,000 and €846,000, 'therefore proving the company was solvent.'

58. In making that averment, Mr Whyte ignores the earlier evidence of the applicant that 'each statement of affairs has substantially – and obviously – incorrectly estimated a surplus in respect of the balance sheet of the company.' That is because each statement merely footnotes that 'up to €66 million of client assets has been misallocated into property investments' by the company, and that the directors 'are unable to quantify the amount that will be recovered and consequently are also unable to quantify the amount of the deficit that will arise.' For good measure, the applicant points out that, while the directors estimated that 50% of the €3 million owed to the company by trade debtors would be recoverable, nothing had been recovered by the time the present application was commenced, due to the inaccuracy of the company's record-keeping and the lack of substantiating documentation.

59. I am quite satisfied on the evidence before me that the company, through Mr Whyte, procured the retention of Ms. Scott's loan monies by fraudulent conduct. Nothing in the evidence given by Mr Whyte for the purpose of the present application is sufficient to disturb, much less require me to demur from, the equivalent finding of Finlay Geoghegan J. in *Scott v Wallace*,

60. I am also satisfied that Mr Whyte, together with Mr Cassidy and Mr Mulholland, signed the board resolution for the back to back loan that the company obtained from a private German bank by improperly pledging misappropriated client funds as collateral, in circumstances where each must have been aware that that was the position.

61. An attempt was made on Mr Whyte's behalf to suggest that, as his responsibilities within the company did not extend to financial management, his conduct should be viewed in the same way that McCracken J. viewed the conduct of one of the respondent directors in *Re Gasco Ltd (In liquidation)* [2001] IEHC 20, that is to say as that of someone, naïve in the relation to the financial affairs of the company, who was entitled to rely on the actions of other directors who did have responsibility for financial management. I cannot accept that the role or conduct of Mr Whyte in this case is remotely comparable to that of the relevant director in *Re Gasco Ltd*, where all that was at issue was whether that director had acted responsibly in the conduct of that company's affairs. Here, I have made extensive findings of dishonesty against Mr Whyte. Mr Whyte may have been excluded from key management decisions in the company, as he contends, but he was not excluded from close involvement in the fraudulent conduct that brought the company down and that caused such devastation to the financial security of its clients.

62. I conclude that Mr Whyte has been guilty, while a director of the company, of a fraud on the company or on its creditors, or both.

iii. John Mulholland

63. To his credit, Mr Mulholland has indicated on affidavit that he is not contesting the evidence against him. The credit due is slightly tarnished by the averment immediately following that concession, when Mr Mulholland enigmatically states that, while there are matters with which he does not agree in the applicant's evidence, he lacks the financial resources to refute them and, for that reason, does not do so. It is difficult to see what it would cost Mr Mulholland, who was represented for the purpose of the present application by solicitor and both junior and senior counsel, to at least identify the matters concerned; the estimated resources required to refute them; and the extent of the resources actually available to him. In the absence of such information, it is hard to view the relevant averment as anything other than a mealy-mouthed attempt to obtain credit for fully admitting his misconduct, without actually doing so.

64. I am satisfied that Mr Mulholland personally benefitted from the payment to him of wrongful 'commissions', in most instances directly from client accounts. Those commissions were unauthorised and unwarranted, and were not disclosed in the company's financial statements, including the financial statements that Mr Mulholland signed as a director of the company for the years ending the 31st March 2008 and 2009.

65. I am also satisfied that Mr Mulholland, together with Mr Cassidy and Mr Whyte, signed the board resolution for the back to back loan that the company obtained from a private German bank by improperly pledging misappropriated client funds as collateral, in circumstances where each must have been aware that that was the position.

66. I conclude that Mr Mulholland has been guilty, while a director of the company, of a fraud upon the company or upon its creditors, or both.

Breach of duty

67. To his credit, and in this instance without reservation, Mr Mulholland acknowledges that he failed to discharge his 'corporate governance duties and responsibilities as a director.'

