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THE HIGH COURT

2005 No. 273 COS

IN THE MATTER OF NATIONAL IRISH BANK LIMITED

IN THE MATTER OF NATIONAL IRISH BANK FINANCIAL SERVICES LIMITED

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2003

AND IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF CORPORATE ENFORCEMENT

PURSUANT TO SECTION 160(2) OF THE COMPANIES ACT 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

PATRICK BYRNE

RESPONDENT

Judgment of Mr. Justice Roderick Murphy dated 26th May, 2008

1. The Director's application

The application by the Director of Corporate Enforcement (the Director) for an order of disqualification of Mr. Byrne pursuant to s. 160 of the Companies Act 1990 is based on findings in a report (published on 23rd July, 2004) of Inspectors appointed by the court on 30th March, 1998 and 15th June, 1998, to investigate National Irish Bank Limited and National Irish Bank Financial Services Limited (the Bank).

Mr. Byrne was Head of Finance and Strategy of National Irish Bank, having been appointed on 11th April, 1994 and served in that position until May, 1998. His title subsequently became Head of Finance and Planning. Mr. Gerry Hunt had held the position of Head of Finance and Strategy until 31st December, 1993, some three months before the appointment of Mr. Byrne.

An audit of Deposit Interest Retention Tax (DIRT) compliance by National Irish Bank entitled "DIRT Theme Audit – December 1994", was circulated in draft form to Mr. Byrne and to Mr. Keane, General Manager - Banking. It was circulated to Mr. Seymour, the then Executive Director and to Mr. Halpin, Head of Treasury and International and issued on 24th January, 1995.

A critical meeting of senior managers was held in relation to the DIRT Theme Audit on 9th February, 1995.

The DIRT Theme Audit Report disclosed that there was a lack of clear and concise guidelines on DIRT compliance issues in relation to non-resident and special savings accounts.

It is necessary to establish the findings of the Inspectors regarding the responsibility and knowledge of the Bank's Internal Audit, the external auditors, the Audit Committee of the Board and the Board of Directors of the Bank, as well as that of Mr. Byrne, given his functions as Head of Finance and Planning.

2. The Inspectors' report

2.1 The order of the High Court appointing the Inspectors to investigate the affairs of the Bank between 1988 and 1998 required them to report on the identity of those responsible for or aware of the practices being investigated. The Inspectors' findings in relation to this are dealt with in chapter 8 under the heading of "Improper Practices: Knowledge and Responsibility".

2.2 The Inspectors had not considered it relevant to comment on the knowledge of employees of the Bank who were in positions subordinate to that of manager, as, while junior officials may have been aware of the existence of practices which were improper, they were not in a position to effect change and so could not be held to have any responsibility for their existence.

2.3 The Inspectors accepted that it was not the function of Internal Audit to correct improper practices or deficiencies in procedures discovered by them.

2.4 The Inspectors considered the position of the external auditors from 1990. The external auditors, KPMG, were aware of and placed reliance on the work of Internal Audit which they concluded was competent. The auditors were satisfied that, insofar as Internal Audit identified the matters being investigated by the Inspectors, the issues were being reported to management and to the Audit Committee.

The external auditors received a copy of the DIRT Theme Audit Report and it was considered by them when conducting their audit of the Bank's financial statements for the year ending 30th September, 1995. The Inspectors found that when conducting their audit the external auditors were, accordingly, aware of the conclusion in the DIRT Theme Audit Report that "this is a risk area and the penalties for non-compliance at the level shown in this report will be very significant". Such conclusion put them on notice of a potentially material liability. This, the Inspectors found, should have led the auditors to ask management to quantify the potential retrospective liability to the Revenue Commissioners for DIRT resulting from the findings of the DIRT Theme Audit. They did not seek to have this done. The Inspectors were of the opinion that had the auditors requested that the liability be quantified, this would have emphasised its importance to senior management. It is unlikely that they could have then ignored it, as they did.

Other than that, the Inspectors were of the opinion that the judgment of the external auditors was appropriate.

2.5 The Inspectors considered the operation of the Audit Committee of the Board of Directors and concluded that it dealt satisfactorily with matters the subject of the Inspectors' investigation which were raised by Internal Audit, save in relation to DIRT. The audit, ending February, 1995, was rated "unsatisfactory". Three major audit findings in relation to DIRT were given a high significance rating. It was clear from the findings that both in regard to non-resident accounts and special saving accounts there had been significant failure on the part of the Bank to observe the relevant statutory requirements. The corrective action proposed by Internal Audit and accepted by management did not include any proposal to deal with the issue of the Bank's liability for such arrears

of DIRT as might be due in the circumstances. Because of this, the Inspectors found that the Audit Committee ought not to have accepted the corrective action proposed as being adequate.

