Neutral Citation Number: [2007] IEHC 102

THE HIGH COURT

[2005 No. 271 COS]

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

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND
BARRY SEYMOUR

RESPONDENT

Judgment of Mr. Justice Roderick Murphy dated the 20th day of March, 2007.

1. Background
1.1 The office of the Director of Corporate Enforcement was established pursuant to the provisions of s. 7 Presenting Officer the Company Law Enforcement Act, 2001.

The functions of the Director, under s. 12(1) of that Act, are

> (a) to enforce the Companies Acts, including by the prosecution of offences by way of summary proceedings,
>
> (b) to encourage compliance with the Companies Acts,
>
> (c) to investigate instances of suspected offences under the Companies Acts,
>
> (d) at his or her discretion, to refer cases to the Director of Public Prosecutions where the Director of Corporate Enforcement has reasonable grounds for believing that an indictable offence under the Companies Acts has been committed,
>
> (e) to exercise, insofar as the Director feels it necessary or appropriate, a supervisory role over the activity of liquidators and receivers in the discharge of their functions under the Companies Acts,
>
> (f) for the purpose of ensuring the effective application and enforcement of obligations, standards and procedures to which companies and their officers are subject, to perform such other functions in respect of any matters to which the Companies Acts relate as the Minister considers appropriate and may by order confer on the Director,

Sub-section 2 of the section provides:

> (2) The Director may do all such acts or things as are necessary or expedient for the purpose of the performance of his or her functions under this or any other Act

The above mentioned functions refer to compliance by a company, through its offices, including liquidators and receivers, with the provision of the Companies Act enforcement and investigation is not limited to cases of insolvency.

Subsection 2 enables the Director to take action ("to do all such acts or things") which are necessary to perform the above functions or to perform functions given under any other act. No reference has been made to any other Act.

However, it seems clear that the Oireachtas may assign other functions to the Director. The functions which the Minister may, by order, confer on the Director relate to the Companies Acts and no other legislation.

1.2 Disqualification
Disqualification of certain persons from acting in relation to a company is provided for in s. 160 of the Companies Act, 1990.

Sub-section 1 relating to conviction for indictable offences in relation to a company, or involving fraud or dishonesty is not relevant to the present application.

Subsection 2(b),(d) and, in particular, (e) are relevant.

The paragraphs of that subsection provide as follows:

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

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

…

(7) Where it is intended to make an application under sub-section (2) in respect of any person, the applicant shall give not less than ten days' notice of his intention to that person.

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

1.3 Section 160 as amended by s. 42 of the 2001 Act provides that the Director may make such application.

Section 22 of the Companies Act, 1990 provides that a report of an inspector appointed shall be admissible in any civil proceedings as evidence

(a) of the facts set out therein without further proof unless the contrary is shown, and

(b) of the opinion of the inspector in relation to any matter contained in the report.

1.4 By notice of motion dated 25th July, 2005 the applicant sought an order pursuant to s. 160(2)a, (d) and (e) declaring the respondent to be disqualified from:

- being appointed or acting as an auditor, director or other officer, 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 Provident Acts, 1893-1978, for such period as the court should deem appropriate.

The grounds upon which the relief is sought is the conclusion of Inspectors, appointed by the court, that responsibility for the six improper practices of the Bank summarised in the introduction of their report rested with senior management. The Inspectors made findings relevant to Mr. Seymour in respect of five of the six mentioned practices which are detailed at 3.2 below.

Affidavits were filed by Mr. O'Rafferty and Mr. Seymour. An application was granted by the court for the cross-examination of Mr. Seymour.

2. Mr. Seymour's position
Mr. Seymour was appointed to the position of Executive Director of National Irish Bank (NIB), with effect from the 22nd April, 1994. His formal appointment was recorded in the minutes of the board of directors as being "on an interim basis". He had undertaken due diligence work for National Australia Bank in relation to its proposed acquisition of Trustee Savings Bank in Dublin. That bank had acquired NIB in 1987.

Prior to that appointment he had no management role and had no executive responsibility of any kind in NIB. He said he took over executive responsibility at very short notice following his predecessor's departure. There was no transition period during which the reins were transferred to him. He said that he inherited an organisation that had been managed in an autocratic fashion and a business that had embedded in it certain problems, which had prevailed for many years before he arrived, but of which he was unaware for many months after his arrival. He believed that the management style, culture and focus on control and procedures which he introduced, facilitated significant progress towards the resolution of those problems, both during his tenure in the bank from 22nd April, 1994 in succession to Mr. Jim Lacy until 15th July, 1996, a period of twenty-seven months.

3. Inspector's Report
3.1 Mr. Justice Blayney and Mr. Tom Grace FCA were appointed by the court on the 30th March, 1998, on the application of the Tanaiste and Minister for Enterprise, Trade and Employment, to investigate the affairs of NIB from 1988 to the date of their appointment.

On the 15th June, 1998, the Inspector's powers were broadened in order to allow them to investigate the affairs of National Irish Bank Financial Services Limited (NIBSF).

Both NIB and NIBSF were, at that time, and since 1987, subsidiaries of National Bank of Australia.

By order of the court made on the 23rd July, 2004, the Report of the Inspectors was published.

3.2 The Report concluded that NIB and NIBSF (collectively referred to as "the bank") were involved in a number of inappropriate practices which were summarised in the grounding affidavit of Dick O'Rafferty, an Officer of the Director of Corporate Enforcement 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;

· CMI (Clerical Medical Insurance) 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. The Inspectors did not make any adverse finding that Mr.

Seymour was responsible for this practice.

· There was improper charging of fees to customers.

3.3 In response to the draft findings and Report of the Inspectors, the banks submitted a "Reaction Paper" dated the 24th March, 2004, to the Inspectors which is appended to the Report. This paper outlined the remedial action taken or action being taken to address the identified improper practices. The reaction paper was, of course, submitted almost eight years after Mr. Seymour's departure from the bank. The following statement was included:

> "It is the matter of the deepest regret to the bank that during the period under investigation events took place which fell short of the standard customers and third parties dealing with the bank were entitled to expect. The bank is profoundly sorry that these events could have occurred, and apologises to all who have been effected by these events. The bank believes that the programmes put in place for those affected by the reason of the practices described by the Inspectors have remedied or will remedy any disability that they may have unfairly suffered as a result of the events described. The changes made in the operational structures of the bank which have been explained to the Inspectors are designed to ensure that the bank operates at all times to high standards of governance. The bank considers that it is also appropriate to mark the debt it owes to its employees who have had to work under the shadow of the investigation. Their dedication has been an essential building block in creating a new bank and maintaining customer confidence."

4. Details of findings particular to Mr. Seymour

4.1 The grounding affidavit of Mr. O'Rafferty details the findings of the report.

In relation to bogus non-resident accounts the report indicated that, during his period as Executive Director of the bank, a period of almost 27 months, Mr. Seymour was copied with internal audit reports, the majority of which referred to the failure of branches to hold properly completed declarations for all accounts classified as DIRT – exempt non-resident accounts.

He accordingly had notice of the deficiencies or "irregularities" which existed in the operation of these accounts. Audit reports referred to instances where the residential status or non-residential declarations were at variance with other branch records. Others referred to instances where lending to resident customers were secured by letters of lien over deposit accounts with non-resident status. It was the Inspectors' opinion that these internal audit reports pointed to the likelihood that the non resident accounts referred to therein were, in fact bogus. The extent of the reported documentary non-compliance was on such a scale, that, in the Inspectors opinion, it constituted a further indication that a substantial proportion of non-resident accounts could be bogus.

In December, 1994 some eight months after Mr. Seymour's appointment, theme audits were introduced at the behest of the bank's holding company, National Bank of Australia. The DIRT theme audit of December, 1994 highlighted the extent of the irregularities. Mr. Seymour was made aware of certain significant issues. These were documentary non-compliance and lack of understanding at branches of the bank's duty to satisfy itself on non-residential status. As a result there was failure to deduct DIRT at the standard rate from interest paid or credited. Moreover, conditions for the operations of accounts as DIRT exempt non-resident accounts were breached.

Mr. Seymour had attended the meeting of senior management of the bank on the 9th February, 1995, which was convened to consider what corrective action was needed to remedy the situation disclosed by the DIRT theme audit. The Inspectors found that he, as well as everyone else who attended that meeting, failed to address or even to raise the question of the potential liability of the bank to the Revenue Commissioners resulting from the irregularities.

The Inspectors found that, through the receipt by him of the branch audit reports and the DIRT theme audit report, Mr. Seymour should not only have been aware of the failure of the branches to hold properly completed non-residential account declarations but should also have been aware of the fact that bogus non-resident accounts existed throughout the branch network.

In spite of the corrective action taken by the bank following the DIRT theme audit, there continued to be non compliance by the branches with the requirements of DIRT exempt status during the remainder of Mr. Seymour's term of office. While DIRT compliance procedures improved during his term of office, nonetheless as Executive Director the inspectors found that, he held ultimate responsibility to ensure that DIRT was deducted from interest paid or credited on all accounts as provided by the Finance Act, 1986. Mr. Seymour failed to discharge this responsibility.

(At pp. 175 and 176 of the Inspectors' report).

4.2 In the area of fictitious and incorrectly named accounts, the findings of the Inspectors were that these accounts were opened and maintained by the bank and existed throughout the branch network during the period of the investigation up to the end of 1996 after Mr. Seymour had left.

The Inspectors found that 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.

In 1995 and 1996, when branch managers were directed that all fictitious and incorrectly named accounts should be regularised and/or closed, even where there was a possibility that business might be lost, managers sought to retain for the bank the funds on deposit in such accounts by proposing to customers that they invest in CMI, or by suggesting that they deposit the funds in another branch of the bank in their correct names. In the opinion of the Inspectors, these "solutions" were improper because they served to encourage customers to continue to evade tax. Bank personnel were either aware or ought to have been aware of the reason for the opening of such accounts.

However, the Inspectors indicated that Mr. Seymour may not have had knowledge of the existence of fictitious or incorrectly named accounts in the branches until late 1995, over a year and a half since he had been appointed in April, 1994. However they say that he must nonetheless bear ultimate responsibility for the practice opening and maintaining fictitious or incorrectly named accounts for the period during which he was Executive Director. During the period when he held his position, the general managers of the bank took action to eliminate these accounts.

4.3 The Special Savings Accounts.

The Inspectors found that the bank failed to deduct DIRT at the standard rate from interest paid or credited on accounts designated special savings accounts (SSAs), where the branch did not hold a properly completed declaration in a form prescribed or authorised

by the Revenue Commissioners, or where there had been a been a breach of the statutory requirement relating to withdrawals.

The inspectors found that, although senior managers were aware of the breaches of the relevant statutory requirements, the bank took no steps to calculate and remit to the Revenue Commissioners arrears of DIRT due, being the difference between tax at the standard rate, which ought to have been deducted, and tax at the reduced rate, actually applied (p.80) of the Inspector's Report.

During the period when Mr. Seymour was Executive Director at the bank he was made aware, through audit reports circulated to him, of the deficiencies which existed in the operations of SSAs at branches both in relation to documentary non-compliance and breaches of the withdrawal notice requirements.

He was also circulated with the DIRT theme audit report of December, 1994 and attended the meeting on the 9th February, 1995, to discuss the results of the audit and the issues relating therefrom. He was thus aware of significant issues of documentary non-compliance in relation to the SSAs, the widespread failure to ensure adherence to the notice requirements for withdrawals from such accounts, and the result and failure to deduct DIRT at the standard rate from interest paid or credited where the conditions for the operation of such accounts as SSAs were breached. The report continued:

As Executive Director, Mr. Seymour bears ultimate responsibility for the failure of the bank to deduct DIRT at the standard rate from interest paid or credited on all accounts classified as special savings accounts, where the conditions to which such accounts were subject were not observed.

4.4. Sale of Clerical Medical Insurance, Scottish Provident and National and old mutual international policies.
The Inspectors found that that certain deposits, including funds held in bogus non-resident accounts in fictitious and incorrectly named accounts, were targeted by bank personnel for investment in CMI policies. These were promoted as a secure investment for funds which had not been declared to the Revenue Commissioners, thereby engaging in a practice which served to facilitate the evasion of revenue obligations by third parties.

Prospective investors were given an assurance by bank personnel from the Financial Advice and Services Division (FASD) that their investment would be confidential from the Revenue Commissioners and, if made subject of a trust, would pass to their beneficiaries without probate having to be obtained, thus making it possible for the funds invested to be kept hidden from the Revenue Commissioners even after the investor's death.

The role of the branch personnel of the bank was to identify likely investors, and the role of the personnel in the FASD was also to introduce customers to CMI and induce them to take out policies with CMI (see pp. 181-82 of the report).

