THE HIGH COURT

[2018 No. 124 COS]

IN THE MATTER OF INDEPENDENT NEWS AND MEDIA PLC AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

INDEPENDENT NEWS AND MEDIA PLC

RESPONDENT

JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 4th day of September, 2018

Introduction

1. The Director of Corporate Enforcement (the "Director") seeks an order pursuant to the provisions of s.748 of the Companies Act 2014 (the "Act") and O.74B, r3(1) of the Rules of the Superior Courts 1986 (as amended) ("RSC") appointing inspectors to investigate and report on the affairs of Independent News and Media PLC (the "company").

2. The originating notice of motion is directed to the company and names its current directors as notice parties.

3. The Director's application is opposed by the company and the named directors.

The Director

4. The office of the Director was created by the provisions of the Company Law Enforcement Act 2001. His principal function is to enforce the Act and to encourage compliance with it. He is also given power to conduct investigations and to make an application such as this.

The Respondent

5. The company is a public limited company. It publishes several of Ireland's daily and weekly newspapers. It has 815 direct employees. It has over 7,800 shareholders.

6. The company was incorporated in 1904 and was originally known as Independent Newspapers Ltd. It was re-registered under the Companies Act 1983 on 6th February, 1985 as "Independent Newspapers, Public Limited Company". It changed its name to "Independent News and Media Public Limited Company" with effect from 9th June, 1999. The Independent News and Media Group ("INM Group") consists of the company together with its subsidiaries, associates and joint ventures. It describes itself as "the leading newspaper and online publisher on the island of Ireland". It has its headquarters in Dublin and its shares are listed on both the Irish and London Stock Exchanges. Some of its better known titles are "The Irish Independent", the "Sunday Independent", the "Herald", the "Sunday World", the "Star" and the "Belfast Telegraph".

Section 748

7. Section 748 is contained in Part 13 of the Act which deals with investigations. The section creates a specific statutory entitlement on the part of the Director to apply to the court for the appointment of an inspector. This power of the Director has been described by Keane C.J. in *Dunnes Stores Ireland Company v. Ryan [2002] 2 I.R. 60 at p.77 as "undoubtedly one of the most important powers which he or she enjoys*".

8. Section 748(1) provides:-

> *"On the application of the Director, the court may appoint one or more competent inspectors to investigate the affairs of a company and to report on those affairs in such manner as the court directs, if the court is satisfied that there are circumstances suggesting that-*
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> *(a) the affairs of the company are being or have been conducted with intent to defraud-*
>
> *(i) its creditors;*
>
> *(ii) the creditors of any other person; or*
>
> *(iii) its members;*
>
> *(b) the affairs of the company are being or have been conducted for a fraudulent or unlawful purpose other than described in paragraph (a);*
>
> *(c) the affairs of the company are being or have been conducted in an unlawful manner;*
>
> *(d) the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to some part of its members;*
>
> *(e) the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to some or all of its creditors;*
>
> *(f) any actual or proposed act or omission of the company (including an act or omission on its behalf) was, is or would*

be unfairly prejudicial to some part of its members;

(g) any actual or proposed act or omission of the company (including an act or omission on its behalf) was, is or would be unfairly prejudicial to some or all of its creditors;

(h) the company was formed for a fraudulent or unlawful purpose;

(i) persons connected with its formation or the management of its affairs have, in that connection, been guilty of fraud, misfeasance or other misconduct towards the company or its members; or

(j) the company's members have not been given all the information relating to its affairs which they might reasonably expect."

9. If he is to be successful on this application the Director must first demonstrate the existence of at least one of the circumstances set out at subparagraph 1(a) through (j) of section 748.

10. As I said in *Director of Corporate Enforcement v. DCC Plc* [2009] 1 I.R. 464 at p.475 "*In the absence of such circumstances no question of an appointment can arise at all.*" However, as I also pointed out in that case the demonstration of the presence of one or more of such circumstances "*… does not give rise to an automatic entitlement to have inspectors appointed. That is because the section is framed in such a way as to confer a discretion on the court. The Court 'may' appoint inspectors; it is not bound to do so."*

11. The first issue which I must decide is whether the Director has demonstrated the existence of one or more of the circumstances prescribed in s.748(1). If I form the view that he has not, then his application fails. If I conclude that he has demonstrated such circumstances then I must consider whether, in the exercise of my discretion, it is appropriate to appoint the inspectors.

12. The Director contends that he has placed evidence before the court which ought to satisfy it that there are circumstances which would entitle the court to appoint inspectors under six of the ten headings set forth in s.748(1) of the Act. The six relevant subsections are subs. (b), (c), (d), (f), (i), and (j).

13. I turn now to a consideration of the evidence. If the Director is to succeed I do not have to make any findings concerning this evidence save one, namely, that it is sufficient to discharge the burden of proof which he has assumed. There must be established by the Director the existence of circumstances suggesting the existence of one or more of the matters identified in s.748(1) of the Act.

The allegations

14. This case has given rise to voluminous affidavits being filed by both sides. It is remarkable that despite the enormous volume of detailed material there is in truth little dispute between the parties as to the existence of the underlying facts which prompted the Director to bring this application. As I do not have to make findings other than the one identified in the preceding paragraph and as there is little or no dispute on the essentials it is not necessary for me to recite the numerous details of the evidence or the responses to the Director's statutory demands made on the company. A summary of the relevant material is sufficient.

15. The evidence relates to four different matters. They have been called by the parties the "Data Interrogation", the "Proposed Newstalk Acquisition/APN Transaction", the "Independent Review Process" and the "Market Abuse Regulations" issues. I will deal with each of them in turn. Before doing so, however, it is necessary to identify some of the people who figure in the *dramatis personae*.

The People

16. Mr. Leslie Buckley ("Mr. Buckley") was Chairman of the board of the company until he resigned on 1st March, 2018. He was succeeded by Mr. Murdoch MacLennan ("Mr. MacLennan"). The Group Chief Executive is Mr. Michael Doorly ("Mr. Doorly") who was appointed to that position following the resignation of Mr. Robert Pitt ("Mr. Pitt") who stepped down with effect from 13th October, 2017.

17. In 2006 Mr. Denis O'Brien ("Mr. O'Brien") acquired an interest in the company and by 2012 had become its largest shareholder. He continues to be its largest shareholder with 29.9% of the shareholding.

18. The current application has arisen from a detailed investigation conducted by the Director into allegations contained in disclosures made both by Mr. Pitt and Mr. Ryan Preston ("Mr. Preston") Group Chief Financial Officer. On foot of these the Director exercised his statutory powers by serving a series of notices on the company and its officers with a view to obtaining additional information. Much information was obtained but many questions remain unanswered. This application is brought in circumstances where he believes he has exhausted his statutory remedies in that regard and is of opinion that nothing less than court appointed inspectors will be able to get to the bottom of matters which are of concern to him.

The Data Interrogation issue

19. In 2014 back-up tapes of computer data were removed from the company's premises. They were taken to the premises of a company outside the jurisdiction. There that data was interrogated over a period of some months. This operation was directed by Mr. Buckley. Other members of the board were not aware of this operation at that time. It is alleged that Mr. Buckley expressly instructed the company's head of I.T. not to disclose the matter to Mr. Pitt. During the course of the interrogation, tapes and associated data appear to have been accessible to and accessed by a range of individuals who are external to the company. These individuals have business links with Mr. Buckley, with each other and appear also to have links with Mr. O'Brien.

20. This exercise was, according to Mr. Buckley in responses which he gave to the Director on foot of statutory demands for information, part of a cost reduction exercise in respect of a contract which the company had with Simon McAleese, Solicitors, for the provision of legal services. Under the terms of that contract Mr. McAleese was guaranteed an annual fee of approximately €650,000 and the contract had a five-year duration. It was due to expire in 2016. The Chairman indicated he thought that that was a very significant fee and an open ended contract. Because he said he found it difficult to obtain information on the contract he felt that he needed to access emails and documentation stored on the company's system.

21. During the course of the interrogation, data appears to have been searched against the names of no fewer than 19 individuals. They included the journalists Rory Godson, Maeve Sheehan, Brendan O'Connor and Sam Smyth; two members of the Inner Bar, Jeremiah Healy S.C. and Jacqueline O'Brien S.C.; former board and staff members of the company including Joe Webb (former Chief Executive of the company's Irish division), Karl Brophy (former Director of Corporate Affairs of the company), Mandy Scott (former Personal Assistant to the Chief Executive), Vincent Crowley (former Chief Executive of the company), Donal Buggy (former Director and Chief Financial Officer of the company) and the late Mr. James Osborne (former chairman of the company). Also included were

Messrs. Andrew Donohue, Mark Kenny, Jonathan Neilan, Harriet Mansergh, Jenny Kilroy, Nick Cooper and Ann Marie Healy.

22. It is difficult to see what the interrogation of information concerning at least some of those persons had to do with a cost reduction exercise in respect of the legal services being provided by Mr. McAleese. The Director points out that both Senior Counsel who were the subject of the interrogation acted for several years as counsel to the inquiry into payments to politicians and related matters presided over by Mr. Justice Moriarty. That tribunal was involved in investigations into allegations relating to the awarding of the second GSM licence to Esat which is an entity controlled by Mr. O'Brien. Indeed, in their letter of 30th April, 2018 to Mr. Buckley the company's solicitors described the names of those searched against as persons who may be regarded as having acted adversely to Mr. O'Brien. The rights and entitlements of some or all of these 19 people may have been transgressed in a most serious way by this activity.

23. The costs of this data interrogation exercise were not discharged by the company. The bills for it were presented to an entity controlled by Mr. O'Brien called Island Capital and were paid by an Isle of Man company called Blaydon Ltd. Mr. O'Brien is the beneficial owner of Blaydon Ltd. The company does not know why Blaydon Ltd. discharged the costs associated with this data interrogation. According to Island Capital, Blaydon acts as paying agent for Mr. O'Brien and his companies.

