Neutral Citation Number: 2005 IEHC 333

THE HIGH COURT

[2005 No. 270 COS]

IN THE MATTER OF NATIONAL IRISH BANK LIMITED AND IN THE MATTER OF NATIONAL IRISH BANK FINANCIAL SERVICES LIMITED AND IN THE MATTER OF THE COMPANIES ACTS, 1963 TO 2003 AND IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF CORPORATE ENFORCEMENT PURSUANT TO SECTION 160(2) OF THE COMPANIES ACT, 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

NIGEL D'ARCY

RESPONDENT

Judgment of Mr. Justice Kelly delivered on the 26th day of October, 2005

The Reliefs Sought

1. The Director of Corporate Enforcement (the Director) seeks a disqualification order under s. 160(2) of the Companies Act, 1990, as amended, against the respondent, Nigel D'Arcy, (Mr. D'Arcy).

2. The effect of such an order is far reaching. It disqualifies the person against whom it is directed from being in any way, directly or indirectly, concerned in the management of any company. Such a person is also disqualified from taking part in the promotion or formation of such a company or from acting as an auditor, director, officer, receiver, liquidator or examiner of such a company. Similar restrictions apply in respect of any society registered under the Industrial and Provident Society's legislation.

Background to the Application

3. In 1998 this court appointed inspectors (the Inspectors) to investigate the affairs of National Irish Bank (the bank) and National Irish Bank Financial Services Limited (NIBFS).

4. On 9th July, 2004, the Inspectors completed their report. By order of the court of 23rd July, 2004, their report was published.

The Inspectors' Conclusions

5. The Inspectors summarised the conclusions which they had reached in their report as follows:

> 1. Bogus non-resident accounts were opened and maintained in the bank's branches enabling customers to evade tax through concealment of funds from the Revenue Commissioners.
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> 2. Fictitiously named accounts were opened and maintained in the branches, enabling customers to evade tax through concealment of funds from the Revenue Commissioners.
>
> 3. Clerical Medical Insurance (CMI) policies were promoted as a secure investment for funds undisclosed to the Revenue Commissioners.
>
> 4. Special saving accounts had Deposit Interest Retention Tax (DIRT) deducted at the reduced rate, notwithstanding that the applicable statutory conditions were not observed.
>
> 5. There was improper charging of interest to customers.
>
> 6. There was improper charging of fees to customers. (See page (i) of Report)

6. The Inspectors also concluded that responsibility for the improper practices which existed rested with senior management of the bank during the period covered by the investigations. It was their view that senior management had the duty to ensure that the business of the bank was so conducted that such practices did not occur and, if they did, that they were stopped immediately.

7. The Inspectors also concluded that the head of the bank's Financial Advice and Services Division, and a number of the Financial Services Managers in that division, were responsible for the promotion of the CMI policies as a secure investment for funds undisclosed to the Revenue Commissioners.

The Financial Advice and Services Division

8. The Financial Advice and Services Division (FASD) of the bank was set up in 1989. It was separate from the branch network of the bank. FASD was responsible for the marketing of financial products which prior to its creation had been sold to bank customers through manager's insurance agencies. The bank acquired the interest in the manager's insurance agencies with effect from 1st January, 1990.

9. As the Inspectors made clear the role of the FASD was to generate income for the bank from a) the sale of high value insurance products used for tax planning, business planning and personal financial planning and b) the development through the bank's branch network of sales of high volume insurance products such as endowment policies, regular premium savings and protection plans. (See page 83 of Report)

Mr. D'Arcy's role

10. On 1st May, 1989, Mr. D'Arcy commenced employment with the bank. He was recruited by the then Chief Executive Mr. Jim Lacey to establish FASD. He held the position of head of FASD from 1st May, 1989, onwards.

11. During his time Mr. D'Arcy reported to Mr. Lacey as Chief Executive and thereafter to Mr. Seymour as Executive Director until 1st January, 1995. From then until 23rd May, 1997, he reported to the General Manager – Banking, and thereafter, up to the date of appointment of the Inspectors, to the Chief Operating Officer.