The inspectors found that the purpose behind the execution of such policies was the earning of commission, the retention of deposits and the gaining of new deposits as outlined in the findings on pp. 115 and 116 of the Inspector's Report.

The report addressed Mr. Seymour's responsibility in this regard by indicating that on his appointment as Executive Director he inherited the practice whereby customers of the bank, and others, were being facilitated in evading tax through investment in the CMI product and as indicated on p.187 of the report, that as Executive Director he had to bear responsibility for the continuation of the practice.

4.5 Improper Charging of Fees
Between 1998 and April, 1996 (three months before Mr. Seymour's departure from the bank) there was no system in operation at the branches, for the contemporaneous recording of administration and management time. The Inspectors were of the opinion that the manner in which such fees were charged was improper, resulting in some customers being overcharged, across the branch network. The new system introduced in March, 1996 which was to take effect from May/August 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.

The report addressed Mr. Seymour's responsibility by indicating, *inter alia*, that;

> – he was made aware, through his receipt of branch audit reports, of consistently reported shortcomings concerning the lack of explanations supporting the increases recorded on the Fees to be Applied Reports; and that, in relation thereto, the Customer Action Plan introduced in July, 1992 was not being used;
>
> – he was responsible for ensuring that there was a system in place in the branches for the contemporaneous and recording of management and administration time which was chargeable to customers. Such a system was introduced in March, 1996 following pressure on the banks from the Director of Consumer Affairs to provide customers with an itemised breakdown of bank charges before they were applied to customer accounts;

and that, during his period as Executive Director, he bore ultimate responsibility for the failure of the bank to put in place in the branches an appropriate system for recording management and administration time which was chargeable to customers.

4.6 Mr. Rafferty avers that, over a prolonged period, the bank *inter alia*; had:

4.6.1 Unlawfully and improperly operated and maintained bogus non-resident accounts on a widespread basis in the branch network which served to encourage the evasion of Revenue obligations by its customers, both on the funds deposited and on the interest earned, and failed, contrary to the Finance Acts, to account to the Revenue Commissioners for DIRT properly payable and to deduct DIRT at the standard rate, despite the fact that senior management were aware or ought to have been aware of these practices;

4.6.2 Opened and maintained fictitious and incorrectly named accounts which served to encourage the evasion of tax by its customers as it concealed the true ownership of funds in those accounts;

4.6.3 Promoted to its customers CMI polices as a secure investment for funds which had not been declared to the Revenue Commissioners, thereby engaging in a practice which served to facilitate the evasion of revenue obligations by its customers;

4.6.4. Improperly charged its customers fees and failed to return any of these funds prior to the commencement of the Inspector's investigation, despite senior management being regularly informed by internal audit reports of these practices.

Insofar as Mr. Seymour was concerned, Mr. O'Rafferty averred that it was evident from the Inspectors Report that

- he had inherited, on his appointment of Executive Director, a situation where various improper practices prevailed within the bank;

- progress was made during his tenure to correct a number of practices of which he was aware;

- he was responsible (with others) for the continuation of these practices and for the failure during his tenure to address the banks retrospective liabilities arising from a number of those improper practices and that, by virtue of his position as Executive Director, Mr. Seymour was ultimately responsible for the banks associated legal and professional failures.

In all the circumstances, Mr. O'Raffery concluded that it was clear that by his actions and omissions, Mr. Seymour, while acting as an officer of the bank for a period of over two years, breached his duty as such an officer in failing to ensure the company's legal requirements were complied with and of failing to carry out his common law duties with due care, skill and diligence (s. 160(2)(b)) and engaged in conduct which made him unfit to be concerned in the management of a company (s. 160(2)(d) and (e)).

5. The Respondent's Representations

5.1 By letter dated 21st April, 2005 Mr. Seymour's Solicitor's replied to the Director of Corporate Enforcement's Notice of Intention to make application under s. 160(2) together with the draft of a proposed notice of motion (s. 160(7) notice).

The letter stated that none of the provisions referred to in s. 160 of the Act, applied to Mr. Seymour in the capacity in which he worked in the bank and in respect of which he was mentioned in the report of the Inspectors. In particular sub-s. (2)(b) did not apply as Mr. Seymour did not breach any of his duties; sub-s. (2)(d) did not apply because Mr. Seymour's acts and omissions, even on the Inspectors accounts (which he disputes), could not reasonably be seen to render him unfit to be concerned in the management of a company and that the test of conduct for the application of subs. (2)(e) is on the same terms as in subs. (2)(d) and the same response therefore applies.

5.2 Even on the Inspectors' accounts of events, the sanction of disqualification would be wholly disproportionate to the nature and duration of any culpable acts or omissions. In particular, the Inspectors make no allegation, express or implied, of impropriety or dishonesty on the part of Mr. Seymour, nor do they draw any adverse conclusions as to his competence, whether as a director, an employee or an executive. Instead they refer principally to areas where Mr. Seymour, as the senior executive in the Bank, must bear "ultimate responsibility" for the alleged acts or omissions of others, and they infer no criticism of his ability, professionalism or *bona fides*. To seek to have applied to Mr. Seymour a sanction, that the courts have held is designed to punish "a lack of commercial probity", or perhaps "extreme case of gross negligence or total incompetence" and to protect the public against persons who have shown themselves to be a danger to creditors, would be wholly unjustifiable.

It was submitted that much of the contents of the grounding affidavit was unfair and prejudicial to the respondent and failed to take account of the true nature, extent and duration of his involvement in the Bank and, what was termed the very limited role in relation to any of the matters which were subject to the report.

It was stated that the report made no reference to Mr. Seymour in connection with the improper charging of interest. In other areas the only adverse comment was that Mr. Seymour must bear "ultimate responsibility" as executive director.

The inspectors expressly acknowledged that action was taken to eliminate fictitious and incorrectly named accounts during Mr. Seymour's tenure and they acknowledged that DIRT compliant procedures improved during that period.

The opportunities to effect change to existing practices and the culture in which they developed and prevailed were very limited.

In addition, it was unfair to Mr. Seymour to omit from the quoted extracts the full findings of the inspectors.

Issue was taken with some of the findings of fact and the inferences and opinions expressed by the inspectors.

Mr. Seymour had taken over the responsibilities for a business that, over a period of many years, had developed the practices that gave rise to adverse findings. His appointment was "on an interim basis" and that he had no previous executive experience with the Bank. Notwithstanding, he put in place initiatives, the effect of which was to address and significantly reduce or eliminate the incidence of the matters that were the subject of the criticisms of the inspectors. His initial focus, understandably, was on the core banking business and the issue of credit risk. His work resulted in a significant review of lending and the making of provisions against doubtful balances. Moreover, he was required to pay significant attention to the proposed merger involving the Bank's parent Bank, National Australian Bank, and the Trustee Savings Bank. He had taken over an organisation that had been managed in an autocratic fashion with embedded problems.

The inspectors sought to impose responsibility on Mr. Seymour for the acts and omissions of the Bank during his tenure.

5.3 Non-resident and fictitious accounts

The detailed submissions on the specific findings regarding non-resident accounts, fictitious and incorrectly named accounts, sale of policies, special savings accounts and the improper charging of fees to accounts of customers, resulted in findings where Mr. Seymour was held to have ultimate responsibility in terms of the convenient categorisation submitted. In addition, a separate category where retrospective tax liability was referred to. This was the failure to address or raise the question of potential liability of the Banks to the Revenue Commissioners, resulting from irregularities.

In relation to the DIRT related matters it was submitted that when and to the extent that the existence and prevalence of practices relating to bogus non-resident accounts and the application of reduced or nil rates of DIRT to accounts not qualified for such rates, came to his attention, Mr. Seymour acted quickly, decisively and effectively to address those issues. Details were given in relation to audit reports that rated two to three per month, the DIRT theme audit, meeting of 9th February, 1995, action plan as per circular S.11/1995 dated 8th March, a field test and help desk. This action resulted in an improvement from 751 to 524 (a 30% reduction) in the six month period from the middle to the end of 1995. A system of twice yearly certification of key matters showed that by 31st March, 1996, only one branch indicated a failure to enter appropriate tax codes for DIRT and hold relevant statutory documentation.

Fictitious/incorrectly named accounts were first brought to Mr. Seymour's attention during the first half of 1995. Memoranda addressing the issue were issued on 7th December, 1995 and 30th May, 1996 and substantial progress was made. While there were 87 such accounts in mid-1996, these had reduced to 37 as of 30th September, 1996 and to zero on 31st December, 1996.

5.4 Retrospective Tax Liability

Mr. Seymour accepted that neither he nor his colleagues at the Bank adverted to the existence of a liability, actual or contingent, for DIRT due but not deducted and paid over. It was submitted that he was entitled to place reliance on his financial management personnel and on the tax functions carried out in relation to the Bank by National Australian Bank European tax personnel; that he was less familiar with Irish revenue law and that no Bank in Ireland, who had failed properly to deduct tax and pay over DIRT in circumstances similar to the Bank had, he believed, calculated and recorded a liability or contingent liability for DIRT at the time. He had no direct responsibility to raise the issue of possible retrospective tax liabilities. This was the function of branch management, internal and external auditors and the audit committee.

It was submitted that the inspectors' findings were based on an assumption that the Bank had, in fact, an obligation to account for and pay over DIRT on a retrospective basis, when such a question had not arisen either in the Bank or, to his knowledge, in the Irish banking sector. Mr. Seymour had been advised that the inspectors' assumption that a retrospective DIRT liability arose might not be valid insofar as breaches of withdrawal notice requirements may have amounted to no more than waivers by the branches of the Bank; that the absence of appropriate declarations might not have resulted in accounts classified as DIRT-exempt, failing to satisfy the conditions necessary to be classified as non-resident and that accounts may not have given rise to retrospective liability for DIRT, on the grounds that the Bank had properly satisfied itself of their status initially and had not previously come into possession of information casting reasonable doubt on that status.

5.5 Insurance policies
The CMI product was launched in 1992 and its so-called shelf life was nearly over when Mr. Seymour arrived. He was not aware that a substantial amount of the funds being invested in those policies was "hot money". Nor was he aware of any mis-selling and that there was no audit report of any non-compliance by the Financial Advice and Services Division during his tenure and that no compliance issues relating to that division were ever otherwise brought to his attention. He had no involvement in the development or selling of the product and very little knowledge of any aspect of it. The "ultimate responsibility" attributed to Mr. Seymour ignored the reality that the scheme was the product of a culture and set of practices that predated his arrival and which he worked actively to eliminate.

5.6 Charging of fees
He believed that it was unfair of the inspectors to criticise him where there was no appropriate system for the recording of management administration time chargeable to customers. There was a manual system which he regarded as workable and that there was, in the culture of the Bank and of its branch managers, a leaning "more towards the customer than the Bank". He was therefore justified in expecting that instances of overcharging of fees would be few. Mr. Seymour believed that the Bank had a policy of operating low charges to attract business and to refund charges where they could not be justified.

Mr. Seymour was not aware of any complaints of overcharging by customers. He was satisfied there was not a policy of making excessive or inaccurate charges. A more accurate and supportive system was introduced in 1996. He introduced the customer action pad which largely overcame the problem.

5.7 The letter concluded that Mr. Seymour could bear no responsibility for any problems that existed at the time of his arrival. There was no issue of any adverse finding, as originating during his term of office. Substantial progress was made towards the resolution of each of the issues identified by the inspectors. It was unreasonable to expect Mr. Seymour to have effected all of the changes in culture, management and procedures necessary to completely eliminate the practices criticised by the inspectors. It would be unwarranted in view of his short tenure, the absence of any business interests in Ireland and the fact that he had now retired following a distinguished career of over forty years to make the order sought.

The order sought is designed to protect the public from persons who have shown themselves to be a danger to creditors, and to have been guilty of a lack of commercial probity or perhaps an extreme case of gross negligence or total incompetence. It was manifest from the submissions made, and indeed from the findings of the inspectors, that Mr. Seymour is very far from being such a person. He was, in fact, the executive who, in a short period, began the transformation of the culture of the Bank from one that was undoubtedly a danger to certain creditors and facilitated improper practices, to one that encouraged compliance and facilitated the cessation of improper practices. He addressed the issues referred to by the inspectors and made substantial progress. His efforts resulted in further positive progress after his departure.

Accordingly, the proposed application would not only be unjustified on the findings of the inspectors, it would be manifestly unsupported in the context of all of the relevant facts. Moreover, the sanction of disqualification would be entirely disproportionate.

6. Respondent's Affidavit
6.1 By affidavit sworn 29th September, 2005, Mr. Seymour confirmed and reiterated the matters of fact set out in his solicitor's letter of 15th April, 2005.

