Neutral Citation Number: [2008] IEHC 132

THE HIGH COURT

2005 No. 266 COS

IN THE MATTER OF NATIONAL IRISH BANK LIMITED
IN THE MATTER OF NATIONAL IRISH BANK
FINANCIAL SERVICES LIMITED
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
FRANK BRENNAN

RESPONDENT

Judgment of Mr. Justice Roderick Murphy dated the 22nd day of April, 2008.

1. Background
This application to the courts by the Director of Corporate Enforcement ("the Director") follows the decision of Kelly J. in *Re NIB Ltd: Director of Corporate Enforcement v. D'Arcy* [2006] 2 I.R. 163 and this Court in R*e NIB Ltd: Director of Corporate Enforcement v. Seymour* [2007] I.E.H.C. 102 and in *Re NIB Ltd: Director of Corporate Enforcement v. Curran* [2007] I.E.H.C. 181. The applications followed the Report of Inspectors appointed by the High Court on 30th March, 1998, to investigate the affairs of National Irish Bank Limited (NIB) and National Irish Bank Financial Services Ltd. (NIBFS), (collectively referred to as "the Bank"). That report was published on 23rd July, 2004.

The Inspectors, Mr. Justice Blayney and Mr. Tom Grace FCA, had made findings in relation to the knowledge and responsibility of certain senior executives of the Bank.

Mr. Brennan was one of the general managers, having been appointed General Manager – Retail Banking in the organisational structure of the Bank, which was put in place in May, 1988, shortly after the appointment of Mr. Lacey as Chief Executive. Prior to that appointment, Mr. Brennan was General Manager (Operations). In both roles, he had charge of the branch network, reporting to the Chief Executive. The respondent held the title of General Manager – Retail Banking until 30th June, 1991. On 1st October, 1990 another person was appointed Head of Retail, reporting directly to the Chief Executive in respect of the branch network. Consequently, from 1st October, 1990, he was no longer directly responsible for the branches, and ceased to be on the circulation list for internal audit reports on branches. These reports identified some irregularities which were the subject of findings by the Inspectors.

Mr. Brennan subsequently held a number of other positions within the Bank being as follows:

> From 1st July, 1991, he became General Manager – Corporate Services, retaining responsibility for management services. Internal audit reported to him in relation to the administrative and operational matters in this role.
>
> On 3rd May, 1993, his title changed to General Manager – Administration, where he assumed responsibility for the treasury and international department, in addition to his existing duties.
>
> In March, 1996 the respondent's title changed to General Manager – Risk Management and Administration and in May, 1997 his role was changed to Head of Risk and Administration.
>
> The respondent was a director of NIBFS during the period which is the subject of the Inspectors' inquiry.

2. Findings of the Inspectors regarding bogus non-resident accounts

2.1 Findings in respect of the Bank
2.1.1 Bogus non-resident deposit accounts were opened and maintained by the Bank and were widespread in the branch network during the period the subject of the investigation.

2.1.2 The opening and maintenance of such accounts by the Bank constituted an unlawful and improper practice which served to encourage the evasion of revenue obligations by third parties, both on the funds deposited and on the interest earned.

2.1.3 Up to May, 1995 senior bank management failed to inform the branch staff in clear terms of the relevant provisions of the Finance Act 1986. Part IV of the 1986 Act, entitled Interest Payments by Certain Deposit Takers, provides for the deduction by the deposit taker – the Bank – of tax from interest due to deposit holders resident in the State. Non-resident deposits had to be treated as deposits in respect of which DIRT had to be deducted from the interest unless the banks were satisfied that the person beneficially entitled to the deposit was non-resident. The Inspectors found that senior Bank management failed to have a review conducted at that time to ensure that all existing non-resident accounts were genuine.

2.1.4 At branch level, the Bank failed to deduct DIRT from bogus non-resident accounts and from non-resident accounts where the Bank did not hold a properly completed the declaration in a form prescribed or authorised by the Revenue Commissioners.

2.1.5 Although senior management were aware of the existence of bogus non-resident accounts, the Bank failed to account to the Revenue Commissioners for the DIRT properly payable on the interest paid or credited on such accounts.

2.2 Responsibility of the Respondent
As General Manager – Retail Banking between May, 1988 and June, 1991, one of Mr. Brennan's responsibilities was to ensure that the branches had full and accurate instructions with regard to deducting retention tax from interest on deposits, and to ensure that appropriate procedures were in place to implement the instructions. This tax was introduced in the Finance Act 1986. Genuine non-

resident accounts were exempt from Deposit Interest Retention Tax (DIRT).

Between July, 1991 and March, 1998, Mr. Brennan continued to be responsible for procedures in the branches and for ensuring that there was an appropriate system in place for compliance with the DIRT regime.

The Inspectors found that he failed to inform the branches prior to May, 1995 of the requirement of the Finance Act 1986 in relation to the deduction of DIRT and that he failed to discharge his responsibility of ensuring that proper procedures were in place in the branches to secure compliance with the statutory provisions for the operation of DIRT-exempt non-resident accounts.

The Inspectors found that Mr. Brennan had been made aware, through internal audit reports, of the deficiencies or irregularities which existed in the operation of DIRT-exempt non-resident accounts at branches. The majority of such reports referred to the failure of branches to hold properly completed declarations for all accounts classified as DIRT-exempt non-resident accounts.

Some of the branch audit reports received by the Inspectors when Mr. Brennan was on the circulation list referred to non-resident accounts linked to other resident accounts at the branch, to lending to resident customers being secured by liens over deposits with non-resident status or to other matters which, in the opinion of the Inspectors, pointed to the likelihood that certain non-resident accounts were in fact bogus. The audit reports showed that these deficiencies and irregularities persisted. This led to a comprehensive DIRT theme audit in late 1994.

Mr. Brennan attended a meeting of senior management held on 9th February, 1995 to discuss the results of the DIRT theme audit and the issues arising therefrom. In the minutes of the meeting, he was noted as having stated that he felt that there was a need to change attitudes at branch level so that possible tax evasion could be eliminated to the greatest degree possible.

On that date, 9th February, 1995, he sent a memorandum to the Executive Director which noted his concerns over a number of years in the area of compliance with the legal requirements for the operation of DIRT-exempt non-resident accounts.

It is the Inspectors' belief that Mr. Brennan was not only aware of the failure of branches to hold properly completed non-resident accounts declarations, but ought also to have been aware that bogus non-resident accounts existed throughout the branch network.

It was his responsibility while acting as General Manager – Retail Banking to ensure that accounts classified as DIRT-exempt non-resident accounts were correctly classified as such, and to see that regional managers secured full compliance with the statutory provisions relating to DIRT. He failed to discharge that responsibility.

At the meeting of 9th February, 1995, he failed to raise the question of potential retrospective liability to the Revenue Commissioners for DIRT resulting from the findings of the DIRT theme audit. In his evidence to the Inspectors, Mr. Brennan claimed that this would have been the responsibility of the financial department. Even if the primary responsibility rested elsewhere, he had a responsibility, by reason of being part of senior management, to raise the issues at the meeting. He failed in that responsibility.

3. Finding of the Inspectors in relation to fictitious and incorrectly named accounts.
3.1 The Inspectors found that the Bank opened and maintained fictitious and incorrectly named accounts which existed throughout the branch network during the period of the investigation up to the end of 1996. The opening and maintenance of such accounts served to encourage the evasion of tax as it concealed the true ownership of the funds in the accounts. Bank personnel were aware, or ought to have been aware, of the reasons for the opening of such accounts.

3.2 Responsibility of the Respondent:
The Inspectors made a positive finding in relation to Mr. Brennan. The report indicated that the Inspectors had received no evidence that he was aware of the existence of fictitious and incorrectly named accounts across the Bank network, prior to the issue by Mr. Keane, General Manager – Banking of a memorandum dated 7th December, 1995 and they believed that Mr. Brennan took appropriate action to eliminate those accounts.

4. Sale of Clerical and Medical Insurance (CMI) and other policies:
4.1 The Inspectors found that 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 the Bank for investment in CMI policies which were promoted as a secure investment for funds which had not been declared to the Revenue Commissioners. The Bank engaged in a practice which served to facilitate the evasion of revenue obligations by third parties. Prospective investors were given an assurance by Bank personnel that their investment would be confidential from the Revenue Commissioners. If made the subject of trust, the investment would pass to 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.

The role of branch personnel of the Bank was to identify likely investors. The role of the personnel in the Financial Advice and Services Division (FASD) was to introduce customers to CMI and induce them to take out policies with CMI. The Bank's purpose in executing such policies was the earning of commission, the retention of deposits and the gaining of new deposits.

4.2 Responsibility of the Respondent
While General Manager – Administration, Mr. Brennan was the addressee of a memorandum dated 17th August, 1994, from Geoff Bell, Head of Management Services, and therefore knew that CMI policies were being promoted to persons with "sensitive funds" with "confidentiality a prerequisite in investment". He also knew the extent of the funds deposited by CMI with the Bank resulting from the sale of CMI personal portfolio policies.

Mr. Brennan shared a responsibility to take steps to ensure that the promotion of CMI policies in this manner was stopped.

5. Improper charging of interest
5.1 The Inspectors found that during the period of investigation, interest charged by the Bank to some customers on their quarterly accounts included sums which were in fact not interest. Such inclusion was improper and should have been immediately refunded.

5.2 Responsibility of the respondent
In 1990, Mr. Brennan was General Manager – Retail Banking. He was made aware of the practice of loading interest through receipt of the audit reports in the Carrick-on-Shannon and Carndonagh branches. His response to the audit report on Carrick-on-Shannon and the related memorandum dated 21st May, 1990, from Mr. Lacey, Chief Executive, was appropriate insofar as he requested that he be advised of the extent of the practice and instructed that the practice cease. However, he omitted to give any instruction that refunds be made to customers. He failed to ensure that he was advised of the extent of the practice, and by reason of this failure, he

was unable to take any decision on whether further action was required.

The Inspectors found that Mr. Brennan shared responsibility for the Bank's failure to make appropriate refunds to customers at the time, notwithstanding his evidence to the Inspectors that the primary responsibility to refund customers lay with the branch managers and thereafter with the relevant regional manager.

6. Practice of improper charging of fees
6.1 The relevant finding of the Inspectors was that between 1988 and April, 1996 there was no system in operation at the branches for the contemporaneous recording of administrative and management time. The manner in which branch managers were to charge such fees was improper and resulted in some customers being overcharged across the branch network. While the new system for recording and charging account administration time, introduced in 1996, was to take effect from May/August, (the charging period of 1996) the system did not become fully operational in the branches on schedule, and extensive manual adjustments were still being effected in a number of branches in November, 1997.

6.2 Responsibility of the Respondent
During the period 1988 to 30th June, 1991, when Mr. Brennan was General Manager – Retail Banking, he knew, or ought to have known, that the Bank Procedures Manual did not contain any guidance on the nature of the work or services to customers which should give rise to an administration or management of time charge, nor did it give any guidance on the form of record to be maintained by branch staff responsible for the delivery of the service. Mr. Brennan bore the principal responsibility for the Bank's failure during that time to put in place an appropriate procedure for recording management and administration time which was chargeable to customers.

Between July, 1991 and March, 1996, while his title and functions changed from time to time, Mr. Brennan continued to be responsible for procedures in the branches. Accordingly, he continued to share responsibility for the Bank's failure in this regard.

7. Director's submission

Summary of Respondent's Responsibility
In summary, insofar as Mr. Brennan is concerned, the Director submitted that the Inspectors' report found that he was aware of various improper practices which prevailed within the Bank and was responsible, with others, for the continuation of many of these practices, for the failure to address the Bank's retrospective liabilities arising from a number of these improper practices and for the Bank's associated legal and professional failures.

In all the circumstances, the Director of Corporate Enforcement says that it is clear that by his actions and omissions, the respondent, while acting as an officer of the Bank over a period of close to ten years –

> Breached his duty as such an officer in failing to ensure that the company's legal requirements were complied with and in failing to carry out his common law duties with due care, skill and diligence. In this regard the Director refers to s. 160(2)(b).
>
> Engaged in conduct which makes him unfit to be concerned in the management of a company and in this regard reference was made to s. 160(2)(d) and (e).

8. Pleadings
By notice of motion dated 20th July, 2005, the Director applied to the court for an order pursuant to s. 160(2)(b) and/or s. 160(2)(d) and/or s. 160(2)(e) of the Companies Act 1990, declaring the respondent to be disqualified from:

> Being appointed or acting as an auditor, director or other officer, liquidator, receiver or examiner or
>
> Being in any way, whether directly or indirectly, concerned or taking part in the promotion, formation or management of any company or any society registered under the Industrial and Providence Societies Act 1893 – 1978.

The grounds upon which the relief was sought were to be found in the Inspectors' report published on 23rd July, 2004, which concluded that NIB and NIBSF (collectively referred to as "the Bank"), were involved in a number of improper practices, summarised as follows:

> "Bogus non-resident accounts were opened and maintained in the branches, enabling customers to evade tax through concealment of funds from the Revenue Commissioners;
>
> Fictitiously named accounts were opened and maintained in the branches, enabling customers to evade tax through the concealment of funds from the Revenue Commissioners;
>
> So-called CMI policies were promoted as a secure investment for funds undisclosed to the Revenue Commissioners;
>
> Special savings accounts had DIRT deducted at the reduced rate, notwithstanding that the applicable statutory conditions were not observed;
>
> There was improper charging of interest to customers;
>
> There was improper charging of fees to customers."

The Inspectors' report concluded that responsibility for the improper practices which existed rested with the senior management of the Bank during the period covered by the investigations. The Inspectors made findings relevant to the respondent in respect of five of the six above mentioned practices. The area where no finding was made was that relating to Special Savings Accounts.

9. Grounding Affidavit of Dick O'Rafferty:
Mr. O'Rafferty, an officer of the Director, deposed to the matters summarised in the notice of motion above.

The Director's solicitor sent the respondent a letter enclosing a notice dated 15th March, 2005 of the Director's intention to make the

application herein. Mr. O'Rafferty points out that the notice of motion in the proceedings differed to some extent from the draft which was forwarded to the respondent with the s. 160(7) notice.

Mr. O'Rafferty concluded that the respondent was a general manager or equivalent grade within the Bank for a period of some ten years, during which time he held various senior positions in areas relevant to the critical findings of the Inspectors. He was also a director of NIBFSC for a period of over ten years. The respondent was, therefore, an officer of the Bank who had clear legal and professional responsibilities to uphold proper standards of corporate and banking behaviour in the Bank. It was clear from the Inspectors' report that the Bank was seriously deficient in meeting these standards in certain areas. The Director believed that the Inspectors made appropriate findings of fact and responsibility with respect to the respondent.

While the Inspectors approved of the remedial action of the respondent in eliminating fictitious and incorrectly named accounts, it was clear from the Inspectors' report that in the areas of bogus non-resident accounts, CMI, interest and fees in particular, the respondent failed, with others to:

> put in place in the Bank proper procedures to secure compliance with legal and professional obligations,
>
> pursue the correction of weaknesses or potential weaknesses in Bank practices of which he was aware,
>
> address the Bank's retrospective liabilities to the Revenue Commissioners and its customers which resulted in the improper enrichment of the Bank at the expense of those stakeholders and/or
>
> create, promote and uphold within the Bank a culture of material compliance with relevant law and duty.

On the basis of the findings of the Inspectors' report, the Director considered that the respondent demonstrated unfitness, a lack of commercial probity, negligence and/or incompetence in the discharge of his duties as an officer of the Bank. Accordingly, the Director was of the view that the respondent is unsuitable to participate in the management of a company and recommended to the court that an order be made against the respondent in the terms of the notice of motion.

10. Respondent's replying affidavit

10.1 By affidavit sworn 15th October, 2005, in response to the affidavit of Mr. O'Rafferty, Mr. Brennan averred that he was never a director of National Irish Bank Limited and was not within the class of persons covered by paragraph (b) and/or (d) of s. 160(2) as he was not an officer of National Irish Bank. He says he was a director of NIBFS but that the application did not contain any reference to any conduct on his part in relation to NIBSF.

Mr. Brennan observed that it was apparent from the notice of motion and the affidavit grounding the motion that the applicant's application was based essentially on the findings of the Inspectors appointed to investigate the affairs of NIB and NIBFS. He took issue with many of those findings insofar as they related to him. He stated that even if the court were to accept all of the findings, insofar as they related to him, they did not indicate conduct on his part which would make him unfit to be concerned in the management of the company or make it appropriate that he be disqualified pursuant to s. 160.