12. All the financial services managers within the FASD reported directly to Mr. D'Arcy.

CMI and other policies
13. At pages 115 and 116 of the Report the Inspectors made the following findings in respect of CMI policies. They found:

> 1. Monies which were undisclosed to the Revenue Commissioners, including funds held in bogus non-resident accounts and fictitious and incorrectly named accounts, were targeted by bank personnel for investment in CMI policies.
>
> 2. Bank personnel promoted CMI policies as a secure investment for funds which had not been declared to the Revenue Commissioners, thereby engaging in a practice which served to facilitate the evasion of revenue obligations by third parties.
>
> 3. Prospective investors were given an assurance by bank personnel that their investment would be confidential from the Revenue Commissioners and, if made the subject of a trust, would pass to their beneficiaries without probate having to be obtained, thus making it possible for the funds invested to be kept hidden from the Revenue Commissioners even after the investor's death.
>
> 4. The role of the branch personnel of the bank was to identify likely investors, and the role of the FASD personnel was to introduce customers to CMI and induce them to take out policies with CMI.
>
> 5. The purposes for the bank behind the execution of such policies were:
>
> (i) The earning of commission
>
> (ii) The retention of deposits
>
> (iii) The gaining of new deposits

Mr. D'Arcy's responsibility
14. Part 8 of the Inspectors' Report is devoted to dealing with those who had knowledge and responsibility for the improper practices identified by them. In dealing with Mr. D'Arcy the Inspectors said as follows: "Mr. D'Arcy was head of the FASD during the entire of the period from 1st May, 1989, to the date of the appointment of the Inspectors on 15th June, 1998 to investigate the affairs of National Irish Bank Financial Services Limited. All the financial services managers reported directly to him. Mr. D'Arcy's evidence to the Inspectors, at his interview on 7th September, 2000, can be summarised as follows:§ As head of the FASD, Mr. D'Arcy became aware in 1992 that funds undisclosed to the Revenue Commissioners were being targeted by bank personnel for investment in CMI.

> § Prospective investors were being assured by the FASD managers that their investment would be confidential from the Revenue Commissioners.
>
> § They were also being assured that if their investment was made the subject of a trust, the beneficiaries could obtain the funds invested, after the death of the investor, on production of a death certificate, thus avoiding the necessity of probate having to be taken out.
>
> § He also became aware that CMI was being used by the bank to regularise bogus non-resident accounts and fictitious and incorrectly named accounts.
>
> § The manner in which the CMI policies were being promoted served to facilitate the evasion of tax by the persons investing in the policies. The Inspector's findings concerning Mr. D'Arcy's knowledge and responsibility are: § Mr. D'Arcy was aware that monies which were undisclosed to the Revenue Commissioners, including funds held in bogus non-resident accounts and fictitious and incorrectly named accounts, were being targeted by bank personnel for investment in CMI policies, and he failed to stop the practice.
>
> § Mr. D'Arcy was aware that the FASD financial services managers were promoting CMI policies as a secure investment for funds which had not been declared to the Revenue and failed to stop the said practice, which served to facilitate the evasion of revenue obligations by third parties.
>
> § Mr. D'Arcy was aware that prospective investors were being given an assurance by the FASD financial services managers that their investment would be confidential from the Revenue Commissioners and, if made the subject of a trust, would pass to their beneficiaries without probate having to be obtained, thus making it possible for the funds invested to be kept hidden from the Revenue Commissioners even after the investor's death. In his evidence to the Inspectors Mr. D'Arcy stated that from 1992 he was fully aware of the manner in which the CMI policies were being promoted by the financial services managers, and since as head of the FASD he could have stopped the practice, he was, in the opinion of the Inspectors, primarily responsible for the continuation of the practice. The responsibility of the financial services managers has to be judged against this background. They were operating with Mr. D'Arcy's tacit approval." It is clear that this practice went on to the knowledge of Mr. D'Arcy over a period of approximately six years.