2.6 The Inspectors considered the duties of the Board of Directors in relation to the matters under investigation, in particular, the general duty of care imposed on directors. The Inspectors noted that the Board appointed an Audit Committee which met regularly and received reports from the head of Internal Audit and that they had received no evidence that any of the improper practices being investigated were brought to the attention of the Board. Accordingly, they were of the opinion that the Board of the Bank could not be held responsible for the existence of these practices.

2.7 Specific findings were made in relation to the Regional Managers, the General Manager – Retail Banking and General Manager – Banking, the Heads of Finance, (including Mr. Byrne), the Chief Executive, Executive Director and Chief Operating Officer and the Head of Audit.

In relation to the Heads of Finance during the relevant period, Gerry Hunt and Mr. Byrne, the respondent herein, they noted that Mr. Byrne was appointed Head of Finance and Strategy on 11th April, 1994, a little over three months after Mr. Gerry Hunt ceased to be Head of Finance and Strategy. Mr. Byrne's title subsequently became Head of Finance and Planning.

The Inspectors found that the Head of Finance had responsibility for ensuring that the Bank made returns of DIRT to the Revenue Commissioners within prescribed time limits. The accuracy of these returns was critically dependent on the proper categorisation of deposit accounts at branch level between those exempt from DIRT, those liable to DIRT at the standard rate of tax, and those liable at a reduced rate.

The Inspectors noted that in the respective periods, throughout which Mr. Hunt and Mr. Byrne were responsible for returns of DIRT to the Revenue Commissioners, neither was on the circulation list for branch Internal Audit reports. Accordingly, neither was aware through this medium of the extent of the deficiencies or "irregularities" in the declarations held by branches in support of claims for DIRT exempt non-resident status.

Mr. Hunt, then Head of Financial Control, wrote a memo on 18th November, 1993 to the two General Managers; Mr. Brennan and Mr. Keane and to Mr. Bonner, one of the three Regional Managers who acted as such from 1st June, 1988 to 4th July, 1997. This memo was written as a result of concerns expressed to him by senior officials in the Department of Finance and in the Office of the Revenue Commissioners. The Inspectors found that the memo alerted to the recipients the probability of a Revenue Commissioners' audit of banks' non-resident accounts. The memo concluded:

> "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 advanced warning."

The memo included a detailed analysis of the increase in non-resident deposits in the previous twelve months from £80 million to £110 million and stated that "It is difficult to explain why such a high proportion of new funds are from non-residents".

Mr. Hunt ceased to be Head of Finance on 31st December, 1993. The Inspectors noted that while the concerns which caused him to send the memorandum referred to could have put him on notice that the DIRT figures received from the branches might not be accurate, since no DIRT returns were submitted to the Revenue Commissioners by the Finance Department in the interval before he left, Mr. Hunt did not have to consider the implications for future returns.

It was in this context that Mr. Byrne was appointed on 11th April, 1994, as Head of Finance. Mr. Byrne was on the circulation list for the DIRT Theme Audit Report of December, 1994, over a year after Mr. Hunt's memorandum and his ceasing to be Head of Finance. Mr. Byrne also attended the meeting of 9th February, 1995, which was convened to discuss the results of the audit and the issues arising therefrom.

The Inspectors concluded that Mr. Byrne was thus aware of the extent of non-compliance in the operation of DIRT-exempt non-resident accounts and ought to have known the consequences of such non-compliance for the accuracy of the returns of DIRT being made by him, or persons under his control, to the Revenue Commissioners.

3. Evidence of Mr. Byrne

3.1 Tax returns
The first two DIRT returns for 1995/1996 onwards, made after the DIRT Theme Audit and the meeting of 9th February, 1995 were made by Mr. John O'Brien, of the Finance Department. Mr. Mulvey made the third and Mr. Byrne the fourth.

Each of the returns was headed "Interest payments by certain deposit takers: Return of relevant interest and appropriate tax under Chapter IV of Part I of the Finance Act, 1986". The return dated 10th April, 1996 was initialled by John O'Brien in the capacity of Financial Accountant. A mid-year DIRT return had been made by him on 12th October, 1995.

The return for mid-year 1996/1997, signed by Mr. Mulvey as Manager of the Finance and Planning Department was made on 18th October, 1996.