68. By reference to the evidence already described, I am satisfied that each of the respondents, while a director of the company, was guilty of many and repeated breaches of his duty as such. Those breaches of duty include, amongst others:

(a) the fraudulent conduct already identified;

(b) the misappropriation of client funds;

(c) causing or permitting the deliberate falsification of client records;

(d) the failure to keep proper books and accounts;

(e) causing or permitting widespread false accounting;

(f) in the case of Mr Cassidy and Mr Mulholland, the abuse by each of his position as director to make undisclosed personal profits;

(g) the failure to ensure compliance with the MiFID Regulations as part of the necessary corporate governance of a MiFID investment firm; and

(h) in the case of Mr Cassidy, failure to co-operate with the liquidator.

Unfitness to be concerned in the management of a company

69. As a guide or useful pointer, conduct rendering a person unfit to be concerned in the management of a company must display a lack of commercial probity, and while, in an extreme case, gross negligence or total incompetence might suffice, ordinary commercial misjudgement is not sufficient; *per* Browne-Wilkinson V.C. in *Re Lo-Line Motors Ltd* [1988] Ch. 477 at 485-6; approved by the Supreme Court (*per* Fennelly J.) in *Dir. Of Corp. Enforcement v Byrne* [2010] 1 I.R. 222 at 256.

70. I conclude that, even if I am mistaken in my view that each of the respondents in this case has been guilty of fraud and of gross breach of duty, each of the respondents has certainly demonstrated a fundamental lack of commercial probity as a director of the company, going far beyond mere negligence, incompetence or commercial misjudgement.

The discretion to disqualify
71. Having formed the view that the jurisdictional gateway has been reached in respect of each of the respondents under s. 160, sub-s. 2 (a), (b) and (d), I must next consider whether there is any reason why, in the exercise of the court's discretion, a disqualification order should not be made. I am satisfied that there is no such reason in respect of any of the respondents to the present application.

Conclusion
72. In *Re Ansbacher; Dir. Of Corp. Enforcement v. Collery* [2007] 1 I.R. 580 at 589, Finlay Geoghegan J. identified the following principles applicable to the determination of an appropriate period of disqualification under s. 160, sub-s. 2 of the 1990 Act:

> '(1) The primary purpose of an order of disqualification is not to punish the individual but 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.
>
> (2) The period of disqualification should reflect [the gravity of the conduct found proved against the respondent concerned].
>
> (3) The period of disqualification should contain deterrent elements.
>
> (4) A period of disqualification in excess of ten years should be reserved for particularly serious cases.
>
> (5) 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.'

73. Applying those principles to the facts of this case, I have concluded that the appropriate period of disqualification before taking into account any mitigating factors should be one of fifteen years. The conduct of the respondents, as I have found on the evidence presented, was deeply dishonest; continued over a protracted period of time until, for a variety of reasons, it could no longer be concealed; and was devastating in its impact on those innocent persons who had the grave misfortune to entrust the company with their pensions or savings. This is, undoubtedly, a particularly serious case.

i. Harry Cassidy

74. There is very little to be said in mitigation on behalf of Mr Cassidy. I am satisfied that he was the primary actor or 'guiding hand' behind the scheme of fraudulent conduct in which each of the respondents ultimately became embroiled. There is uncontroverted evidence that he has personally benefited from that fraudulent conduct. There is no suggestion that he has made any attempt to address the deficit in client funds. While he did co-operate with the inspectors, he did not co-operate with the applicant and did not appear in answer to the present application. I must assume, in the absence of any evidence to the contrary, that he had an unblemished record in business and as a company director before 2007. The findings I have made and Mr Cassidy's failure to appear in answer to the present application, prevent me from concluding other than that it is strongly necessary to protect the public against the running of any company by him for a long time to come. It is equally necessary to impose a disqualification designed to have some deterrent effect on other persons otherwise disposed to engage in such fraudulent conduct.