15. It is in these circumstances that the Director seeks a disqualification order against Mr. D'Arcy.

Relevant statutory provisions
16. Section 160 of the Companies Act 1990, as amended by the Company Law Enforcement Act 2001, confers an entitlement on the Director to seek a disqualification order pursuant, inter alia, to s. 160 (2) (b), (d) and (e).

17. Section 160 (2) insofar as its relevant provides that:

> *"(2) Where the court is satisfied that in any proceedings or as a result of an application under this section that… (b) A person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner…*
>
> *(d) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company; or*
>
> *(e) in consequence of a report of inspectors appointed by the court or the Director under the Companies Acts, the*

conduct of any person makes him unfit to be concerned in the management of a company…

the court may, of its own motion, or as a result of the application, make a disqualification order against such person for such period as it sees fit."

18. A disqualification order is defined in s. 159 of the Act. It means:

"(a) An order under this Part that the person against whom the order is made shall not be appointed to act as an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company, or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978, or

(b) an order under section 184 of the Principal Act."

19. That section also contains the following definition of the term 'officer'. It reads:

"Officer", in relation to any company, includes any director, shadow director or secretary of the company."

20. Two other provisions of s. 160 are relevant on this application. The first is sub-s. 8 which provides that:

"(8) Any person who is subject or deemed subject to a disqualification order by virtue of this Part may apply to the court for relief, either in whole or in part, from that disqualification and the court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit."

21. Finally sub-s. 9(A) confers a power on the court where it adjudges that disqualification is not justified, to make a restriction order under s. 150 of the Companies Act 1990.

Onus of proof

22. In In *Re Newcastle Timber Limited and Companies Acts* [2001] 4 I.R. 586 McCracken J. in this court pointed out a number of distinctions between applications under s. 150 and 160 of the Act. He said:

"A very important distinction between these two sections is that under s. 160 where, as in the present case, an application is made by a liquidator for a disqualification order, the onus is clearly on the liquidator to satisfy the court that the conditions of the section have been complied with, while on the other hand, under s. 150, the court must make a restriction order unless it is satisfied that the person acted honestly and responsibly, and therefore the onus is on the director concerned to satisfy the court as to his honesty and responsibility. It is probably also relevant to note that s. 150 applies only to directors and secretaries of companies, while s. 160 applies to a much wider range of persons connected with a company. Even more relevant in the present case is that the use of the word "may" in s. 160 gives the court a discretion which does not exist under s. 150."

23. That approach of McCracken J. was approved by the Supreme Court in *In Re Readymix Limited Cahill v. Grimes* [2002] 1 I.R. 372. There Murphy J. speaking for the court said:

"The onus does fall on the applicant to establish the allegations on which he relies and, even where a case is made out, the use of the word "may" in s. 160(2) confers a discretion on the court whether or not to make the order as was pointed out in Re Newcastle Timber Ltd. [2001] 4 I.R. 586."

24. In the light of these authorities it is hardly surprising that the Director fully accepts that the onus is upon him to satisfy the court that the necessary conditions prescribed in the relevant provisions of s. 160(2) are established.

25. His task in this regard is somewhat assisted by the attitude which has been adopted by Mr. D'Arcy since he was first notified that the Director was contemplating the bringing of this application. Long prior to its institution he made it clear in correspondence from his solicitor that he did not intend to contest this application. Neither did he, and in fact he consented to a disqualification order being made. Nonetheless as the power given to the court is a discretionary one the court has to be satisfied that the statutory conditions have been met and the onus of proof discharged by the Director.

26. I will consider each of the statutory subheadings under which he applies in turn.

Section 160(2)(b)

27. This subsection applies to a person who has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner.

28. The only way in which Mr. D'Arcy could come within the ambit of this subsection would be if he were "an officer" of either the bank or NIBFS.

29. The terms "officer" is defined in s. 159 as I have already pointed out. It is clear that the definition is non-exhaustive. An officer includes any director, shadow director or secretary of the company. As the definition is non-exhaustive it clearly covers other categories of person. The Director contends that a person in an elevated management position such as Mr. D'Arcy comes within the meaning of the term "officer". In that regard he cites a number of English authorities supportive of that notion.