24. The Director is critical of the way in which the company dealt with the information concerning the payment by Blaydon Ltd. Apparently Mr. Preston sought advice from KPMG regarding the audit treatment of the payment of the invoices by Blaydon Ltd. KPMG gave verbal advice supporting the company's accounting treatment of it. It is averred that as there was no liability for the company it was not recognised as an invoice in its accounts and it is said that this is in accordance with standard practice in any business. The Director believes the matter ought to have been referred to the Audit and Risk Committee of the company. He identifies a number of questions at para. 80 of his third affidavit pertaining to this matter. They include:-

- whether a transaction of that nature amounted to a gift and if so whether there were any taxation issues;
- whether the transaction gave rise to any internal control and/or governance issues; and
- whether the transaction had given rise to the necessity for any disclosures in the relevant financial statements.

A further issue was identified in the course of submissions namely, if a third party was paying for the interrogation did it benefit from it in some way?

25. Whilst the Director is critical of the board of the company in respect of the matter, his more serious criticism is directed at what happened when the board was alerted to the data interrogation which had occurred. He contends that the board of the company did not acknowledge the seriousness of the event. Whilst it is true that it made a disclosure to the Office of the Data Protection Controller ("DPC") on 24th August, 2017 it is said that that notification down-played the gravity of the matter and appeared to accept the explanation of Mr. Buckley in preference to the concerns raised by Mr. Pitt.

26. It is alleged that the disclosure to the DPC did not inform her of all of the information which the board had been given by Mr. Pitt on the topic. Deloittes were appointed to conduct a review but its report which was received in October 2017 was not sent to the DPC until after these proceedings were commenced. The Deloitte report was conducted without any input from the company to which the data was sent and without any independent verification of what they were told by reference to either emails or documents.

27. The material before me would suggest that when it came to a conflict of accounts between Mr. Buckley and Mr. Pitt the board in this regard tended to believe Mr. Buckley. Through the testimony of one of its directors, Dr. O'Hagan, it has accepted that in a number of instances it is likely that it was misled by Mr. Buckley.

28. Even to this day it is not clear whether the data removed and taken out of the country was copied and, if so, if the copies were retained by those responsible for or benefitting from the interrogation. These matters do not appear to have been addressed in the report commissioned by the company from Deloittes and a further report sought from Deloittes has not yet been completed. Many questions remain concerning this whole affair.

29. It is in these circumstances that the Director contends that inspectors ought to be appointed to carry out a thorough investigation into this matter.

Proposed Newstalk Acquisition /APN Transaction

30. At the same time as the data interrogation was taking place at the direction of Mr. Buckley, Island Capital, the company that was the conduit for part of the payments, sought to be paid of the order of €1 million by the company in connection with work allegedly undertaken by it. The work allegedly done was in respect of the disposal of the company's shares in an Australian company APN. Mr. O'Brien was a shareholder in APN and his shareholding in that entity was disposed of at the same time as the company's and in one block. Mr. Pitt has alleged that Island Capital provided no services to the company. His view was shared by Mr. Preston. Why then was it sought to pay this sum to it? This request for payment was withdrawn when it was pointed out that it would have to be disclosed publicly.

31. Mr. Pitt has claimed that Mr. Buckley also requested that monies be set aside as fees for three other persons, one of whom, Mr. Connolly, was a director of the company nominated to that position by Mr. O'Brien. It is alleged that he did no work to justify such a payment. This request for payment in respect of services not provided was also withdrawn when it became clear that it too would have to be disclosed. The allegation is that Mr. Buckley was advocating for the company to make these payments which would be commercially advantageous to Mr. O'Brien and his companies but to the disadvantage of the company.

32. There is no documentary evidence, to-date at least, to show what either Island Capital or Mr. Connolly did with a view to justifying these demands for fees. The Director draws attention to the fact that the day after the request for payment was made on 19th March, 2015, Mr. Buckley and Mr. O'Brien exchanged text messages in which Mr. O'Brien asked Mr. Buckley not to mention what he described as the "cosi deal" to anybody in response to which Mr. Buckley wrote "we in INM need to handle it very carefully".

33. It is alleged that in January 2016 Mr. Buckley directed Mr. Pitt and Mr. Preston, in the context of a strategy document which was under consideration within the company, that the priority should be to maximise returns to the two main shareholders of the company.

34. That was followed by incidents which occurred in the autumn of 2016 concerning the possible purchase of Newstalk, a radio station owned by interests controlled by Mr. O'Brien.

35. Discussions had been taking place with an entity called Communicorp about the possible purchase of Newstalk. Mr. Pitt had no issue in principle with such a transaction but was concerned that the commercial conditions which would have to attach to such a deal would be onerous and that the suggested value of the asset was very high. The valuation which was under consideration was substantially higher than the range of asset values that had previously been put forward by the company's own advisors, Davy. Mr. Pitt thought it relevant that Newstalk had been described at an initial meeting which took place on 15th September, 2016 as loss-making.

36. At a meeting on 28th September, 2016 with Mr. Buckley, Mr. Pitt expressed the view that a good price would be around €12 million. A valuation was prepared by Davy's in which it indicated that it would not value Newstalk at above €14 million.

37. The following month at a meeting on 14th October, 2016 with representatives of Communicorp, Island Capital, Davy (advising the company) and IBI (advising Communicorp) IBI proposed a valuation of €30 – €35 million for Newstalk. The company representatives agreed to consider the matter.

38. Following the meeting, Mr. Pitt spoke with Mr. Ivan Murphy, the managing director of Davy Corporate Finance who was of opinion that the transaction would not be good value at that price. Mr. Pitt understood that Mr. Murphy expressed those concerns to Mr. Buckley. Davy were directed to prepare a rebuttal document to respond to the IBI valuation.

39. On 20th October, 2016 Mr. Pitt, Mr. Buckley and Mr. Preston met. Mr. Buckley indicated annoyance by Mr. Pitt's and Mr. Preston's negativity about the transaction and said that he would not let negativity stand in the way of doing the deal. Mr. Buckley indicated that he would do the deal regardless and said that a possible valuation of €14 million was "insulting to the major shareholder". Mr. Pitt alleges that Mr. Buckley also said that Mr. O'Brien was entitled to a reward for bailing out the company and had written a large cheque at the bail-out time. Mr. Buckley is alleged to have said that he wanted to do this transaction no matter what. In response, Mr. Pitt asked Mr. Buckley as to whether he intended the transaction to happen no matter the conclusion arrived at by Davy and the company's management concerning valuation. Mr. Buckley stated that he did so intend.

40. On 21st October, 2016 Mr. Pitt presented an updated Davy valuation to Mr. Buckley. It valued Newstalk at a range of €11 - €15 million with what was described as an "outlier range" of €16.7 million. Mr. Pitt made it clear to Mr. Buckley that he could not possibly recommend any higher figure than €17.5 million.

41. A further meeting took place on 26th October at which a further IBI document was presented giving a detailed revised valuation of Newstalk of €26.8 million. Subsequent to this meeting Mr. Pitt, Mr. Preston and Mr. Buckley met. Issues arose that caused Mr. Pitt to be alarmed and concerned both for the company, himself and Mr. Preston. Mr. Buckley is alleged to have asked Mr. Pitt whether he wanted to do the deal, indicated his great disappointment and asked both of them "did they not get it?". Mr. Pitt also alleged that Mr. Buckley said that Davy could be influenced by management to write what management told them to write in the Davy valuation. Mr. Buckley said he wanted to do the deal at the latest IBI price.

42. On 28th October, 2016 Mr. Pitt alleges that he spoke to Mr. Buckley by telephone who indicated that he was very disappointed that the valuation range had not moved up as requested. Mr. Buckley is alleged to have expressed disappointment that Mr. Pitt had not influenced Davy to move closer to the IBI figure.

43. These matters were drawn to the attention of the senior non-executive director, Mr. Kennedy, in Mr. Pitt's protected disclosure of November 11th. After 10 days they were drawn to the attention of the board. It constituted a special committee which met with Mr. Buckley on 23rd November and cleared him of any wrongdoing. That conclusion was accepted by the full board later the same day. Neither the committee nor the board heard from Mr. Pitt or advised him of what Mr. Buckley had said. In fact, he was not advised that it had met with Mr. Buckley and thus no opportunity was given to him to comment on what Mr. Buckley had said.

44. Under threat of litigation the board decided to establish an independent review. One of the candidates proposed to serve on that independent review was Mr. Brian O'Moore S.C. He was objected to by Mr. Buckley who led the board to believe that he was voicing his own objection to Mr. O'Moore when in fact it was the objection of Mr. O'Brien.

45. In a moment I will consider the Director's concerns about the independent review which was set up but before doing so I should point out that he also places evidence before the court of circumstances suggesting that the company may well have breached its statutory obligations under the Protected Disclosures Act 2014 owed to both Mr. Pitt and Mr. Preston. In his grounding affidavit he points out the prohibition on disclosure of any information that might identify the maker of a protected disclosure on the part of a person to whom a protected disclosure is made or referred in the performance of that person's duties. The Director believes that the identities of both Mr. Pitt and Mr. Preston were disclosed by Mr. Buckley to inter alia Mr. O'Brien. He is furthermore of the view that the immediate reaction of the company on receipt of Mr. Pitt's disclosure was to give consideration to the termination of his contract of employment. There is dispute about this which has not been resolved.

The independent review process

46. I have already alluded to the alleged behaviour of Mr. Buckley in giving the impression that his objection to Mr. O'Moore S.C. was his own rather than that of Mr. O'Brien. Mr. O'Brien was clearly consulted in respect of the decision of the board to set up an independent review process. The review was to be conducted into Mr. Pitt and Mr. Preston's disclosures but the Director is critical of it. He does not criticise the work carried out by the reviewers but rather the terms of reference given to them.