In that affidavit he set out a summary of his 42-year career in banking during which, he averred, he had carried out his duties with as much skill, competence and integrity as he could and that his fitness to be concerned in the management of any company at all levels had never been impugned. Although his career was at an end and he had no current involvement in, nor intention to involve himself in, the promotion or direction of any commercial entity, he resisted the application strongly and believed that an order against him would be entirely unjust and would cast a significant and undeserved blemish on his career. He says he did not breach any duty as an officer of the Bank or of any other company during his career.

He said that he was undertaking due diligence work in Dublin for the National Australian Bank, in connection with its proposed acquisition of the Trustee Savings Bank, when he was asked to assume the senior executive position at the Bank to "hold the fort" pending the appointment of a permanent chief executive. He explained his role in the Bank from 22nd April, 1999 until he retired over two years later on the 15th day of July, 1996. He continued for several months managing aspects of the proposed acquisition by National Australian Bank of the Trustee Savings Bank and was required to monitor and report to the former on a daily basis regarding progress and the dealings with the considerable uncertainty amongst Bank staff associated with the proposed merger. He had also responsibility for dealing with the media.

6.2 His immediate day to day responsibilities included:

monitoring the performance of the business at a detailed level;

visiting branches and regional offices;

attending board meetings and maintaining regular contact with the non-executive chairman;

daily contact with general managers and head of human resources in the Bank;

regular meetings with senior managers across the Bank;

managing the Bank as a core asset of National Australian Bank and keeping in regular communication with senior National Australian Bank management in other jurisdictions;

attending meetings of National Australian Bank Group Management in London, Australia and other locations;

maintaining contact with external regulators and agencies, including the Central Bank, and

managing the implementation of National Australia Bank Group initiatives in the Bank.

He accepted that he was responsible for the overall management and direction of the business during that time but was not aware and could not have been aware of every detail in the operation of the Bank which, he said, had a management structure designed to ensure that all areas of responsibility were properly managed by appropriately qualified and experienced personnel and that adequate resources were available to do so. He said that he was entitled to rely on the Bank's existing systems, procedure and controls and on the internal audit function, to detect and report accurately and comprehensively on the implementation and operation of appropriate procedures, controls and practices and on departures therefrom.

He says that it would have been impossible for him to bring about total elimination of the small number of departures from acceptable practices referred to in the internal audit reports in the summer of 1994. He arrived in the Bank with no knowledge of the existence of the practices criticised by the inspectors. No member of the Bank informed him of the widespread existence of those practices. He did not otherwise become aware of the possible extent of them until, in the autumn of 1994, the head of internal audit at the Bank briefed him on continuing occurrences of non-compliance with DIRT regulations. On the information furnished to him he believed that the problem appeared to be one of poor compliance with proper administration procedures rather than anything more serious. He carried out the special audit – the DIRT theme audit – in or about December, 1994.

6.3 He said that once the practice as later criticised by the inspectors came to his attention he acted with as much determination and speed as was reasonably possible to eradicate non-compliance and to alter the prevailing culture.

He referred to the liability for DIRT in relation to which the inspectors were critical and referred to the matters contained in the letter of 15th April, 2005. It was unfair of the inspectors to criticise him for failing to raise the issue of retrospective liability in circumstances where Irish tax was outside his area of direct knowledge and expertise and where he had relied on other expert personnel and when it was far from certain that such a liability in fact arose at all.

He referred to the affidavit of Mr. O'Rafferty and the steps taken by him as already summarised in the letter of 15th April, 2005 in relation to the other matters summarised in the report and in Mr. O'Rafferty's affidavit.

In relation to other matters raised in the grounding affidavit of Mr. O'Rafferty he says that he notes that it is accepted that he inherited the various practices referred to and that progress was made. To ascribe responsibility to him for the continuation of practices in such circumstance was unfair and unjustified. He was unaware of the "associated legal and professional failures" referred to in the grounding affidavit which had concluded that Mr. Seymour, by virtue of his position as executive director, was ultimately responsible for the Bank's associated legal and professional failures.

6.4 Mr. Seymour accepted that most senior executives of the Bank had a duty, as part of a team of senior executives, to ensure that the company complied with its legal obligations in all material respects. He accepted that he had a duty to carry out his duties with due care, skill and diligence, to establish and maintain an appropriate corporate ethos and insofar as possible to entrench values of integrity, professionalism and legal compliance throughout the company. He believed he had discharged those duties appropriately. He never suggested that a chief executive could abrogate a duty to ensure compliance with legal and professional obligations but that it was normal and entirely acceptable to delegate responsibilities and to place reliance in people, systems, procedures, controls and internal and external audit processes in so doing.

In conclusion he said that he did not believe that he had conducted any aspect of his career in such a way as to justify the making of the order sought by the Director for Corporate Compliance and he would be greatly saddened were his unblemished business life to culminate in a finding of that sort.

7. Second affidavit of Mr. O'Rafferty

7.1 By affidavit filed 3rd November, 2005 in response to Mr. Seymour's affidavit Mr. O'Rafferty averred to the serious nature of the practices condemned in the report. Immediate steps should have been taken at the highest level to ensure that such practices were ended and, where appropriate, remedial action taken. In respect of the period of 6th April, 1986 to 5th April, 1999, (which included Mr. Seymour's tenure of office) the Bank paid the Revenue some €6.7 million by way of settlement of its DIRT liabilities.

The Bank had or was in the process of refunding customers some €12.5 million in respect of the overcharging of fees and interest.

It was clear that practices continued during Mr. Seymour's period of office. This continuation attracted the criticism of the inspectors in their report which was at the root of the application.

Ultimate responsibility rested with the chief executive to ensure that the company carried out and complied with all its obligations imposed on it by law. It was Mr. Seymour's failure in this regard during his term of office that attracted the criticism of the inspectors.

In relation to the culture and operational environment of the Bank, the report had concluded that responsibility for the improper practices which existed rested with senior management of the Bank during the period covered by the investigations. It was their duty to ensure that the business of the Bank was so conducted that such practices did not occur and, if they did, that they were stopped immediately.

7.2 Bogus non-resident accounts

Mr. O'Rafferty counterposes the inspectors' findings in relation to bogus non-resident accounts with the position of Mr. Seymour. The numerical references are to the paragraphs in Mr. Seymour's replying affidavit.

Inspectors' Findings in Summary	Respondent's Position in Summary

"Through his receipt of the branch audit reports referred to above, and the DIRT Theme Audit report, Mr Seymour should not only have been aware of the failure of the branches to hold properly completed non-resident account declarations, but should also have been aware of the fact that bogus non-resident accounts existed throughout the branch network.

Mr Seymour attended the meeting of Senior management of the Bank on 9th February 1995, convened to consider what corrective action was needed to remedy the situation disclosed by the DIRT Theme Audit, but he failed at the meeting, as did everyone else who attended it, to address, or even to raise, the question of the potential liability of the Bank to the Revenue Commissioners resulting from the irregularities.

In spite of the corrective action taken by the Bank following that DIRT Theme Audit, there continued to be non-compliance in the branches with the requirements for DIRT-exempt status during the remainder of Mr Seymour's term of office.

Whilst the Inspectors accept Mr Seymour's submission that DIRT compliance procedures improved during his term of office, nonetheless, as Executive Director, Mr Seymour held ultimate responsibility to ensure that DIRT was deducted from interest paid or credited on all accounts subject to DIRT under the Finance Act, 1986. He failed to discharge this responsibly." (Page 176 of the Report).

"17. I was not aware when I took up the
position of Executive Director of the existence of any of the practices that have been criticised by the Inspectors, notwithstanding that they all appear to have been prevalent by then. Although I had received some internal audit reports in the summer of 1994 referring to a small number of departures from acceptable practice, no member of NIB informed me of the widespread existence of those practices and I did not otherwise become aware of the possible extent of them until, in the autumn of 1994, the Head of Internal Audit in NIB briefed me on continuing occurrences of non-compliance with DIRT regulations. Even then, on the information furnished to me, the problem appeared to be one of poor compliance with proper administration procedures rather than anything more serious. In any event, I authorised a special audit of area, which was the DIRT Theme Audit carried out in or
about December 1994."

"22. The area of compliance with Irish tax legislation was neither under my direct supervision nor within my detailed knowledge during my time in NIB. Although, as the senior executive in NIB, I was responsible generally for compliance within the Bank, detailed day-to-day responsibility for various compliance-related matters was held by others. I say and believe that I was entitled to rely upon, and did so rely upon, the appropriate members of senior management to ensure compliance and to identify any areas of retrospective or prospective liability for taxation."

"26. I say and believe that, even if the issue of a possible retrospective liability for DIRT ought to have been raised, the failure of senior management to do so cannot of itself render those managers unfit to be involved in the management of a company. Further, I am advised and believe that it is far from clear that the effect of the relevant legislation at the time would have been to impose a retrospective liability on the Bank for DIRT in the circumstances described by the DIRT Theme Audit report of December 1994."

	"35. The results of the DIRT Theme Audit revealed continuing non-compliance in certain areas. However, the report on the audit made no reference to tax evasion and did not conclude that any accounts were bogus. I do not accept that a render of the report at the time, without the benefit of the considerable hindsight now available to both the Inspectors and the applicant, ought to have concluded from that report that bogus non-resident accounts existed throughout the Bank's branch network." "40. With regard to the Inspector's conclusion that I, as the senior executive in NIB, had ultimate responsibility to ensure the proper deduction of DIRT pursuant to the 1986 Finance Act, I say that I discharged that responsibility to the full extent reasonably possible in the circumstances and in the time available to me; that I achieved very significant progress during my tenure; and that I left the Bank with a fundamentally changed culture and in a significantly better state than I found it with regard to the matters that are the subject of the Inspectors' report."

In relation to the comparison above, Mr. O'Rafferty says that the Bank had an established senior management team who had considerable experience in the Bank and in banking generally. The assertions of Mr. Seymour that he continued to be unaware of the scale and prevalence of the improper practices with respect to DIRT in particular after the findings of the DIRT theme audit had been made known to him in late 1994 and early 1995 were untenable.

Mr. Seymour had averred that the DIRT theme audit report made no reference to tax evasion. Mr. O'Rafferty referred to s. 32 of the Finance Act, 1986 regarding the deduction of tax from relevant interest which imposed an obligation to deduct unless it was actually satisfied that the deposit in question was not a relevant deposit. The duty to ensure compliance with a clear statutory requirement rested with senior management including the respondent. Mr. O'Rafferty continued:

> "18. … if the Bank and its managers failed in this duty, then even if it were otherwise correct (which in any event is not accepted as appears below) that there was nothing to alert the respondents to the fact that the tax evasion was prevalent, or that the bank held bogus non-resident accounts, the failure of the statutory duty outlined above is sufficient to render the respondent liable in respect of these practices. It is untenable for Mr. Seymour to say he could not have not have known of the existence of tax evasion following the theme audit report. The conclusion of the management's summary, a copy of which was reproduced in Appendix 9 of the Inspector's Report, referred to very significant penalties envisaged as a result for non-compliance:
>
> > The result of this audit are very disappointing and management must take immediate steps to improve the situation. The structure of the whole area can be improved but the level of non-compliance is too high. It appears that there needs to be an organisation-wide change in attitudes to the whole area. This is a risk area and the penalties for non-compliance at the level shown in this report would be very significant."

Mr. Seymour was at the meeting of 9th February, 1995, convened to consider the report. At that meeting Mr. Frank Brennan, a general manager, confirmed as accurate the finding of the report that a fundamental attitudinal change at branch level with respect to "possible tax evasion" was necessary. The relevant minute states:

> "JFB stated that he felt that there was a need to change the attitudes at bank level so that possible tax evasion could be eliminated to the greatest degree possible. This means that we deduct DIRT at the standard rate (27%) unless the necessary clear documentation is held."

Mr. Seymour's assertion that the DIRT theme audit report did not conclude that any accounts were bogus was not tenable in view of the report which stated:

> "Instances have been reported in branch audits where non-resident details were at variance with other branch records. Some branches appear to be of the opinion that once a non-resident declaration form is held there is no obligation on the branch to confirm the residency of the account holder.
>
> A significant number of non-resident accounts had a statement dispatch flag of 'B' i.e. statement is sent to branch. (This

area was not reviewed in detail as it would be subject to a separate theme audit later)."

Mr. O'Rafferty also found untenable the statement of Mr. Seymour that it was far from clear that the effect of the relevant legislation at the time would have been to impose retrospective liability on the Bank for DIRT. Given the obligation imposed by s. 32, the content of the conclusion to the report and earlier correspondence among the Bank's senior management referred to Appendix 8 of the Inspector's Report being copy memorandum dated 18th November, 1993, from Gerry Hunt, head of financial control, to Michael Brennan, Michael Keane and Dermott Boner with copy to 'Mr. Lacey re non-resident accounts'.