30. The principal authority relied upon is the decision of the Court of Appeal in Re: A Company [1980] Ch. 138.

31. There the Court of Appeal was dealing with an appeal from a decision of Vinelott J. who had refused an application made by the Director of Public Prosecutions under s. 441 of the Companies Act 1948. That section enabled the Director of Public Prosecutions to apply to a High Court judge where there was shown to be reasonable cause to believe that any person had, while an officer of a company, committed an offence in connection with the management of the company's affairs and that evidence of the commission of the offence was to be found in any books or papers of or under the control of the company. The section provided that an application might be made in such circumstances for an order authorising inspection of the books or papers of the company. Lord Denning M.R. described such an order as being "analogous to a search warrant".

32. In the course of his judgment he had to consider the meaning of the word "officer" in relation to a body corporate. He said:

"The word "officer" in relation to a body corporate is defined in

s. 455 of the Act. Not really "defined" for it only includes a director, manager, or secretary."

Its meaning may depend on the context in which it is used and in this case on the whole phrase 'while an officer of the company, committed an offence in connection with the management of the company's affairs….'.

The officer here referred to is a person in a managerial situation in regard to the company's affairs. I would not restrict these words too closely. The general object of the Act is to enable the important officers of the State to get at the books of the company when there has been a fraud or wrongdoing. It seems to me that whenever anyone in a superior position in a company encourages, directs or acquiesces in defrauding creditors, customers, shareholders or the like, then there is an offence being committed by an officer of the company in connection with the company's affairs."

33. The Director relies on this statement in support of his argument that a person in an elevated management position such as Mr. D'Arcy falls within the meaning of the word "officer" in the Companies Act 1990. He may very well be correct in that assertion but it must be borne in mind that the dictum of Lord Denning dealt with an admittedly non-exhaustive definition of "officer" but one which included a "manager." The term "manager" is not included in the definition of "officer" in the Irish legislation. It is therefore arguable that having regard to this distinction Mr. D'Arcy does not fall within the definition of "officer" as prescribed by the Irish legislation.

34. In the concurring judgment of Shaw L.J. he said by reference to Vinelott J.

"He also considered that the party said to be an officer of the company of whom it was alleged that he had committed some offence in connection with the management of the company's affairs was not to be regarded as an officer or a manager within the definition of s. 455 of the Companies Act 1948. The expression "manager" should not be too narrowly construed. It is not to be equated with the managing or other director or a general manager. As I see it, any person who in the affairs of the company exercises a supervisory control which reflects the general policy of the company for the time being or which is related to the general administration of the company is in the sphere of management. He need not be a member of the board of directors. He need not be subject to specific instructions from the board. If he fulfils a function which touches the central administration of the company, that is sufficient in my view to constitute an "officer" or "manager" of the company for the purposes of s. 441 of the Act."

35. I do not think that this statement brings us any further since once again the court is dealing with a different definition of the term "officer", that with which I am concerned.

36. If s. 159 of the Companies Act 1990 defined "officer" in the same terms as did the English Companies Act of 1948 as including a "manager" there would be no doubt but that Mr. D'Arcy would fall within that definition.

37. As s. 159, although framed non-exhaustively, does not include the term "manager", it is arguable that Mr. D'Arcy does not fall within it. In the present case he has chosen not to make any such argument. The Director has quite properly drawn my attention to English authorities of relevance. They were not confined to Re a Company but extended to In Re: *Johnson and Co. Builders Limited* [1955] Ch. 634 where Lord Denning M.R. said that the meaning of the word "manager" for the purposes of the Companies Act meant "a person who is managing the affairs of the company as a whole. The word "officer" has a similar connotation…." and *R. v. Boal* [1992] Q.B. 591 all of which dealt with the term as defined in the English Companies legislation. English authorities are at best persuasive but their persuasive value must be lessened when they are dealing with a different definition to that which obtains in the Irish legislation.

38. I think that the Director is probably correct in his submissions but I do not propose to make a finding on the issue since it is not necessary. Such a finding would be of little precedent value as the question was not argued before me. A point not argued is a point not decided.