He said he was at a significant disadvantage in dealing with the issues raised in the grounding affidavit by reason of the expiry of the time and a lack of access to some of the documentation which would be relevant to the defence of his conduct within the relevant period. He had retired from NIB in December, 1999 and did not have access to documentation other than a small amount of copy documentation which was furnished to him in connection with the inquiries of the Inspectors. By letter of 23rd September, 2005 his solicitors requested various documents from NIB which was refused by letter of 26th September, both of which he exhibited. He believed that some of the documentation relevant to the application was among documentation stolen from the remote storage facility used by NIB and subsequently furnished to RTÉ journalists and shown on the News and other programmes broadcast by RTÉ in 1998.

10.2 He referred to a broad range of responsibilities which he held in NIB and described the regional managers' structure, whereby Kevin Curran and Dermot Bonner were appointed regional managers with "specific responsibility for the management, development and control of the business in the two regions". The five Dublin branches already had senior managers in place who reported to him. That left the regional managers and the five senior managers to get on with the task of managing the regions and branches respectively. His duties as General Manager – Retail Banking included responsibility for the establishment of the Dublin based computer operation known as Management Services, which was in the process of separation from Northern Bank in Belfast. He was involved in the Bank's credit committee which absorbed a considerable amount of his time and represented the Bank and the Bankers' Federation, the Institute of Bankers, the Ombudsman Board and a number of other bodies.

On the appointment of Dermot Bonner as Head of Retail in October, 1990, reporting directly to the Chief Executive, he ceased to have responsibility for the branch network and was not on the circulation list of the branch audit reports from 30th September, 1990.

On 1st July, 1991, when Basil Noone replaced him as General Manager – Retail Banking, he was appointed General Manager – Corporate Services. he was given additional tasks with the following areas reporting to him: Head of Legal, Company Secretary, Head of Asset Finance, Head of Credit Administration, Head of Internal Audit (of administration and corporational matters only) as well as Head of Management Services. He continued to have the external representational roles as well as being a member of the in-house committees such as executive, credit, asset and liabilities, and pricing. In May, 1993 he was also given the responsibility for treasury and international matters. In March, 1996 his title was changed to General Manager – Risk Management and Administration but this did not entail any change in duties.

10.3 Mr. Brennan said that the improper practices identified in the report of the Inspectors occurred at branch level. He notes that the Inspectors decided that it was not appropriate to make any findings of individual responsibility against branch managers. They decided that the responsibility lay with senior management to ensure that the practices did not exist. He did not accept this as either a valid or a reasonable approach and suggested that the Inspectors did not appear to have given sufficient weight to the calibre of person who had been chosen and appointed branch manager which role was a considerable responsibility and trust arising from considerable banking experience, typically twenty years, and proven ability. He placed a high degree of trust in the regional managers and the senior and branch managers to carry out their responsibilities in an appropriate manner even where, as matters turned out, this appears not to have been well-founded.

10.4 Mr. Brennan then dealt with the Inspectors' criticism in relation to bogus non-resident accounts, operation of DIRT-exempt non-resident accounts, CMI policies and improper charging of interest and fees.

Mr. Brennan firstly deal with the Inspectors' criticism that he failed to inform the branches prior to May, 1995 of the requirements of the Finance Act 1986 in relation to the deduction of DIRT.

There were a number of circulars issued to branches prior to the establishment of National Irish Bank in 1987 and to his appointment as General Manager – Retail Banking in May, 1988. These circulars were referred to at pages 25 and 26 of the Inspectors' report. He referred to circular SI/86 of 24th July, 1986 and quoted therefrom. He also referred to the Bank's Procedures Manual regarding the identity, respectability and suitability of the proposed customer when opening an account. He had a clear recollection of meetings attended by branch managers and regional managers making clear the position in relation to non-resident accounts. In the period 1989 to 1993 he wrote on a number of occasions to the branches and to the regional managers, emphasising the legal requirements in relation to DIRT and referred, in particular, to a letter of 4th October, 1989, which stated, *inter alia*:

> "Branches will be aware of the qualification of payments of interest growth, i.e. non-resident exempt societies etc. and clearly we must deduct DIRT on all other accounts.
>
> I am enclosing with this letter a print out of all DIRT-free accounts for your branch and should be obliged if you would run through the list and confirm to me by signing the end of the report that you are satisfied that all these accounts are correctly classified."

He also referred to a letter of 15th January, 1990 regarding the "correct flag set to account for DIRT" where interest bearing accounts were opened.

He referred to a memorandum to regional managers of 7th August, 1991, making reference to the Finance Act 1986 which stated:

> "Over the past year the investigation branch of the Revenue Commissioners has been extremely active in pursuant of what they term 'bogus' non-resident accounts. These are accounts where the person who is beneficially entitled to the interest has completed the declaration form (Stock 44) as a non-resident but in fact is resident in the Republic of Ireland. Less there be any ambiguity on the obligations of our branch managers in this respect I am enclosing the following for guidance.
>
> Appendix 1:
>
> > Note of meeting between Irish Bankers' Federation/Department of Finance/Revenue Commissioners held on 26th February, 1986.
>
> Appendix 2:
>
> > Copy of letter of 21.3.1986 from the Department of Finance concerning reference to 'a normal degree of care'.
>
> Appendix 3:
>
> > Extract from the Finance Bill, 1986 that indicates reference to non-resident deposits.
>
> The question that immediately comes to mind is the interpretation of the term 'normal degree of care'. From my conversations with the Revenue Commissioners it is clear that their interpretation will stretch to inquiry when the account is opened but this has not yet been tested. What is clear is that the Revenue Inspector may examine any declaration held by a relevant deposit taker (ref. Chapter 37/2(b)). It is vitally important that all DIRT-exempt accounts are supported by a properly completed declaration form. …
>
> Should we find declarations incorrectly completed and then be required by the Revenue Commissioners to produce these declarations you do not need me to tell you the implications for both the customer and the Bank."

Mr. Brennan referred to the note in Appendix 1 of the meeting between the Irish Bankers' Federation, the Department of Finance and the Revenue Commissioners which stated, *inter alia*:

> "Asked if the provisions of the recent budget in relation to Retention Tax would place a greater burden than hitherto on branch managers to satisfy themselves that the necessary requirements would be met by non-resident depositors, the Revenue officials replied that they did not think so. They felt that branch managers would be expected to exercise 'reasonable discretion' in their dealings with such depositors. obviously, if it could be shown that a branch manager accepted declarations which he knew to be false, this would be a different matter."

In the fourth place, Mr. Brennan referred to a memorandum of 11th November, 1991, to regional managers in relation to DIRT-exempt accounts. He received a confirmation from Mr. Curran, Regional Manager, by memo of 12th November, 1991, that he had thoroughly investigated the position with each manager in his region and that all managers confirmed that any DIRT-exempt accounts were correctly documented.

He also referred to a memorandum of 7th December, 1992, to regional managers and a letter of 26th November, 1993, regarding non-resident accounts and the Bank policy.

There were eight circulars which he said were relevant from 1992 to 1993. Subsequently, circular S.11, 1995 combined these into one to replace all previous circulars on DIRT.

In the circumstances, he failed to understand how the Inspectors could have concluded that he failed to inform the branches of the requirements of the Finance Act 1986 in relation to deduction of DIRT. It was clear that notwithstanding the numerous reminders, some bank managers chose to ignore the Bank's written procedures. This became apparent in the DIRT theme audit which was discussed at the meeting at which he was present on 9th February, 1995.

11. Further Affidavit from Director

Mr. O'Rafferty's second affidavit, at para. 14, stated that the fact that the issue of DIRT was a regular topic underlined the inadequacy of the procedures in place as alluded to by the Inspectors and, indeed, by the DIRT theme audit. The letters referred to

by Mr. Brennan had little impact on addressing a clearly identified problem. On analysis, they did not address the failings in the circulars which, again, were clearly acknowledged to be inadequate, both in the DIRT theme audit and in the European audit in January, 1999. The problem was identified by the external auditors and referred to in the letter of 4th October, 1989, which caused Mr. Brennan to write to the branches.

12. Further Affidavit of Respondent
In Mr. Brennan's second affidavit he had referred to Mr. O'Rafferty's reference to the management meetings at Head Office and clarified the position by saying that he was not present at management meetings and regional management meetings but was present at biannual meetings attended by senior management at which he was told that regional managers were raising DIRT as an issue.

Mr. Brennan said he could be mistaken with regard to his reference to being present at biannual meetings where he was told that regional managers were raising DIRT as an issue. In his evidence, he referred to a particular meeting where the matter was raised by Mr. Lacey.

In his first affidavit, Mr Brennan had stated that he regularly raised the issue of DIRT. He said in his evidence to the court that he was aware of it when regional managers raised it with him during his regular meetings with them up until 1990. He said it would be wrong of him to say that the management meetings in Head Office raised the issue as a regular item. He could not say how frequently the issue of DIRT was raised at senior management meetings.

He believed that Mr. Lacey's concern that the deposits base at the Bank would be eroded because he did not want deposits that might be at risk through tax evasion, rather than indicating a desire that deposits were to be held onto and not lost. He was aware that many branch managers and officials explained that they permitted bogus non-resident accounts to be opened by reference to a desire to ensure that business was not lost, that customers would not go elsewhere with their money.

13. Evidence to the court
13.1 In his evidence on cross-examination, Mr. Brennan outlined his career with Northern Bank from 1st November, 1960 to 1986 when Northern Bank (Ireland) Limited separated from the Northern Bank at which time Mr. Brennan was Assistant General Manager of Operations and set up the headquarters in Dublin as part of the Midland Bank Group. In 1987 it was part of the National Australia Bank Group. Mr. Brennan was General Manager – Retail Banking and a member of the Executive Committee until 1994 when Mr. Lacey left as Chief Executive to be succeeded by Mr. Seymour. The Executive Committee met about once a month. Mr. Seymour had more broadly-based meetings in what was a traumatic time. As he was less familiar with Irish banking he "had to rely on us". The Executive Committee gave policy directions but did not go into the detail of operations. He did not remember the problems of the Bank being dealt with at that level.

The Board of Directors was quite independent with non-executive directors apart from the Chief Executive. The Executive Committee addressed issues and was responsible for the strategic and policy direction of the Bank. It did not deal with actual practical issues that were presenting themselves for resolution at executive level. Mr. Brennan did not remember the DIRT problems, ensuring that the DIRT regime was applied at branch level, being discussed. He accepted that it could have been. He continued:

> "I am not saying that they were not, they could have been, but I cannot remember that level of detail being discussed and unfortunately we do not appear to have minutes of the meetings."

After the DIRT theme audit report was circulated in December of 1994, Mr. Seymour was appointed Executive Director. The panel of people who were invited to the meeting on 9th February, 1995, comprised the members of the Executive Committee. Mr. Brennan did not believe that the Executive Committee was as active as it had been during Mr. Lacey's time.

His responsibilities at all material times related to retail, credit/lending and the profitability of the branches. The responsibility with regard to corporate matters lay with National Bank Finance Corporation and then National Irish Investment Bank.

His office was close to Mr. Lacey's, with whom he had daily contact.

The business of the Bank was growing to such an extent that he could not manage retail on his own. Retail managers were appointed in 1988 and reported to him until 1990.

Once a year all managers met with Mr. Lacey, who addressed them. The issue of DIRT came up at one of those meetings. Prior to 1994, the issue of DIRT was raised at a meeting in headquarters, at which all managers were present. The Bank's performance was the main issue. Mr. Brennan said that Mr. Lacey was unequivocal regarding DIRT: he did not want the deposit base to be eroded by non-compliance.

Mr. Brennan said that there was one meeting that he could remember in particular where Mr. Lacey referred to concerns in respect of DIRT as Mr. Lacey chaired that meeting. He said he could be mistaken in mixing up the regional meetings with the senior management meetings. He was not certain, he might have been mistaken. He agreed that he had said he was present at biannual meetings attended by senior management at which he was told that regional managers were raising DIRT as an issue and that management meetings held around the country regularly raised the issue of DIRT. He said he did not know after 1990 but certainly the regional managers during their regular meetings with him would have raised the issue.

Mr. Brennan had averred in his affidavit that he believed that management meetings held at Head Office and regional management meetings held around the country regularly raised the issue of DIRT but he could not identify a particular meeting other than the one he had referred to. In his evidence he said he thought that it would be wrong of him to say that the management meetings at Head Office raised the DIRT issue as a regular item. Mr. Brennan said that he would be aware of what was going on up to October, 1990 and assumed that the issue of DIRT continued after that date but he could not be certain of that at this moment.

He agreed that he had written to managers subsequent to 1990. He had read the explanation given by many branch managers and officials to the Inspectors that they permitted bogus non-resident accounts to be opened to ensure that business was not lost, that customers would not go elsewhere with their money. He did not interpret that as the explanation of the remarks being made by Mr. Lacey.

Mr. Brennan averred that he believed that management meetings held at Head Office and regional management meetings held around the country regularly raised the issue of DIRT but that there was no written record of those meetings available. He did recollect that such meetings were held and that, at management meetings, the position in relation to non-resident accounts was made clear to managers and regional managers.

Mr. Brennan had agreed that the tax ought to have been remitted to the Revenue Commissioners where the accounts were misclassified. He agreed that there was a tax liability but could not remember the matter being discussed. He was the Bank delegate to the quarterly meetings of the Bankers' Federation where DIRT compliance was discussed in 1991. It was public knowledge within the Bankers' Federation that there were non-resident accounts in Bank of Ireland branches in August, 1991 and that one of the major banks was talking with the Revenue Commissioners. He was told that another bank was competing with one of the branches of his Bank regarding the facility of non-resident accounts. He was aware of the branch which had a client from the U.S. who was allowed to open a non-resident account though he was resident in the jurisdiction. This, he thought, was in 1991. Other cases were not established. The Bank, because of its Northern Ireland roots, had many genuine non-resident accounts. He agreed that the issue could have been solved by treating the account as subject to DIRT – it could be sorted with a stroke of a keyboard. The background of the black economy and the tax amnesty of 1993 was relevant.

He said that the 1995 DIRT theme audit report shook him.

The memorandum of 7th August, 1991 referred to the Revenue Commissioners' interpretation "stretched to inquiry" when an account was opened. This led Mr. Brennan to understand that if there was a complete declaration that there was no problem.

He said he understood the properly completed form meant that the customer was truly resident. He said he had not got advice regarding taxation other than the references from the Irish Federation of Bankers. He believed that the reference to sensitive meant that they would lose deposits if they did not do what other institutions were doing. The deposit base would be under threat. There was a reality of losing customers. However, he had seen no evidence of the Bank trying to facilitate customers holding bogus non-resident accounts. He believed that if there were properly completed declarations, there would be no problem. He made no request to enquire of the bank managers.

He said he believed that the reference in the memo of 7th December, 1992 to a tax inspector contacting the Company Secretary of the Bank with regard to the percentage of non-resident accounts resulted in the Revenue official interviewing a bank manager and being satisfied with the answers given.

13.2 A book of documents for cross-examination was prepared and referred to as "the yellow book" consisting of five sets containing eleven, six, two, one and two documents, being a total of twenty-two documents selected.

> The first set relates to memos from 1989 after Mr. Brennan had become General Manager – Retail Banking up to the DIRT theme audit meeting of 9th February, 1995. From October, 1990, when Mr. Bonner was appointed Head of Retail, Mr. Brennan was no longer directly responsible for the branches and ceased to be on the circulation list for internal branch audits.
>
> The second set of six documents related to August, 1995 to October, 1996, after the DIRT theme audit and the meeting of February, 1995.
>
> The third set are documents sent by Mr. Brennan to Geoff Bell and his reply to Mr. Brennan on 3rd and 17th August, 1994, relating to CMI.
>
> The fourth set are documents relating to two branches regarding audits and interest loading.
>
> Finally, the fifth set comprises of two special circulars S11/95 and S22/95 after the DIRT theme audit meeting.

The court summarises the evidence from cross- and re-examination and makes certain conclusions as follows.

13.2.1 The first, dated 4th October, 1989, is a standard form letter headed "re: Deposit Interest Retention Tax".

The first paragraph of the letter of 4th October, 1989, reads:

> "In the course of this year's audit we have become aware of some accounts incorrectly flagged as free from Deposit Interest Retention Tax. This, of course, means that the interest has been paid gross for the past couple of years."