It does not appear that Mr. Seymour was copied with this memorandum which was referred to but not exhibited in the affidavit of Mr. O'Rafferty.

The memorandum at Appendix 8 to the Inspector's Report stated as follows:

> "I have recently received three separate phone calls from senior officials in the Department of Finance and Revenue on the 1993 tax amnesty and they are clearly unhappy about the alleged actions of a number of bank officials. I am now convinced that the Revenue will commence detailed audits of the major banks in 1994 with particular attention on non-resident accounts. The U.K 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 analysis attached) and it is difficult to explain why such a high proportion of new funds are from non-residents. I have spoken with R. Bowden and P. Harte and both share my concerns that our documentation may be weak in the following areas:
>
> 1. c/o Branch addresses,
> 2. Non-resident declaration forms missing, incomplete or inaccurate,
> 3. Unusual addresses that clearly warrant closer scrutiny, e.g. Main Street, Swansea, Wales,
> 4. Obvious errors, e.g. non-res. deposit and resident loan in same name.
>
> It is essential to advise all managers of the immediate risks and the personal penalties. There can no longer be excuses for sloppiness in this area and we have been given advance warning."

Mr. O'Rafferty believed that Mr. Seymour exaggerated the impact of his leadership of the bank. While the inspectors acknowledge in their findings the DIRT compliance procedures improved during his tenure, the respondent's assertion is undermined by the findings of the theme audit of compliance of tax legislation and bank internal procedures which was conducted by the European Audit Division of the National Australia Bank in late 1998.

The overall conclusion of the report on this theme Audit, issued in January, 1999, assessed the standard of compliance as unsatisfactory with a high number of errors in overseas residents accounts, 18% of which had been found to be erroneous when tested against current legislative requirements.

The report also states that these errors "do not in themselves suggest that the customers were ineligible for the payments of interest without deduction of tax but do indicate a need for immediate remedial action."

In addition the significant audit issues identified included blank declarations signed by customers and not subsequently completed. The procedures for ensuring that customers' identity was verified did not provide evidence that this, in fact, had occurred. The six-monthly branch declaration process gave a false picture of compliance in the bank.

Mr. Rafferty referred to the early actions of Mr. Seymour's successor, after the latter left on the 15th July, 1996, in circulating all bank staff with a warning of the consequences of their breaching banking procedures in their participation in fraudulent acts (a circular dated the 18th September, 1996) that undermined the respondents assertions that "substantial progress" was achieved and that the banks culture had been "fundamentally changed" for the better during his tenure as Executive Director.

While there may have been improvements Mr. Seymour should have been aware of the failure of the banks' branches to hold properly completed non-resident account declarations and should also have been aware that bogus non-resident accounts existed throughout the branch network.

In this regard the affidavit contrasts the Inspector's position with the corresponding position of Mr. Seymour as follows:

Inspectors' Findings in Summary	Respondent's Position in Summary

"Barry Seymour, Executive Director of the Bank from 22 April 1994 to 15 July 1996, may not have had knowledge of the existence of such accounts until late 1995. Nonetheless, as… Executive Director…. Mr. Seymour must bear ultimate responsibility for the practice of opening and maintaining fictitious or incorrectly named accounts during the (period he held his position). During the period Mr. Seymour held the position of Executive Director, the General Managers took action to eliminate such accounts." Page 178 of the Report).	"42, I confirm that instances of fictitious named appearing on customer accounts were first brought to my attention during the second half of 1995. Memoranda addressing this issue were subsequently issued on 7 December 1995 and on 30 May 1996 in the names of other members of senior management and substantial progress was made. I gave express instructions to my senior management to sort out the question of fictitious accounts." "45. The Inspectors found that fictitious and incorrectly named accounts existed in the branch network since 1988. In circumstances where my employment by the Bank commenced approximately 6 years later and the practice ceased within approximately one year of the date one which I became aware of it, I say and believe that it would be completely unreasonable to ascribe to me responsibility for the organisation, existence of, continuation of the practice."

Mr. Rafferty avers that there is no dispute between the Inspectors and the respondents in relation to the state of knowledge of the problem of fictitious and incorrectly named accounts. On becoming aware of the problem in late 1995 the Inspectors have acknowledged that actions to eliminate the problem were taken during Mr. Seymour's tenure but that, as Executive Director, he was ultimately responsible for the continuation of this improper practice. The existence of accounts in a Licensed Bank which were fictitious and were incorrectly named was as such a serious matter that the practice should have been discontinued immediately once their existence became known.

7.3 Special Savings Accounts

In relation to special savings accounts, Mr. Rafferty compares the Inspectors' findings with corresponding position of the respondent as follows:

Inspectors' Findings in Summary	Respondent's Position in Summary

"Barry Seymour held the position of Executive Director of the Bank from 22 April 1994 to 15 July 1996 and during that period was made aware, through audit reports circulated to him, of the deficiencies which existed in the operation of SSAs at branches, both in relation to documentary non-compliance and breaches of the withdrawal notice requirements. Mr. Seymour was also circulated with the DIRT Theme Audit report of December 1994 and attended the meeting on 9 February 1995 to discuss the results of the audit and the issues arising therefrom. He was thus aware of significant issues of documentary non-compliance in relation to SSAs, the widespread failure to ensure adherence to the notice requirements for withdrawals from such accounts, and the resultant failure to deduct DIRT at the standard rate from interest paid or credited were the conditions for the operation of such accounts as SSAs were breached. As Executive Director, Mr. Seymour bears ultimate responsibility for the failure of the Bank to deduct DIRT at the standard rate from interest paid or credited on all accounts classified as Special Savings Accounts where the conditions to which such accounts were subjected were not observed." (Pages 180 and 181 of the Report)	"47. I have dealt herein before with the circulation of internal audit reports to me, my authorisation of the DIRT Theme Audit, my convening of the meeting on 9 February 1995 and the various other steps taken by me, at my direction, with my authorisation and/or with my approval to address and resolve DIRT-related practices. Those averments apply equally to the area of SSA accounts, as DIRT-related issues were identified, investigated and addressed actively in the same way and at the same time in relation to both non-resident accounts and SSA accounts." "48. I say and believe that it is unreasonable to ascribe responsibility to me for the origination, existence or continuation of practices in circumstances where such long-standing practises were addressed actively within a short period of their coming to my attention and where, under my leadership, the continuation of those practices was changed within a short period of time."

While there is no dispute between the Inspectors and the respondent in relation to his state of knowledge and to the special circulars dealing with qualifying criteria, it is evident from the DIRT theme account report of December 1995 that the scale of non-compliance was very serious. Mr. Rafferty refers to the uncontroverted findings of that audit in relation to withdrawal notices, SSA declarations and account holders. The report had, as already stated, identified this as a risk area, the penalties of which were very significant.

The respondent's contention that very significant progress was made is undermined by the theme Audit on compliance which was conducted by the European Audit Division of the National Australian Bank in late 1998. This rated compliance standard as unsatisfactory and noted in relation to SSAs that 21% of sample SSA accounts were in error against legislative requirements and that in 79% of the samples tested withdrawals made in 1998 from accounts (were) being allowed without the required notice been given.

Mr. O'Rafferty averred that the Director had no further information on the matter but it appeared that the results of 39% and 91% from the DIRT theme Audit of 1994 and the corresponding figures of 21% and 79% from the theme Audit of 1998 on compliance were comparable figures. There remained a continuing problem of substantial non-compliance with respect to SSAs after Mr. Seymour had left the bank. Fear of losing deposits was one of the reasons established by the Theme Audit to explain why many branches were finding it difficult to impose the notice requirements. Mr. Seymour, having notice of these facts, ought to have known that there were potential legal consequences for the banks' participation in this failure. It was difficult to avoid the conclusion that Mr. Seymour and other senior management to the bank were careful not to damage business retention and growth prospects in the interest of legal compliance.

7.4 Sale of CMI policies

Mr. Rafferty compares the Inspectors' finding with the corresponding position of the respondent in relation to the sale of the Clerical Medical Insurance and similar policies in the following tabulation:

Inspectors' Findings in Summary	**Respondent's Position in Summary**

"Barry Seymour held the position of Executive Director of the bank from 22 April 1994 to 15 July 1996. On his appointment, he inherited the practice whereby customers of the Bank, and others, were being facilitated in evading tax through investment in the CMI product. As Executive Director of the Bank he has to bear responsibility for the continuation of the practice." (Page 187 of the Report)	"50. I confirm that I had no knowledge at any time during my tenure that customers of the Bank or others were being facilitated in evasion of tax through investment in the CMI product that there was no audit report of any non-compliance or other issue relating to that division was ever otherwise brought to my attention. The CMI product had been launched some years before my arrival at the Bank, and declining commissions indicated that its shelf-life was almost expired by the time I joined NIB. The product was relatively unimportant to the Bank's performance by then and received little management attention." "51. In these circumstances, I say and believe that it is unreasonable to ascribe responsibility to me in relation to the use of the CMI product which the Inspectors acknowledge I inherited and to ignore the reality that the culture and set of practices that pre-dated my arrival and that facilitated such use was fundamentally altered under my leadership."

The Inspectors had not made an explicit finding that Mr. Seymour was aware that such Insurance products were being marketed or promoted by the Bank so as to facilitate tax evasion. They have acknowledged that he inherited the practice but have, nevertheless, indicated that he must bear responsibility for its continuation in the light of the direct reporting relationship with which Mr. D'Arcy, the Manager responsible for those products, had with Mr. Seymour until the 1st January, 1995; the testimony of Senior Management and Branch Mangers to the Inspectors that the CMI product was marketed to people with "revenue sensitive" funds; the volume and nature of the documentation circulated regarding the benefits of those products and the open manner in which publicity for such products extolled the advantage for the beneficiary of clients being able to obtain the proceeds of the investments after death with no probate requirement, thereby facilitating concealment of the funds from the Revenue Commissioners.

7.5 Improper charging of fees
Finally, Mr. Rafferty compares the Inspectors' findings with the corresponding position of the respondents in relation to the practice of improper charging of fees which include the table in page 22 and 23 of 26 which I include.

The Inspectors' had recorded 25 internal audit reports from the period April, 1994 to May, 1996 which showed shortcomings in the justification for the fees being levied in customer accounts. That figure being about 60% of the internal audited accounts for the years in question. It was clear that there was a significant and longstanding systemic weakness which required the attention of the Bank's Senior Management, including Mr. Seymour, given the implicit risk to bank/customer relationships. Mr. O'Rafferty pleads that Mr. Seymour was not in a position to deal persuasively with the Inspectors' findings, that this practice was only addressed after pressure from the Director of Consumer Affairs on the banking industry in general. Mr. Seymour was ultimately responsible, during his tenure, for the failure of the bank to introduce an appropriate system for the recording of management time chargeable to its customers.

In conclusion Mr. Seymour's contentions that the Inspectors' findings were or are incorrect, unfair or unreasonable or untenable. The Inspectors' had properly defined his level or responsibility for those failings based on the level of knowledge attributed to him and the seriousness of the identified failures.

Mr. Seymour had presided over the bank which had breached its obligations under the Finance Acts, facilitated others to defraud the Revenue Commissioners, applied fees to customers' accounts, which were not properly justified and facilitated the sale of certain insurance products. Neither of the insurance companies was authorised to carry on life assurance business in the State at any time in the period up to the 15 June, 1998. Further, there was a failure to make return of those sales to the Revenue Commissioners as is required by law.

The Inspectors' report, at 94/95, in relation to the obligation to make returns to the Revenue Commissioners stated that it appeared that none of the Financial services Managers had been instructed by Management of the provisions of the Finance Act, 1993 (s. 24, subsequently s. 594 of the Tax Consolidation Act, 1997) which obliged any Irish resident person acting as an intermediary in connection with the issuing of foreign life assurance policies on or after the 20th May, 1993 to deliver returns specifying certain details in respect of each resident.

Mr. O'Rafferty says that the findings in the Inspectors reports in aggregate are correct in stating that Mr. Seymour was aware of the significant level of non-compliance in the operation of both DIRT exempt non-resident accounts and SSAs and that like other members of Senior Management, he failed at the meeting of the 9th February, 1995 to address, or even to raise the issue of potential retrospective liability for DIRT resulting from the irregularities. Companies are required to comply with law and officers of the company are obliged to carry out their functions with due care, skill and attention. Notwithstanding ample warnings as to the real risks which

existed with respect to compliance in a number of areas. The Inspectors correctly found that Mr. Seymour failed to discharge properly his responsibilities in his position as Executive Director from 22nd April, 1994 to the 15th July, 1996 in a number of respects. This was particularly serious for a licensed bank which occupied a unique position of trust and which is required to adhere to the highest possible standards of conduct. Having regard to the findings of the Inspectors and the banks acknowledgment of its past failures, there is sufficient evidence of illegality to indicate that Mr. Seymour demonstrated unfitness, lack of commercial probity, negligence and/or incompetence on the discharge of his duties as an Executive Director of the bank. Mr. O'Rafferty averred that his disqualification under s. 160(2) of the Companies Act, 1990 was warranted for a period of time.