47. The evidence demonstrates a conflict of testimony between Mr. Pitt and Mr. Preston on the one hand and Mr. Buckley on the other. But no power was given to the independent reviewers to enable them to resolve that conflict. Indeed, in the course of their findings they made that abundantly clear. They said that it was not intended, as they understood their terms of reference, that they would have that power. When they pointed out that limitation on their ability in March 2017 no change to their terms of reference was made. When they delivered their report in July 2017 they said, as they had warned four months earlier, that they could not resolve the conflict between Mr. Pitt and Mr. Buckley as to what happened in relation to Newstalk although they did comment that if what Mr. Pitt alleged was true it was very serious indeed. No resolution of this conflict was possible having regard to the limitations placed on the independent reviewers by their terms of reference.

48. The Director believes that the board of the company failed to discharge its duties in an adequate way in fashioning such a restricted form of review and in failing to take all appropriate steps to investigate the issues properly.

Market abuse

49. The Director has averred that during the course of his investigation he has uncovered evidence to suggest that there may have been unlawful sharing of the company's inside information with third parties outside of the company as well as unlawful sharing of the

company's confidential information. This, it is said, constitutes an illegality within the meaning of the European Union (Market Abuse) Regulations 2016 [S.I. 349 of 2016] ("The Market Abuse Regulations").

50. The information giving rise to this concern came to the Director's knowledge during the course of his own investigation and was not at any time a matter considered by the independent reviewers. His concerns in this regard are set out extensively from paras. 595-630 of his first affidavit. Those paragraphs include a table at para. 600 in which email and text messages exchanged between Mr. Buckley and Mr. O'Brien are set out in considerable detail. That material, if correct, seems to demonstrate a pattern of wrongful disclosure of price sensitive information by Mr. Buckley to Mr. O'Brien.

51. The whole idea behind the Market Abuse Regulations is to ensure that there is an equality of treatment as between shareholders and the market.

52. It is not necessary for me to go through this email traffic in detail and thereby add unnecessarily to this already lengthy judgment. A consideration of this material gives rise to a concern that there may indeed have been a breach of these regulations.

Company's position
53. As I have pointed out there is really no dispute but that the events giving rise to the Director's concern in respect of the four matters in question took place. The basic elements of them are not controverted although quite a few questions remain to be answered concerning them. The company and its current directors have at various stages expressed serious concerns regarding these matters and have taken a number of steps to address them. These steps are described in the affidavits. The company opposes this application contending that its said response is adequate and considers that the appointment of inspectors will have a seriously damaging impact on it, its shareholders and employees. In addition, it queries what the appointment of inspectors is intended to, or will, achieve. It believes the order sought by the Director is, in all the circumstances, disproportionate and ought to be refused.

54. In furtherance of its opposition to the order sought it contends that the factual matter relied upon by the Director does not fall within the scope of any one of the six subheadings of s.748(1) of the Act under which he makes this application. If the company is correct in this contention, then that is an end of the matter.

55. I therefore turn to a consideration of the arguments made to the effect that the largely uncontroverted factual matter put before me does not fall within the purview of the six subsections of s.748(1) of the Act relied upon by the Director. The subsections are (b), (c), (d), (f), (i) and (j).

56. Before considering the legal argument which was made in support of the company's stance it is appropriate that I should place it within a factual background as deposed to in affidavits sworn on behalf of the company. A major part of the argument made by the company is that the activities relied upon by the Director were activities embarked upon by Mr. Buckley without the knowledge or consent of other board members or of the company itself. Once they became aware of these activities they say that they took all reasonable measures to deal with them.

Data Interrogation issue - response
57. The company points out that both its current and former board is independent and highly qualified. It meets the recommendations of the U.K. Corporate Governance Code and enjoys the support of the shareholders. The board members were wholly unaware of the activities engaged in by Mr. Buckley on this issue. Once it received notification of the data interrogation matter in August 2017 it contends that it acted properly in that it took advice, notified the issue to the DPC and appointed Deloittes to undertake an investigation. It says that it relied on the explanation given to it by Mr. Buckley as to the purpose of the exercise. It did not then have available to it the material which has been revealed in the Director's application and which suggests that the information given by Mr. Buckley to his fellow board members was false. The board also relied on the explanation given by Mr. Buckley for the payment by Blaydon of the invoice submitted in respect of the work undertaken.

58. The company contends that the extent and the breadth of the data interrogation was not known to its board until March 2018 when it received the spreadsheet which contained the list of the 19 individuals mentioned at para. 21 of this judgment. On receipt of that information the board of the company made a further notification to the DPC, commissioned Deloitte to reopen its investigation and instructed its solicitors to consider the matter. It also personally notified the 17 surviving traceable individuals of the 19 who had been named and placed a notification on its website and also notified its staff. It sought explanations from those involved in the data interrogation.

59. On 30th May, 2018 (subsequent to the commencement of these proceedings) the company commenced proceedings against Mr. Buckley seeking damages for breach of fiduciary duty, negligence, misrepresentation, breach of contract and wrongful interference with the economic interests of the company.

60. All of this factual material is called to my attention in support of an argument that whilst there may have been a breach of the data protection legislation it was a breach committed by Mr. Buckley and not the company. Once the breach was notified to the company it took all appropriate steps to deal with it. Thus, it cannot be said that the affairs of the company insofar as this matter is concerned were conducted in an unlawful fashion.

Newstalk/APN transaction - response
61. The company points out that the major allegation of wrongdoing made by Mr. Pit to the company in November 2016 was that he had been put under improper pressure by Mr. Buckley to influence the price to be paid for the acquisition of Newstalk. It correctly points out that the transaction did not progress beyond initial discussions and that no monetary loss was caused to the company. Following the protected disclosure, the board established the special committee and set up the independent review. It cooperated with the independent reviewers and followed their recommendations in full.

62. The company points out that the independent reviewers were able to reach conclusions on all issues save the conflict of interest between Mr. Pitt and Mr. Preston on the one hand and Mr. Buckley on the other in relation to the Newstalk acquisition.

63. The company calls attention to the independent reviewers' conclusions that no direct financial loss was sustained and that its corporate governance procedures would have ensured that no loss would have occurred to the company if the matter had been progressed. Again, insofar as this transaction is concerned, the company points out that the evidence adduced by the Director, if it demonstrates fault or wrongdoing is the fault or wrongdoing of an individual director, namely, Mr. Buckley. This, it contends, does not amount to evidence of the affairs of the company being conducted in an irregular manner.

64. Insofar as the APN transaction is concerned the company points out that no payment was ultimately made. The activities giving

rise to this complaint were again, it is said, individual wrongdoings on the part of Mr. Buckley.

The independent review - response
65. The principal complaint which is made in respect of the independent review is that it was substandard to the task because the reviewers were not furnished with the necessary powers to reach a conclusion on the conflict of testimony between Mr. Buckley and Messrs. Pitt and Preston. The reviewers themselves pointed out that the terms of reference did not permit of such a power being exercised by them. No steps were taken by the board to remedy this. The company contends that such criticism could not amount to affairs of the company being conducted in a fashion which falls within the ambit of the legislation. If seen in isolation that could perhaps be correct. But such a blinkered view would not be appropriate. This review must be seen in the context in which it was set up. When so viewed, it forms part of the Director's complaint as to the alleged failure of the board of the company to discharge its statutory obligations fully or appropriately.

Market abuse - response
66. The Director believes that inside information and confidential information was furnished by Mr. Buckley to Mr. O'Brien. This was not done with the knowledge of the company board but when it became aware of these matters the Director contends that it did not investigate or react appropriately to the information. The company contends that it took detailed advice on the matter and has averred through Dr. O'Hagan that the board of the company did not believe that the sharing of the information *ipso facto* was prohibited or unlawful. The board implemented the independent reviewer's recommendations and brought about a change in composition of the board which included the departure of Mr. Buckley from it. Furthermore, the Central Bank has sought papers relevant to the issues and the board of the company has cooperated with it.

67. Again, the board contends that a breach of obligation by a single individual, in this case Mr. Buckley, does not constitute evidence suggestive of the affairs of the company being conducted in an irregular manner.

68. The above are the principal factual matters which set the basis for the legal argument to which I now turn.

Legal argument
69. It is to be noted that subs. (b), (c), (d), and (f) of s.748(1) all refer to the "affairs of the company" being conducted in some wrongful manner.

70. In the instances which have been relied upon, the wrongdoing is alleged to have been that of Mr. Buckley, not the then or the current board or management of the company. Thus, it is argued, none of the material relied upon demonstrates that the "affairs of the company" were being conducted in an irregular fashion. So, it is said, these subsections do not capture the actions of an individual director or in this case, a director who is also chairman. Even egregious wrongdoing on the part of an individual director or chairman does not amount to the "affairs of the company" being conducted in an improper fashion. The argument goes that it is the board that conducts the affairs of the company and these subsections are only triggered in the event of the board or a majority of it behaving improperly. So, wrongdoing on the part of an individual director is a wrong against the company but it does not mean that the company's affairs are being run in an improper fashion.