The letter enclosed a print-out of all DIRT-free accounts for the relevant branch with a request that the manager confirm that the accounts listed were correctly classified and that the branch held either the non-resident declaration form or the tax exemption notice. The letter was addressed to the manager personally with a request that confirmation be returned by 13th October, eleven days hence.

Mr. Brennan agreed that it was to be sent by him as General Manager – Retail Banking. He said that the Finance Act, 1986, introducing DIRT, came into effect from 6th April, 1986. As the Bank was then administered from Belfast he was not required to concern himself with the new DIRT regime. The gradual transfer of responsibilities from Northern Bank occurred during the latter half of 1986 and practically the whole of 1987. The collection of tax was the responsibility of the Finance Department. National Australia Bank, the parent Bank, had a tax adviser for the group who was based in London. The external auditors also had a tax partner available to the Finance Department. Everybody in the Bank had responsibility for ensuring that the Bank observed the laws of the land. Special circulars were drafted by him or by the function head most associated with the change and it was then agreed with either Mr. Lacey or Mr. Brennan himself. He said that the standard letter of 4th October, 1989, had been prompted by the external auditors.

He agreed that the interest was being paid gross for the past couple of years and that the Revenue Commissioners had lost out in respect of the operation of those accounts.

Mr. Brennan agreed that there ought to have been tax deducted in respect of the operation of such account, that tax ought to have been remitted to the Revenue Commissioners and that there was a retrospective tax liability. He agreed that there were problems in relation to DIRT in October, 1989 which were raised by the external auditors and he undertook the task of bringing these problems to the attention of the branch managers.

He agreed that the Revenue Commissioners had lost out in respect of the operation of these accounts if they were incorrectly flagged. He understood the requirements of the Finance Act 1986, hence his letter saying: "We must deduct DIRT on all other accounts".

It was put to Mr. Brennan that, where there were incorrectly classified accounts identified by the audit, it followed automatically that the Revenue Commissioners had lost out in respect of the DIRT on those accounts. He replied:

> "I would obviously be aware if the tax was not deducted where it should have been deducted that the Revenue required the tax or should have received that tax.
>
> …
>
> Yes, there would be a retrospective tax liability."

He said he honestly could not remember retrospective tax liability being specifically discussed at senior management meetings but he would clearly know that there was a retrospective liability for DIRT if any account was incorrectly flagged for any reason. He would have thought that every manager in the Bank in particular, probably every official in the Bank, would know that if there was an error in respect of the collection of DIRT and that error was not found out for a particular period of time that there was retrospective liability. He was not sure that a statement from him or a statement from anyone else was required to tell the managers that there was a retrospective liability.

He said that it never crossed his mind to give an instruction to bank managers to refund overcharged interest because common sense suggested it should be so and that the same applied to remitting to Revenue Commissioners of monies retrospectively due. Managers would have known this. As the events occurred over 20 years ago he had no recollection of the matter being discussed.

In re-examination he told the court that the letters of 4th October, 1989 and 15th January, 1990 and a memorandum of 7th August, 1991, relating to the areas of concern, left branch managers in no doubt of what he considered were their requirements in respect of the DIRT regulations.

The appendix to the last document, a note of a meeting between the Bankers' Federation and the Department of Finance and the Revenue Commissioners on 26th February, 1996, was attached. He had referred to false declarations and his worry that there were penalties attaching to people who knowingly assisted in tax evasion. He believed that insofar as declarations of residence were concerned that a normal degree of care had been taken and that one did not accept declaration forms which the branch managers knew to have errors in them. A memorandum of 7th December, 1992 made it clear that there could be no ambiguity about the Bank's policy to observe the law.

The court concludes that the letter, prompted by the (external) auditors clearly identifies, though does not quantify, accounts incorrectly flagged as free from DIRT. The second paragraph refers to the branches being aware of the qualification for payment of interest gross, i.e. non-resident, exempted societies etc., and that "We must deduct dirt on all other accounts".

In his evidence Mr. Brennan acknowledges that the Revenue Commissioners lost out in respect of accounts which were improperly flagged. He agreed that everyone in the Bank had responsibility for ensuring compliance. However, he seemed to suggest that the collection of tax was the responsibility of the Finance Department, of the tax department in London or of the tax partner of the auditors. Yet it is clear that the latter prompted the letter. No evidence was given of advice being sought from the Finance Department or from London.

On the other hand, he said it had never crossed his mind to give instructions to branch managers to remit to the Revenue Commissioners taxes retrospectively due, notwithstanding his assertion in re-examination that there could be no ambiguity regarding the Bank's policy.

Mr. Brennan limited his responsibility to a standard letter requesting confirmation that accounts were correctly classified.

13.2.2 The second document, also a standard template, dated 15th January, 1990 re Auditors' Recommendations, 1989 raised three points, one of which was DIRT. The letter stated that care should be exercised when interest bearing accounts were opened to ensure that the correct flag was set to account for DIRT.

> "It has become apparent from the recent returns from branches that non-resident declaration forms could not be located for a number of the savings accounts so designated and also that some resident accounts had been incorrectly set up originally as being DIRT-exempt. Please ensure the declaration forms are held for all non-resident accounts and note and advise me at the end of January of any outstanding items or difficulty encountered where accounts were wrongly flagged, correcting entries where necessary."

Mr. Brennan said he was not aware that no retrospective payments were being made in respect of these accounts as he did not know what went on in individual branches. He would have been very surprised if there were not correcting entries passed in respect of errors.

The Court concludes from the evidence in cross- and in re-examination that Mr. Brennan was aware of problems in relation to DIRT in October, 1989. This issue had been raised by the Bank's auditors. He undertook to bring the problem to the attention of the branch managers. While he agreed in cross-examination that there was retrospective tax liability and that the Revenue Commissioners had lost out as a result of incorrect flagging of the accounts he did not insist on raising the matter nor did he obtain advice nor attempt to calculate retrospective tax. While this may have been the responsibility of the Finance Department, he agreed that he too had responsibility for instructions and circulars.

13.2.3 The third document was dated 9th August, 1991, from Mr. Brennan as General Manager to the Regional Managers and to Mr. Noone, General Manager and to Mr. Bonner, Head of Retail. It post-dated the time when Mr. Brennan had ceased to have direct responsibility for the branches but he continued to write to the Regional Managers. This appears to have been prompted by meetings Mr. Brennan had with the Irish Bankers' Federation, where he was the Bank nominee until 1999. He said he attended most of the meetings and that issues of DIRT and DIRT compliance and enforcement were discussed. A big issue in the branch of another bank became public knowledge in August, 1991 in relation to bogus non-resident accounts. That was the first time he had heard the term "bogus" being used meaning individuals were signing declarations to say they were non-resident.

Mr. Brennan said that around August, 1991 – it may have been sometime later, he was not altogether certain – there were a number of issues with major banks mentioned at the Bankers' Federation. Some banks were having discussions with the Revenue Commissioners. The cards were not put on the table, but there were certainly issues being raised. A particular manager raised an issue of a competitor bank providing facilities to one of NIB's customers in respect of what would now be termed bogus non-resident

accounts.

He was aware one of the banks settling with the Revenue Commissioners in circumstances where declarations were falsely made. He was concerned that they might filter through to NIB and that was the reason why he was writing to the regional managers and including a copy of the notes of meetings of the Irish Bankers' Federation, the Department of Finance and the Revenue Commissioners, a copy of the letter of 21st March, 1986, from the Department of Finance and an excerpt from the Finance Bill 1986. The letter also referred to a recent trawl of NIB's DIRT-exempt deposit accounts. Mr. Brennan was surprised to find a number given on the print out as either "C/O Branch" or with an address within the Republic of Ireland. He referred to the whole area of non-resident accounts as a sensitive issue and rather than write again to the individual managers was sending a copy of the computer report to the regional managers so that the regional managers might contact "one or two branches in your region and enquire if there is any cause for concern".

Mr. Brennan referred to one issue where one of NIB's officials was reported to the Revenue Commissioners by a customer for opening a non-resident account for a person who was a resident who had returned from America and bought a pub and where the manager was aware or should have been aware of the circumstances. He disciplined the manager and fined him £250. He was not sure of the date but he thought it was 1990 or 1991.

He said it was correct that there were bank officers to his knowledge who were willing to facilitate a customer willing to make false declarations. He had no reason to believe that anyone, apart from that particular official, was concerned, within the Bank. A further report where the investigation branch carried out an inquiry turned out not to be correct. For this reason he described the issue as a thorny subject. Because the Bank began in Northern Ireland a lot of its staff were, in fact, Northern Ireland residents with family connections, the Bank had more than its share of legitimate non-resident deposits customers who had a great reluctance to get correspondence sent to them in Northern Ireland and there were difficulties in getting declarations for which, he said, "they did not have to sign up until then and they may have had to account for a number of years". There were still problems with documentation when one looked at the external Auditor's report in 1989. He believed the primary problem was documentary. He had argued that, as a matter of law, these accounts should have been treated as subject to DIRT. However, the difficulties were still being presented to him five years after the introduction of the Finance Act 1986. He agreed that it would have been possible to have introduced a computer system to change the flag and to have audited the accounts that did not have a proper declaration. He believed that the apparent reluctance to do this was because the people on the ground who were dealing with customers on a day-to-day basis, seemed to have a concern that they did not want to lose the deposit, they felt that they would get it sorted out and get the customer to complete the correct documentation.

He agreed that the Finance Act 1986 created an incentive to people to dishonestly represent themselves as non-resident for the purpose of avoiding DIRT at that particular time, when tax rates were high and where the black economy and tax evasion seemed to be a common problem throughout the economy.

The memo referred to the interpretation of the Revenue "stretching to inquiry" having not been tested. Mr. Brennan accepted that it was a basic term of banking that when a bank account was opened correctly one would not accept the position of any manager, or any official in the Bank, opening an account which the knew to be wrong. The Revenue Inspector may examine any declaration held by a deposit taker. The mechanical requirement to have a declaration is to have a formal solemn declaration. He agreed that customers were prepared to solemnly declare in false terms. If the Bank got the correct declaration completed, he did not see any problem. It did not necessarily follow, he said, that a care of branch address in the Republic of Ireland meant that there was a bogus non-resident account. If the declaration were not correctly completed, then it was invalid and the Bank should not have the account deemed as DIRT-free. The Bank would have a liability, a retrospective liability, for DIRT. He did not accept that there was no concern being evidenced in the memo about the issue of bogus non-resident accounts and no concern about any liability to the Revenue Commissioners arising from such accounts. He stated that the memo 'talked' in terms of bogus non-resident accounts. He said that, to his knowledge, the Bank had not obtained advice from a legal or accountancy source as to the validity or otherwise of its interpretation of its duty to the Revenue Commissioners. He added that this would probably have been for the tax people to deal with. He did not obtain advice. The only discussions he would have had with regard to that would have been in the Bankers' Federation. He said that the phrase "properly completed" could mean making sure that all of the document was completed with appropriate information. It appeared from the memorandum that it was a matter for resolution by the regional managers.

Some of the other organisations that he knew about were using the facility to avoid tax. New managers were distinctly saying that the Bank was going to lose deposits if we did not do what the other banks were doing or other organisations were doing. It was becoming an issue for them because their deposit base was under threat at branch level. He continually made the point that that was not the business they were in. He remembers saying that to one particular manager. There was not a more widespread contact between him and the managers. He agreed there was a threat if they did not offer DIRT-free accounts. That was the reality. He said he had no evidence that they facilitated the opening of accounts as non-resident accounts knowing the customers were not entitled to the non-resident accounts. He felt that if they had properly completed declaration forms, they had nothing to fear.

A standard form NIB declaration was uniform for all organisations. There had been discussion between the Revenue Commissioners and the Irish Bankers' Federation at the time. A declaration provided for a description of the account as the "person's beneficially entitled to the interest".

At a meeting of the Bankers' Federation in February 1986, before the enactment of the Finance Act, there was a reference to a greater burden on bank managers to satisfy themselves that the necessary requirements were met by non-resident depositors. There was a reference in the meeting to the Revenue officials requiring branch managers to exercise "reasonable discretion" in their dealing with such depositors.

The excerpt continued:

> "Obviously if it could be shown that a branch manager accepted declarations which he knew to be false, this would be a different matter. Notwithstanding the assurances given by banks in recent years to the effect that bank branch mangers have been directed to comply fully with statutory requirements, there were claims from tax evaders to the effect that bank managers had actively encouraged them insofar as false declarations were concerned. In relation to the penalty and provisions of the relevant statutes, branch managers would not be liable to penalties such as those imposed, for example, in the case of tax due under PAYE, were the employer is liable for tax due but not deducted."

Mr. Brennan agreed that, in 1986, there were suggestions from the Revenue Commissioners that tax evasion was being facilitated by bank managers. His memo said that the Revenue Commissioners interpreted a 'normal degree of care' to mean 'inquiry'. He agreed that in the memo he did not suggest that bank officials or bank managers ought to enquire into the validity of the declarations. He did not

instruct managers to make enquiry.

Mr. Brennan said that, in addition to the reference in his memo of 7th August, 1991, he had further dealings with the investigation branch of the Revenue Commissioners, in addition to the meetings under the auspices of the Irish Bankers' Federation. The Comptroller and Auditor General's report referred to a number of matters being investigated in the period 1988 to 1992 in relation to certain branches of the Bank and a further incident in June, 1994. Mr. Brennan said that no action was taken against the bank official concerned. Mr. Brennan said he had no way of verifying that the account holder had returned here. He could not recall the extent of the non-resident accounts. The Bank's Secretary had dealt directly with the Revenue Commissioners.

Mr. Brennan agreed that there was a reference to him in the Comptroller and Auditor General's report as follows:

> "There were difficult cases which required a lot of tenacity on the part of the officers of the Investigation Branch. I do not believe that there are grounds for suggesting that more could have been done by Revenue. In response to what they felt was implied criticism that the Bank was in some ways obstructive or uncooperative with the inquiries.
>
> The National Irish Bank assured Revenue that they would give the fullest co-operation within the boundaries of its legal duties and the powers under which the Revenue were acting. The General Manager of the Bank said that there were no grey areas when the question of providing full customer account information was concerned. The information would be provided when the Bank had an authority signed by the account holder or an order of the court."

The two incidents involved the same official.

Mr. Brennan said he would have been surprised if he did not discuss the issues which prompted him to write the memo of 7th August, 1991, with Mr. Lacey, who would have been fully aware of the concerns he had.

The Court concludes that, in the period of over a year and a half from the previous document, Mr. Brennan had the benefit of the Irish Bankers' Federation discussions with the Revenue Commissioners and with particular incidents within the Bank. It was by then clear that the normal degree of care in opining non-resident accounts required inquiry and not passive acceptance of what customers said. This was not done.

He did not instruct managers to make enquiries.

No advice had been sought.

He relied on documentary compliance despite the import of the discussions between the Revenue Commissioners and the Irish Bankers' Federation at whose meeting he represented the Bank.

Nothing in re-examination dissuades the court from such conclusion.

13.2.4 A document of the 11th November, 1991 was sent by Mr. Brennan to the regional managers. This was after he had ceased to have direct responsibility for the branches regarding the matter of non-resident accounts. He expressed the hope that any irregularities would be cleared up prior to the 30th September, 1991. He had not had the opportunity to speak with the Bank's external auditors on the content of their comments for that date which was the end of the Bank's financial year.

> "I have not as yet had the opportunity to speak with our external auditors on the content of their comments this year, but before I do so, I would wish to be in a position to confirm that we have a clean slate as far as DIRT exempt accounts are concerned. To prepare for this, I would wish to know if you are in a position to confirm that all DIRT exempt accounts are correctly documented".

The following day, 12th November, 1991, Mr. Curran, a regional manager replied saying that he thoroughly investigated the position of each manager in his region and that all managers confirm that all DIRT exempt accounts are now correctly document.

Mr. Brennan did not know if he received a reply from the two other regional managers as he did not get discovery of Bank documents before 1994. He said that over a period of time he would have received confirmations and would be very surprised if he had not gone back to them if they did not reply. The Court concludes that Mr. Brennan was aware of the need to satisfy the auditors regarding the documentation behind non-resident accounts. He was also aware that previous assurances did not eliminate the problem of documentation. He was aware that at this time the problem was not solely documentary in nature.

13.2.5 Over a year later, on 7th December, 1992, Mr. Brennan sent a document to the regional managers and copied it to Mr. Bonner regarding non-resident accounts.