By 1997, Mr. O'Brien had changed his role and Mr. Mulvey was on leave. Accordingly, the return for the end of year 1996/1997 was made by Mr. Byrne himself and signed "Pat Byrne, Head of Finance and Planning" and dated 18th April, 1997.

The declaration in the October and April returns, in all cases, was as follows:

> "I declare, to the best of my knowledge and belief, that the correct method of calculation has been applied and that the payment on account is correct and complete."

His evidence to the court was that he had never completed a tax return that he did not believe to be true and that he had honestly completed the return.

Mr. Byrne accepted that the returns made by the Finance and Planning Department were his responsibility. The figures returned corresponded with the figures provided by the branches. That was the responsibility of General Manager – Banking. He said, in evidence, that he had no responsibility, power or authority to analyse the figures. His role, as distinct from his predecessor, Mr. Hunt, included a limited role in taxation (his job description dated August, 1996 had, he said, also applied to the previous period from 11th

April, 1994, when he was appointed Head of Finance).

Section 3.5 of that job description was as follows:

> "3.5 Taxation – advise on corporate banking deals and IFSC 10% activities.
>
> · Minimise the taxation related risk associated with the transactions entered into by the Bank.
>
> · Maximise the after tax performance for the shareholders.
>
> · Facilitate the group in maximising the benefits of the 10% Corporation Tax regime in the IFSC."

Taxation, Mr. Byrne stated, was the role of the European Head of Tax, Richard Bowden. He said he was sure that Mr. Bowden had received a copy of the DIRT Theme Audit Report but does not remember having given it to him.

3.2 Action delegated
The task of finalisation of the special circular S11/95 (action No. 4 below) had been delegated to him pursuant to the minutes of the meeting of 9th February, 1995. Over one-third, six of seventeen, of the tasks actioned by the meeting, involved the Finance department which he headed, either on its own or in conjunction with other departments. The following chart indicates the six tasks, all but one of which had to be completed within three weeks:

Action Number	By Whom	Function	Time Limit
1	Marketing Department in consultation with Finance	Marketing Aspect related to applying interest on special savings accounts before the new DIRT rate comes into force	28th Feb., 1995
2	Finance/Legal	To confirm legality of the proposal to apply interest to SSAs before the new DIRT rate comes into force	By 28th Feb., 1995
3	Regional Manager/Finance and Audit	RMs to ensure that nominated staff have read the special circular. Meet with Finance and Audit for final review and agree on enforcement/implementation issues.	By end Feb., 1995
4	Finance	Issue the special circular in relation to DIRT compliance	By end Feb., 1995
5	Finance	To review all stationery in relation to DIRT compliance generally	By end Feb., 1995
6	Marketing and Finance	Issue a procedure summary in relation to DIRT compliance.	By end March, 1995.

3.3 Evidence in relation to irregularities
In his evidence, Mr. Byrne said he was not aware of the existence of any bogus non-resident accounts. He believed that customers were *bona fide* and there was no reason to believe that the Bank had anything but *bona fide* account holders. There was nothing, he said, in the DIRT Theme Audit Report to make him change his mind – his department tackled the actions assigned to it. *Bona fide* non-resident customers were entitled to the appropriate tax treatment on the interest earned on their deposits.

He said that the external auditors, KPMG, received the DIRT Theme Audit Report, as did Mr. Seymour, the Executive Director who succeeded Mr. Lacey, the Chief Executive, on 22nd April, 1994 and who continued in this position until 15th July, 1996. No-one had raised with him the possibility of retrospective tax liability. No-one raised an issue of irregularity with him.

Mr. Byrne said that the reporting between Dublin and London was through George Galazka, who was the General Manager of Finance and Strategy in Europe. Mr. Bowden reported to him on tax, Mr. John McKenna was the European Financial Controller and Margaret Murray dealt with planning. The Irish bank, Scotland, Yorkshire and other United Kingdom banks within the group reported to Mr. Galazka.

3.4 Appointment and Report of Inspectors
Mr. Byrne spoke about the effect of the media coverage in January, 1998 and the subsequent appointment of the High Court Inspectors in March, 1998.

In July, 1998 he was given two months' redundancy notice. He went to an employment agency and found that it was difficult to get work. National Australia Bank in London offered him a project in Glasgow until 2000, where he worked as a business manager for eighteen months. He then worked with Australian Life and Business for a year. Subsequently he worked for AIB on a project basis.