71. I am unable to agree with this proposition. First, all of the allegedly wrongful activity engaged upon by Mr. Buckley was done in his capacity as the chairman of the company. He was given the authority, for example, to conduct the so called cost cutting exercise (Project Quantum). It was because of that that he became involved in accessing the data. He was spearheading that exercise. He was doing so in his capacity as chairman of the company. He was, therefore, conducting the affairs of the company for that purpose and thus wrongful acts by him in that connection were the conduct of the affairs of the company. He would have had no authority or entitlement and indeed it is unlikely that anybody would have responded or cooperated with him were it not for the fact that he was cloaked with the authority of chairman of the company and acted in that regard. Likewise, the other allegations made were all in respect of matters carried out by him in his capacity as chairman of the company. Indeed, that was Mr. Buckley's own perception of himself as is clear from a short extract from his solicitors' letter of 9th July where they say:-

> *"Several individuals within INM were aware of the work which our client authorised as part of Project Quantum in his capacity as executive chairman".*

72. Mr. Buckley was at all relevant times functioning as executive chairman of the company and had authority in relation to the data interrogation and the other issues in that capacity. Mr. Buckley had actual or ostensible or apparent authority when engaging in the activities alleged. His entitlement so to do flowed from the fact that he was chairman of the company and he was therefore, in my view, conducting the affairs of the company even if he acted wrongfully or outside his actual authority.

73. The term "affairs of the company" was considered by Phillimore J. in *R. v. Board of Trade, ex parte St. Martin Preserving Co. Ltd.* (1965) 1 Q.B. 603 where he stated:-

> *"What are 'its affairs' when the company is in full control? They must surely include its good will, its profits or losses, its contracts and assets including its shareholding in and ability to control the affairs of a subsidiary, or perhaps in the latter regard a sub subsidiary".*

Thus the "affairs of the company" has a very broad meaning.

74. There was a second argument made by the company to the effect that the relevant subsections could not capture the actions of an individual director and in this case did not because Mr. Buckley was engaged in a wrong against the company. As he was committing a wrong against the company he could not have been conducting the "affairs of the company". But that argument ignores the fact that the board of the company can commit a wrong against it. Is it to be said that in committing a wrong against the company the board or a majority of it are not conducting the affairs of the company? I do not think so. This underlines the flaw in the argument which is sought to be made. Just as the board can be conducting the affairs of the company wrongfully so can an individual director or chairman.

75. Accordingly, I reject the contention which is made that the activities of Mr. Buckley in respect of which complaint is made could not amount to the conduct of the affairs of the company as contemplated under the relevant subsections.

Section 748(1)(b)
76. I give the expression "affairs of the company" the broad meaning identified by Phillimore J. in the *St. Martin's case* [1965] 1 Q.B. 603 in this and the following subsections.

77. This subsection refers to the affairs of the company "*… being or have been conducted for a fraudulent or unlawful purpose other than that described in s.748(1)(a)*". This clearly includes the possibility of the company's affairs having been previously conducted for a fraudulent or unlawful purpose since it uses the expression "*have been*". Keane C.J. in the *Dunnes Stores* case [2002] 2 I.R. 60 considered similar statutory language and held that it refers to circumstances not merely where the affairs of a company are being, but also where they have been, conducted in such a manner even if the impugned conduct has ceased.

78. It is also to be noted that the subsection requires evidence of a purpose rather than an outcome or effect. If one contrasts it with the wording of subsection (a) which speaks of an "*intent to defraud*" this subsection speaks of "*fraudulent or unlawful purpose*". It appears to me that the reference to "*purpose*" rather than "*intent*" introduces a broader concept.

79. I am satisfied on the basis of the evidence which has been put before me that a number of the incidents relied upon by the Director are suggestive of the conduct of the affairs of the company for an unlawful purpose. That is particularly so in the cases of the data interrogation where its actual purpose remains unclear but is certainly suggestive of the company's affairs being conducted for a purpose that is unlawful. Whilst the Newstalk acquisition and the APN transaction did not ultimately lead to any loss to the company, the circumstances surrounding them are certainly suggestive of an unlawful purpose directed to the benefit of Mr. O'Brien directly or indirectly and the detriment of the company. Equally, the apparent disclosure of the company's commercially sensitive information has about it circumstances which suggest that the company's affairs were being conducted for an unlawful purpose.

80. In these circumstances I am satisfied that the Director has put before me the necessary evidence which falls within the ambit of subsection (b).

Section 748 (1)(c)
81. This subsection refers to the affairs of the company which are now or have in the past been conducted in an unlawful manner.

82. I am satisfied that the Director has put evidence before the court demonstrative of the affairs of the company having been conducted in such manner, particularly in relation to apparent breaches of the data protection legislation, the protected disclosures legislation and the Market Abuse Regulations.

Section 748 (1)(d)
83. The sort of activity that is captured under this subsection is that which is "unfairly prejudicial to some part of the members" of the company. Unfairly prejudicial conduct is not defined in the Act nor indeed in its predecessors. However, some assistance can be gleaned by reference to case law.

84. The phrase "unfairly prejudicial" in the corporate statutory context is to be found in the legislation dealing with examinership. In *In Re McInerney Homes Ltd*. [2011] IESC 31 O'Donnell J. said:-

> *"It is very unlikely that a comprehensive definition of the circumstances of when a proposal would be unfair could be attempted, or indeed would be wise.*
>
> *… The Act of 1990 appears to invite a court to exercise its general sense of whether, in the round, any particular proposal is unfair or unfairly prejudicial to any interested party."*

That approach was followed by McGovern J. in *Re Lodgewood Engineering Ltd.* [2016] IEHC 51.

85. Guidance can also be gleaned from the views of Fennelly J. in *Re SIAC Construction Ltd*. [2014] 2 ILRM 357 where he said:-

> *"Whether a set of proposals is unfairly prejudicial to any particular interested party will involve a comparison of the treatment of that party with any similarly situated interested party. The court will also take account of any aspects of either party's individual position which places it at either an advantage or disadvantage. The court will take account of the totality of the circumstances."*

86. It is argued, and I believe correctly, that the expression "*unfairly prejudicial*" was imported from the United Kingdom where it replaced the concepts of "oppression" and "disregard of members interests" in company legislation. Those expressions, however, remain part of Irish Company law by virtue of s.212 of the Act which affords protection for minorities. In Courtney's *The Law of Companies*, 4th Ed. at 28.023 it is suggested that a court will have regard to such concepts when interpreting "unfair prejudice" in the Act. That view is supported by the views of Murphy J. in *Horgan v. Murray* [1997] 3 I.R.23 where he was of opinion that there is little distinction in substance between concepts of "oppression/disregard of interests" and "unfair prejudice".

87. Conduct which is unfairly prejudicial does not have to be unlawful (see *Re Clubman Shirts* [1983] ILRM 323).

88. Examples of unfairly prejudicial conduct are to be found in *Irish Press plc v. Ingersoll Irish Publications Ltd.* (High Court, 15th December, 1993) where such conduct arose from a plan to damage the interests of a company carried out by a shareholder in the manner by which it exercised its power to conduct the affairs of the company. Barron J. observed that the plan was not such as to "*… destroy the business of the company, it was a plan of action against the interests of the petitioner and was carried out by the manner in which the affairs of the companies were exercised*".

89. Adopting this "in the round" approach to unfair prejudice I am of opinion that the Director has demonstrated quite a number of circumstances suggesting that the affairs of the company were conducted in a manner that is unfairly prejudicial to some part of its members. These would include the data interrogation, the proposed network acquisition, the APN transaction, market abuse infringements and the furnishing of information by the chairman to the main shareholder. In this regard there was an inequality of treatment between the major shareholder who appears to have been closely informed and other shareholders.

Section 748 (1)(f)
90. This subsection captures any actual or proposed act or omission of the company (including an act or omission on its behalf) which was is or would be unfairly prejudicial to some part of its members.

91. It is to be noted that this subsection refers to an individual act rather than a course of conduct. Acts which are attempted but not implemented are included since it speaks of "proposed acts". It covers not merely an act or acts currently proposed but one which has or have in the past been proposed.

92. The acts which would principally fall within the purview of this subsection are, in my view, the proposed network acquisition and

the APN transaction. The Director has produced evidence in respect of those transactions which falls within this subsection.

Section 748(1)(i)
93. I next turn to the provisions of subsection (i). In the course of discussion with counsel for the company he readily accepted that this was the subsection which presented him with most difficulty from the point of view of defeating the Director's application. It deals with circumstances suggesting that persons connected with the company's formation or management of its affairs have, in that connection, been guilty of fraud, misfeasance or other misconduct towards the company or its members. Having regard to that wording, the argument which was made concerning the "affairs of the company" in respect of the four preceding subsections simply does not apply. There is no doubt but that Mr. Buckley, as chairman, was connected with the management of the company's affairs. On the basis of the information put before me he may well have been engaged in activities of the type which are described in the subsection. Notwithstanding that, however, an argument was made to the effect that this subsection did not apply.

94. Counsel on behalf of the company did not argue that the facts disclosed by the Director did not suggest misfeasance or misconduct. The argument was that the section does not apply because Mr. Buckley is no longer connected with the company and was not so at the time of commencement of this application. It is said that "persons connected" has to be read in the present tense. On this construction, the subsection would only apply to persons who were connected with the company at the time of the wrongdoing and remained connected at the time of the application. I do not agree. First, it cannot have been the intention of the legislature that a person guilty of wrongdoing of the type contemplated by the subsection could by the stratagem of removing him or herself from the company effectively disapply the subsection. Second, in any event, the whole thrust of the section is in respect of activities conducted in the past ("have been") by a person connected with the management of the company at that time. Mr. Buckley is just such a person.

95. There was a second line of argument to the effect that even if it could be said that Mr. Buckley was a person connected with the company for the purposes of the subsection it would not apply to him if it were established that the company had taken action against him. Had that not been done then the section would apply. I can find no basis to support that proposition. Either the subsection applies or it does not. It does not matter whether the company has taken action against Mr. Buckley. In my view the subsection applies in this case.

96. I reject the construction which is sought to be put on this subsection. I hold that Mr. Buckley was a person connected with the management of the company and that on the evidence before me the circumstances suggest that he has been guilty of misconduct and misfeasance of the type contemplated by the section. He was the major player in the circumstances relied upon by the Director. Thus, the jurisdiction to consider the appointment of inspectors is likewise triggered under this subheading.