> "You will remember that over the last few years I have written a number of times on the above subject. My concern stems from the experience I have had with an inspector of taxes (who) has seen the pursuit of bogus non-resident accounts as a personal crusade. There will be no need for me to tell you again of problems experienced in other banks where evidence of irregular practice was found and acted upon by the inspector. The Finance Department have recently run a report for me which shows the percentage of non-resident credit balances as a percentage of total credit balances. As these are available from branch I am sending you the list for information. In the statement of practices recently received from the Revenue Commissioners following changes in the Finance Act 1992, extract attached, there can be no ambiguity of our responsibilities in the area of paying interest without deduction of income tax. The purpose of this note is to again remind you the Banks' policy on strictly observing the regulations in respect of non-resident accounts and to ask you to remain alert when visiting branches to ensure that the Bank's policy is understood by all staff."

Mr. Brennan confirmed that one particular official in the investigation branch of the Revenue Commissioners had been in touch with the Secretary of the Bank on more than one occasion. He was concerned with bogus non-resident accounts. A Revenue official had been involved in the incident where a Bank official was found guilty of opening a non-resident account. There was a further case where there was an accusation made that the manager was facilitating a customer. The Revenue inspector was satisfied with the explanation made by the manager. His memo of the 7th December was just an information swap where the name of a particular inspector of taxes was a common denominator and who was focusing on bogus and non-resident accounts in deposit taking banks. He did not think anyone was critical of him.

The attachment to the memo of the 7th December, 1992 showed the percentage of non-resident credit balances as a percentage of

total credit balances with a descending table of branches referenced.

Mr. Brennan agreed that border branches such as Gweedore with 57% was the highest and then Dungloe and Castlebar almost in excess of 50%. Killarney, however, had an excess of 43%. Sligo, Galway, Waterford, Limerick and Swords had more that one in six Irish pounds deposited in non-resident accounts. Baggot Street was under 5%. Mr. Brennan said there were a couple of explanations or possible explanations. Killarney was a relatively new branch and his manager was actually from Belfast and would have attracted funds from business acquaintances and relatives from the North. It was opened in the late 1980s, Mr. Brennan thought. He said that there was a problem with Castlebar and in Ennis. He was not sure about whether the manager in Galway was from the North as well which was a target market for garnering deposits. There was disciplinary action taken against both the manager and the assistant manager in Castlebar and against the manger who was formerly in Ennis and subsequently in Galway. He was not involved in the Castlebar proceedings but heard about it subsequently. He thought it might have been an issue with fictitious accounts. In Ennis and Galway the particular issue was with interest rates. There was a problem with it here as to DIRT procedures as well. It was correct to say that he was responsible for terminating the employment of the person who was manager of Galway and Ennis.

Other managers in Waterford and Limerick and Swords had previously worked in branches in Northern Ireland. He was not saying that it was a simple explanation. The deposit base was not huge. The money that came from the North might be on the larger side which could account for the imbalance. He did not accept that the accounts were bogus.

He said that it did not cross his mind when he saw the figures that there was one obvious potential explanation that the accounts were bogus non-resident accounts. He had made it quite plain to the managers that the Bank was not in the business of bogus non-resident accounts but he agreed that there was pressure from managers. If there was a problem with the branches the regional managers were the people who could address it. He did not deny that there was potentially evidence of irregular practices. It was their job to get down to see if there was a problem.

The Court concludes that whatever the position had been by December, 1992 Mr. Brennan was aware of the focus of the Inspector of Taxes in relation to bogus non-resident accounts. He sent a report of the Finance Department to the regional managers showing the high proportion of non-resident credit balances in certain branches should have caused stronger reaction than asking managers to be alert to Bank policy and to strictly observe the regulations.

Despite this knowledge, Mr. Brennan did not accept that there were bogus non-resident accounts.

While, somewhat inconsistently, he did not deny that there was potential evidence of irregular practices he believed, as stated above, that this was a matter for the regional managers.

13.2.6 Mr. Brennan was asked to consider a sixth document sent by Mr. Hunt to him on the 18th November, 1993. That document read:

> "I have recently received three separate phone calls from senior officials from the Department of Finance and Revenue on the 1993 tax amnesty. They are clearly unhappy about the alleged actions of a number of bank officials. I'm now convinced that the Revenue will commence detailed audits of the major banks in 1994, with particular attention on non-resident accounts. The UK Revenue did a similar exercise in Northern Bank in 1990 and made claims for negligence based on inadequate documentation. Over the past twelve months non-resident deposits in branches have increased from 80 million to 110 million. Detailed analyses attached. It is difficult to explain why such a high proportion of new funds are from non-residents."

Mr. Brennan said that it did not occur to him to inquire as to why the Bank had still less than 20% of its total deposit base as non-resident. He agreed that there was a 36% increase. He agreed that Mr. Hunt was drawing attention to an issue of concern about the conduct or actions of Bank officials in relation to DIRT. He was aware that during the years 1991 and 1992 there were ongoing problems with DIRT throughout the country and throughout the financial institutions. He did not believe there was a problem in the Bank but was aware of problems in other financial institutions.

In his evidence Mr. Brennan told the court that he was not saying the problems were not replicated in the Bank but to his knowledge they were not. He was seeking assurances from the managers and from the regional managers that their house was in order and that properly completed documents were in place. He disagreed that the document had nothing to do with the substance as, in his view, incorrect information should not be put on any document.

Mr. Brennan was asked where it was said in any of those documents that managers do not open an account for a non-resident unless satisfied that the person opening the account is in fact non-resident as that was not what they were about in banking. When a bank account is opened inquiries are made from the customer as to where they lived and that detail is correctly put on the form. He knew it was a problem. He believed that if they had their documents correct and properly completed, then they did not have a problem. He could not accept that the document (memo) was not an instruction to enquire but an instruction as to how to focus on the documents.

It was correct to say that a bank official was alleged by Revenue Commissioners to have opened an account in favour of a friend of his that was false or a bogus non-resident account. From memory, he said, the customer involved was availing of a tax amnesty and disclosed that he was assisted in opening a non-resident account (by a bank official) who was from the same rural town as he was.

The issue of retrospective DIRT arising from that account was not raised with the Bank. He personally warned the official who explained that the customer had returned from the United States of America and purchased a pub in a local town. It was the first time he had come across a complaint from the Revenue. The declaration was not properly completed as it gave an address in New York and the Bank knew that the customer now lived in a provincial town in Ireland.

He agreed that had the Revenue Commissioners considered the document on its face, it would appear to them to be a properly completed declaration. He raised the issue with the branch. The bank official remained in place.

The court concludes that by November, 1993 matters were even clearer. Three separate calls from the Revenue Commissioners and the Department of Finance were received by him regarding alleged actions of a number of bank officials. Mr. Brennan still found it difficult to explain why such a high proportion of new funds were from non-residents. To continue to maintain that he did not believe that there was a problem with the Bank, in the light of specific incident where he had dealt with and warned an official, seems implausible. Properly completed documentation was perceived by him to be a solution to the persistent problems raised.

13.2.7 The next document was a memo from Mr. Brennan of 26th November, 1993, to various heads and regional managers referring to the Department of Finance and the Revenue Commissioners concerns about the validity of the figures coming through from banks in respect of non-resident accounts. Mr. Brennan, having had occasion to seek assurances from branches that all non-resident accounts were correctly documented, referred to the level of non-resident deposits rising by close to 30%. He decided that an attached letter be written to all the branches regarding the substantial increase which was welcome and essential for the bank. However, recent analysis of the sources new money indicated that a significant proportion came from non-resident accounts. The draft letter to the branches referred to the deposit interest retention tax exempt flag and continued:

> "Branch officials should be aware of the need to act prudently in accepting such declaration. Incomplete forms are not acceptable and a non-resident address should be clearly stated. It is not permitted for a non-resident to provide a vague address, (e.g. London, England) and use of the branch as an accommodation address is strictly forbidden. Declarations should not be accepted from customers where the detail is obviously incorrect as this leaves the Bank, and in particular the official accepting the declaration, liable to penalties imposed by the Revenue Commissioners and possible prosecution."

A computer printout of all accounts classified as DIRT exempt would be sent. Branch managers were required to complete certificates as evidence at all non-resident and other debt exempt accounts and have the supporting documentation completed not later than the 20th December, 1993.

The certificate was short, headed 'Non-Resident Accounts' and stated as follows:

> "I confirm that proper documentation is held in respect of all non-resident accounts listed on the printout dated 2nd December, 1993.
>
> For National Irish Bank _____ branch
>
> Date Manager/Assistant Manager"

Branch officials had a duty to enquire to get the details correct from that particular customer according to the Bank's account opening procedures. He agreed that (nationally) there was widespread practice of bogus non-resident accounts but he was not sure that it could be described as widespread in the Bank even in the light of what he read of the Comptroller and Auditor General's Report. That report referred to Bank managers opening accounts without inquiring or satisfying themselves that non-resident customers were in fact non-resident. That was causing concern to the Department of Finance and the Revenue Commissioners. He did not see why he needed to keep repeating what was a basic fundamental procedure in the Bank to follow account opening procedures. The instructions for opening accounts had never changed and are still contained by the Bank in the Branch Procedure Manual.

The Court concludes that to persist in the understanding of the correctness of documentation and to rely on the Bank's Procedural Manual at this stage despite the memos written by him to the bank managers and regional managers pointed to a blind spot in Mr. Brennan's vision of his responsibility. He ignored the concerns of the Revenue, the Department of Finance, the Irish Bankers' Federation and the evidence of non-compliance within the Bank itself.

13.2.8 The DIRT theme audit report of 24th January, 1995 provided compelling evidence of the extent of non-compliance. Mr. Brennan said that he certainly did not receive the report at that date. He did not remember having read the full report subsequently but remembered that the position was unsatisfactory. He could not remember the fact that the theme audit was being undertaken but he probably would have heard about it. He had no involvement. He agreed that he was giving instructions to be passed on to all Bank officials and to that the audit says that there was a lack of care and concise guidelines in DIRT compliance issues. He did not accept that it was a criticism not exclusively of him but certainly which applied to him. He believed it to be a criticism of the original DIRT circular in 1986 and of the SSA circulars in relation to which he never gave any instructions.

In relation to the major findings, he said that it was right and that these were the sort of documentary errors which he had been earlier referring to in documents which he sent. He agreed that Mr. Hunt had raised the same issue in his memo to Mr. Brennan on the 18th November, 1993, which was a phenomenon that he was not aware of beforehand. He agreed that the standard operating procedures dealing with the opening of accounts generally within the Bank needed to be improved where there was evidence of unsatisfactory compliance. He did not believe that he said so specifically in any of the documents dating from 1989. He did not think he adverted to clarification of Bank's responsibility for verification of account holders residency, e.g. passport, licence etc. He thought the requirement for documentary evidence had been strengthened by the provisions of the Criminal Justice Act, 1994.

Mr. Brennan did not think it was an obvious step to have independent evidence of residence because many of the Bank's non-resident accounts came from branches in Northern Ireland. In fact, in some cases managers (in this jurisdiction) may have not ever have even met the customer. The customer may not have come to the branch. The declaration might be completed but (the account holder) may not necessarily have appeared in front of the particular official opening the account at that particular time. The managers relied on their colleagues in other branches to complete the documentation. He repeated that the account opening procedures were quite clear. If the manager did not know the customer was coming in to open any account – it need not be a deposit account – the manager was to get documentary evidence to support and references if necessary. He agreed that there was no specific reference in the documents he had authored to obtain or look for documentary evidence of residence before opening an non-resident account. The greater problem was a technical one in the Bank's computer system. On a rollover of a fixed term deposit it was necessary to close the account and open a new account with the result that a new account number was required. (That would create a difficulty in referencing the declaration.)

Appendix 4 of the DIRT theme audit report referred to a significant level of missing declarations in the Malahide, Dungloe and O'Connell Street samples of between a fifth and a quarter of the deposits. Mr. Brennan said he could not deny that it was very disappointing to hear at this particular time, after all he had said and had understood to be the case from the regional managers. He was not sure that systematic failure would be the word but it was certainly careless. It was disappointing to find elementary errors such as missing declarations. He agreed it was just incredible and showed a picture of incompetence or carelessness on the part of branch officials. He did not agree that it reflected anything more. It was his view at the time that they were seriously at risk because of the documentary problem as the Bank had an obligation to remit the DIRT on any account where they did not have the proper documentation to support the non-resident status.

Mr. Brennan said that if they were not able to correct the error, by the date not being on it or getting the date put on it, then they would have a liability. He would not have been aware of any action been taken with regard to repayment of DIRT to the Revenue in respect of missing declarations. There was no reference to retrospective liability in the minutes of the meeting that followed the DIRT

theme audit report.

The court concludes that the evidence of Mr. Brennan discloses a reluctance of accepting any involvement in or being aware of the DIRT theme audit report. His belief was that it was a criticism of the previous circulars relating to DIRT and Special Savings Accounts. He maintained, however, that he never gave any instructions in relation to these. He denied being aware of the issues being raised by Mr. Hunt on 18th November, 1993.

The court accepts the technical difficulty with regard to the rollover of fixed-term deposit accounts. However, no evidence was given as to having been perceived as a problem much less of any solution being sought. The court concludes that this indicates a lack of finance control and legal compliance with the administration of DIRT.

There seems to be some inconsistency between Mr. Brennan's knowledge of Mr. Hunt's memo and his understanding of the audit report and, more particularly, of the opening of the minutes of the meeting of 9th February, 1995, which is the next document put in cross-examination.

13.2.9 Mr. Brennan (JFB) was recorded in the minutes as being the first person to address the meeting of the 9th February, 1995. The minutes began as follows:

> "JFB stated that he felt that there was a need to change attitudes at branch level so that possible tax evasion could be eliminated to the greatest degree possible."

In his evidence to the court Mr. Brennan said that he doubted that that was so. He did not remember the actual content of the meeting or even remember the statement that he made at the meeting until the document was presented to him. He remembered the meeting but did not remember what he had said and to this day cannot remember.

He said he certainly contributed to the discussion on DIRT down through the years but he did not think that he would be considered to have "taken ownership". He knew that Mr. Lacey had quite a role in DIRT compliance.

He was asked whether there was a connection between documentation and tax evasion as the problem being recognised in the minutes by him was a problem of tax evasion. He agreed and said that tax evasion was a particular problem throughout those years.

It would be tax evasion in his opinion if the Bank officials were aiding and abetting individuals in respect of incorrect declarations and not deducting appropriate tax. He agreed that that constitutes tax evasion. There was nothing in the DIRT theme audit report that suggested that the Bank was facilitating the opening of bogus non-resident accounts. He replied that there was always a danger that if it were a case in the Bank, as appeared from what he heard was occurring in other organisations, then tax evasion would have been a problem for them. He said that if they had a situation where they were assisting in bogus non-resident accounts then it was a tax evasion matter. He had no evidence to suggest that the Bank was involved in opening bogus non-resident accounts. He honestly did not know, he said in his evidence, what prompted him to suggest that the problem was really one of tax evasion. It could well be part of the discussions that were taking place. He found suggestion to be extraordinary that he opened the meeting by using the words "tax evasion".

He said that the circulars which he signed were not issued by him but by the Finance Department.

The meeting attended by eight or nine of the most senior managers, including the Executive Director, Mr. Seymour, to discuss the implication of "recent unfavourable audit report of DIRT interest tax issues". Mr. Brennan did not believe it to be a crisis but it was certainly disturbing to him. He just could not recall the level of discussion at the meeting. He did not believe that there was a more fundamental problem than a clerical or administrative problem and was one involving tax evasion as there was no mention of tax evasion in the DIRT theme audit report.

Before arriving at a conclusion in relation to the minutes of the meeting of 7th February, 1995 it is appropriate to consider the memorandum of that date written by Mr. Brennan to the Executive Director.

13.2.10 On the same day as the meeting of 7th February, 1995, Mr. Brennan wrote to Mr. Seymour, the new Executive Director from the United Kingdom, who had replaced Mr. Lacey on 22nd April, 1994.

Mr. Brennan wrote:

> "Having wrestled with DIRT for a number of years, I do believe that we must introduce a change of attitude by our management staff to the legal requirements. It is an Irish failing that is considered little harm in closing one's eyes to tax evasion and to confusing evasion with avoidance.
>
> As far as tax is concerned, the DIRT regulations are not that difficult. We must however start from the premise that DIRT, presently at 27%, is deducted in all interest paid to customers unless and until we have clear and correct documentary evidence to support the lower rate of 15% applicable to special savings accounts or the nil rate applicable to non-resident and other qualifying accounts."