39. I note that in the case of In *Re A Company* Queen's Counsel appeared as *amicus curiae* to argue the matter. Such a facility is not readily available in this jurisdiction.

40. If Section 160(2)(b) were the only provision under which the Director was applying I would have to reach a conclusion on this question without the benefit of argument contra. I am satisfied that it is not necessary to do so here since Mr. D'Arcy is clearly covered by one of the other provisions relied on by the Director to which I will turn presently.

Section 160(2)(d)
41. This subsection deals with the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, where his conduct makes him unfit to be concerned in the management of a company. Again the success of the Director's application turns upon him being able to satisfy me that Mr. D'Arcy was an "officer" of the relevant companies. This is the same issue which I have just considered. I will adopt the same approach to it.

Section 160(2)(e)
42. This subsection applies where in consequence of a report of Inspectors appointed by the court or the Director under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company.

43. Mr. D'Arcy was clearly a person who was animadverted upon by the Inspectors appointed by this court. Was his conduct such as to make him unfit to be concerned in the management of a company?

44. In order to satisfy the onus of proof in this regard the Director relies exclusively upon the report of the Inspectors. He does so pursuant to the provisions of s. 22 of the Companies Act 1990.

Section 22
45. This section provides that:

"A document purporting to be a copy of a report of an inspector appointed under the provisions of this Part shall be admissible in any civil proceedings as evidence -

(a) of the facts set out therein 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."The Director is clearly entitled to rely on the findings of the Inspectors' report which have not been contested in any way by Mr. D'Arcy.

Is Mr. D'Arcy unfit?

46. I have already set out the findings made against Mr. D'Arcy by the Inspectors. Can it be said that these findings make him unfit to be concerned in the management of a company?

47. In attempting to answer that question I derive assistance from the observations of the Supreme Court in *Re: Readymix Limited (in liquidation)* [2002] 1 I.R. 372 where Murphy J. quoted with approval the dictum of Browne-Wilkinson V.C. (as he then was) In *re: Lo-Line Limited* [1988] Ch. where he said:

> *"What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the cases to which I have been referred is broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others. Therefore, the power is not fundamentally penal. But, if the power to disqualify is exercised, disqualification does involve a substantial interference with the freedom of the individual. It follows that the rights of the individual must be fully protected. Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."*

48. That passage has been cited with approval on a number of occasions in this jurisdiction quite apart from the reference made to it by Murphy J. He went on to say as follows in relation to it:

> *"It is I believe a correct statement of the law and represents a proper approach to the application and interpretation of s. 160 of the Companies Act 1990."*

49. Whilst of course the observations of Browne-Wilkinson V.C. were related to the unfitness of a director and dealt with an insolvent company it seems to me that a similar line of reasoning is applicable to the question of the disqualification of a person whose conduct is alleged to have made him unfit to be concerned in the management of a company. His conduct must show a lack of commercial probity or gross negligence or total incompetence before disqualification can be ordered.

50. I also derive assistance from the dictum of Henry L.J. in *Re: Grayan Building Services Ltd.*, *Secretary of State for Trade and Industry v. Grey* [1995] Ch. 241 where he said:

> *"The concept of limited liability and the sophistication of our corporate law offer great privileges and great opportunities for those who wish to trade under that regime. But the corporate environment carries with it the discipline that those who avail themselves of those privileges must accept the standards laid down and abide by the regulatory rules and disciplines in place to protect creditors and shareholders… The parliamentary intention to improve managerial standards…is clear. The statutory corporate climate is stricter than it has ever been, and those enforcing it should reflect the fact that Parliament has seen the need for higher standards."*

51. That statement, whilst made in the context of the law of England and Wales, applies with equal force to the position in this jurisdiction.

52. My attention has been drawn to a number of Irish cases where the court has been asked to make disqualification orders. They include *Re: Newcastle Timber Limited* (op. cit.) where the court found that whilst the respondents had failed to make returns, traded whilst insolvent for four years, and discharged trade creditors in priority to the Revenue, their conduct warranted a restriction order pursuant to s. 150 but not a disqualification order under s. 160. The essence of the finding appears to have been that the respondents there had acted incompetently and irresponsibly.