Section 748(1)(j)
97. The final subsection relied upon is subsection (j). It deals with the company's members not having been given all the information relating to its affairs which they might reasonably expect. Again, it is the alleged wrongdoing of Mr. Buckley and in particular his frequent communication with one individual shareholder namely, Mr. O'Brien, and the imparting to him of information which arguably other members of the company were entitled to that satisfies me that this subsection has likewise been engaged. The board members as well as company members were kept in the dark by him of many of his activities.

98. I conclude that the Director has put before me evidence satisfying me that there are circumstances present in respect of which all six subsections relied upon by him are applicable. I now go on to consider whether the discretion of the court should be exercised in his favour in appointing inspectors as he seeks.

Discretion
99. In essence the Director contends that the court should make the order sought: -

> (a) having regard to the public interest;
>
> (b) because the appointment will lead to the ascertainment of facts which are at present unknown and will thus achieve the statutory purpose of such appointment;
>
> (c) notwithstanding the fact that other statutory bodies are or will enquire into aspects of the matters identified;
>
> (d) even though such an appointment does have negative consequences for the company it would be proper and not disproportionate to make it.

100. The company contends that the Director is wrong in the arguments which he makes under each of these headings. It also argues that in circumstances where the activities complained of were not done with the knowledge or approval of the board and where the board has taken all reasonable steps to deal with the matters, the appointment of inspectors would not be justified and disproportionate particularly when one considers the damage to the company's affairs and reputation.

101. I will consider each of these arguments in turn.

The public interest
102. There is no doubt but that in the exercise of its discretion on an application of this sort the court is entitled to take into account the public interest. That was the view of the Supreme Court in *Dunnes Stores (Ireland) Co. v. Ryan* [2002] 2 I.R.60 where Murray J. said:-

> *"I do not think the statutory duties and obligations imposed on companies and directors can be viewed simply as an end in themselves for their benefit, since those duties have a function in preventing abuses of their corporate status which may lead to consequences which are not just breaches of the Companies Act per se, but may have other far reaching consequences of public interest."*

The same judge also spoke of the supervision of companies being important with a view to maintaining "*public confidence in how companies conduct their affairs*".

103. In the same case Keane C.J. observed that the Minister (now the Director) enjoys –

> *"… significant powers to ensure that companies incorporated under the Acts do not abuse the privileges which incorporation confers on them to the detriment of their members, their creditors or indeed the public in general. That*

has been a recognised function of the second respondent and her statutory predecessors since the first decade of the twentieth century".

104. The Director is obliged to look to the maintenance of standards of corporate governance and it is a matter that the court is entitled to consider in the exercise of its discretion on an application of this sort.

105. Again, in the same case Murray J. said:-

> *"The very nature of public regulation of companies such as that found in the Companies Acts (as well as other legislation), is to ensure and reinforce certain standards of governance of corporate bodies".*

106. The same judge observed that-

> *"Corporate governance has an internal and external dimension. It is only in its narrowest sense that corporate governance can be viewed as a set of arrangements internal to the corporation that define relationships between managers and shareholders. … the external dimension comprises those standards or obligations laid down by external sources such as statutes or statutory regulations".*

He also commented that-

> *"Companies which have availed of the right to incorporate and register under the Acts and the advantages which such incorporation offers, (should) not abuse those advantages to the detriment of their shareholders, creditors and, in particular, the public interest".*

107. Shanley J. in *Re National Irish Bank (No.1)* [1999] 3 I.R. 145 commented that:-

> *"It is, of course, a legitimate objective of the State, and entirely in the public interest, to lay bare frauds and dishonest stratagems…"*

108. In my own decision in *Director of Corporate Enforcement v. D.C.C.* [2009] 1 I.R. 464 I also identified the public interest as one of the matters which the court must take into account in the exercise of its discretion.

109. This short review of relevant case law demonstrates that the public interest in ensuring the maintenance of proper standards of probity and good governance in companies is one of the major matters which ought to be taken into account on an application such as this. That is so because it is in the public interest that the privilege of incorporation is not abused and that public confidence in how companies conduct their affairs is maintained. It is also important to ensure, particularly in the case of a public company, that its affairs are conducted entirely above board and with proper respect being afforded to the interests of all shareholders and not just some.

110. In this case there is a further dimension to the public interest because of the nature of the business which is carried on by the company. A free press is a cornerstone of a functioning democracy. Journalists' communications have a particular importance in that regard. Thus, allegations of the accessing of journalists' communications by unauthorised third parties raise issues of particular public interest. That anybody's private data would be wrongfully accessed is a serious matter but in the context in which that was allegedly done in the present case it is even more so. The company occupies a dominant position in the media sector in this country and there is an obvious public interest in its proper governance. It is in the public interest to discover everything about, in particular, the data interrogation issue so as to find out if there were wrongdoings carried on by the company in the conduct of its business or by persons connected with its management. It is, as was said by Shanley J., a legitimate objective of the State to lay bare dishonest stratagems which may have infected the affairs and governance of the company. It is legitimate for the Director to see to it that the issues identified are investigated and, if found to have happened, dealt with effectively. That exercise may lead to further legal action or the enactment of statutory measures that may be necessary to prevent its repetition.

111. Having regard to the evidence which has been placed before me I am of opinion that the issue of the public interest in this case is one to which I must afford considerable weight. Substantial emphasis was placed by the Supreme Court on the public interest in the *Dunnes Stores* case and I think that this case requires no less emphasis.

The purpose of the investigation

112. The court must also keep in mind the purpose of an investigation to be carried out by inspectors if appointed.

113. As I noted in my decision in the DCC case Keane C.J. in his *Company Law*, 4th Ed. (2006) said:-

> *"… the functions of the inspectors are to investigate and report. It is thus, in essence, a fact finding exercise which does not of itself affect the legal rights and obligations of any individual concerned, although the publication of the report – and even the fact of an investigation having been ordered – may affect their reputations."*

114. As I pointed out in the DCC case that statement from Keane C.J.'s work mirrored views expressed by Sachs L.J. in *In Re Pergamon Press Ltd*. [1970] 1 CH 388 where he said:-

> *"The inspector's function is in essence to conduct an investigation designed to discover whether there are facts which may result in others taking action …"*

That approach was also to be found in the Canadian case of *Saunders v. Echo Temp International Inc.* [2007] A.B.Q.B. 136 where Lee J. said:-

> *"The primary purpose of an investigation is to 'bring to light facts which otherwise might be inaccessible to shareholders and security holders."*

115. As I went on to say in DCC:-

> *"The statutory discretionary power given to the court should only be exercised in circumstances where the statutory preconditions are satisfied and where the exercise of the discretion is likely to achieve the purpose of uncovering facts not already known. Thus, for example, there could be no justification for the appointment of inspectors if the sole*

purpose was to provide the applicant with a procedural or evidential advantage in the pursuit of disqualification proceedings against persons associated with the companies."

116. In the circumstances of this case, as is clear from even the summary of the evidence placed before me, there are a myriad of issues the answers to which are not known. The statutory powers exercised by the Director (he made 14 statutory requirements for information pursuant to s.778 of the Act) have produced a good deal of information but it is far from comprehensive and considerable mystery still surrounds a number of the issues. It is highly desirable the Director be able to get to the bottom of the issues which he has identified. Indeed, it can be argued that it would also be of advantage to the company so as to ensure that it can be sure that it has put in place procedures to ensure that no future chairman or director will be able to behave in the manner which it is alleged Mr. Buckley behaved in the instant case.

117. I am thus satisfied that the necessary statutory preconditions having been met, the appointment of inspectors would be capable of achieving the statutory purpose. If I were of opinion that no new facts could be gleaned by inspectors I would not appoint them since to do so would be wrong.

118. That, however, is not the end of the matter since the exercise of the discretion also requires me to consider the other two issues identified in paragraph 99.

Other investigations

119. The fact that other investigations are or may be carried out by statutory bodies such as the DPC or the Central Bank or indeed by the company itself is a proper matter to take into consideration in the exercise of the court's discretion. The fact of such inquiries, however, does not of itself preclude the appointment of inspectors.

120. This issue has been considered by the courts on a number of occasions. In *In Re National Irish Bank Ltd.* [1999] 3 I.R. 190 I had to consider an application seeking to restrict the scope of an investigation being carried on by inspectors who had been appointed by the court pursuant to the relevant statutory provisions. In that case the Comptroller & Auditor General had been asked to conduct an industry wide investigation in relation to deposit interest retention tax. The bank sought orders restricting the inspectors from investigating the same matters as were being investigated by the Comptroller & Auditor General. I held that there could be little doubt but that there might well be an area of overlap between the two inquiries. However, I took the view that there was not a duplication of process because "*… the purpose of the exercise, the object sought to be achieved by it and the steps to be taken on foot of it are entirely dissimilar and distinct*". I held that the object of the inspection directed by the court was "*… to ensure that bodies corporate comply with their statutory obligations and do not engage in unlawful activities*". That was a different object to the one which was being pursued by the Comptroller & Auditor General.

121. In the present case the company has been notified by the DPC of her intention to commence an investigation. The notification is dated 26th June, 2018 and post-dates the commencement of these proceedings.

122. There was a good deal of debate as to whether the investigation being commenced by the DPC was one which will be dealt with pursuant to the provisions of the Data Protection Acts 1988 and 2003 or whether the 2018 Act had any relevance. It is common case that the commencement date for the 2018 Act was 25th May, 2018. In the course of the notification of 26th June, 2018 specific reference is made by the DPC to the provisions of s.8(2) of that Act.

123. In the course of her notification she says:-

"Pursuant to s.8(2) of the Data Protection Act 2018, the Data Protection Act 1988 and 2003 apply to the Data Security incident and it shall be examined by the DPC thereunder".