It is significant that Mr. Brennan did write directly to Mr. Seymour on the 9th February, 1995, the very day of the meeting, to discuss the DIRT theme audit report. His action points are reflected in the timetable appended to the minutes.

Mr. Brennan did not remember whether Mr. Seymour reverted to the issues raised. He said that in other banks there was a problem of tax evasion he did not believe that the problem in the Bank was one of tax evasion. The regional managers were supplying him with information from the managers saying that everything was in order. He agreed that he had looked for assurances and he had got them. There were problems but they were of a documentary nature. He asked what more was he to do. What he was suggesting in the memo to Mr. Seymour was that a compliance officer take a role to inspect all documentation. He agreed that he had never asked bank managers to confirm that they had inquired, checked and were satisfied that the non-resident accounts in their branches were legitimate non-resident accounts opened by persons who are non-resident of the State and were entitled to operate and maintain such accounts. He said he has asked them to confirm that they had proper and correct documentation for every non-resident account.

He said that the compliance office was appointed sometime during 1994 in anticipation of the discussions on the Criminal Justice Act. There had been nobody occupying such office beforehand. The person appointed had been a branch manager, had been with the

Bank for 25 years and was just below the regional manager level.

Mr. Brennan did not disagree with the Inspectors' report that there was no accounting by the Bank to the Revenue Commissioners in respect of DIRT as he had no evidence to the contrary. There was no documentary evidence to support the fact that it was considered and who considered it. He could not recall directing, recommending or advising anyone that was an issue to be considered, he agreed that it was a lamentable failure on the part of the Bank not to account to the Revenue. He did not accept that he, as one of the three or four more senior managers, had significant responsibility for that failure. He did not have any role to play in the collection of the DIRT tax. He agreed that if there was a liability it was the management of the Bank that was responsible for considering the issue of retrospective liability for DIRT. If the documentation was properly in place at the branches that was not an issue with calculation of DIRT as the computer system was sufficiently robust to deduct tax where appropriate, providing that everything was imputed correctly. He agreed that that was not so, that it was the responsibility of the management of the Bank to give direction as to how to treat those accounts or whether or not to account to the Revenue. He claimed he did give that direction.

He was asked whether instructions were given to compute retrospective liability and answered by saying that was not specific instructions. If there were a problem with documentation at the Bank, the bank manager knew at the beginning that he had responsibility to make the adjustment in respect of DIRT. The managers on the ground knew as well as he did that there was a retrospective liability in respect of DIRT if there was an error found subsequently.

Mr. Brennan agreed that he was one of the most senior managers at the Bank. He did not personally enquire or consider any inquiry from any branch manager as to what problems were found with the non-resident accounts nor instruct that steps be taken to calculate the tax liability and remit that tax liability to the Revenue Commissioners.

In the first place, the customer would have a liability if the declaration signed was incorrect. If the account were closed subsequently and the Bank could not recover it from the customer, then the Bank had the liability to account DIRT. He said he doubt he would have heard of a five or ten year DIRT retrospectivity liability being withdrawn from the customers account unless a dispute arose where the customer claimed that he was aided and abetted by the manager.

If it did not come within the branch manager's discretion it would be a matter for the regional manager or the general manager of banking.

The Bank had competent and qualified accountants in the Finance Department dealing with tax returns whose duty it was to quantify the tax liability. He did not see it as his role to tell them how to do their job. It was a matter of the retail bank side and particularly the managers on the ground.

The court having regard to the evidence in cross-examination and re-examination finds it significant that Mr. Brennan dismissed the suggestion that the problem was more fundamental than a clerical or administrative problem and asserts that there was no mention of tax evasion in the DIRT theme audit report. He believes that there was a lot more discussion in the meeting of the 9th February, 1995 than appeared in the minutes and found it extraordinary the suggestion that he opened the meeting by using the words tax evasion even though that clearly appears in the minutes. The court accepts the minutes as a summary of the proceedings of that critical meeting. There was no evidence of any attempt to correct the minutes.

In his evidence he distinguished between aiding and abetting people to evade tax, which is tax evasion purely and simply, from a passive facilitation. While the DIRT theme audit report did not mention tax evasion it was clear from the opening line of the minutes of the 9th February, 1995, that Mr. Brennan felt there was a need to change attitudes at branch level so that possible tax evasion could be eliminated to the greatest degree possible. He did not say that tax evasion could be eliminated absolutely. The second sentence is consistent with his case that it remained a documentary problem:

> "This means that we deduct DIRT at the standard rate (27%) unless the necessary clear documentation is held."

This sentence indicates a mere documentary solution rather than to an obligation to inquire and to verify. While there may have been some ambiguity regarding the indications from the Revenue in the immediate aftermath of the Finance Act 1986 this clearly was dispelled from the attitude of the tax inspector referred to by Mr. Brennan and discussed at the Irish Bankers' Federation (referred to in the memo of 9th August, 1991 and Mr. Hunt's memorandum of 18th November, 1993). The development of the Bank's own memoranda and circulars reflected the increasing awareness of non-compliance with DIRT obligations. It is significant that the tax inspectors criticised circular s. 11 of 1995 which was actioned as the solution to the inadequacies of the past by the critical meeting of the 9th February, 1995. Yet it is clear that documentary irregularities persisted after the issuing of that circular. One has to conclude that some documents remained formally incomplete and substantially non-compliant. The ultimate result was, of course, an accumulation of retrospective tax. There is no breakdown of the settlement as to whether it was tax, interest and/or penalties. Non-resident deposits increased without their being any substantial improvement in compliance.

The Court concludes that Mr. Brennan had a pivotal role in the presentation of the DIRT theme audit report notwithstanding his doubts that he was the first to speak at the meeting and his evidence that he had not been involved in its drafting. He sought to underline the fact that the report did not mention tax evasion, but agreed that tax evasion was a problem throughout the previous years. In the opening sentence of the minutes he himself is recorded as saying that there was "a need to change attitudes at branch level so that possible tax evasion could be eliminated to the greatest degree possible". In reality the attitude of senior management needed to be changed to eliminate the lack of compliance just as had been done by Mr. Brennan in the elimination of fictitious accounts following the Criminal Justice Act 1994.

In re-examination he said that it was not just documentation which was a key focus of his, but that the documentation had to be correct. If the declarations were correct then the Bank would not have a problem with DIRT.

The reference to "sensitive" by the Department of Finance was a reference to the flight of capital out of the country if they were too stringent in their examination and their application of the Finance Act 1986. He thought that it was the Revenue Commissioners who would use the term. It was clear that the DIRT problem was far more extensive that he had believed, even from the information he was gleaning from his contacts with other banks at the time. Other banks also had a problem. He thought the Comptroller and Auditor General's report alluded to the fact that one of the State banks had a particular difficulty and an unusual amount of non-resident accounts. It seemed to be public knowledge, and known to the Revenue Commissioners and the Department of Finance at the time.

What they were doing was saying to the banks: you do your best to get your house in order. That is exactly what he believed he was doing.

Mr. Brennan said he did not believe he was responsible for all the procedures in the Bank. He never claimed to know everything that was going on. He said that the administration area for which he had responsibility had no role in relation to monitoring and enforcement.

14. Post DIRT Theme Audit

14.1 Mr. Brennan wrote to Mr. Keane dated 2nd August, 1995, in relation to the Ballinasloe audit in the following terms in relation to fictitious accounts:

> "Bearing in mind the dangers of a Revenue audit and the confirmations given by the Bank to the Tax Inspector following the branch trawl in December, 1993, the reassurances from Regional Managers that all managers fully understood the Bank's attitude to fictitious accounts, the distribution of the Bank's code of conduct policy and staff guidelines in February, 1993, the experience of recent disciplinary cases in the past and the Criminal Justice Act, 1994, I am at a loss to understand how any manager could be in doubt of the Bank's attitude.
>
> There can be absolutely no excuse, from what I have heard from the Head of Audit, and while I have not seen the report, wearing my operational risk hat I am concerned with what has now been discovered. Clearly, there is something radically wrong with our procedures. This has allowed this practice to go on for years without being brought to the attention of the regional and executive management. The question that immediately springs to mind is how widespread is this practice and how do we believe managers who can supply an incorrect certification. While I know you will be addressing the issue with those concerned, we as a management must not underestimate the disastrous effects something like this could have on the Bank and its management. Do the managers involved realise the risk that they run to themselves personally, as well as to the rest of the Bank? I am simply at a loss for words to describe adequately my shock at what has been disclosed and when you have time to consider the report maybe we can discuss."

There was no finding by the Inspectors in relation to Mr. Brennan's responsibility for fictitious accounts. He had not received the audit in relation to Ballinasloe as he was not on the circulation list for audits. He was correct to say that Mr. Harte had come to him in relation to difficulties that were disclosed in the Galway and Ennis branch and, prior to 1995, he had recommended to determine the employment of the manager involved. It was correct to say that he had ceased to be General Manager of Banking some time in 1990 and had relinquished control of the branch network. However, Mr. Harte had referred the matter to him because of its gravity. He believed that the reference to "wearing your operational risk hat" referred to the risk the Bank undertook if it was involved in opening fictitious accounts. They all had specific responsibility for operational risk at the Bank. He accepted that any element or risk in the Bank was his responsibility as a senior manager. He accepted that management had a collective responsibility for stamping out the practice. Here was clear evidence of wrongdoing when the Head of Audit told him that the manager had aided and abetted the opening of fictitious accounts knowingly. He did not believe the certification given.

14.2 The next document is a response from Mr. Brennan on 26th April, 1996, to a memo from Mr. Harte of 24th April relating to incorrectly titled accounts where Mr. Brennan said:

> "I believe that a fresh and unequivocal instruction be given to all staff involving the opening and control of customer accounts and any further indiscretions in this area will simply not be tolerated. In fact, I believe that any evidence reported in the future of our staff knowingly involved in the opening or maintaining of fictitiously incorrectly named accounts could lead to automatic disciplinary action. We simply cannot put the Bank's licence to operate at risk, and it behoves us in management to protect the shareholders' investment by ensuring that we obey the law."

It was put to Mr. Brennan that strong recommendations were nowhere to be found in relation to bogus non-resident accounts. Mr. Brennan said that he did not know what the memo of 24th April had said as he was not able to obtain that document. While the words were not used in relation to DIRT compliance, he had consistently adhered to the Bank's procedures on the law.

14.3 The next document, a joint memorandum of 30th May, 1996, shortly after the April document was to all branch management from Mr. Keane and Mr. Brennan. Mr. Brennan said that is was originated by Mr. Keane who asked him to countersign the memorandum, in relation to fictitious accounts, which again was a strong memorandum stating that existing branch management have responsibility for all accounts in their branches regardless of when they were opened; that certificates had to be properly completed and must be regularised and/or closed, even where there was a possibility that business would be lost. Disciplinary action would be taken against all staff who had been knowingly involved with the opening and maintaining of accounts. Mr. Brennan said they would have to be closed. He did not remember if those accounts were also non-resident accounts. By regularising he meant putting the correct name on the account.

14.4 The next document was a joint memo of 22nd July, 1996, by Mr. Harte to Mr. Brennan and Mr. Keane following up on the previous memo mentioning branches with the most fictitious accounts.

14.5 A memo of 24th September, 1996 contained recommendations to close accounts, interview managers and ensure compliance with money laundering legislation when a new account was being opened. The same standards were to be applied to existing accounts as new accounts. All fictitious and incorrectly named accounts had to be cleared by 30th September, 1996 and internal control could not be signed off by the Chief Executive without the manager's confirmation that these accounts had been regularised.

In his evidence Mr. Brennan said that there was a problem that customers might not wish to change or to close the account and there was a great reluctance on any manager to lose an account. Mr. Brennan said that the Inspectors' report seemed to confirm that such action would be equally applicable to bogus non-resident accounts. Some managers who inherited branches where there were irregularities were able to sort them out very quickly. All they had to do was to change the customer's account or else change the flag on the customer's account which would automatically deduct the DIRT up to the previous charging period. If it went prior to that, then it would require a manual intervention. But it would not require any permission from him to do that.

14.6 The last document was dated 2nd October, 1996, regarding fictitious or incorrectly named accounts and referred to the feeling that some of the branches did not fully appreciate the risk for the Bank in the continuation of the irregular practice. Twenty-four branches had disclosed fictitious accounts in Mr. Harte's memo of 22nd July, 1996. Twelve branches admitted retention of fictitious or incorrectly named accounts. Mr. Brennan said it was not a case of managers not knowing what their instructions were. But in October, 1996 there were still a few managers, not many, who were reluctant to grasp the mettle and tackle the individual customers. Mr. Brennan retired from the Bank in December, 1998. He was not able to say what the position was with the Bank at present with regard to the DIRT problem. In his opinion there was a different environment in the 1990s.

The court finds that Mr. Brennan continued to have an important overall responsibility regarding operational risk at the Bank. This was

acknowledged by Mr. Harte, the Head of Audit, in relation to Ennis and Ballinasloe.

He had discharged that responsibility in relation to the elimination of fictitious accounts.

15. Circulars
15.1 Special circular s.11 of 1995 was issued on 8th March, 1995, under the name of Mr. Brennan but was headed Finance and Planning Department and was drafted by them. Mr. Brennan said that as there had been glaring errors in a previous circular so circulars were then issued by the Chief Executive or a General Manager. He did not know why it emanated under his name rather than under the name of Mr. Keane who had responsibility for corporate and retail banking from the 3rd May, 1993, to the 18th August, 1995.

The circular referred to lack of documentation and/or incomplete documentation exposing the bank to potential losses and needed to be eliminated. It gave instructions that DIRT must be deducted at the standard rate unless the valid declaration was held, signed and dated and in all other respects were fully completed by the customer. There was a provision that before an account was opened for a person who wished to avail of non-resident statutory status that documentation must be produced as evidence that they were resident outside the State and such declaration held on file. Mr. Brennan said that that did not appear at all in the Bank's account opening procedures. In his affidavit Mr. Brennan referred to the manual which stated "when you are opening an account the manager must be satisfied about the identity, respectability and suitability of a proposed customer". Mr. Brennan agreed that that statement refers to a Bank Procedures Manual in relation to current accounts but that similar provisions granted to deposit accounts which he referred to in re-examination.

The Inspectors had made two criticisms of s.11 of 1995. One is that it did not contain an instruction from the Bank that the manager had to be satisfied that someone was a non-resident before opening a non-resident account: staff were not instructed that DIRT had to be deducted unless the Bank was satisfied that the depositor was non-resident.

The second criticism was that the circular did not address the satisfaction of the Inspectors to the question of existing non-resident accounts and did not require bank officials or branch managers to audit existing accounts so as to satisfy themselves that they were proper accounts.

Mr. Brennan said in his evidence in relation to new non-resident accounts that if experienced Bank Managers did not understand the DIRT requirements, which they obviously did not, he did not know what more he could say to emphasise the requirements of the law. The findings of the Inspectors and of the Comptroller and Auditor General's report was one of non-compliance at branch level and it was not any misinterpretation of the rules that is laid down. He believed it to be a violation of the rules laid down. In his opinion he did not believe that the branch managers needed to wait until the issue of circular s.11 of 1995 to understand the requirements for non-resident accounts. He found it disheartening to see that the same issues were being repeated. While it was the first time that there was evidence in writing, there was no question in his mind that bank managers knew exactly what the requirements of the Act were. He agreed that what transpired was that the managers were consciously departing from the requirements of the Finance Act, 1986. He agreed there were instances that proved, subsequent to the 1998 audit, that there were managers who violated basic instructions and knew they were violating such instructions. He did not accept for one minute that they did not clearly understand the position of the bank in relation to compliance.

It was not correct to suggest that managers were oblivious to the requirement for a genuine non-resident account. There was no need for him to elaborate any more on what was in the circular. The duty of care extended to inquiry of the residence of the account holder.