53. In the case of *Director of Corporate Enforcement v. McGowan* (21st February, 2005) Laffoy J. declined to make a disqualification order in circumstances where she found that the respondents had acted irresponsibly and described their conduct as reprehensible insofar as they as directors of the relevant company failed to discharge the company's tax liabilities to the Revenue. She took the view that the conduct of the respondents had come very close to the threshold of warranting disqualification but had not quite reached it.

54. On the other hand in *Re: Readymix Limited* (op. cit.) the Supreme Court upheld the decision of Smyth J. in this court to make a disqualification order in respect of the respondent who had acted as liquidator of a company. He took control of the books and records of the company and deprived the official liquidator of them. He then destroyed them. He swore in an affidavit that no money whatever was due to the Revenue Commissioners and embarked on a course of conduct which he explained to the trial judge in the course of his submissions as follows:

> "1. I was determined to screw the Revenue, no matter what it took.2. I was prepared to blow up anyone who got in my way. 3. I was going to make an example of the applicant.
>
> 4. I would not obstruct the liquidator but I would not help.
>
> 5. Whatever tactics it took I was going to bring the Revenue to book."

55. He was disqualified for seven years.

56. It is a truism that every case has to be decided upon its own facts and whilst these cases are helpful in demonstrating the general approach of the court, ultimately I have to decide whether on the material put in evidence here Mr. D'Arcy's conduct was such as to make him unfit to be concerned in the management of a company.

57. I have already set out the inspector's findings concerning Mr. D'Arcy's knowledge and responsibility.

58. From 1992 onwards he was fully aware of the manner in which the CMI policies were being promoted by the managers who

reported to him. The Inspectors concluded that he could have stopped that practice but did not do so. They also found him to be primarily responsible for the continuation of the practice. The financial services managers who were actually carrying out these operations on the ground were held to be doing so with Mr. D'Arcy's tacit approval.

59. This practice went on over a long period of time. The sums involved were large. Mr. D'Arcy was in the upper echelons of bank management. True, he was not at the very top level of management but was at just one remove from it.

60. An extremely serious element of the conduct was that all of it was taking place within a bank. Banks are not just ordinary corporate entities of the type that the court had to deal with in the various cases which I have cited. They occupy a special position in society.

61. They are licensed to carry out financial transactions which ordinary corporate entities are not.

62. The edifice of banking is built on a foundation of trust. On the Inspectors findings there was a breach of trust by dishonesty on the part of the bank in the operation of the CMI policies. That operation was carried out over a period of years in a deliberate fashion. The Inspectors held that Mr. D'Arcy could have stopped the practice but did not do so. They held him primarily responsible for the continuation of this practice.

63. This is demonstrative of a lack of commercial probity on his part. I am of opinion that the Director has proved that the conduct of Mr. D'Arcy as found by the Inspectors was such as to make him unfit to be concerned in the management of a company. I therefore propose to accede to the application to make a disqualification order under s. 160(2)(e).

64. This is not a case in which to make the lesser restriction order contemplated by s. 150 of the Act.

Length of disqualification
65. It is clear from the statutory provisions that the court may make a disqualification order "for such period as it sees fit."

66. In considering this aspect of the matter Finlay Geoghegan J. said in the case of *Re: Clawhammer Limited* (Unreported, 15th March, 2005):

> *"In determining a period of disqualification the court must have regard to the fact that the Oireachtas intended such order as a more serious sanction than a declaration of restriction under s. 150 of the Act of 1990. This follows from the express wording of s. 160(9A) of the Act of 1990.*
>
> *The mandatory period for the declaration of restriction under s. 150 is five years.*
>
> *Whilst a full disqualification order is in its terms more restrictive than a declaration of restriction, in practice the latter may operate to prevent certain respondents from acting as directors. This depends upon the particular circumstances of a respondent director. In the absence of a respondent putting before the court any relevant evidence, it is difficult to conclude that a disqualification order for any period less than five years will be a more onerous sanction for the respondent than a declaration of restriction which must be for five years.*
>
> *If a respondent by failing to offer any evidence to the court has overlooked putting before the court evidence which might have persuaded the court to either make a disqualification order for a lesser period or grant a declaration of restriction there is available an application for relief under s. 160(8).*
>
> *Hence in the absence of any relevant evidence in relation to a respondent, other that (sic) the minimum proof to satisfy s.160(2)(h) of the Act of 1990, a period of disqualification for 5 years appears appropriate".*