That seems to me to make it clear that the DPC considers that her remit to conduct her investigation lies under the old 1988-2003 legislation rather than the 2018 Act. The company argues that the DPC may well be entitled to utilise the wider powers given under the 2018 Act. I would be slow to accept that contention given the view that the DPC has taken in respect of her own powers. But even if the company is correct and the 2018 Act may be utilised by the DPC it does not appear to me to matter very much in the context of the issue that I am now considering. In her notification of 26th June, 2018 the DPC says that she considers it appropriate to investigate the circumstances of the data security incident "*… in order to establish a full set of facts so that it may examine whether or not INM has discharged its obligations as data controller in connection with the subject matter of the data security incident and determine whether or not any provisions of the Acts have been contravened by INM in that context.*"

124. Thus, it is clear, the DPC investigation is limited to what is identified in that paragraph whether carried on under the old or the new legislation. It does not have about it the breadth of the inquiry that will be carried out by inspectors (if appointed). The DPC could not, for example, conduct an examination of whether the data interrogation issue was part of a broader abuse of information within the control of the company with a view to benefiting the major shareholder. In the light of the extent of the data interrogation and the persons who were the subject of it, that is certainly an issue that arises for consideration and one which the DPC would be unable to investigate. In addition, the DPC investigation does not have available to it the sort of powers that inspectors appointed by this court have. Indeed, it has to be pointed out that the company itself has acknowledged the limited jurisdiction of the DPC because in the issues that arose for consideration prior to trial as to the persons who were entitled to have sight of the affidavit evidence the company made it clear, and I agreed with it, the DPC was only entitled to sight of those aspects of the evidence relevant to her remit. Accordingly, I am of the view that the investigation being undertaken by the DPC should not tip the balance of the scales of discretion in favour of this application being refused.

125. The Central Bank has taken an interest in these proceedings but as yet no notification of an investigation by it has been given. Even if it were, it would suffer from the same limitations as to scope and powers as that of the DPC. It would be limited to that bank's statutory role which is substantially different from the role to be undertaken by inspectors appointed by this court.

126. Neither do I think that any of the investigations that have been or are being conducted by the company would be a satisfactory way of dealing with the disquieting matters which have caused the Director to bring this application. I do not believe that the company can effectively investigate matters in circumstances where there is now a stand-off between it and its former chairman. High Court proceedings have been commenced against him. Such litigation is not an appropriate vehicle in which to investigate matters which fall within the statutory remit of the Director. Indeed, such proceedings would be under the control of the company which could at any stage compromise them or discontinue them. The issues in any event which would fall to be dealt with in them are different to the concerns of the Director.

127. None of these inquiries would, in my view, address the public interest element in an adequate way.

128. There are three further matters that may legitimately be taken into account in considering this topic. The first is the extensive nature of the powers that court appointed inspectors have by comparison with those conducting investigations under the other statutory disciplines. For example, s.757 of the Act enables a court appointed inspector to call upon the court's assistance by certifying a refusal to cooperate with him. Powers are then given to the court to deal with that. The inspector's powers would be worth little if they were unable to see that they were readily enforced and they have a speedy mechanism for so doing. This is more extensive and more effective than powers available to those conducting inquiries under the other statutory regimes.

129. Second, is the question of publication of a report. The extent to which the report of a court appointed inspector is to be published is a matter for the court save, of course, that all such reports must be furnished to the Director. Section 759(ii)-(iv) of the Act empowers the court, if it thinks fit, to provide the report to a variety of persons or agencies and to order how it shall be published. The question of the publication of reports produced by the other statutory entities is much less clear. It was accepted by both sides that the DPC report when it comes into being will be confidential. However, counsel on behalf of the company was authorised to say that it will publish or agree to the publication of any report by the DPC. Whilst that approach is to the company's credit, I do not know whether the DPC would consider that she has power to publish such a report even with the company consenting. As of yet, there is not even notification of an investigation from the Central Bank. None of this lack of clarity pertains to a report produced by court inspectors.

130. The third matter relates to the effect and status of reports. A court appointed inspector's report falls to be considered by the court and the court is given power to make such order as it thinks fit in respect of it. Those powers include an order for the winding up of a body corporate or an order for remedying any disability suffered by any person whose interests were adversely affected by the conduct of the affairs of the company that is the subject of the report. *In Re National Irish Bank* (No.3) [2004] 4 I.R. 186 I noted the corresponding provision in the prior Companies Acts "*confers an extraordinarily wide jurisdiction on the court*". The court might even award damages to persons adversely affected by the conduct of the company's affairs. None of these powers are available to inspectors appointed under other statutory regimes.

131. If proceedings are brought arising out of a court appointed inspector's report that report's admissibility and presumptive evidentiary status is provided for in s.881(4) of the Act. That section provides:-

> *"A document purporting to be a copy of a report of an inspector appointed under Part 13 shall be admissible in any civil proceedings as evidence –*
>
> > (a) of the facts set out in it 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".

This is a powerful provision peculiar to reports provided by inspectors appointed by the court.

132. In these circumstances I hold that the DPC's investigation and the possible investigation by the Central Bank are not sufficient for the reasons stated to warrant a refusal of the Director's application.

Negative consequences

133. The final matter is the company's argument that the negative consequences for the company which would result from the appointment of inspectors is in all the circumstances disproportionate. The company invites me to take into account, which I do, that the mere making of this application had an immediate and significant impact upon it, its management, employees and shareholders. It complains that it ought to have had an opportunity to make submissions to the Director before the application was brought. However, that complaint was dealt with comprehensively by Noonan J. when he dismissed the company's application for judicial review [2018] IEHC 319. It has put extensive affidavit evidence before me as to the changes in personnel which have been brought about in the company in recent times. It points out that the wrongdoing in question was done without the knowledge or approval of the board and that the board is prepared to take such steps as are necessary to protect its interests and to obtain redress from third parties if advised that it is appropriate to do so. It points out the substantial changes recently made to the composition of the board. Its current chairman and three other directors were appointed in early March of 2018 and Mr. Doorly the Chief Executive was appointed in October 2017. I am given much information concerning both the current chairman, Mr. Murdoch MacLennan and the other directors. Dr. O'Hagan avers that the company has strong corporate governance measures in place and sets out in great detail the steps taken by the company to deal with the matter. However, the fact that wrongful activity has ceased and that the company believes that it cannot be repeated is not a basis for refusing the Director's application. As was pointed out by Keane C.J. in the *Dunnes* case it is a "… *fallacious proposition*" to suggest that where the relevant conduct has ended, the interest in intervention is also at an end.

134. The company alleges that it has suffered and will continue to suffer financial harm and reputational damage if an inspector is appointed. The Director accepts that the court is entitled to consider these issues and does not dispute but that the court will do so but he does not accept that the damage is as contended for. This is dealt with extensively in the company's affidavits and in the third affidavit of the Director.

135. The company put before me an affidavit of Mr. Kim Green, a business advisor and former partner of the global business advisory firm PWC. He prepared a report addressing the potential impact of the appointment of inspectors on the company. The relevant part of the report commences on p.8 and points out that the company in common with other media businesses with significant print media interests, has suffered from shrinking markets with the shift to digital. He highlights a decline in total advertising revenues of 10.6%, circulation revenues of 8.4% and distribution revenues of 9.5%. This was in respect of the 2017 results which were announced on 9th March, 2018. No dividend was proposed for 2017 reflecting the continuing difficult trading circumstances, he points out. All of this antedates this application.

136. He then deals with the direct effects of the appointment of inspectors on the company's financial performance which he says would include legal fees, the hiring of additional specialist personnel, augmentation of the finance team, I.T. costs and potentially increased cost of borrowing. The report then deals with the indirect costs which he sets out under various different headings. Both the affidavit evidence of Dr. O'Hagan and Mr. Green are heavily criticised by the Director in his third affidavit. Amongst other things he points out the speed with which Mr. Green's report was prepared and expresses the view that the task could not have been performed properly in such an expedited time frame. He then critiques many of the key assertions made by Mr. Green.

137. Conflicts of fact on affidavit cannot be resolved without cross examination. Such did not occur in this case and rightly so. I am not in a position to adjudicate on these conflicts but a number of matters are clear.

138. The appointment of inspectors is always likely to cause damage to the company to which they are appointed. In the DCC case I cited the observations of Goldstone J. in *Sage Holdings Ltd. v. Unisec Group Ltd*. [1982] 1 S.A. 337 where he said:-

"The company may be caused harm and damage and be put to substantial expense. This is especially so in the case of a large public company where its reputation in the market may become tarnished by the very fact of an investigation being ordered. However, the potential harm and damage from this source is probably less substantial in the case of a non-trading company. This consideration, in my opinion, should temper the natural inclination the court may have to protect members of the public from those whose control of large companies has become entrenched".

139. I recognise that the appointment of inspectors is a serious matter and that it carries implications for the company. I am not convinced on a consideration of the evidence that the consequences in this case are as serious as are suggested. For example, I find it difficult to accept what is sworn to by Mr. MacLennan in his second affidavit where he says:-

"The board believes that INM's very survival would be jeopardised if there were a general erosion of confidence, including a loss of advertiser and supplier confidence in the INM group such as would follow from the appointment of inspectors."

I am sceptical that the mere appointment of inspectors would have such devastating consequences. In any event the company has cash and cash equivalents of €91.5 million and in those circumstances I have doubts as to whether any solvency issue could arise from the appointment of inspectors.

140. The view of the company seems to be based upon the likelihood of what is described by Ms. Fionnuala Duggan in her second affidavit as a "*protracted multi-year and wide ranging inspection*". If inspectors are appointed they will have to operate to a time table fixed by the court and whilst the issues are wide that does not mean that the inspection need be protracted particularly if cooperation is forthcoming from all parties. If it is not, then the court is possessed of powers which can be exercised speedily to ensure compliance with the inspector's directions.