16. Clerical Medical Insurance (CMI)
16.1 The memo from Mr. Brennan to Mr. Bell, Head of Management Services, dated the 3rd of August, 1994, some four months before the DIRT theme audit referred to Clerical Medical International (CMI) and was copied to Nigel D'Arcy, the Head of Financial Advice and Services. The memo referred to Mr. Brennan being surprised that the issue of the CMI deposits was not sorted out. Mr. Brennan, having conducted some research on CMI, was satisfied with the strength of the institution but expressed dissatisfaction with the manner in which the funds were introduced to CMI and in particular with the role played by the branch manager. The bank manager referred to had clearly identified the deposit with a particular customer even though the account title (in the branch) was CMI with the unique number. Mr. Brennan suggested to the Chief Executive that deposits be maintained centrally rather than in branches. He had written to Nigel D'Arcy outlining his views. He was concerned with the complicated procedures that were open to error and abuse and with the implications that branches might be assisting in opening non-resident accounts. He wished to see the matter implemented that month.

As well as being General Manager – Administration, Mr. Brennan was the Director of National Irish Bank Financial Services which was in receipt of the income generated by FASD rather than directly into the bank for some technical or tax reason. Mr. D'Arcy was recruited in the 1980s and had reported directly to Mr. Lacey, the Chief Executive.

In his evidence to the Court, Mr. Brennan said that the first reference to CMI came when he was on the Assets and Liability Committee chaired by Mr. Lacey. The size of the deposit with CMI of £20 million formed part of the reporting to the Central Bank as a large deposit. Mr. Brennan said that if the figure were double or more there were possible implications to the liquidity if such deposit were lost. Non-resident deposits around that time had increased from £80 million to £110 million.

He had heard of CMI as a substantial company but did not understand that CMI was a product that could only be sold to non-residents as he had heard they had been sold to Irish residents. Mr. Brennan agreed that all monies coming in from CMI were non-resident. FASD were handling the administration with CMI directly and were not providing each individual branch with a declaration form in respect of each and every account that CMI had in that particular branch. In his evidence, Mr. Brennan said:

> "No, they were able to identify the accounts as CMI accounts in the branches that they linked the accounts to an introduction that would have been made on behalf of the customers. The customers name was not on the account, it was a CMI account. But because of the timing presumably a couple of weeks after they would have invested money on behalf of the customer with CMI, it came back and there was an account opened in the branch. Now, they would then, if you like, link that in their own mind to a particular customer, yes,"

The dissatisfaction that Mr. Brennan felt was that the bank managers were not equipped to be advising customers on insurance related products. The FASD team were experts in that particular area. He wanted the branch managers to call in the FASD and not to get the branch manager involved in providing advice that might not have been correct. The customers gave instructions to FASD to place monies. The managers were concerned about the interest rate that would be applied to that account with the customer.

In relation to the clerical medical accounts (CMI) he said in re-examination that there was some confusion at branch level in relation to the nature of the accounts and withdrawals.

Mr. Brennan did not remember the particular document dealing with sensitive and confidential information other than to say he did not pay any great significance to either phrase because he knew that people with large sums of money had particular issues with regard to confidentiality and, moreover, there were some non-residents who invested in CMI.

16.2 The next document put to Mr. Brennan was a memo from Mr. Bell to Mr. Brennan, (copied to Mr. Keane, Mr. Harte, Mr. Byrne and Mr. D'Arcy) dated the 17th August, 1994, in answer to Mr. Brennan's memo of the 3rd August. Attached was a document headed "CMI Deposits with Flow Chart" showing the operation of the deposits at present and the proposed operation. References were made to "client confidentiality", "sensitivity of the scheme", "confidentiality of pre-requisite in the investment", "the funds usually being of a sensitive nature" and Mr. Brennan was asked what he understood by those references. He said that the word sensitive had gained common currency in the 1980s and 1990s and related to the fear of anyone knowing about the funds. It could well be that the Bank had a potential Revenue problem.

He agreed that NIB or other banks would not disclose details of customers' accounts to anyone other than the customer. The reference to "funds may be in existing branch deposits or other" was to funds that could be introduced to CMI. Mr. Brennan agreed that what they had in common was that they were usually of a sensitive nature. Customers resented any enquiry. One interpretation was that the monies were sensitive vis-à-vis the Revenue Commissioners. He did not know specifically what the memo was referring to. Some weeks earlier, on 3rd August, 1994, Mr. Brennan had expressed concern that branches might be assisting in opening non-resident accounts which he referred to as "abuse". He said that in that particular case they were opening non-resident accounts for CMI. The monies coming back from CMI were not resident accounts but CMI's money. Mr. Brennan's memo continued:

> "What was happening was I did not want in any way, shape or form that those funds were linked to customers, which the branch managers believe they were. They believed that they were the original investment going to CMI on behalf of a customer but coming back in CMI's name. CMI was the account holder."

In his evidence to the court Mr. Brennan believed it to be correct that all CMI accounts were non-resident accounts because CMI itself was non-resident. It was correct to say that there was an initial charge by the deposit holder of 3% and thereafter a recurring charge of 1.6% when deposits were transferred by individuals to CMI. Mr. Brennan said that he did not know the commercial reason for an investment being reduced to 97% with the deposit still in place in the branch, which was subject to an ongoing charge of 1.6% per annum. He believed that the customers were buying a single premium insurance policy which he had not seen. He presumed there was a life assurance element to it. He agreed that looking back at the first paragraph of Mr. Bell's memo, which referred to funds being invested for Irish residents by an insurance company based in the Isle of Man, that it was primarily an investment.

He said there was an interest element attaching to the deposit presumably. When asked if the interest element would have been attaching to the deposit in any event, he replied:

> "It would, but presumably I possibly understood, I cannot remember particularly at this particular juncture, that there was a tax avoidance scheme available. There was an awful lot of tax avoidance scheme available around at that time in respect of investments in A, B, Cs and car parks and the like. It was a period of very high interest rates, because of that people were looking for investments to avoid paying the high rates of tax."

He was not aware of an announcement in the budget that provided for investments of that kind, which would attract favourable tax treatment. He was not au fait with what the FASD people were selling and he had no role in the organisation of FASD.

While he now knew that they were targeting "hot" money for investment in CMI products, he firmly believed that at that time and right up until 1998, they were selling a legitimate product. He had no reason to doubt it. He never questioned the particular investment in CMI as they had people who were responsible for running that particular department who knew far more about insurance than he did. He did not raise inquiry from Mr. D'Arcy or anyone else as to why a person would invest but knew that they were very successfully selling these products to customers. He now knew the reason but certainly did not know then. He says that in hindsight, he is wise now but at the time he was not, to the reference to funds being of a sensitive nature and confidentiality being a prerequisite in the investment. There was no mention that it was a tax evasion scheme. It did not occur to him that it was not justifiable on any rational commercial basis. He had enough to do with his own job rather than get involved in trying to run another division of the Bank that did not report to him.

He agreed that in his memo of 9th February, 1995, albeit in the context of DIRT, he had referred to a culture of tax evasion in Ireland. However, he did not associate the memo from Mr. Bell with tax evasion. It was tax avoidance but not tax evasion. If it had been the latter he certainly would have made enquiry. One of the problems with CMI was that there was never a circular issued and he never saw a brochure though he agreed that he could, of course, have asked for one. He was not aware of the promotional material. He was concerned about the impact on the Bank if the £20 million in CMI constituted a very large proportion of non-resident deposits which could be withdrawn overnight. He agreed that that was what led, apparently, to his concerns in the course of early 1994. His first introduction to CMI was in connection with the commissions FASD were earning. They were lauded for the success they were having as CMI maintained the deposits in the branches.

Appendix 10 to the Inspectors' Report in relation to CMI referred to clients' names not appearing on any account and to deposits being transferred out of the existing account and re-invested in the names of a holding company and that the investment was written in trust so that clients can decide who the beneficiaries would be in the event of death so that there were no probate requirements. Reference was made to "tax-free, all returns are paid gross". Mr. Brennan said he never saw that document at the time.

16.3 The next document was an FASD document on 28th February, 1990, some four and a half years prior to the exchange of memos between himself and Mr. Bell. That document referred to standard questions being asked of customers and investors which included a question whether the money was declared. There was a reference to people who have money invested offshore already or whose money is "hot". The last paragraph stated:

> "Finally, we have the people who have money invested off-shore already or whose money is hot. In this scenario we should in almost all cases direct the monies into our new bond, the Emerald International Portfolio, which is a combination of the above funds."

Mr. Brennan said he did not see that but he remembered a paper about Emerald International which was marketed to non-residents only. It appeared to be a predecessor to the CMI Investment Bond.

Mr. Brennan believed that Mr. Bell would have received the information, the subject matter of a memo, from a third party or from somebody involved in FASD which did not have any employees. They were all employees of the Bank under the umbrella group. Mr. D'Arcy worked in the same building on a different floor and attended the senior management meetings. He did not remember Mr. D'Arcy or anyone other than Mr. Lacey presenting figures. He agreed that FASD was presented as one of the success stories in the early days. Mr. D'Arcy had been recruited by Mr. Lacey to set up the Financial Advice and Services Division.

Mr. Brennan did not think that Emerald was very successful, if he remembered rightly, because it was focused entirely on non-resident customers who were non-resident in Ireland. He did not think it took off that well, but certainly CMI "was presented to us at various meetings as that (sic) the commissions earned from that were now proving very successful, yes". While he could not ever remember anyone saying that it was a target market, it was a new income stream that the Bank had. It was successful and he did not think and could not remember anyone questioning anything about it. He agreed that he could have asked for further information in relation to the CMI products or in relation to the business of FASD. However, he and others had responsibilities for their own areas which were their priority and for which they were responsible. A huge change had taken place during the early years of 1986, 1987 and 1988 as the Bank changed and furthermore, there was a disaster in 1993 when Mr. Lacey was kidnapped and later left the organisation at short notice.

He first became aware the CMI products had been marketed by employees of the Bank and targeted as people with "hot" money in 1998 when a letter came to the acting Chief Operating Officer from RTÉ to say that they were going to have a Prime Time programme the following night, together with the Chief Operating Officer he asked Mr. D'Arcy to find out what was going on. They found out subsequently that the scheme was illegal and that the target market for it was people who had monies that were not declared to the Revenue and that they had provided the facility to evade tax rather than to avoid tax.

16.4 The Court notes that, at all material times, Mr. Brennan was a director of National Irish Bank Financial Services Limited which reported FASD profits. Mr. Brennan's evidence was vague in relation to the commercial benefit of customers investing in CMI. He had not seen the insurance policy. He had not seen any promotional literature nor circular. He presumed there was a life element to it but that it was primarily an investment. He did not remember whether it was a tax avoidance scheme. The Court finds that Mr. Brennan was indeed concerned with CMI but only from the point of view of declarations by CMI, as the deposit holder, being centralised in FASD.

He was clearly aware of "the implication that branches might be assisting in opening non-resident accounts". This was, indeed, the conclusion of the Inspectors. It is difficult to understand his concern if he considered CMI as an insurance product. His concern for opening non-resident accounts can only be based on a concern that they might be bogus. Similarly, his memo of 13th August, 1994, that he did not want the funds to be linked to customers has to be understood in the context of his claim that "client confidentiality is of utmost importance", to "the sensitivity of the scheme" and to the reference in the flowchart that "funds may be an existing branch deposit or other but are usually of a sensitive nature". Mr. Brennan accepted that one interpretation was that "monies were sensitive vis-à-vis the Revenue Commissioners". He was aware of procedures being open to abuse. He failed to acquaint himself with the nature of the product which the Bank was selling and failed to act or to take advice.

17. Interest Loading

17.1 Mr. Brennan agreed that there was no instruction to refund interest in the memo of 21st May, 1990, where Mr. Lacey had expressed his concern to Mr. Brennan about interest loading in Carrick-on-Shannon, the audit report of which was copied to Mr. Brennan.

Mr. Brennan wrote to Mr. Curran, the relevant regional manager, on the same date referring to the audit report and to 33 cases of interest loading to compensate for a shortfall in fee income. It was noted that some refunds were made. No instruction was made to refund though it was clearly stated that the so called "soft option principle" was unacceptable.

Mr. Brennan's memo to Mr. Bonner and Mr. Curran dated 5th June, 1990, in relation to Carrick-on-Shannon and Carndonagh asked for confirmation that the extent of the practice be ascertained and ceased immediately. However, no reference was made to interest being repaid.

In his evidence to the court Mr. Brennan said that interest rates were in the high teens. The practice of loadings was initiated for accounts which were constantly in excess of the agreed limits. In relation to one of the branches, the manager was claiming that he was owed fees by the customers in question and was adding the amount of the fee onto interest, which was quite wrong. Mr. Brennan continued that he did not have documentation in relation to the follow-up but he would have been surprised if he did not do so because his secretary was very good at monitoring anything which required a reply. He agreed that, according to the Inspectors' report, the practice did not disappear in 1990 and, ultimately, there was a full recompense to customers.

The Inspectors had concluded that Mr. Brennan knew or ought to have known that the Bank procedures manual did not contain any guidance on the nature of the work or services to customers which could give rise to an administration or management time charge, nor did it give any guidance on the form or record to be maintained by branch staff responsible for the delivery of the service. The Inspectors concluded:

> "Mr. Brennan and Mr. Keane bear the principal responsibility for the Bank's failure during the periods they occupied the respective positions of General Manager, Retail Banking, or General Manager, Banking, to put in place an appropriate system. Between July, 1991 and March, 1996 while Mr. Brennan's titles and function changed from time to time, he continued to be responsible for procedures in the branches and accordingly he continued to share responsibility for the Bank's failure in this regard."

Mr. Brennan took issue with the fact that the Inspectors had found him liable for not introducing a system in the Bank or a solution for a problem in the Bank of which he was not aware.

He did not accept that there was a deficiency in procedures. There was an entitlement to charge. As lending manager he used get the customer to sign a certain stock form 36. There was no evidence of this practice continuing.

He agreed that it was unsatisfactory to have a kind of estimated figure, or 'guestimate', in relation to the charges as mentioned in the evidence of former branch managers to the Inspectors. One of the managers had referred to such charges being a "sort of a nuisance". Mr. Brennan said that there was no such charge for nuisance. The Bank charged only what they were allowed to charge and there was no such charge for nuisance value as far as he was concerned. He agreed that there was an emphasis on driving up the fees but it was in the context of getting adequately covered for the work they were doing. He was aware that the cost recovery for fees was grossly inadequate – in one particular branch it was below 10%. He agreed that in a few branches it was, as counsel

suggested, 'guestimated'. But he had no knowledge of it being arbitrary or discretionary.

The court concludes that, while Mr. Brennan's practice as lending manager in getting the customer to sign for any charges was proper and presumably compliant with Bank procedures, the subsequent ad hoc practice which was allowed to develop was not satisfactory.

It would appear that procedural controls were inadequate. The emphasis of driving up fees could not have been justified on the basis of work being done for clients without there being verifiable agreement giving an entitlement to charge.

The court concludes that Mr. Brennan's responsibility extended, with others, to ensure that procedures were in place and adhered to and that there was adequate control of compliance. The court accepts the findings of the Inspectors.

18. General Responsibility

18.1 Mr. Brennan was asked whether he considered then and did he now consider that he was jointly responsible for that state of affairs in the Bank. He answered:

> "Yes, I consider that every one of us could have done more and I certainly could have done more too if I had known then what I know now.
>
> …
>
> Certainly there was illegality involved in it, no question about it.
>
> …
>
> I believe that a number of our managers were also responsible."

Mr. Brennan said he became aware of the widespread existence of bogus non-resident accounts in 1998.

He did not disagree that there was a problem in terms of his participation in the management. He was unaware of those problems even though he had been in a senior management position in the Bank for the period 1988 to 1998. He said he could only rely on the information that was coming forward to him, the enquiries he was making. He did not think at any stage that he would ever encourage or condone illegality.

The following exchanges then occurred on the last day of the hearing:

> "141. Q. Everything was there to indicate to you at a far earlier stage?
>
> A. Everything was there, but what the indications were – I did not interpret the indications to the extent that we are doing today.
>
> 142. Q. Was not that, with respect, and I do not mean to offend you in any way, a massive failure on your part in terms of the discharge of your obligations?
>
> A. Of course. It was a complete let-down for me personally. I let down my employer. I let down my Chief Executive, whom I reported to. There is no question about this. You can imagine how I felt in 1998 when I saw this coming forward?
>
> 143. Q. This was a catastrophic failure.
>
> A. It was. I worked for this organisation for 40 years, at that stage 36 or 38 years. This hit me so hard, I never recovered from it. I have not even today. There is no question about it, because here I was dealing, as I thought, right along the line following the law of the land and following the procedure of the Bank and yet I failed miserably to maybe find the fault at an earlier stage. As you rightly say, there were indications there. There were, I acknowledge that. In that respect I did fail, but I failed my employer which is the most important thing. I failed my Chief Executive and I also failed the customers of the Bank. This was the worst event in my life, no question about it. I do not think there is any – sorry, I feel emotional about it today, but I do."