As he had children who were young at the time, he decided from 2001 to date to work as an accountant on an assignment basis at a daily rate but with no pension. He established his own company. He was concerned that if he were disqualified he would not be able to be a director of that company.

In July, 2004 the High Court had referred to comments in the reports about him. The Report of the Inspectors was published on 30th July, 2004 and made reference to him. As a result he was informed by the General Manager of AIB that he was to be suspended from project work in that bank.

Later that year, his professional body, the Institute of Chartered Accountants in Ireland, having read the Inspectors' Report, initiated a complaints procedure against him. In June, the following year, they found no *prima facie* case for him to answer.

In November, 2007 he was given a three-year contract as Chief Executive of St. Patrick's Credit Union, having told them of the Inspectors' Report. When he required time off for the hearing of these proceedings in February, 2008 for one or two weeks, the Board asked him to resign with three months' pay or to be dismissed. Given these proceedings, he opted not to challenge that decision but to accept resignation effective from 11th January, 2008.

Mr. Byrne said there was no issue of probity in the ten years in which he worked with the Bank nor, indeed, in the seventeen years of his previous employment. He was now 48 with a young family. His financial earnings, he said, were frozen to the level they were when he left the Bank in 1998 and he had poor pension arrangements.

The cumulative stress element of the suspension of his project work with AIB, the Institute of Chartered Accountants Complaints Inquiry and the action of the Director, originally due for hearing in April, 2007, required him to avail of stress reduction courses and other alternative medical remedies.

4. Court's findings

4.1 The Inspectors made findings of knowledge and responsibility against Mr. Byrne. Notwithstanding that the Report did not expressly so say, he was part of senior management. The Inspectors' view was that senior management in the Bank were responsible for the existence of the improper practices. Senior management had a duty to ensure that the practices did not exist and had the authority to put an end to them. The individual manager's authority was restricted to what happened in each individual branch. The branch manager could not be held responsible, the Inspectors held, for practices which existed across the Bank's branch network.

The duty to ensure that improper practices did not exist lay with those senior managers who had responsibility and who had the authority to put an end to such practices.

The Director noted that the findings against Mr. Byrne were restricted to two areas: non-resident accounts and special savings accounts, both of which the Director regards as serious.

4.2 At all material times, Mr. Byrne was a member of the Executive Committee.

Mr. Byrne was also Head of Finance and Planning and a Chartered Accountant. In the making of DIRT returns, he failed to deal with retrospective DIRT for which he had a responsibility. The Inspectors had criticised the absence of any such reference to retrospective liability for DIRT in the special circular S11/95, which his department had been asked to draft as one of its tasks.

He was on the circulation list for the DIRT Theme Audit Report of December, 1994 and attended the meeting of 9th February, 1995. He was thus aware of the extent of non-compliance in the operation of DIRT-exempt non-resident accounts. The Inspectors also found that he ought to have known the consequence of such non-compliance for the accuracy of the returns of DIRT being made by him, or persons under his control, to the Revenue Commissioners.

Not alone did certain staff members of the Finance Department, of which he was head, make DIRT returns which were inconsistent with this knowledge but Mr. Byrne made the Bank's DIRT return for 1996/1997 on 18th April, 1997, to which the court has already referred.

4.3 The court notes the memorandum of Mr. Hunt of 18th November, 1993, sent to Mr. Brennan, Mr. Keane and Mr. Bonner and copied to the Chief Executive, Mr. Lacey. Mr. Hunt referred to three separate phone calls from the Revenue Commissioners and Department of Finance, expressing their concerns. Mr. Hunt ceased to be Head of Finance on 31st December, 1993. The Inspectors commented that as no DIRT returns were made to the Revenue Commissioners by the Finance Department in the interval before he left, Mr. Hunt did not have to consider the implication for future returns.

There was a gap of over three months before Mr. Byrne was appointed. Significantly, Mr. Byrne, in his evidence, said that while he had taken over the files of Mr. Hunt, he was not aware of the memorandum of 18th November, 1993. The Inspectors have made no findings in relation to this hiatus, to the gap in his appointment or to his being unaware of that significant memorandum.

Indeed, the Report of the findings of the Inspectors does not ascribe knowledge to Mr. Byrne in relation to the improper practices to such an extent as the preliminary findings. However, the Inspectors were of the opinion that he ought to have known, in the light of the DIRT Theme Audit Report itself and the minutes of the meeting of the improper practices.

4.4 Mr. Hunt's position as Head of Finance and Strategy ceased on 31st December, 1993. Mr. Byrne was appointed as Head of Finance on 11th April, 1994. There was no documentary evidence in relation to any restriction in the role of Mr. Byrne in relation to taxation. He had responsibility for making interim and end of year DIRT returns.