141. As to reputational damage, it seems to me that a good deal of that has already occurred as a result of what has been disclosed to date. It is a matter of public knowledge that the company's former chief executive and chief financial officer regarded what was taking place in the company so seriously that they made protected disclosures. The company is suing its former chairman for damages, breach of fiduciary duty and misrepresentation. The DPC and the Central Bank have sought access to the affidavit evidence put before me. The DPC has given notification of the commencement of an investigation. The company is potentially facing litigation from many persons whose data may have been unlawfully accessed. Given that amount of information which is already in the public domain, it is difficult to see how the appointment of inspectors is likely to cause very much more reputational damage to the company.

Conclusion
142. As I said in the *DCC* case on the topic of proportionality the appointment of inspectors is a serious matter and such a sledge hammer should not be used to crack a nut. What has been disclosed in the evidence before me is no nut. The appointment of inspectors to ascertain the truth of what has allegedly gone on in the company is well justified and is not disproportionate. None of the issues raised by the company warrant the court exercising its discretion against making the order sought. It may be that there will be a complete explanation for all of the Director's concerns but if there is not then, to borrow the language of the independent reviewers, what is alleged is very serious indeed. The evidence merits the appointment of inspectors and that is the order I make. I now turn to a consideration of the terms of reference under which the inspectors will carry out their task.

Terms of reference
143. The terms of reference sought by the Director are as set out in the notice of motion. They were not discussed in detail during the oral hearing but were the subject of an exchange of submissions between the parties subsequent thereto. This is my adjudication as to the appropriate terms of reference.

Paragraph 2 (a) of the notice of motion
144. The Director seeks, pursuant to s.748 of the Act, that the inspectors shall investigate and report on the affairs of the company as the court shall deem fit and in particular -

"(a) the accessing by third parties (including but not limited to Trusted Data Solutions U.K. Ltd., Trusted Data Solutions LLC, DMZ IT Ltd., Specialist Security Services Ltd., Reconnaissance Group Ltd., Resilient Defence Ltd., John Henry, Derek Mizak, Keith Duggan, Shane Henry, Robert Breen and Ron Cole) from October 2014 or thereabouts, of the company's informational technology systems and the collection, extraction and/or processing of data held therein (referred to hereinafter as the "data interrogation"), to include:

(i) the fact of and circumstances concerning the data interrogation;

(ii) the reasons for and the purposes of the data interrogation;

(iii) the knowledge of the company's directors (the directors) of the data interrogation;

(iv) the results of the data interrogation;

(v) payment for the data interrogation;

(iv) the persons for whose benefit the data interrogation was conducted;

(vii) the adequacy of the director's response to notification of the data interrogation, including their investigation of the same and engagement with the Data Protection Commissioner."

145. The company contends that this term of reference should be omitted in total because of the DPC investigation. Should that approach not meet with the approval of the court it is suggested that a decision on this point should be deferred until the DPC investigation has concluded. The company also contends that the term of reference at 2(a)(vii) should be omitted because it relates not to the data interrogation but the adequacy of the board's response and its engagement with the DPC.

146. The Director argues that I should disallow these objections on the part of the company. He points out that the DPC investigation is not an adequate substitute for an investigation by inspectors. He points out that even within her jurisdiction her powers are limited and inadequate especially if her investigation is carried out under the old legislation which she has determined applies. He argues that the DPC's jurisdiction is limited and cannot consider the full ramifications of the data interrogation on areas such as corporate governance, breach of director's duties and any possible criminality outside of data protection law. All of these are matters which

could be dealt with by inspectors. The Director also points out the special evidentiary status of a report produced by inspectors which does not apply to a report from the DPC. Indeed, he raises the issue as to whether the DPC can produce a report at all. There is also the question of its publication.

147. In the course of the judgment I have dealt with all of these issues which are raised by way of objection to the terms of reference. I have pointed out the limited nature of the DPC's investigation, her powers, by way of contrast to those of inspector. I have held that the DPC investigation is not a basis for refusing to appoint the inspectors and consequently it would make no sense in the light of my findings to omit these terms of reference. Neither would it be appropriate to defer this investigation until after the DPC has conducted hers. Neither do I see a basis for omitting paragraph 2(a)(vii). It is correct to say that it does not relate to the data interrogation per se but to the adequacy of the board's response and its engagement with the DPC. But the adequacy of the board's response is a subject of the Director's concern and falls within the statutory provisions of section 748. Consequently, I see no basis for excluding it and I will therefore order that the inspectors shall have the terms of reference precisely as prayed for at para. 2(a) of the notice of motion.

Paragraph 2(b)
148. The Director seeks an order that the inspectors shall investigate and report on "*the proposed acquisition in 2016 by the company from Communicorp Group Ltd (Communicorp) of Newstalk Radio (the proposed Newstalk acquisition), to include*:-

> *(i) the facts of and circumstances concerning the proposed Newstalk acquisition; and*
>
> *(ii) the role played by Leslie Buckley (the Chairman), then Chairman of the Board of Directors (the Board), in relation to the proposed Newstalk acquisition."*

149. The company contends that if inspectors are to be appointed to deal with this issue then what is provided for at 2(b)(ii) is all that is needed. It also contends that the language at 2(b)(i) is broad and in substance repetitive of the earlier text that refers to the proposed Newstalk acquisition generally.

150. The Director does not have a strong objection to the removal of 2(b)(i) which he contends was included for clarity.

151. Whilst the inspectors will have a broad remit I do not wish to expand it unnecessarily. That will give rise to both additional time and costs being expended. The principal complaint which is made in respect of this transaction was the role played by Mr. Buckley and his endeavours in that regard. In the course of investigating Mr. Buckley's involvement, the inspectors will have to have regard to the facts and circumstances surrounding the acquisition. They will not have to report on them save insofar as they provide background to what was allegedly done by Mr. Buckley. I will therefore direct the inspectors only to proceed as provided for in paragraph 2(b)(ii).

Paragraph 2(c)
152. The Director wishes the inspectors to have power to examine "*the proposed payment of a fee to Island Capital in March 2015 or thereabouts (the success fee) in connection with the disposal of the company's holding in APN News and Media Ltd (the APN transaction) to include:-*

> *(i) the facts of and circumstances concerning the proposed payment of the success fee;*
>
> *(ii) the role played by the chairman in relation to the proposed payment of the success fee."*

153. The company contends that there should be no investigation into this at all because it was addressed by the independent reviewers. Their review found no wrong-doing. The reviewers did not consider there was any evidential conflict relevant to the matter that they were unable to resolve.

154. I have not had to deal in detail with the report prepared by the independent reviewers in this judgment to date. The reviewers were persons of the highest calibre and delivered a very competent report prepared within the limits of the terms of reference given to them. They accepted Mr. Buckley's and Mr. Kennedy's evidence that valuable work was done by Island Capital. The Director contends that that, however, should be looked at afresh having regard to additional information which is now available as a result of the statutory demands which he has made and the responses to them. He says that it should also be looked at afresh in circumstances where, as I have already mentioned, the board accepts that in respect of another issue it was probably misled by Mr. Buckley and has now commenced proceedings against him. The Director points out, I believe correctly, that no documentary evidence was ever adduced of work having been done for INM by Island Capital. That of itself might appear strange but the matter becomes more suspect when, as I already pointed out, the claim was dropped once it was clear that it would have to be disclosed. The independent reviewers noted that the period in which it was likely the work was done was not the period that was actually billed for. The question still arises as to why Island Capital should be paid a fee of €1 million at all.

155. In addition, the independent reviewers did not have information relating to the "cosi deal" to which I have already referred. The Director is correct when he contends that the reviewers did not investigate whether the "cosi deal" was connected with the APN transaction (nor could they as they did not know of it), why Mr. O'Brien did not wish the matter to be mentioned to anybody and why Mr. Buckley felt it necessary that INM should handle it very carefully. In these circumstances, notwithstanding the contention of the company, I am satisfied that the inspectors must be authorised to carry out the investigation identified at para 2(c) of the notice of motion. The order which will be made on foot of this judgment will so provide.

Paragraph 2 (d)
156. This seeks to cover "*consideration of payment of a fee to Paul Connolly, then a director of the company, in connection with the APN transaction*".

157. Precisely the same submissions are made by the company as were made in respect of relief 2(c). Likewise, the Director makes the same submissions and calls my specific attention to what he avers to at paras. 486-488 of his grounding affidavit.

158. For the same reasons I believe it appropriate that the inspectors should be given authority to investigate this matter. The order will so provide.

Paragraph 2(e)
159. The Director wishes the inspectors to investigate "*the board's response to the disclosures and/or attempted disclosures made*:

by Robert Pitt, then Chief Executive of the company (the Chief Executive), in November 2016, concerning the proposed Newstalk Acquisition and the proposed payment of the success fee (the Pitt disclosure); and

by Ryan Preston, then Chief Financial Officer of the company in December 2016 concerning the proposed Newstalk Acquisition (the Preston disclosure)"

to include:-

(i) the proposed appointment of a mediator between the Chief Executive and the Chairman had any influence on the part of the chairman in that regard;

(ii) the investigation of the Pitt disclosure and /or the Preston disclosure, including:

I. The role played by the disclosure committee;

II. The circumstances in which the decision to establish and independent review was taken;

III. Any influence on the part of the chairman in relation to the appointment of independent reviewers or otherwise concerning the investigation."

160. The company contends that the facts in relation to the board's response are well known. The report of the independent reviewers speaks for itself and thus it is difficult to see the necessity for this term which is potentially very broad.