67. No evidence has been put before the court on this application by Mr. D'Arcy. He has not availed himself of the entitlements given by s. 160(8). Such being so, it appears to me that the rationale of the decision of Finlay Geoghegan J. is that in such a case the minimum disqualification period ought to be one of five years.

68. In fixing the period I derive some assistance from the observations of the Court of Appeal in England *In re: Seven Oaks Stationers (Retail) Limited* [1991] Ch. 164.

69. In that case the court was dealing with a potential disqualification period which by statute has an upper limit of fifteen years. As I have already pointed out there is no such upper limit in this jurisdiction. In the course of his judgment Dillon L.J. divided the potential fifteen-year disqualification into three (as follows):

> *"(i) The top bracket of disqualification for periods over 10 years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again.*
>
> *(ii) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious.*
>
> *(iii) The middle bracket of disqualification for from six to ten years should apply for serious cases which do not merit the top bracket."*

70. That approach provides some guidance, albeit that the statutory regime under which it is given differs in a number of material respects from that which is applicable here.

71. I also derive some assistance from the observations of Lord Woolf M.R. (as he then was) in *Re Westmid Packing Services Limited* [1998] 2 All E.R. 124.

72. Having quoted the well-known dictum from Browne-Wilkinson V.C. which I have already set forth in this judgment, he said:

> *"…other factors come into play in the wider interests of protecting the public, i.e. a deterrent element in relation to the director himself and a deterrent element as far as other directors are concerned. Despite the fact that the courts have said disqualification is not a 'punishment', in truth the exercise that is being engaged in is little different from any*

sentencing exercise. The period of disqualification must reflect the gravity of the offence. It must contain deterrent elements. That is what sentencing is all about, and that is what fixing the appropriate period of the disqualification is all about. What Vinelott J. (in re: Pamstock Limited [1994] 1 B.C.L.C. 716 at 737) called 'tunnel vision', i.e. concentration on the facts of the offence, is necessary when considering whether a director is unfit. In relation to the period of disqualification the facts of the offence are still obviously important but many other factors ought and (in reality do) come into play."

73. Later in the judgment he said:

"We do not consider that it would send out a wrong message to fix the period of disqualification by starting with an assessment of the correct period to fit the gravity of the conduct, and then allowing for the mitigating factors, in much the same way as a sentencing court would do".

74. In the present case, taking into account the findings made by the Inspectors and the other factors which I have identified I am of opinion that the appropriate period of disqualification should be one of twelve years. I am satisfied that it must have, as the Director urges upon me, a deterrent element to it.

75. I have no idea what impact this order will have on Mr. D'Arcy insofar as his own personal circumstances are concerned. He has chosen not to put any material before me dealing with them. I afforded him a further chance to do so at the hearing but he did not avail himself of that opportunity.

76. I am satisfied that Mr. D'Arcy should be given credit for the approach which he has taken to the Director's complaints. He is entitled to allowance for the fact that he indicated from the outset that he would not contest this application and, in fact, consented to the disqualification order being made.

77. He went somewhat further than that because even before these proceedings were commenced his solicitors wrote, on his instructions, tendering his resignation with immediate effect from the two companies of which he is a director. He also indicated a willingness to give an undertaking in writing to the Director that he would not act as director, promoter, officer or involve himself in any way in the formation or management of both those companies or any company whatsoever.

78. In these circumstances, I am satisfied that the approach taken by Mr. D'Arcy is a mitigating factor and that that should be reflected in the length of the disqualification. I will therefore reduce the disqualification period by two years.

79. I make a disqualification order against Mr. D'Arcy pursuant to s. 160(2)(e) with a duration of ten years from today's date.