8. Second Affidavit of Barry Seymour filed the 18th June, 2006
Mr. Seymour says that he did not deny that the practices criticised by the Inspectors were of a very serious nature. He had set out in his previous affidavit details as to how he addressed those practices, as soon as they came to his attention. He introduced a change in culture within the Bank, such that the importance of compliance received a much greater emphasis than it had previously.

He had no direct knowledge of the payment of €6.7 million in respect of DIRT liabilities relating to the period of 13 years from the 6th April, 1986, to the 5th April, 1999. The relevance of the size of the payment to whether he was fit to be a Director was not clear to him.

The amount that the Bank decided to refund to customers in respect of overcharging of fees in interest was of little or no relevance to the application. He had introduced an improved system for capturing management administration time and making accurate and supportable charges to customers. No finding of any kind was made against him by the Inspectors in the area of the improper charging of interest.

He took exception to his assertions being regarded as untenable with regard to the DIRT practices. He did not see the relevance of the Public Accounts Committee. He had no information regarding the improper practices of the Bank prior to his arrival when he was asked to look after the bank for a short period, following the departure of his predecessor. His first weekend was spent obtaining legal advice in relation to his predecessors' challenge to his removal.

In addition to dealing with the issues, internal and external, arising as a result of Mr. Lacey's departure, he continued working on the proposed merger between the parent company, National Australian Bank and TSB which ultimately did not proceed. From April, 1994 when he took over, until late 1995, the absence of any additional or dedicated resources from the parent company, demanded a vast amount of his time and that of Senior Management, over and above that required in the normal daily running of the bank. In the absence of any information as to the practices criticised by the Inspectors, he said that it would be wholly unreasonable to inspect him to have anticipated and to have sought out information concerning such issues in the early months of his tenure.

He outlined the compliance issues as being, not the only areas required to be addressed and improved in the Bank during that tenure. Liability, asset and human resource management as well as branch performance communication were indicated by him.

In relation to the DIRT theme audit report he said that the extracts quoted by Mr. O'Rafferty did not contain any conclusion the tax was in fact being evaded. The extracts refer to penalties that "would be very significant" and to "possible tax evasion".

Notwithstanding Mr. O' Rafferty's assertion that he had exaggerated the impact of his leadership, he said that it was evident that a substantial improvement in compliance had occurred during his short tenure.

He took issue with the statement that it was difficult to avoid the conclusion that he was careful not to damage business retention and growth prospects in the interest of legal compliance. This was untrue, without foundation and totally unjustified. The Inspectors had made no finding of this kind against him, nor could they. He introduced an emphasis on the importance of legal compliance that had previously been lacking and thereby brought about a significant improvement in the bank's culture.

The Inspectors had made no finding of knowledge on his part of the insurance products. His direct reporting relationship with Mr. D'Arcy lasted only for a matter of months following his arrival. The bank's parent had in place a system for vetting new products. He assumed all of the bank's products had been vetted.

He did not deny that, as Executive Director, he had ultimate responsibility for the operation of the bank generally for a period of almost 27 months. The practice, as criticised by the Inspectors, did not justify finding that he had conducted himself in a manner that displayed any lack of commercial probity, such as to justify an order that he was unfit to act as director of a company.

9. Third Affidavit of Mr. O'Rafferty
9.1 (This affidavit arose as a result of a discovery of certain documents held by the bank as ordered by the Court on the 29th May, 2006).

Mr. Rafferty referred to the transcript of evidence and submissions made by Mr. Seymour together with book of correspondence, copy extracts of branch internal audit from April, 1994 to July, 1996.

Mr. O'Rafferty averred that the length of the tenure of Mr. Seymour could not dilute the duties imposed upon him as the most Senior Executive Director of a Licensed Bank. On the 18th July, 1994 the Group Manager of National Australian Bank in Melbourne faxed Mr. Seymour asking him to report back on the matters raised in the Audit Committee by the non Executive Chairman. Mr. O'Rafferty said that it was clear from the exchange of correspondence that the parent company regarded Mr. Seymour as the person responsible for addressing their concerns.

9.2 Mr. O'Rafferty says that in late 1995, Mr. Seymour was responsible for major restructuring of the business in terms of the regional management. And accordingly, was involved both in day to day and longer term issues.

In relation to DIRT regulations and non-resident accounts he had been copied with internal audit reports and had notice of the deficiencies or irregularities which existed in the operation of DIRT exempt non-resident accounts. Through the DIRT theme Audit report of December, 1994 he was aware of the significant issues of documentary non-compliance in the branches. He interpreted such reports as disclosing errors or omissions in compliance with the banks documentation standards and did not accept that the reader of the report at that time, without the benefit of considerable hindsight, ought to have concluded that bogus non-resident accounts existed throughout the bank network.

In this regard Mr. O'Rafferty referred to the first internal audit report received by Mr. Seymour, in respect of the Blanchardstown bank in April, 1994 which not only referred to the fact that in a number of non-resident accounts the non-declaration forms were missing

but that also a number of instances were noted where the declaration forms were not completed or dated. The risk rating given to this report item is five stars, which is the highest risk category within internal audit.

Mr. O'Rafferty also refers to non-compliance in Mullingar, Athlone, Strokestown, Killarney, Ballybofey, Raphoe, Ballinamore, Mohill, Swords, Cork and Fermoy, which showed a serious, usually meriting a four or five-star rating, problem with non-resident forms. Furthermore, the fact that such failings expose the bank to risk of penalties was highlighted. All of those related to May to September, 1994. Five to six internal audits were performed per quarter. Accordingly, the irregularities referred to could only have been interpreted as having been widespread throughout the network unless the branches audited were in some way representative.

The branch audit reports received from April to December, 1994 each highlighted significant concerns over DIRT and non-resident accounts. The DIRT theme audit report issued on 24th January, 1995, concluded that in the twelve branches audited, an "unacceptably high proportion of declarations were missing or incomplete". The report, having concluded that the results of the audit were very disappointing and that management must take immediate steps to improve the situation, concluded that it was a risk area and the penalties for non-compliance at the level shown in this respect would be very significant.

Mr. Seymour, when examined by the inspectors regarding the issue and how he felt replied:

> "Well DIRT itself we have the responsibility to an external body, principally the Revenue, and we weren't complying."

On 9th February, 1995, Mr. Frank Brennan, General Manager, sent a memo to Mr. Seymour specifically addressing the issue of DIRT and the theme audit which commenced as follows:

> "Having wrestled with DIRT for a number of years I do believe that we must introduce a change of attitudes of our management staff to the legal requirement. It is an Irish failing that there is considered little harm in closing one's eyes to tax evasion and to confusing evasion with avoidance."

The minutes of that meeting refer to Mr. Brennan as saying:

> "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 the course of his evidence given to the inspectors Mr. Seymour was asked what steps had been taken arising out of that meeting and out of Mr. Brennan's memo. He said:

> "We were aware of the problems of DIRT. That meeting discussed those problems thoroughly and, in my view, came out with procedures well intended to attack it, and indeed I think did begin to attack the problem. The reference to it being endemic, again I was the only non-native there, all the other people who were well aware of the endemic nature of taxation and the desire of people to avoid, wherever they can, to pay their tax. I think also what is not here, of which by that time I was fully aware, that wasn't just an NIB problem – again I think what Frank Brennan is saying there – it was an industry problem …"

Mr. O'Rafferty says that, accordingly, it was clear that at the very least from 9th February, 1995, Mr. Seymour was or ought to have been aware that the bogus non-resident accounts were widespread throughout the network and that the problem was not one of technical non-compliance with formalities.

He believed that the steps taken to eradicate the DIRT non-compliance was inadequate as found by the inspectors. Mr. Seymour had held ultimate responsibility to ensure that DIRT was deducted from interest paid or credited on all accounts subject to DIRT under the Finance Act, 1986. He failed to discharge that responsibility.

The averment by Mr. O'Rafferty to the concession made by Mr. Seymour as to the inherent liability to the Revenue is based on his replies during examination of 14th January, 2003 at pp. 79 to 80 as follows:-

> "195.Q. Mr. Clarke: I suppose there is potentially another question which, with the benefit of knowing what's now happened, we are all aware of. We know that all of the deposit-taking institutions have paid not insignificant sums to the Revenue to make good the deficiency. That was a long time after any involvement you had. It's perhaps almost unnecessary, in the light of what Judge Blayney had indicated. But do I take it that, apart from there being no discussion, none of the advisers, whether internal advisers or external advisers such as the external auditors, made a suggestion to you that this was something which should be done?
>
> 195. A. Regrettably, no. If I were seeking to avoid blame or a share of the blame, it would be to say yea, there was one or two financial experts around me who should have thought of it, but it wasn't discussed and I don't wish to.
>
> 196. Q. Insofar as people didn't think about it, you were one of the people who didn't think about it, but there were others?
>
> 196. A. Yea, yea.
>
> 197. Q. Yes, but I think you do accept that, with the benefit of hindsight, there was clearly an inherent liability to the Revenue there?
>
> 197. A. Yes, I do, but I don't think it's a mission (sic) need necessarily be determined or translated as a form of intent to avoid. I certainly don't believe that."

It would appear that the transcription of 'a mission' should have read 'admission' and the addition of the word 'which' before "need necessarily be determined" might make more sense.

Counsel for Mr. Seymour submitted that this was not an admission. While he stated that it need not necessarily be understood as a form of intent to avoid, he agreed that there was an inherent liability to the Revenue.

Mr. Grace asked whether the DIRT theme audit which identified the risk area and the penalties for non-compliance. Mr. Seymour had replied:

"153. A. I think there is no room for any misunderstanding and that would be taken to executive committee and we would discuss it and we would lay down a plan to attack it and in due course I believe we came out with a brand new circular. We came out with some new procedures, I think, in terms of certification.

…

156. Q. I think – or would it be fair to say that effectively it looks like that there was a situation where tax that is, that is due, is not being paid?

156. A. I read that conclusion slightly differently.

157. Q. Sure, ok?

157. A. I don't think it pulls punches. Therefore I think anyone who reads that within the bank realises the seriousness of that.

158. Q. And what did you regard the seriousness of it, I mean, what did you feel it was saying?

158. A. Well DIRT itself we have responsibility to an external body, principally the Revenue, and we weren't complying.

…

162. Q. Sure, the first, the question that I would have in relation to it is: at the time would it have appeared right from what the conclusion says, 'that this is a risk area and the penalties for non-compliance at the level shown' – that appears to suggest that tax which should have been deducted wasn't being deducted?

162. A. I think there is non-compliance but in fairness it's not quantified there in punts."

Mr. O'Rafferty referred to the failure to consider the issue of retrospective liability as a very serious breach.

In relation to fictitious accounts, the inspectors had recorded that Mr. Seymour may not have had knowledge of fictitious accounts until late 1995. Memos from Mr. Keane dated 7th December, 1995 and Messrs. Keane and Brennan of 30th May 1996 clearly linked the issue of fictitious accounts with tax evasion. The problem was specifically addressed in the former and was still continuing in the latter.

Mr. Keane's memo to all branch management of 7th December related to account names/descriptions and stated that a small number of cases had come to his notice where account descriptions and/or addresses were not correct. He stated that this was a serious matter and was not acceptable, *inter alia*, because there was a possibility that accounts operated in this manner could be aiding and abetting tax evasion; tax evasion is a crime and further referred to money laundering legislation.

The second memorandum of 30th May, also to "all branch management re fictitious/incorrectly named accounts". The memo stated:

"As a result of findings in recent audits we have decided that it is necessary to again write to you on this important subject.

Fictitious or incorrectly named accounts cannot be tolerated under any circumstances and every staff member is forbidden from knowingly operating or maintaining such accounts. The importance of the subject and the reasons why these accounts are not acceptable were covered in Michael Keane's note dated 7/12/95."

During the course of his interview on 13th April, 2000, Mr. Seymour was asked what he understood by the term "fictitious accounts" and replied:

"256. A. Mickey Mouse, genuinely names of personalities that didn't exist.