161. The Director points out that the board response is of key concern to him because it raises issues of (1) the standard by which the then directors discharged their duties and obligations, (2) compliance or otherwise with the Protected Disclosures Act 2014, and (3) potentially inappropriate influence exercised by the major shareholder over the company's internal affairs. He contends that if the underlying issues are being investigated it would be wrong to exclude from the inspectors' remit consideration of how the issues were addressed by the board. He also points out that several of these issues were not investigated by the independent reviewers.

162. I have come to the conclusion that all that is necessary in this regard is that the inspectors be given authority to investigate the board's response to the disclosure and /or attempted disclosures made by Messrs. Pitt and Preston. That provides them with full authority to investigate all matters in that regard. Paragraphs (i) and (ii) are surplusage since what they contain is already covered in the general remit on this topic. The inspectors will be fully au fait with the Director's concerns and can deal with whatever issues they think appropriate concerning this matter.

Paragraph 2 (f)
163. This seeks to give power to the inspectors to investigate "*whether the chairman, in March 2016, August 2016, September 2016, November 2016, December 2016, January 2017 or at any other time, unlawfully disclosed to any third parties (including but not limited to Denis O'Brien and James Morrissey) 'inside information' within the meaning of the European Union (Market Abuse) Regulations 2016 and/or Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16th April, 2014 on Market Abuse (Together, the "Market Abuse Regulations") to include:-*

(i) the facts of and circumstances concerning any such disclosure;

(ii) the response of the board to being made aware of the same".

164. The company contends that this term of reference should be omitted in total because the Central Bank is the competent authority to investigate and has requested and obtained relevant documentation. Alternately, it argues that a decision on this point should be deferred until inquiries are made of the Central Bank as to the status of its consideration of the allegations of disclosure of confidential or inside information made by the Director. If the Central Bank confirms that it is going to investigate then any decision should be deferred until that investigation has concluded.

165. The Director correctly points that as of now there is no indication that the Central Bank is going to investigate these matters. In any event, he says that if there were unlawful or unauthorised disclosures by a director of confidential information under the market abuse rules it would be a breach of director's duties and might well form part of a broader pattern of possible inappropriate involvement.

166. I have already indicated that the possibility of a Central Bank investigation would be no basis for refusing to appoint inspectors. I have also pointed out the limited nature of the investigation that could be carried out by the Central Bank and the many advantages that an inspection pursuant to the order of the court and a report prepared by court inspectors has over what may be done by the Central Bank. I do not accept the company's submissions. Accordingly, I will direct the inspectors to investigate the matters as set out at paragraph 2(f).

Paragraph 2 (g)
167. This reads "*whether the Chairman, between June and November 2016 or at any other time, disclosed to third parties (including but not limited to Denis O'Brien, Dominic Shorthouse and Dermot Hayes) information that was or is confidential to the company (including but not limited to legal advice received by the company), to include –*

(i) the facts of and circumstances concerning any such disclosures and

(ii) the response of the board to being made aware of the same."

168. The company contends that this should be omitted in total because the Central Bank is the competent authority to investigate and has requested and obtained relevant documentation. Alternatively, the decision on this should be deferred. These are precisely the same arguments that were made in respect of 2(f) and for the same reasons I reject them here. The Central Bank is not the competent authority in relation to unlawful or unauthorised disclosure by a director of confidential information.

Paragraph 2(h)
169. This relates to "*whether any documents including passwords – protected documents falling within the parameters of directions given by the Chairman, Derek Mizak and/or DMZ IT Ltd. by the Director of Corporate Enforcement under s.780 and/or 784 of the Act*

were not furnished to the Director as required and if so -

(i) the identification of the documents concerned;

(ii) the relevant circumstances;

(iii) who was responsible for such documents not being furnished."

170. No objection is made to this power being given and it seems to me appropriate that it should be included. Accordingly, the order will so provide.

Paragraph 2(i)
171. The Director seeks to have the inspectors investigate "*whether the company has failed to comply with any aspects of the U.K. Corporate Governance Code (as applied by the Irish Corporate Governance Annex) in circumstances where such non-compliance has not been reported to the members of the company in the company's annual reports*."

172. The company objects, in my view correctly, to this provision on the basis that it is not limited to any particular period, is not a ground of itself upon which the Director may apply for the appointment of an inspector and is too potentially wide ranging. I agree with the company that there should not be a roving review of the company's corporate governance generally since to do so would unnecessarily extend the scope of the investigation with consequent delay and cost implications. On the other hand, the company has asserted on affidavit that it is compliant with the U.K. Corporate Governance Code. It appears to me that the inspectors will in any event report any breaches of the U.K. Corporate Governance Code as may be disclosed arising out of any other matter the subject of their inspection. This proposed term of reference is unnecessary.

Paragraph 2(j)
173. The Director wants the inspectors to have power to investigate "*the overall governance of the company, having regard to the foregoing issues and any other issues determined by the inspectors to be relevant thereto*".

174. The company objects to this on the basis that it is far too broad and uses what is described as "catch all language".

175. The Director submits that the "other issues" mentioned do not constitute a free standing basis for inquiry. However, he says, that should other issues relating to corporate governance come to light in the course of the inquiry into the matters specified the inspectors should be free to report on them. That is so and I do not believe that it is necessary to include paragraph 2(j). I come to that conclusion particularly having regard to the relief which is sought at para. 2(k) and 2(l) to which I will turn presently. However, although I am refusing to include para. 2(j) as a specific obligation on the part of the inspectors I would not in any way wish to limit or frustrate their investigative effectiveness. Accordingly, if in the course of their investigation they feel it is necessary or desirable that their remit should be expanded as is sought at para. 2(j) they will have leave to return to court to request such.

176. Indeed in that regard I propose to give them a general leave to apply to court in the event of them reaching the conclusion that the terms of reference as authorised are inadequate to enable them to carry out their investigation in a thorough comprehensive and effective way.

Paragraph 2(k)
177. This paragraph seeks to have the following term of reference provided to the inspectors. They should report on whether there have been

"Any breaches of

(i) the Act

(ii) the Protected Disclosures Act 2014;

(iii) the Data Protection Acts 1988 and 2003 (as amended);

(iv) the Market Abuse Regulations;

(v) any regulatory approvals or conditions attached thereto (or any conditions otherwise associated with such approvals) granted to the company by competent authorities (including, but not limited to, the Minister for Communications, Climate Action and Environment, the Competition and Consumer Protection Commission and the Broadcasting Authority of Ireland); and/or

(vi) the common law;

and, if so, the circumstances relating to such breaches, the provisions involved, the persons in default and the associated evidence."

178. The company says that paragraphs (iii) and (iv) should be omitted because they properly fall within the purview of the DPC and the Central Bank. For the reasons which I have already indicated I disagree with that approach and in any event it is not certain that there will be a Central Bank investigation.

179. The company also objects to "catch all language" where it speaks of "any other matters identified by the inspectors". I do not consider this to be overly broad because it does not constitute a separate free-standing basis for an inquiry. The terms as set out require the inspectors to report on breaches insofar as they have discovered them during the course of the investigation of the matters consigned to their charge.

Paragraph 2(l)
180. This seeks to have the inspector's report on "*whether arising out of the foregoing or any other matters identified by the inspectors;*

(i) the affairs of the company have been conducted;

I. in an unlawful manner; or

II. in a manner that is unfairly prejudicial to some part of its members;

(ii) any actual or proposed act or omission of the company (including an act or omission on its behalf) was, is or would be unfairly prejudicial to some part of its members;

(iii) persons connected with the management of the company's affairs have, in that connection, been guilty of misfeasance or other misconduct towards the company or its members; or

(iv) the company's members have not been given all the information relating to its affairs which they might reasonably expect."

181. This relief reproduces the statutory language to be found in s.748 of the Act. That is the section under which the inspectors will be appointed. As the Director has satisfied me that there are circumstances suggesting that each of the six subsections of s.748(1) are satisfied I decline to confine the terms of reference as though the inspectors were only to be appointed pursuant to section 748(1)(i). I reject the company's submission in that regard. All of these matters in para. 2(l) will be included.

Paragraph 2(m)
182. This seeks that the inspectors should report on "*any related or other matters with the prior approval of the court, given on consideration of an interim report from the inspectors*". That is not objected to and will be included as part of the terms of reference.

The inspectors
183. The Director has nominated two inspectors who are prepared to carry out the inspection if appointed by the court. The first is Mr. Sean Gillane, S.C., who was called to the Irish Bar in 1997 and the Inner Bar in 2009. He is highly experienced and is a specialist practitioner in criminal law. He previously acted as Senior Counsel to the O'Higgins Commission of Investigation. I see no reason why he should not be appointed as inspector and I so order.

184. The second person nominated by the Director is Mr. Richard Fleck, CBE, who is a solicitor by profession. He is a former partner and currently a consultant with Herbert Smith Freehills London. He was a director of the Financial Reporting Council from 2004 to 2014 and was also chairman of the Financial Reporting Review Panel from 2012 to 2014. That Review Panel is responsible for monitoring U.K. listed entities compliance with their financial reporting obligations. Mr. Fleck has previously been chairman of the Auditing Practices Board. He has experience as an inspector having been appointed by the Bank of England to that role and has advised on several investigations and statutory inspections under United Kingdom company law. He appears to be eminently qualified to act as an inspector and accordingly I appoint him. Messrs. Gillane and Fleck have confirmed that they have no conflicts vis-a-vis any of the principal individuals or entities involved in this inspection.

Modus operandi
185. I do not propose to issue any specific directions as to how the inspectors should go about their task. That is a matter entirely for them. They may wish to consider undertaking their task in modules. If they are so minded, then it is up to them to consider the order in which they will investigate the matters.

186. I believe this to be a case where an interim report from the inspectors should be provided. Subject to any submissions either by the Director, the Company or the inspectors I propose that the first interim report be furnished to the court no later than the last day of Hilary Term 2019.