It was put to Mr. Brennan that that was not said in any of his documents. He agreed that it was absent from those documents but that there was no question in his mind but that managers understood. The Regional Managers told him that the Bank was not involved in illegality of any description. He did not know why the managers and other branch officials persisted in opening and maintaining bogus non-resident accounts. All he could do was to refer to the Inspectors' report and see some of what he called the "ridiculous answers" that the bank managers were giving to the Inspectors: that they were under pressure for targets, for deposit targets and that they were being pressurised by customers who said they would go elsewhere. He did not believe that the managers understood that the Bank was not sufficiently serious about the problem or was tolerating the practice by simply indicating that the problem was merely one of documents. They did not get the message that such accounts were not to be opened. All the branch managers at the meeting with the Chief Executive in 1992, 1993 or early 1994 were told that the Bank was not to be involved in illegality and did not want to compete with other banks in that respect. Mr. Brennan believed that if the instructions asking managers to fill up documents correctly were followed there would be no problem. Accepting a declaration that was false was breaking the rules of the Bank and the laws of the land. The account opening procedure was the most important document to start from would have to be administered correctly for a valid account to be opened. It was not a case of "see no evil and hear no evil" or of a "nod and a wink". He said that there was no reference that the Bank was involved in illegality. He agreed that the instructions issued in 1995 were not taken seriously as new accounts were opened post-1995.

He explained:

> "We say, was for the first time we said do not open accounts. We were still opening accounts post-1995 which were bogus non-resident accounts. You know, how do you? We did not realise until 1998 the real problem. The real problem was that it did not matter what instructions we gave the managers, in some cases – now in a few case (sic), not very many – but in a few cases it [did not] matter what instructions we gave them, they still went about and got involved in this particular business."

It was put to Mr. Brennan that as far back as 7th August, 1991 when he wrote the long, detailed memo referring expressly to bogus

non-resident accounts that he knew then, at least in respect of other financial institutions, that there was a problem. He agreed. It was further put to him that the Revenue Commissioners had taken the view that the Bank's obligations extended to a duty of inquiry. Circulars and letters were not the only communication regarding DIRT to the Bank. Regional managers were meeting on a quarterly basis with managers and he was sure that the issue was discussed at a majority of those meetings but, unfortunately, he could not answer for them.

Some managers were disciplined, transferred and suspended. He thought there were DIRT issues as well as other matters in relation to fictitious accounts. These sorts of problems were more significant than simply documentary. He could not remember whether he was informed. Mr. Keane, who became Head of Banking in 1993, probably informed him of disciplinary action in respect of branch managers relating to DIRT. He would not have known the specific details.

Mr. Brennan told the court in re-examination that he was the longest serving senior manager. When difficulties arose such as bank raids and the kidnapping of Mr. Lacey, he assumed responsibility. He was a member of all the senior committees and was the representative of the Bank on the Institute of Bankers, the Ombudsman Board and other bodies.

He was in the Bank at about 7.15 in the morning and would rarely leave before 7 in the evening. In the late 1990s he tried to reduce the amount of work he did at home. The Bank had a very small management team and the number of areas which he had to cover was varied and quite extensive. Lending could take as much as 40% to 45% of his working day.

The case of the Director focused on certain responsibilities that he had in this period which he said constituted a very minor proportion of his overall work commitments: less than 5% of his work. There were many aspects of his work which did not appear on the organisation chart. He never took all of the holidays which he was allowed. In 1986, he spent his holidays working on branch profitability which resulted in a recommendation to close the six branches which were loss making.

18.2 Mr. Brennan said in re-examination that management services was the area responsible for technology and the computer area. The Company Secretary reported to him in respect of staffing and also reported to the Board, though this did not appear from the organisation chart. In fact, the reality should have been a straight line from the Board to the Company Secretary.

Mr. Brennan said that the Audit Committee was the first line in relation to substantive audit matters. He had no responsibility for retail banking and the branches after 1st October, 1990 and thereafter did not receive any internal audit reports.

18.3 Between 1988 and 1990, when the regional managers reported to him once every month or two months, he had a more hands on role in relation to DIRT, interest, fees and CMI and received internal audit reports in relation to the branches. In relation to the branches, his responsibility more often than not was in relation to lending issues which are the bread and butter of banking. The fee income was quite miniscule in comparison to the interest income.

He was very disappointed with the Bank's replies to his requests for documentation from 1988 to 1996. He said that he received absolutely nothing for that period.

He was meticulous in taking notes of which he retained more than he probably needed. He would have received 20 to 30 memos a day. These were eventually sorted and sent to remote storage. He had sought this documentation from the Bank and inspected 23 boxes of his. He had not taken anything with him at all. He said he had not received the documentation which he had expected to find in remote storage. Some of the documents were not his copies nor were there responses to certain letters – all of which related to the period from August, 1991 to November, 1993.

18.4 Since he retired at the end of 1998, he has had no contact with the Bank in a business sense. He has not worked and it is not his intention to take up employment.

He never received any requests from the Director in relation to stating his intentions or what his activities were. He said he had learned of the matters when they came into the public domain through the RTÉ programmes and he felt that he had failed the Bank and its customers. Had he known then what he knows now he would certainly have acted differently. He stated in his evidence on re-examination:

> "In that respect I have failed my employer, as I mentioned earlier, and failed my Chief Executive and everybody else. I let people down. But in saying that, you know, the only comfort I have is that I felt and I still feel today that I did the best I could in the circumstances that were available to me at the time and the knowledge that I had at the time. I have looked back on those memos so many times, I'd look back on them, and as Mr. Collins alluded to so many times, why did you no say this or why did you not say that? I can tell you, there are many times I have asked why I did not go further, why I did not put in another phrase, why I did not look at that, but in all honesty, from the information I had at the time I genuinely did the best, I felt I did the best at the time.
>
> I have gone over it, I have gone over these documents, I have looked at the Inspectors' report, I have accepted the criticism of the Inspectors' report where I felt it was justified. But I must say I was taken by the fact that my colleagues let me down and lied to me, that upset me most.
>
> But how I would have acted differently I just do not know. If I had more knowledge I certainly would have acted differently. … when I did acknowledge in a particular case, another case we mentioned, a disciplinary case, I did act. In fact, despite the fact that I knew this particular individual extremely well, I had to sit across the desk and sack him and knew that this was the end of his career. It was not the easiest thing in the world to do, when you have worked with somebody for the best part of 20 years and to sit across the desk and say that your career is finished.
>
> So a number of issues like that. I felt if I knew then what I know now I would have acted differently and in that I let people down. I can have comfort in the knowledge that I have convinced myself that I did my best. But, obviously, my best was not good enough.
>
> … we are the ones who have been pilloried, we are the ones who are subject to the Inspectors' report and, in all honesty, I cannot for the life of me make any complaint of the Inspectors and their findings overall. I am talking about here we had individuals in the Bank knowingly stealing money from customers' accounts. There could be absolutely no excuse. No matter what they have said the draft (sic) report, there could be no excuse for it, none whatsoever.
>
> In respect of DIRT, the other major issue they have come across, I suppose I have gained some comfort in respect of the

> Comptroller and Auditor General's report and say we were certainly not the worse by a long chalk and we certainly were an awful lot better than an awful lot of the others and we generally tried to make the best of what was a bad lot at the time. But, you know, what was there, what the Comptroller and Auditor General's report brings out is that there was an endemic problem of tax evasion in the country during those particular years. No question about it. And we were fighting an uphill battle in National Irish Bank. We did our best. Our best was not good enough. But we did our best.
>
> …
>
> I know that's a speech rather than an answer. I am sorry, but that is my interpretation of it. I accept what the Inspectors' report, in respect of overcharging customers was damnable. And that's the word I would use and I make no excuse and make no compensation for it. In respect of DIRT, I would consider it is a different issue, in that we had an environment that we were working in which we were up against. In respect of CMI, we had a situation where we were targeting and evading. We were, obviously, providing a tax evasion vehicle for people, which I was not aware of and which I have said continually I was not aware of. I have not condemned myself for that because I just did not know.
>
> What I condemn my self for is maybe I should have written memos in a more clear and logical way, as [counsel for the Director] has alluded to. And I have agonised over that I can tell you."

19. The statutory provisions and case law

19.1 The Companies Act 1990 provided a new generation of company law with emphasis on investigation, transactions involving directors, insider trading and disqualification and restriction of directors. Provision was also made for greater accountability.

Section 160 provides for the disqualification of certain persons from acting as directors or auditors or of managing companies.

The Director has pleaded the court to make an order under subs. (2)(b), (d) and (e) of that section.

The former, (b) and (d), refer, *inter alia*, to an officer who has been guilty of a breach of his duty (b),or whose conduct makes him unfit to be concerned in the management of a company.

The latter, (d), refers to a report of inspectors appointed under the Companies Act in consequence of which the court is satisfied that the conduct of any person makes him unfit to be concerned in the management of a company.

Section 22 provides that the inspectors' report is admissible in any civil proceedings as evidence of the facts in the report and of the opinion of the inspectors as provided in the section. See *Countyglen plc v. Carway* [1998] 2 I.R. S40 at 551.

19.2 Mr. Brennan was a director of NIBFS. He was, accordingly, an officer of one of the companies under investigation, notwithstanding its limited role in relation to FASD and the marketing of CMI.

19.3 The task of the court is to determine whether there is, on the balance of probabilities, sufficient evidence of some conduct that constitutes, as a minimum, a breach of standards of commercial morality or gross incompetence which makes the director, officer or person unfit such as to justify disqualification in order to protect the public.

19.4 General authorities

The origin of this phrase "a breach of standards of commercial morality" and "gross incompetence that requires the director to be disqualified in order to protect the public", has been considered the Irish and English decisions in this regard, which flow from the decision of Sir Nicholas Browne-Wilkinson V.-C. in In *re Lo-Line Ltd*. [1988] 1 Ch. 477 at p. 486 and in the Barings case (cited below).

In *re Lo-Line Ltd*. arose out of insolvency proceedings and was decided under s. 300 of the English Companies Act 1985. It was held that the primary purpose of that section was to protect the public against future conduct of companies by persons whose past records as directors of insolvent companies showed them to be a danger to creditors and others. In considering whether a person was unfit to be a director under that section, only his conduct "as a director" was relevant. Under the English provisions, the definition of director was inclusive and not exhaustive and was capable of including a *de facto* director. On the evidence of that case Mr. Browning Junior, who had been appointed when he attained his majority in 1968, had been shown to have behaved in a commercially culpable manner in trading through limited companies when he knew them to be insolvent and in using unpaid Crown debts to finance such trading.

It was in this context that the judgment examined the proper approach to decide whether someone is unfit to be a director, an approach which has been widely cited in the Irish cases:-

> "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.
>
> … (emphasis added)
>
> 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."

Laffoy J. considered the authorities under s. 160(2)(d) at page 10 *et seq.* of *Director of Corporate Enforcement v. McGowan* (Unreported, High Court, 24th February, 2005) citing In *re Lo-Line Ltd*. and noting that the passage above cited was quoted with approval and adopted by Shanley J. in *La Moselle Clothing Ltd. v. Soualhi* [1998] 2 I.R.L.M. 345, by McGuinness J. in *Re Squash (Ireland) Ltd.* [2001] 3 I.R. 35 and in the judgment of McCracken J. in *Re Newcastle Timber Ltd. (in liquidation)* [2001] 4 I.R. 586 and by Murphy J., for the Supreme Court, in *Cahill v. Grimes* [2002] 1 I.R. 372.

In *Director of Corporate Enforcement v. McGowan* the respondents' company, Wood Products (Longford) Limited, was struck off for failure to make annual returns. ACC Bank Limited applied to have the company restored to the Register. There were outstanding returns to the Revenue Commissioners and a failure to discharge the company's tax liability. The court had no doubt that the respondents had acted irresponsibly and posed the question of whether they had displayed a lack of commercial probity or fallen

below the standards of commercial morality. In the view of the court, the conduct of the respondents had come very close to the threshold but did not quite breach it. The first respondent had remedied the breaches of the Companies Act and the taxation code in relation to making returns albeit when faced with the application for a disqualification order. Both directors combined in restructuring the corporate governance of the company and intended to discharge the company's indebtedness. In those circumstances the court did not consider it appropriate to make a disqualification order as it was not necessary to do so to protect the public.

Smyth J. in *Cahill v. Grimes* (Unreported, High Court, 20th July, 2001) also adopted the above quotation from In *re Lo-Line Ltd*. and other authorities. The court was satisfied that the respondent had acted in gross dereliction of his duty in serious breach of commercial morality as described by Hoffman J. in *Re: Dawson Print Group Lt. & Anor.* (cited below). His actions were deemed to be reckless and in disregard of ordinary business ethics and were not mere oversight or misjudgement – his acts were quite deliberate.

Re Dawson Print Group Ltd. & Anor. [1987] 3 B.C.C. 322 is authority for the proposition that proof of dishonesty in a company director is not a strict requirement before disqualification can be ordered:-

> "There must, I think, be something about the case, some conduct which if not dishonest is at any rate in breach of standards of commercial morality, or some really gross incompetence which persuades the court that it would be a danger to the public if he were to be allowed to continue to be involved in the management of companies, before a disqualification order is made."

Henry L.J. in In *re Grayan Ltd.* [1995] Ch. 241 at pp. 257, 258 referred to the standards and regulatory rules governing the privileges of limited liability in the following terms:-

> "The parliamentary intention to improve managerial safeguards and 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."

19.5 National Irish Bank cases

In *Re NIB Ltd.: Director of Corporate Enforcement v. D'Arcy* [2006] 2 I.R. 163, the court held that for a disqualification order to be made, Mr. D'Arcy's conduct had to show a lack of commercial probity or gross negligence or total incompetence. An element of the conduct which made the respondent unfit to be concerned in the management of a company was that it occurred within a bank rather than an ordinary corporate entity.

Kelly J. noted that the definition of "officer" in this jurisdiction did not include a "manager" as in s. 455 of the U.K. Companies Act 1948. He stated that English authorities were, at best, persuasive, but that their persuasive value must be lessened when they were dealing with a different definition from that in the Irish legislation.

He cited and approved the above referred to passages of In *re Lo-Line Ltd.* and In *re Grayan Ltd.*

In relation to Mr. D'Arcy and the promotion of CMI policies, the Inspectors had concluded that Mr. D'Arcy could have stopped the practice but did not do so. They also found him to be primarily responsible for the continuation of the practice which went on over a long period of time involving large sums. Mr. D'Arcy was in the upper echelons of bank management, not at the very top level, but just one remove from it. The court continued:

> "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.
>
> They are licensed to carry out financial transactions which ordinary corporate entities are not.
>
> 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 C.M.I. policies. That operation was carried out over a period of years in a deliberate fashion. The inspectors held that the respondent could have stopped the practice but did not do so. They held him primarily responsible for the continuation of this practice.
>
> This is demonstrative of a lack of commercial probity on his part. I am of opinion that the applicant has proved that the conduct of the respondent as found by the inspectors was such as to make him unfit to be concerned in the management of a company."

In the matter of *Ansbacher (Caymen) Limited: Director of Corporate Enforcement v. Collery* [2006] I.E.H.C. 67, reference was made to *D'Arcy* and also, indeed, to the conclusions of the Inspectors cited herein. The Court held that the conduct of Mr. Collery, in relation to the off shoring of funds, was such as to make him unfit to be concerned in the management of a company.

This Court in the *Matter of Vehicle Imports Limited (In Liquidation)* [2000] I.E.H.C. 90, adopted the enumeration of director's duties listed in B*arings plc & Ors. (No. 5) Secretary of State for Trade and Industry v. Baker & Ors.* [1999] 1 B.C.L.C. 433 at pp. 435, 436, 486 – 489.

19.6 It is useful to refer to the following propositions from that decision of the English High Court:

> "(a) Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them.
>
> …
>
> (d) Where delegation has taken place the board (and the individual directors) remained responsible for the delegated function or functions and retained the residual duty of supervision and control. The precise extent of that residual duty will depend on the facts of each particular case, as will the question of whether it had been breached.
>
> (e) A person who accepted the office of director of a particular company undertook the responsibility of ensuring that he understood the nature of the duty a director was called upon to perform. That duty would vary according to the size and business of that particular company and the experience or skills that the director held himself or herself out to have in

support of appointment to the office. The duty included that of acting collectively to manage the company.