257. Q. And from the bank's perspective what was your concern in relation to that?

257. A. Well, I am not naive. One would have thought, immediately thought it would be, would have been tax related and safer than keeping money under the bed so they would open a fictitious account but I was offended principally by the fictitious nature. I have got no room for that. I didn't allow the thought process to go beyond that 'it is wrong, let's put it right'. We did encounter difficulties in trying to put that right, in trying to put that right, bank managers would feel intimidated by some customers whom they perceived as wealthy. They were aware that it was a fictitious account.

258. Q. And would you have been aware that some of the fictitious accounts might have been taken as securities for borrowings?

258. A. Oh, now you are frightening me. No, I wasn't aware of that but I would have been doubly anxious of that. No, I think that when something is wrong I don't worry about the peripheral things. It was wrong and we had to put it right."

The inspectors then referred to the above mentioned memo of Michael Keane, General Manager, and asked how he thought the problem could be rectified. He replied:

"267. A I had a very simplistic approach, close the account and get rid of it. I didn't want to be associated with that. Now the last two hours have been instructive, if nothing more. They were obviously secondary questions but as I have said before, if you are offended by a practice, you get rid of it."

The exchange between Mr. Grace and Mr. Seymour shows the response of Mr. Seymour in a positive light and shows his degree of exasperation in respect of the response from branch managers.

Having been confronted with the problems in various branches over the period Mr. Grace had said, at Q. 271, that "at the time there was no doubt that when you were there in December, '95 that you were aware of the problem. You have told us that you take a dislike to it, an intense dislike to it?" Mr. Seymour replied, "I do." and added that:

"Some managers feel intimidated by certain customers."

Mr. O'Rafferty says that given the acknowledged seriousness of the practice and the fact that it was not stopped immediately but persisted even after Mr. Seymour's tenure the conclusion was properly made that he was responsible for the practice during his term (para. 39).

9.3 With regard to the CMI product the inspectors, while acknowledging that the practice had been inherited by Mr. Seymour, held that he had to take responsibility for its continuance during his time as chief executive. The deposit at that time amounted to £20 million which was centralised, having been previously deposited at individual branches. It appears that Mr. Seymour was responsible for that change. The reason for the centralisation, according to Mr. Seymour, was that it made sense from a treasury and balance sheet perspective. Mr. Nigel D'Arcy had said that the centralisation occurred because a branch manager had allowed a customer to make a withdrawal, even though the funds were in fact owned by CMI.

Mr. O'Rafferty said that that matter had not been put directly to Mr. Seymour by the inspectors though it appeared, from the transcripts, that he had known that the money had been previously held by the bank's customers.

It is clear, from the evidence of Mr. D'Arcy, that there was no doubt that they were all non-resident accounts because they were all CMI accounts. An investor invested in CMI. It was CMI who placed money back on deposit. CMI would sign the non-resident declaration. Clearly CMI was non-resident. It had been well known that a lot of these were accounts that had been tidied up using that mechanism. The memo to Frank Brennan from Geoff Bell, Head of Management Services (Q. 237 of the examination of Mr. D'Arcy) in 1994 refers to the launch "whereby funds are invested for Irish residents … by insurance company … based in the Isle of Man … in deposits, securities or stocks and shares in accordance with the individual customer's requirements. Funds are introduced by the financial services division and client confidentiality is of the utmost importance."

Mr. D'Arcy believed that senior people within the bank were aware that Irish residents were investing in CMI. He agreed that funds that were invested were sensitive from a Revenue Commission position.

Mr. Seymour was not aware of a customer seeking a refund of the £500,000 in CMI and seeking a refund and complaining of a commission of £45,000.

It is acknowledged that Mr. Seymour did not have direct knowledge but had to bear the responsibility of the continued practice, particularly given his background knowledge and the level and source of the deposits.

Finally, Mr. O'Rafferty, in this affidavit, expanded on the issue of improper charging of fees. He believed it to be clear, from the branch audit reports received by Mr. Seymour, that the existing system was not being used for branch audit reports which are referred to in this regard. Mr. O'Rafferty believed that the changes introduced in 1996 were as a result of a demand for pre-notification of fees made by the Director of Consumer Affairs. Significant refunds were made to customers in respect of overcharging, some of which arose during Mr. Seymour's term of office.

10. Evidence in cross-examination and re-examination

In his evidence to the court over two days Mr. Seymour accepted that from the moment he took up his position he was receiving branch audit reports that indicated weaknesses in respect of controls and non-compliance with the requirements of the 1986 Act. He accepted that by July, three months after his appointment in 1994, he received six reports in relation to DIRT problems, two of them with five-star (the highest risk) rating and two with four-star risk ratings. He believed that the DIRT theme audit would assess how widespread the problems were. When asked if, in November, 1994 when he authorised the theme audit, that he knew that there was widespread non-compliance throughout the branches that that could have had implications for the Bank's liability to Revenue and could present a potential loss, he replied in the affirmative that it would have implications to Revenue where revenue was not being collected and should have been. No consideration was given at any stage to sending in either internal audit or someone else from outside the branches to review all of the non-resident accounts to make sure that they and the special savings accounts were in fact properly compliant with the law.

He said that the word "bogus" was never common vocabulary within the Bank. There was no report evidencing that the accounts were bogus.

He said he knew that if, as we found out, that there were widespread documentary deficiencies, we were non-compliant. He recognised that when Mr. Brennan referred to the problem of tax evasion at the meeting in February he thought he was referring to evasion of all sorts of which documentation would be one aspect.

He agreed that he did not consider the question of how Revenue was going to be paid the taxes that should have been retained. He did not consider retrospective liability to tax. He never informed the audit committee that there was a possible liability for the Bank to Revenue as a result of irregularities nor informed the board of that fact. He agreed that he had a role in the signing-off of accounts in the company in the making of representations to the board in that connection and that they relied on him in relation to the accounts. He agreed that the statement that accounts gave a true and fair view was, to some extent, influenced by the reliance that was placed on him by the board to give them information. He did not give them information about retrospective liability nor tell the Board nor the Audit Committee that there was a serious systemic problem with Revenue compliance.

He accepted that there was a serious problem in the Bank with documentary compliance in relation to DIRT. He knew that the theme audit had shown that there was a risk that such practices were occurring and were continuing. It was regrettable but the situation was improving. He still contended that throughout the process the emphasis was upon documentary deficiencies which could have hidden the nature of accounts. The theme audit had demonstrated that there were deficiencies but it did not highlight them as bogus.

By the end of 1995 he acknowledged that he was aware that there were fictitious and incorrectly named accounts in the branches and he acted promptly, as the Inspectors had acknowledged.

He did not necessarily believe that this was clear evidence of a symptomatic problem within the Bank in relation to those accounts and the way they were being used or abused. The audit reports were all given the risk rating they deserved. They were taking a larger sample of accounts. He believed that by the end of 1995 they were on course to resolving the problem.

Mr. Seymour was aware from the internal audit reports of the deficiencies and irregularities which existed in the operation of bogus non-resident accounts at branches at least from the time of the DIRT theme audit and the meeting of 9th February, 1995.

The audit reports showed that branch records were at variance with the apparent non-resident status of the account holder. This, at least, raised the suspicion that those non-resident accounts were bogus and put a responsibility on the bank in general, senior management, nd Mr. Seymour, in particular, on notice that a significant proportion of non-resident accounts did not comply with the provisions of the finance Act..

Moreover, the DIRT theme audit report confirmed and quantified the widespread nature of irregularities in relation to documentary non-compliance throughout the branch network.

When asked how long did it take to solve a problem in a bank where the branches were failing to comply with their legal obligations Mr. Seymour answered:

> "At a stroke in terms of the collection of DIRT. Because you can recategorise the account. And several branch managers were doing just that, as was brought out in certain audit reports. And the circular (of February, 1995) was specific in that regard."

He added that the mere attention to retrospective tax liability would not have solved the documentation deficiencies as there would have been ongoing issues but it would have provided a better focus. He regretted that they had not done that. He contended that the circular addressed past and future problems and had the instructions been adhered to the latter, the totality of the tax problem would have been resolved.

11. Decision of the Court

11.1 This is a contested application where the relationship arises between two revised provisions of company law enforcement and provisions.

The first is the investigative procedure provided for in Part II of the Companies Act, 1990 (ss. 7 to 24) whereby inspectors may be appointed by the court where the affairs of a company are being conducted, *inter alia*, with intent to defraud creditors or otherwise for a fraudulent or unlawful purpose or in an unlawful manner or where persons connected with its formation or management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct. Inspectors may also be appointed where members have not been given all the information that they might reasonably expect.

The second is the disqualification procedure provided for in Part VII (ss. 149 to 169).

Section 160(2)(e) links the two procedures (see 1.2 above).

The Companies Act, 1990 was in this and in other respects a new generation of company law.

What is critical is the enforcement of standards of management. Where the conduct of any person makes him/her unfit to be concerned in the management of a company the court may make a disqualification order.

The application is different from the cases arising under insolvent trading or where records are not kept nor returns made. It extends to a situation where a director fails to act as he is required to act, fails to take action which should have been taken and fails to realise that which ought to have been realised. Moreover, there is a more important circumstance and that is that the application applies in the context of a very particular type of business that of a licensed bank where customers, the Revenue Commissioners and the regulatory authorities place very considerable trust in the bank's strict compliance with the law.

The Inspectors identified several serious and very significant defaults of management and legal non-compliance within the Bank. Mr. Seymour, for a period of 27 months, was the single most senior and responsible employee in the company. The Inspectors found that he knew of DIRT irregularities, that he ought to have known of the widespread bogus non-resident accounts and they found that he failed in his responsibility to eradicate them. They fond that he knew of the special savings account irregularities and that he bears ultimate responsibility for the failure to eradicate them. They also found that he knew of the shortcomings concerning the lack of explanation supporting fee increases and that there was no system in place for contemporaneous recording of management of administrative time and that he was ultimately responsible for that also.

The Inspectors' report and the transcripts showed that the inspectors were aware of the length of tenure and the steps taken by Mr. Seymour to deal with non-compliance within the Bank. The Inspectors had expressly acknowledged the action taken by Mr. Seymour which improved but did not resolve non-compliance.

Section 22 of the Companies Act, 1990 provides that the facts set out in an inspectors' report are admissible unless the contrary is shown. The inspectors' opinion is also admissible.

The counterposition of the Inspectors' findings and the position of Mr. Seymour derived from the latter's replying affidavit, as tabulated in Mr. O'Rafferty's second affidavit has not been contradicted nor significantly disputed in the hearing before this Court for the reasons given hereafter.

Mr. Seymour should have been more decisive and effective in eliminating issues of non-compliance and redressing the consequence of improper practices. His successor adopted a tougher stance by giving bank staff a warning of the consequences of breaking bank procedures and of participating in fraudulent acts. As a result of the Inspectors' report the Bank made a substantial payment to the Revenue.

Notwithstanding, the court does not assess the application with the benefit of hindsight. (See decision in *Barings* at 10.6 below)

The applicant has emphasised the first and the fourth findings of the Inspectors of inappropriate practices detailed at 4.1 to 4.6 above. These were bogus non-resident and fictitiously-named accounts opened and maintained in the Bank's branches which enabled customers to evade tax through the concealment of funds from the Revenue Commissioners and the treatment of special savings accounts.

The evidence in cross-examination and in re-examination also concentrated on these practices. They appear to the court to be the practices which are most serious. The Inspectors held Mr. Seymour to be directly responsible, as distinct from being ultimately responsible.

No responsibility was levied against Mr. Seymour in respect of the improper charging of interest.

The Inspectors had found that it was his responsibility to ensure that there was a system in place for the contemporaneous recording of management and administrative time before March, 1996. The court is satisfied that Mr. Seymour was aware of the failure of the branches to utilise the Customer Action Pad introduced in March, 1992 which allowed arbitrary charging of fees, failed to redress the problem until 1996 or to account for refunds.

Notwithstanding that the Inspectors found that Mr. Seymour had to bear responsibility for the continuance of the CMI policies they acknowledge that internal audit did not identify or report any improper practices. The significant role of Mr. D'Arcy has been the subject of a disqualification order. It does not seem to the court that Mr. Seymour's responsibility for the continuance of the practice, on its own, is a ground for disqualification. There was no evidence that he could have stopped the practice.

A director must familiarise himself or herself with the business of the company in order to carry out his or her duties. The business of banking requires adherence to and compliance with the statutory provisions relating to deposit taking. While a director may rely on delegating to others, there remains an ultimate responsibility with regard to the discharge of the statutory obligations. In does not appear, from the written records of the bank, and in particular in relation to the DIRT theme audit report and the meeting of 9th February, 1995, and the circulars emanating therefrom, that the issue of retrospective liability for DIRT tax or the necessity to get specific advice in relation thereon was addressed by Mr Seymour, let alone the making of a provision in relation thereto.