75. Taking these factors into account, I conclude that the appropriate period of disqualification should be reduced by one year. Accordingly, I will make a disqualification order against Mr Cassidy for a period of 14 years. For the reasons outlined earlier in this judgment, I propose to make that order pursuant to s. 842 (a), (b) and (d) of the 2014 Act.

ii. John Whyte

76. While I have found that Mr Whyte participated in fraudulent conduct on behalf of the company, I accept that he was not the original instigator of that fraudulent conduct and that he did not personally profit from it. I accept also that, albeit at the eleventh hour, Mr Whyte did make certain disclosures to the Central Bank and to a third party that were helpful in uncovering the pervasive misconduct within the company. Further, Mr Whyte has co-operated fully with both the inspectors and the applicant, as liquidator of the company. I must accept that, prior to 2007, Mr Whyte also had an unblemished career in business and as a company director. Nevertheless, his misconduct was grave and has had grave consequences for many former clients of the company.

77. Taking these factors into account, I conclude that the appropriate period of disqualification should be reduced by five years. Accordingly, I will make a disqualification order against Mr Whyte for a period of 10 years, pursuant to s. 842 (a), (b) and (d) of the 2014 Act.

iii. John Mulholland

78. Mr Mulholland was a non-executive director of the company. However, I have found that, while Mr Cassidy may have been the primary actor in, or original instigator of, the fraudulent conduct in which the company became engaged, Mr Mulholland also personally benefitted from it. Although Mr Mulholland has expressed embarrassment and distress at the position the company's clients now find themselves in, as with Mr Cassidy, there is no suggestion that he has made any attempt to address the deficit in client funds. Mr Mulholland did co-operate with the inspectors and, unlike Mr Cassidy, also co-operated with the applicant, as liquidator of the company. He is also entitled to some allowance for the indication he gave at the outset that he would not contest the merits of the application.

79. Mr Mulholland was, until relatively recently, a director of three other companies, at least two of which appear to have operated in the financial services sector. Although, as Mr Mulholland acknowledges, one of those companies experienced some compliance issues of a relatively minor nature with the Central Bank in 2012, those issues appear to have been promptly resolved. Otherwise, I must accept that, apart from the fraudulent conduct, breach of duty and lack of commercial probity which are the subject of the present application, Mr Mulholland has had an otherwise unblemished career in business and as a company director.

80. On Mr Mulholland's behalf, some emphasis has been laid on the fact that he has resigned as a director of the other three companies in which he was previously involved. It is not entirely clear to me what the purported significance of that step is. In *Re NIB Ltd; Dir. Of Corp. Enforcement v D'Arcy* [2006] 2 I.R. 163, the respondent took an approach that Kelly J. identified as a mitigating factor. That approach was to consent to a disqualification order being made against him and, in that context, to tender his resignation with immediate effect from the two companies of which he was then a director, as well as indicating a willingness to give an undertaking in writing that he would not act as a director, promoter, officer, or involve himself in any way in the formation or management of those companies or any other company whatsoever.

81. In this case, Mr Mulholland does not consent to an order of disqualification being made against him and does not indicate any willingness to give an undertaking not to act as a director etc. Rather, he relies on his resignation from the companies concerned, amongst other things, as the basis for asking the Court to exercise its discretion not to make a disqualification order against him.

82. Mr Mulholland submits that the Court should instead apply the discretion conferred under s. 160, sub-s. 9A of the 1990 Act, whereby, in considering the penalty to be imposed under that section, the court may, where it ajudges that disqualification is not justified, make a declaration of restriction under s. 150 of the 1990 Act instead.

83. That submission fails in limine because, for the reasons I have already outlined, I ajudge that disqualification is justified on the uncontroverted evidence presented and that to merely restrict Mr Mulholland as a director instead would be a disproportionately lenient exercise of the Court's discretion in the face of his grave misconduct.

84. Taking the relevant factors into account, I conclude that the appropriate period of disqualification should be reduced by three years. Accordingly, I will make a disqualification order against Mr Mulholland for a period of 12 years, pursuant to s. 842 (a), (b) and (d) of the 2014 Act.