…

(g) The following general propositions could be stated with respect to the directors' duties:

(i) Directors had, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.

(ii) Whilst the directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegated functions.

(iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, depended on the facts of each particular case, including the director's role in the management of the company."

Jonathan Parker J. in Re Barings Plc at p. 487 believed it not to be in dispute that where delegation has taken place the Board (and the individual directors) will remain responsible for the delegated function or functions and will retain a residual duty of supervision and control.

It is clear that the duty will vary according to the size and business of the particular company and the experience or skills of the director held himself or herself out to have in support of appointment to the office. (See Daniels v. Anderson [1995] 16 ACSR 607 where the Supreme Court of New South Wales analysed directors' duties of skill, care and diligence.)

In addition, the level of reward which a director is entitled to receive may be a relevant factor. According to Jonathan Parker J., at p. 488:

"The point is that the higher the level of reward, the greater the responsibilities which may reasonably be expected (prima facie, at least) to go with it.

'… but the higher the office within an organisation that is held by an individual, the greater the responsibilities that fall upon him. It is right that that should be so, because status within an organisation carries with it commensurate rewards. These rewards are matched by the weight of responsibilities that the office carries with it, and those responsibilities require diligent attention from time to time to the question whether the system that has been put in place and over which the individual is presiding is operating efficiently, and whether individuals to whom duties, in accordance with the system, have been delegated are discharging those duties efficiently."

Morritt L.J., giving the decision of the Court of Appeal for the court, upheld the decision of the High Court. The Court of Appeal was of the view that the issue was not whether the director was an incompetent operator in the financial products or derivatives market of the bank. It was wrong to equate disqualification proceedings with a professional negligence claim. The standard of competence to be shown by a person or director was a different question and was one of law. Whether the director failed to achieve that standard was a question for the court to decide.

The Court of Appeal held that the High Court was right to find that the director had management responsibilities for the unauthorised trading of the employee of the Singapore subsidiary. The director had a duty as a director of the bank to acquaint himself with the nature of that employee's trading and to take reasonable steps to ensure that it was properly conducted. The director knew, or ought to have known that, contrary to advice from Barings internal audit department, the employee continued to run both the front and back offices in Singapore and his trading was not subject to risk limits or that risk limits were not enforced. The director never investigated the employee's business to enable him to assess its reported profitability. The Court of Appeal held that the High Court was right to find the charges against the director proved and that they demonstrated incompetence of such high degree that it led to a finding of unfitness. The director's conduct involved a serious abdication of responsibility by a senior director of the principal operating subsidiary of a major public company.

The Court of Appeal at p. 535 emphasised the propositions referred to by Jonathan Parker J. in relation to the question of "unfitness". The court had to decide whether "viewed cumulatively and taking into account any extenuating circumstances [it] had fallen below the standards … of competence appropriate for persons fit to be directors of companies". It could be no answer to the allegations that separately and individually none of (the allegations) was sufficiently serious to demonstrate the requisite unfitness.

Secondly, the court held that the "director's responsibility for the causes of the company becoming insolvent" in that case, required a broad approach and was not to be assessed by reference to "nice legal concepts of causation".

Thirdly, where the allegation made related to incompetence without dishonesty, this was to be demonstrated to a high degree. This followed from the nature of the penalty. Nevertheless, the degree of incompetence should not be exaggerated, given the ability of the court to grant leave, as envisaged by the disqualification order as defined in s. 1, notwithstanding the making of such an order.

Fourthly, the Court of appeal stated that:

"…it is not necessary for the Secretary of State to show that the person in question is unfit to be concerned in the management of any company in any role. This test, described by the judge as the lowest common denominator approach, is not what the Act enjoins. As the judge observed the court is concerned only with the respondent's conduct in respect of which complaint is made set in the context of his actual management role in that company. If his conduct in that role shows incompetence to the requisite degree then a finding of unfitness and a consequential disqualification order should be made.

Fifthly a finding of breach of duty is neither necessary nor of itself sufficient for a finding of unfitness. As the judge observed a person may be unfit even though no breach of duty is proved against him or may remain fit notwithstanding the proof of various breaches of duty."

This apparent contradiction is explained in the light of the proposition that no rule of universal application can be formulated as to the duty of the director. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of a company.

19.7 *Re Westmid Packaging Services Ltd., Secretary of State for Trade and Industry v. Griffiths and Ors.* [1998] 2 B.C.L.C. 646 at p. 653, Lord Woolf M.R. stated:

> "It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a company director should realise that these are inescapable personal responsibilities. While an individual director may delegate but, having delegated a particular function, he has a duty in relation to the discharge of that function, notwithstanding that the person to whom the function has been delegated may appear both trustworthy and capable of discharging the function."

19.8 Application to present case

The evidence in this case is that Mr. Brennan was, not alone a director of National Bank Financial Services Limited but was also on the Management Committee of National Irish Bank Limited. For the ten year period which was the subject of the Inspectors' investigation he was a General Manager of the Bank and, indeed, for much of that time the senior General Manager who reported frequently to Mr. Lacey.

The court was impressed by the evidence given by Mr. Brennan and, in particular, by his closing remarks. He felt let down by the branch managers and was sincere in his remarks about letting the Bank down. The court accepts fully the genuineness of his shock on hearing the two television exposés of the bogus non-resident accounts, fictitious accounts (for which he bore no responsibility) for the promotion of CMI and other products by the FASD and for the charging of fees and expenses.

The reference by Mr. Brennan to the climate of tax evasion, amnesties and the concerns of the Department of Finance and Revenue regarding the flight of capital during the period within which were difficult times in the Irish economy, excused the lack of control and the persistence of abuses at certain branches of the Bank. While Mr. Brennan was not in receipt of the audit reports of the branches after October, 1990 which, taken cumulatively, showed persistent irregularities, he was still involved in the drafting and signing off of memoranda and circulars in relation to compliance. I have no doubt of his frustration in this regard. However, the evidence of the perfunctory implementation of these directives demonstrated that there was no effective control or supervision.

The court has to contrast the action taken by Mr. Brennan in relation to fictitious accounts following the Criminal Justice Act 1994 which, admittedly, had an element of criminality and personal responsibility inherent in it. The Inspectors made no adverse findings against Mr. Brennan. The court acknowledges the efforts of Mr. Brennan in this regard.

However, the failure to implement effective sanctions in relation to bogus non-resident accounts and the few incidents of disciplinary action against managers' breaches of the directives made contrast with the actual effectiveness of eliminating fictitious accounts. There is no evidence or analysis of the fictitious accounts that became bogus non-resident accounts.

Mr. Brennan said that the Bank could have introduced a computer system to change the flag on all of the accounts which lacked a proper declaration. That would have been possible. He said that the people on the ground who were dealing with the customers on a day to day basis seem to have had a concern that they did not want to lose a deposit and felt that the matter would get sorted out with correct documentation. He agreed that the Finance Act 1986 created an incentive for people to dishonestly represent themselves as non-resident. At that particular time, tax rates were high and the black economy and tax evasion seemed to be a common problem, not just in the banking industry but throughout the economy. Even aside from the Bank being put on inquiry, the normal degree of care required that accounts be opened correctly. Mr. Brennan agreed that he was emphasising that what must be complied with was the requirement that a declaration held in respect of each account. He agreed that there were people who were prepared to solemnly declare in false terms. He did not see a problem once the Bank got the correct declaration, completed with procedures in place, that all the information taken from the customer's account was correct.

He did not see any contradiction between that requirement and the additional requirement which the Revenue Commissioners had identified which was described as the duty of inquiry. He said it did not necessarily follow that if there were a c/o branch address or a Republic of Ireland address on the declaration that it was a bogus non-resident account. This was so where the customer had asked not to send any correspondence to his home address. The implications for the Bank would be a liability and a retrospective liability for DIRT which the customer would have and the Bank would have.

He did not know whether the Bank had obtained advice from a legal or accountancy source as to the validity or otherwise of the interpretation of the Revenue Commissioners. He felt that it would be a matter for the tax people. He did not obtain advice. The only discussions he had were with the Bankers' Federation. His understanding was that the branch should not open an account if the facts were known to be wrong.

The switching of funds from non-resident deposit accounts into CMI products appeared to have been marketed as a solution to the problem of bogus non-resident accounts. Mr. Brennan presumed the legality of the CMI product and relied on Mr. D'Arcy, who had experience in the insurance industry. It is difficult to understand how he ignored the reference to sensitivity, confidentiality and the artificial nature of the deposits remaining in the branches and, indeed, being drawn down. Equally curious was the benefit of such policies being outside the ambit of probate in the event of the death of the policy holder. While the fiction of the non-resident CMI depositor may have justified such claim, the reality of the solution and of the operation of the scheme should have raised suspicion to an experienced banker who represented his bank with the Irish Bankers Federation and indeed with the Revenue Commissioners. While this has, perhaps, more relevance to the issue of bogus non-resident accounts, it is also of relevance to CMI.

Whatever may have been the difficulties in understanding the failures of the Bank up to the time of the DIRT theme audit report, it seems clear that the meeting of 9th February, 1995 and Mr. Brennan's memo to the Executive Director was critical with regard to what was known of the motivating factors for non-compliance.

No reference was made expressly to tax evasion. One can, perhaps, understand the reluctance of committing to paper this motivation for non-compliance. It is difficult to understand the failure to ask the obvious question. There is a degree to which trust borders on naivety in relation to notice of irregularity. There is also a degree to which naivety borders on duplicity. It is difficult to understand the persistence of non-compliance unless there were a fear that the elimination of bogus non-resident accounts without being channelled into CMI-like products could result in a loss of business to the branches and of profitability to the Bank.

In relation to the computing of fees, the same observations apply. There appeared to have been some pressure on branch management time being recompensed by these from customers. It was clear that, at best, this was discretionary or even haphazard. The business of banking is, of course, the business of lending and the profits derived therefrom are subject to the liquidity ratio of deposits to lending set down by the Central Bank. The provision of management services, at least in the high street banks, is somewhat secondary.

The court expresses some concern regarding the availability of documentation to Mr. Brennan. The court accepts his evidence that he did follow up each matter. He had very wide responsibilities and not alone received but generated many memos each day. He was, of course, also involved in many of the crises of the Bank in relation to the establishment of a separate bank in the Republic of Ireland, in the takeover by National Australia Bank, in the procurement and management of premises and in relation to the crisis of the kidnapping of the Chief Executive and his subsequent departure from the Bank.

However, the court does not feel that Mr. Brennan was disadvantaged from the lack of documentation available to him. While it may have been frustrating to find that the directives given in the memos sent by him were not being complied with, his role of supervision and control with regard to the three areas in relation to which the Inspectors attribute responsibility to him, remains.

In order to satisfy itself the court has had regard to the seniority of the respondent together with his experience at senior level in the Bank for a period of over ten years. The court also acknowledges the attempts made by Mr. Brennan to rectify or stop the misconduct. It gives credit to him in relation to the elimination of fictitious accounts and contrasts the ineffectiveness of his attempts to rectify the prevalence of bogus non-resident deposit accounts.

Some ten years have passed since the events relied on by the Director. The delay in making of the application by the Director is, of course, not due in any way to the respondent.

Mr. Brennan's attitude in the proceedings has been co-operative. He has not sought to minimise non-compliance.

The consideration of the potential impact of a disqualification order on someone who has retired and is not involved in the promotion, formation or management of a company is two-fold. It is unlikely that he will become involved in business through a company. This is, however, not a reason why an order should not be made.

Mr. Brennan, as a director of Irish Banks Financial Services Limited, was an officer of that company. He was a member of the Committee of Management of National Irish Bank Limited and involved in the central management thereof, had a duty to inform himself about the affairs of the Bank and to join with his co-directors in supervising and controlling those affairs. He had a residual duty of supervision and control, even where these affairs were delegated to trustworthy and capable managers. He had a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business which extended, after the Finance Act 1986, to the retention of tax on the profits and to the insurance business undertaken by the Bank.

He was a senior manager, indeed the General Manager for Banking Administration. Rather than narrowing his responsibilities, he would appear to have had broader responsibilities with regard to the affairs of the Bank. Even where he had delegated his functions in relation to the branches and was no longer in receipt of the branch audit reports, he still had a role with regard to that function.

It does not appear to the court that it is an answer to the allegations of the Director that each of the elements of the Bank's non-compliance for which he had responsibility, was insufficient to justify disqualification.

The court has to take into account the scope and persistence of non-compliance, especially after the DIRT theme audit report and the meeting of 9th February, 1995 and, indeed, the persistence of non-compliance after that date, notwithstanding the issue of circular 11/95:

> "The findings of the Inspectors criticise the inadequacy of circular 11/95 and attribute responsibility to Mr. Brennan in that regard."

It is clear that the failure to deal with retrospecivity was critical in this regard. It would appear that the failure even to consider, or get advice, in relation to tax which might be due on bogus accounts reflected the attitude to which the court has already referred to as those who did not want to see. The indication that, perhaps, tax might not be due because of the possible interpretation of the section was not a matter in respect of which evidence of any expert opinion was given or available to the Bank at the time. While, here again, the court acknowledges the efforts that were made by Mr. Brennan and, without seeking to rely on hindsight, it does appear that the efforts made in relation to this aspect was not as clear cut, as decisive and as backed up by disciplinary action as was the documentation in relation to fictitious accounts.

20. Decision of the Court

The court has considered the pleadings, including references to the Inspectors' report, to the extensive affidavits and to the cross-examination and re-examination of Mr. Brennan.

The court has considered, in particular, the content and evidence of Mr. Brennan in relation to the several documents put in cross-examination.

The court has already made findings in relation to the evidence given in relation to documents put to Mr. Brennan. The conclusions reached in relation to pre-February, 1995 documents (pre DIRT theme audit) are at 13.2.1 to 13.2.10 above; those in relation to post-February, 1995 are at 14.1 to 14.6. Conclusions regarding special circulars, CMI and interest loading are at 15 to 17. Findings in relation to general responsibility are at 18.1 o 18.4.

The court is conscious of the danger of hindsight and the illusion of synoptic vision.

Nevertheless, the court considers that it was an admission of failure of management not to have been aware, over a period of ten years, of the nature and persistence of non compliance with appropriate banking and tax compliance standards. Mr. Brennan was one of the most senior managers in the Bank over the entire period of the Inspectors' investigation. To have learnt from RTÉ on two separate occasions of two separate schemes of tax evasion unknown to him before that revelation was, in itself, indicative of a shortcoming in management and control. Despite instructions, memoranda and meetings he, with others, failed to lead decisively, to organise effectively, to organise effectively and to control adequately the implementation of the provision of the Finance Act 1986 and failed, with others, to deal decisively with bogus non-resident accounts, CMI and the improper charging of interest. His instructions in relation to fictitious accounts, on the other hand, were decisive.

It was not just a failure of control. It was ignoring or facilitating tax evasion. Deposits were sought and maintained by the Bank through the opening and maintenance of bogus non-resident accounts and the marketing of CMI policies. The responsibility of the Bank's management, of which Mr. Brennan was, over the whole period of the Inspectors' investigation, a General Manager was to comply with the relevant legislation. He was involved in the central administration of the Bank and, as such, the court considers him to have been an officer of the Bank.

The court declines to make an order under s. 160(2)(b) as it is not satisfied that there is sufficient evidence adduced by the Director that the respondent has breached his duty as officer under the Companies Acts. Such duties relate to administration being compliance with the provisions of the Companies Acts (see *Christy Kenneally Communications Ltd.* (High Court, July, 1992, Costello J.), *Re Godwin Warren Control Systems plc* [1993] B.C.L.C. 80, *Re Barnroe Ltd., Director of Corporate Enforcement v. Rogers* [2005] IEHC433 and *Re Kentford Securities Ltd., Director of Corporate Enforcement v. McCann* [2007] IEHC 1.)

In the circumstances, it appears to the court that, as a result of the failure to supervise and control while a senior General Manager of the Bank, the conduct of Mr. Brennan is such that it is appropriate to make a disqualification order, pursuant to s. 160(2)(d) and (e), in respect of Mr. Brennan.

The Court will hear counsel in respect of any proposals he has to be involved in companies and we will also hear counsel with regard to the period of disqualification.