It is clear from the taxation of credit interest audit of January, 1999 which was, of course, compiled after Mr. Seymour had left the bank, that the standard of compliance in overseas resident accounts continued to be unsatisfactory for a further four years after the DIRT theme audit report.

The fact that after he left office the bank made a substantial settlement with the Revenue Commissioners regarding its liability for DIRT incurred, in part, during Mr. Seymour's tenure, further highlights the non-compliance by the bank and its directors, particularly its executive director, in discharging its, their and his statutory duty.

The Bank's failure effectively assisted tax payers to avoid their legal responsibilities to the Revenue and contributed to, if not caused, a further liability of the bank in discharging its statutory duties in relation to tax.

The court does not accept the suggestion by Mr. Seymour in his affidavit that it was not clear that such a liability existed. Nor was this a suggestion that was made by him to the Inspectors.

The court is of the view that the duty of care and skill owed by a director in relation to these matters is a serious responsibility and cannot be compared to the oversight of an individual tax payer or the reliance of an individual tax payer on his accountant or tax adviser. While, of course, such an oversight does not excuse the tax payer from discharging his liability, including interest and penalties, the duty of a director is more explicit and demanding. Not alone is there an obligation towards the members of the company there is also a duty towards its creditors, especially to the Revenue Commissioners in respect of retention tax preferential debts. Directors of a bank have a particular responsibility to its customers to advise and account for such tax from a relevant deposit where they are aware of circumstances where it was obliged to deduct.

11.2 The clear and specific duties imposed on the bank by statute with regard to the collection and remittance of deposit interest retention tax is provided for in s. 32 of the Finance Act, 1986.

That section provides as follows:

> "(1) Where a relevant deposit taker made a payment of relevant interest it shall deduct out of the amount of the payment the appropriate tax in relation to the payment; and any person to whom such payment is made shall allow such deduction upon the receipt of the residue of the payment; and the relevant deposit taker shall be acquitted and discharged of so much money as is represented by the deduction as if that amount of money had actually been paid to the person.
>
> (2) A relevant deposit taker shall treat every deposit made with it as a relevant deposit unless satisfied that it is not a relevant deposit; but where it has satisfied itself that a deposit is not a relevant deposit it shall be entitled to continue to so treat the deposit until such time as it is in possession of information which can reasonably be taken to indicate that the deposit is, or may be, a relevant deposit."

A relevant deposit does not include a deposit from a genuine non-resident depositor who complies with the requisite provisions and makes an appropriate declaration.

The obligation on the relevant deposit taker, the bank in this instance, is very clear. The bank is obliged to deduct relevant interest. It is also obliged to treat every deposit as a relevant deposit, unless satisfied that it was not. The obligation would appear to be to collect interest as agent of the Revenue Commissioners just as employers are obliged to deduct PAYE and PRSI from employees. Once payment was made by the bank under these provisions the bank is expressly discharged from any obligation to account to the customer for the tax deducted and remitted.

The Director of Corporate Enforcement submitted that the Bank had a special relationship to the Revenue which was fiduciary in nature. It does not follow, however, that Mr. Seymour, as Executive Director had such a relationship.

A director's fiduciary duty is to the company and, in limited circumstances, may also extend to members (see Palmer 8.502-3). Such a duty involves personal liability which is not contended in this case.

Mr. Seymour, as director, owes a duty of care, diligence and skill to the Bank as fully considered by Romer J. in *City Equitable fire Insurance Co. Ltd. re (No. 1)* (1925) Ch. 407, 427.

The application before the court is not, however, an allegation of breach of such duty but that the director's conduct makes him unfit to be concerned in the management of a company. The former duty is owed to the company, the latter to the public.

In order to ascertain the duties that a person appointed to a board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances. In discharging the duties of his position as ascertained, a director must, of course, act honestly, but he must also exercise some degree of both skill and diligence.

City Equitable decided that a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. A director of a life assurance company, for instance does not guarantee that he has the skill of an actuary or of a physician. In the words of Lindley M.R.: "If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company." It is perhaps only another way of stating the same proposition to say that directors are not liable for mere errors of judgment.

City Equitable is also the authority for the proposition that in respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. (See Palmer, 8.401).

There is an overlap between the breach of duties to the company and breaches leading to disqualification. *City Equitable* recognised both equitable and legal duties owed to the company.

11.3 Section 160(2) of the Companies Act, 1990 provides that where the court is satisfied in any proceedings under the section that –

> (c) where a person has been guilty, while an officer of a company of any breach of his duty, or
>
> (d) where the conduct of any person as officer of a company makes him unfit to be concerned in the management of a company, or
>
> (e) in consequence of a report of inspectors appointed by the court of the Director under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company, then the court may make a disqualification order against such person.

Sub-section (2)(d) appears wider in scope. There is no requirement of guilt or of breach.

Sub-section (2)(e) is not restricted to officers, nor is there any requirement of guilt or of reach. Where a person's conduct, in consequence of a report of inspectors, makes him unfit to be concerned in the management of a company, the court make a disqualification order.

11.4 In *Continental Assurance Company of London Plc* [1996] BCC 888, the first respondent was chairman and managing director. The second respondent was disqualified for four years under a summary procedure and the third was a non-executive director in the latter half of the relevant period when the company went into insolvent liquidation with a deficiency of Stg. £8 million.

Chadwick J. disqualified the first and third respondents for nine and three year respectively on the basis that the first named respondent, as the only full-time director, was in day to day control of the company and knew that the company was lending its funds interest and security free to its holding company in clear breach of the Companies Act and channelled further monies to his own use. This conduct made him unfit to be a director. Any competent director in his position would have known what was going on. His failure to know displays serious incompetence or neglect in relation to the affairs (of the company). (at 895).

In relation to the third respondent, the court accepted that as non-executive director he may not have known what was going on but held that any competent director in his position should have known what was going on in relation to the Companies Act and in relation to the signing of misleading accounts. This showed such incompetence or neglect as made a finding of unfitness appropriate.

The unfitness in this context included incompetence in allowing to happen what the statutory regime of directors' disqualification was designed to prevent.

11.5 In *Re Barings Plc* [1999] 1 BCLC 433 (referred to in *Vehicle Imports* and in *Kavanagh v. Delaney*) the following propositions arose in the judgment of Jonathan Parker J.

Unfitness might be shown by conduct which was dishonest, (including conduct showing want of probity or integrity) or by conduct which was merely incompetent. In every case the function of the court in addressing the question of unfitness is to decide whether the conduct of which the complaint was made, viewed cumulatively and taking into account any extenuating circumstances had fallen below the standards of probity and competence appropriate for persons fit to be directors of companies.

The respondent's conduct had to be evaluated in context. The burden was on the applicant to satisfy the court that the conduct complained of demonstrated incompetence of a high degree assessed in the context of, and by reference to, the role in the management of the company which was assigned to the respondent and by reference to his duties and responsibilities in that role. While it might be said that there was a universal standard, that standard had to be applied to the facts in each particular case.

There was no defence to a charge of unfitness based on incompetence to contend that, in discharging the management role assigned to him or which, in fact, he assumed, he had not been shown to be unfit to be concerned in the management of a company. It was not a prerequisite to a finding of unfitness that a respondent should have been guilty of misfeasance or breach of duty in relation to the company. Unfitness might be demonstrated by conduct which did not involve a breach of any statutory common law duty.

In *Barings* no challenge of any kind was made as to the honesty and integrity of any of the respondents. The case against them was based solely on incompetence. It was submitted that incompetence was a departure from the ordinary standards of conduct expected of a director or officer to such an extent that the court concludes that a respondent in the circumstances is unfit to be involved in the management of a company.

In *Barings* at 497 the court held:

> "… in assessing the conduct [of the respondents] there is in this case a particular risk of applying the wisdom of hindsight. The collapse of Barings was a commercial catastrophe of epic proportions, and that fact alone makes it, perhaps, easier in the instant case than in others to fall into the error of looking at what happened prior to the collapse in the light of the collapse itself. This is not the correct approach. I have to put aside completely the wisdom of hindsight and judge the conduct of the respondents in the context of the circumstances which existed at the time."

11.6 Conduct which makes an officer unfit to be concerned in the management of a company has been considered by this Court in *Re*

Readymix Limited (In Liquidation), *Cahill v. Grimes* [2002] 1 I.R. 372 at 381 where the Supreme Court, following Shanley J. in *La Moselle Clothing Company v. Soualhi* [1998] 2 I.L.R.M. 345, McGuinness J. in *Re Squash (Ireland) Limited* [2001] 3 I.R. 35 and McCracken J. in *Re Newcastle Timber Limited* [2001] 4 I.R. 586 all quoted with approval the general approach of Browne-Wilkinson V.C. in relation to the English disqualification provisions:

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

The Supreme Court believed this to be a correct statement of the law which represented a proper approach to the application and interpretation of s. 160 of the Companies Act, 1990 as amended by ss. 14 and 42 of the Act of 2001.

Murphy J. in *Business Communications Limited v. Baxter & Parsons* (Unreported, High Court, 21st July, 1995), involved an application pursuant to s. 150 providing for a restriction on directors of insolvent companies and noted that such restriction was mandatory, while in the case of s. 160 applications, the court had a discretion.

Laffoy J. in *Director of Corporate Enforcement v. McGowan*, (Unreported, High Court decision Laffoy J., 21st February, 2005) at 16, 17, having found that the respondents acted irresponsibly posed the question whether they had displayed a lack of commercial probity or, as it was sometimes put, whether they had fallen below the standards of commercial morality. In her view, the conduct of the respondents had come very close to that threshold, but had not quite reached it as they had remedied the breaches of the Companies Act and the Taxation Code in relation to making returns when faced with an application by the Director for a disqualification order. Both parties combined in restructuring the corporate governance of the company, which, the court hoped, would prevent a repetition of the defaults which occurred in the past. In the circumstances of the restructuring of the company and in the interest of employees and creditors the court considered it appropriate not to make a disqualification order against either respondent. The court was satisfied that it was not necessary to do so to protect the public.

11.7 The first application for disqualification of directors of the Bank was uncontested. It is necessary to consider it extensively. In that case, *Director of Corporate Enforcement v. Nigel D'Arcy*, (Unreported judgement of Kelly J., 26th October, 2005) at p. 28, Kelly J., having considered the authorities, stated that it was a truism that every case had to be decided upon its own facts. Ultimately he had to decide whether on the material put in evidence the director's conduct was such as to make him unfit to be concerned in the management of a company. Mr. D'Arcy had, of course, been recruited by the then Chief Executive of National Irish Bank, Mr. Jim Lacey, to be the head of the Financial Advice and Service Division (FASD). He reported to Mr. Lacey as Chief Executive and thereafter to Mr. Seymour as Executive Director until 1st January, 1995. From then until 23rd May, 1997, he reported to the General Manager – Banking and thereafter, up to the date of the appointment of the inspectors, to the Chief Operating Officer. All the financial service managers within the FASD reported directly to Mr. D'Arcy.

As head of the FASD, Mr. D'Arcy became aware in 1992 that funds undisclosed to the Revenue Commissioners were being targeted by bank personnel for investment in CMI. Certain assurances were given regarding confidentiality and the avoidance of the necessity of probate. Mr. D'Arcy became aware that CMI was being used by the bank to regularise bogus non-resident accounts and fictitious incorrectly named accounts. The manner in which the CMI policies were being promoted served to facilitate the evasion of tax by persons investing in the policies.

The inspectors' findings concerning Mr. D'Arcy's knowledge and responsibility were that he was aware that the monies which were undisclosed to the Revenue Commissioners, including funds held in bogus non-resident accounts and fictitious and incorrectly named accounts, were being targeted by bank personnel for investment in CMI policies and he failed to stop that practice.

He was also aware that FASD financial services managers were promoting CMI policies as a secure investment for funds which had not been declared to the Revenue. He failed to stop the said practice which served to facilitate the evasion of Revenue obligations for third parties.

Mr. D'Arcy was also aware that respective investors were given an assurance that their investment would be confidential from the Revenue Commissioners, even after their death.

He was aware of the manner in which the policies were being promoted. As head of the FASD he could have stopped the practice. He was, in the opinion of the inspectors, primarily responsible for the continuation of the practice.

The responsibility of the financial services managers had to be judged against this background. They were operating with Mr. D'Arcy's tacit approval according to the inspectors.

It was in such circumstances that the Director had sought a disqualification order against Mr. D'Arcy.

Having considered the relevant statutory provisions the court noted that the onus was on the Director to satisfy the court that the necessary conditions prescribed were assisted by the attitude adopted by Mr. D'Arcy who made it clear that he did not wish to contest the application. Indeed, he consented to his disqualification order being made. Nonetheless, as the power given to the court was a discretionary one, the court was satisfied that the statutory conditions had been met and the onus of proof discharged by the Director.

The point regarding whether "manager" was included in the definition of "officer" was not argued and the court did not propose to make a finding on the issue since it was not necessary. Mr. D'Arcy was clearly covered by one of the other provisions relied upon by the Director. The practice had gone on over a long period and the sums involved were very large. Mr. D'Arcy was in the upper echelons of bank management, just one remove from the top level of management. An extremely serious element of the conduct was that all of it was taking place within a bank. The court held that banks were not just ordinary corporate entities, of the type that the court had to deal with in the various cases, but occupied a special position in society being licensed to carry out financial transactions. In this regard the court held:

> "The edifice of banking is built on a foundation of trust. On the inspectors' findings there was a breach of by dishonesty on the part of the bank in the operation of the CMI policy. The operation was carried out over a period of years in a deliberate fashion. The inspectors held that Mr. D'Arcy could have stopped the practice but he 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 the opinion that the Director has proved that the conduct of Mr. D'Arcy as found by the inspectors was such as to make him unfit to be concerned in the management of a company. I therefore propose to accede to the application to make a disqualification order under section 160(2)(e)."

Having considered the disqualification orders under s. 150, restriction orders and the assistance derived from previous cases the court was of the opinion that the appropriate period of disqualification should be one of twelve years. The court was satisfied that it must have, as the Director had urged upon him, a deterrent element. The court was satisfied that Mr. D'Arcy should be given credit for the approach which he had taken to the Director's complaints. He was entitled to allowance for the fact that he indicated from the outset that he would not contest the application and, in fact, consented to the disqualification order being made. In those circumstances he was satisfied that the approach was a mitigating factor and that the disqualification period should be reduced by two years.

11.8 In *Director of Corporate Enforcement v. Collery* (Unreported, High Court, Finlay Geoghegan J., 9th March, 2006) an application was made in relation to the report of the inspectors appointed to inquire into the affairs of Ansbacher (Caymen) Limited which was published by order of the court made 24th June, 2002.

In that case the Director relied exclusively on the content of the report and submitted that certain findings and conclusions therein established, as a matter of probability, that Mr. Collery was guilty of a serious lack of commercial probity, in relation to the affairs of the company under investigation, such that it made him unfit to be concerned in the management of a company within the meaning of s. 160(2)(e) of the Act of 1990. Mr. Collery did not contest any of the findings, nor seek to dispute the contents of the report.

Ms. Justice Finlay Geoghegan referred extensively to the judgment of Kelly J. in *Director of Corporate Enforcement v. D'Arcy*. References to the extracts of the report were made.

The conclusions of the inspectors as set out at p. 207 of their report were as follows:

> "The Inspectors have concluded that there is evidence tending to show that after Hamilton Ross took over the memorandum accounts in late 1992/early 1993 Mr. Collery:
>
> (a) knowingly assisted Hamilton Ross in its unlicensed banking activities in Ireland;
>
> (b) knowingly assisted Hamilton Ross in its breaches of sections 352, 353, 355 and 357 of Part XI of the Companies Act, 1963
>
> (c) knowingly assisted Hamilton Ross in evading tax due on its own activities;
>
> (d) knowingly assisted Hamilton Ross in carrying on business in this jurisdiction in such a manner as to defraud creditors (that is, the Revenue authorities) or other persons."

In relation to the Ansbacher business after the death of Mr. Traynor (whom Mr. Collery had succeeded) the inspectors conclude that the Ansbacher business was reducing at that stage but concluded at p. 209:

> "To the extent that Ansbacher continued to act illegally during this period, Mr. Collery has a residual responsibility. The Inspectors are mindful of the difficult circumstances created by the death of Mr. Traynor in this period of running down of the Ansbacher operation. Mr. Collery in this period, in view of his experience, was or ought to have been fully aware of all the wrongs of Ansbacher's Irish operation."

The Inspectors state that Mr. Collery received substantial sums from Hamilton Ross after the death of Mr. Traynor. They concluded that Mr. Collery, as an experienced banker and businessman, must have been aware of the nature of the business being carried out by Hamilton Ross after the death of Mr. Traynor.

The court held that the conduct of Mr. Collery in the period of 1991 to 1997, in relation both the Ansbacher and Hamilton Ross, as found by the inspectors was such as to make him unfit to be concerned in the management of a company.

The principles applicable to determining the appropriate period of disqualification were considered as follows:

> (1) The primary purpose of an order of disqualification is not to punish the individual but to protect the public against future conduct of companies by persons whose past record has shown them to be a danger to creditors and others.
>
> (2) The period of disqualification should reflect (in relation to an order under s. 160(2)(e)) the gravity of the conduct as found by the Inspectors which makes the respondent unfit to be concerned in the management of a company.
>
> (3) The period of disqualification should contain deterrent elements.
>
> (4) A period of disqualification in excess of ten years should be reserved for particularly serious cases.
>
> (5) The court should firstly assess the correct period in accordance with the foregoing and then take into account mitigating factors prior to fixing the actual period of disqualification

Applying those principles the court concluded that the appropriate period of disqualification before taking into account any mitigating factors should be one of twelve years, on the basis of the serious nature of the conduct and the considerable experience that Mr. Collery had in banking.

The inspectors had stated that "Mr. Collery had assisted the inspectors with promptness and courtesy in difficult circumstances". He had not sought to put any evidence before the court as to the impact of an order for disqualification on him. Accordingly, the court reduced the disqualification order by three years.

11.9 Counsel for Mr. Seymour contended that disqualification affected the constitutional right to earn a livelihood. It accordingly raised an important question regarding the balance between enforcing standards of corporate governance and that right.

The court believes that sub-section (8) of s. 160 provides a remedy to ensure that right is not denied even where it is subject to the court. Moreover, being a director is only a mode of earning a livelihood and not a trade, vocation or profession.

The case against Mr. Seymour is based not alone on the findings and opinion of the inspectors but also on the evidence given in cross- and re-examination.

Counsel had also claimed that the Inspectors were expressing an opinion and not making findings of fact where, at p. 75 of the Inspectors' Report it is stated:

> "In the opinion of the Inspectors these audit reports pointed to the likelihood that non-resident accounts referred to therein were in fact bogus. In addition, the extent of reported documentary non-compliance was on such a scale …"

The court does not agree with the submissions on behalf of Mr. Seymour that the Inspectors only expressed an opinion rather than making findings of fact. The reference at p. 175 is not sufficient, in itself, to dissuade the court regarding the finding s of the Inspectors. Even in that instance the use of the word "opinion" does not seem to me to resile from a finding of fact. Accounts were bogus, though that expression was not used in the audit reports. Nonetheless, it was clear from the audit reports and, indeed, from the evidence of Mr. Seymour himself, that there was a systemic problem in relation to compliance with the 1986 Finance Act which continued beyond the meeting of February 1995 and the subsequent S.11 circular.

11.10 Counsel for Mr. Seymour distinguished between corporate breach and personal fitness of a director on the basis of lack of commercial probity. This must involve gross incompetence which persuades the court that it would be a danger to the public if the director were to be allowed to continue. He referred to Hoffman J. in *Dawson Print Group Ltd.*. Ordinary commercial misjudgement does not constitute unfitness (*Lagunas Nitrate Company per* Lindley M.R.). In *Landhurst Leasing* the distinction was made between the duty of the board and of each individual director who might not be charged by the board to procure financial controls but has struggled to introduce them as Mr. Seymour did.

The court recognises those efforts. However, as Executive Director he had an overall duty to ensure compliance. It was not unrealistic to take steps to ensure that the bank became compliant within the period of over two years while he was in control. His actions did not, in fact, resolve the problem.

The court acknowledges that Mr. Seymour's evidence was not evasive nor did he rely to the same extent as Mr. Baker did in Barings, on an internal audit report as a *tabula in naufragio* during the latter's three years as director of that bank.

In *Sevenoaks* Dillon J. said that the Official Receiver cannot automatically treat non-payment of any Crown debt as evidence of unfitness of the directors. It was necessary to look more closely to see what the significance of such non-payment was. It is clear in the present case that the non-accounting for DIRT resulted in a significant settlement to the Revenue and led to an investigation of the Bank.

Counsel for Mr. Seymour had submitted that the internal audit reported to the non-executive Board who were exonerated by the Inspectors as were the auditors.

11.11 The knowledge, follow-up and control rested particularly on Mr. Seymour and not with the former bodies. He was in a position to require compliance.

When asked how long did it take to solve a problem in a bank where the branches were failing to comply with their legal obligations Mr. Seymour answered:

> "At a stroke in terms of the collection of DIRT. Because you can recategorise the account. And several branch managers were doing just that, as was brought out in certain audit reports. And the circular (of February, 1995) was specific in that regard."

He added that the mere attention to retrospective tax liability would not have solved the documentation deficiencies as there would have been ongoing issues but it would have provided a better focus. He regretted that they had not done that. He contended that the circular addressed past and future problems and had the instructions been adhered to to the latter, the totality of the tax problem would have been resolved.

Mr. Brennan had, however, alerted Mr. Seymour to the question of tax evasion in February, 1995. Mr. Seymour's response was inadequate and systemic problems post-dated circular S. 11 after meeting in February 1995.

Mr. Seymour failed to make enquiries that any reasonable chief executive would have made knowing what he knew and bearing in mind the very significant and important responsibilities which the Bank had under the provisions of the 1986 Act.

Counsel submitted that Mr. Seymour was making strenuous efforts in the difficult circumstances to resolve the increasing problems that were dawning upon him during his tenure. He was broadly complying with his obligations under the Companies Act and acted with a degree of commercial probity.

It seems to the court that, broadly complying with obligations under the Companies Act is too narrow a test. This is particularly so in relation to persistent non-compliance. More importantly, in relation to an investigation by the Court the conduct of the directors may be looked at in relation to all legal compliance, including compliance with the Finance Acts and legislation generally. The courts are entitled to look into all the circumstances of the conduct within the particular business.

Moreover, there is clearly no requirement that the company becomes insolvent as a result of the director's conduct. Nor, indeed, is it necessary that the director's conduct involves the commission of wrongdoing. Non-feasance in relation to systemic non-compliance may be sufficient. The clear evidence was that Seymour did know of the recurrent problems and, at least in respect to the bogus non-resident accounts could have re-designated these, accounted for the DIRT unpaid and disciplined senior and branch management for non-compliance. The failure to do so is, in the opinion of the court, a lack of a proper standard of conduct.

The same would appear to apply to the other areas identified by the Inspectors which could have been resolved by the repayment of

these improperly charged and by the cessation of the practice whereby bogus non-resident accounts were transferred into CMI policies.

It was remarkable that Mr. Seymour did not communicate to the Audit Committee nor to the board the extent of these failures and the potential liability of the bank to the Revenue. It is, in the view of the court, not an answer that he was making a strenuous effort in the difficult circumstances to resolve the increasing problems that were dawning upon him during his tenure. Neither is it an answer to say that the problem was endemic in Irish banking nor, indeed, that taxation matters were dealt with outside the Bank. No advice was sought in relation to potential retrospective or continuing liability.

It is clear from the decisions in *D'Arcy* and *Collery* where, notwithstanding that the applications were not contested, nonetheless were examined in detail by the courts, that a failure to comply with legislation by a person who had responsibility and who could have resolved issues of non-compliance, is sufficient to justify disqualification.

Moreover, even where a disqualification order is made a respondent can, of course, apply to the court under sub-s. (8) of s. 160 for an attenuated order. The issue raised by counsel for Mr. Seymour at the opening of his submissions related to the constitutional right to earn a livelihood and to one's good name. It is clear that an order made under s. 160 is not penal in nature – it is not a criminal sanction nor a determination of liability in respect of any losses that accrued to members, creditors or the regulatory authorities – but an indication of a lack of commercial probity in relation to the management of a company.

11.12 The court is of the opinion that the appropriate period of disqualification before taking into account any mitigating factors should be one of twelve years given the serious nature of irregularities which were allowed to continue and the senior position of Mr. Seymour. The court is also mindful of the deterrent element of such a disqualification period.

The court notes that while in the actual hearing Mr. Seymour did not contest the findings of the inspectors, nonetheless in terms of the correspondence and the affidavit of Mr. Seymour, certain matters were in issue which required extensive evidence on affidavit. The court acknowledges the efforts he made in attempting to resolve the issues of non-compliance. The court noted the courtesy and politeness of Mr. Seymour and his frankness in relation to the hearing. The court has considered his age, his retirement and his non-involvement in banking or any commercial activities. In the circumstances the court decides that the proposed disqualification order should be reduced by three years.