His evidence to the Inspectors was that, when he took over the position as Head of Finance, Mr. Bowden dealt with taxation at European level from London.

The Inspectors, accordingly, wrote to Mr. Byrne's solicitors on 29th July, 2002, asking them to put the following question to Mr. Bowden.

> "Who, in your view, between the period 1988 to 1998, the period covered by our investigation, had responsibility in National Irish Bank Limited to ensure that all returns in respect of Deposit Interest Retention Tax to the Irish revenue authorities correctly recorded the Bank's liability for this tax?"

The Inspectors informed Mr. Byrne's solicitors that Mr. Bowden's response to that question, on the face of it, was quite simple and direct. The court, indeed, agrees with that observation.

However, Mr. Bowden continued by saying that to reply that "A or B had such responsibility" could be misleading. The Bank's liability in relation to DIRT arose out of an obligation imposed by law to make a withholding from deposit interest and to account for that amount so withheld to the appropriate government authority. The court accepts that this is a clear statement of retention or withholding.

Mr. Bowden continued that he understood that the Bank's internal procedures and systems were such that the amount so withheld could be extracted from the banking/accounting system and included in the relevant return form. He then addresses responsibility:

> "The person responsible for that task was an officer in the NIB Finance Department reporting to the Head of Finance. However, the responsibility there could extend only to correctly returning and paying over the amount withheld as recorded in the Bank's records.
>
> The interface with the customer was at branch level. It was in the branch that determination was made whether a particular customer was without the DIRT scheme, i.e., because the customer had certified in the appropriate form that he was not an Irish resident for tax purposes, and thus set up the appropriate 'flag' in the Bank's systems. The branch

> procedures covered these obligations in detail and, if followed, should have resulted in the correct withholding being made."

The evidence of Mr. Byrne to the court was to the same effect. His responsibility extended only to correctly returning and paying over the amount withheld as recorded in the Bank's records and that he had no obligation to question these records as there was no information that would lead him to doubt them.

Mr. Bowden, however, refers to Bank procedures covering the obligations in detail. The assumption that if the procedures had been followed they should have resulted in the correct withholding being made, begs the question of who had the responsibility to ensure that the procedures were, in fact, followed.

The Director makes a case that Mr. Byrne was aware of irregularities prior to the DIRT Theme Audit. Mr. Byrne's clear evidence given repeatedly to this Court, was that he was not so aware, that he had not seen the memorandum of Mr. Hunt of 18th November, 1993 and that he was not in receipt of the branch audit reports showing consistent incidence of incomplete documentation.

Notwithstanding, Mr. Byrne believed that the problem was only that of documentation. He did not question the *bona fides* of the customers and reiterated that the problem was of incomplete documentation.

The final paragraph of the memorandum of Mr. Bowden included in the letter that the Inspectors sent to Mr. Byrne's solicitors on 29th July, 2002 states:

> "Whilst the Finance Department and myself would have had input to, and reviewed branch procedures, neither the Head of Finance nor myself had line management responsibility for branch banking. Clearly the manager in each branch had responsibility for ensuring his branch staff followed the Bank's procedures. In an ideal world these managers would report to the Regional Managers, who in turn would report to the General Manager, Banking that the procedures had been complied with."

On 4th October, 2002, the Inspectors wrote to Mr. Byrne's solicitors. The Inspectors said that, in their opinion, Mr. Bowden's evidence was not consistent with that of Mr. Byrne who maintained that he had no responsibility for the accuracy of returns of DIRT. Mr. Bowden did not say that Mr. Byrne had no responsibility.

Mr. Byrne's solicitors wrote on 6th January, 2003 to Mr. Bowden, summarising the previous correspondence and submitted that Mr. Bowden's evidence was entirely consistent with that of Mr. Byrne, particularly in relation to Mr. Byrne's responsibility in respect of DIRT returns to the Irish revenue authority. The solicitors summarised the position of Mr. Byrne and said that it was no part of the responsibility of the Finance Department nor of Mr. Byrne as Head of Finance to investigate or in any way approve or confirm that a given account had been correctly classified as resident or not resident by the branch manager. The responsibility was to ensure that a correct analysis was made of the information furnished from the branches to the Finance Department with a view to calculating the total amount of DIRT due to the Revenue Commissioners, thus making a return to the Revenue Commissioners in that amount. Mr. Byrne's contention was that his responsibility for the accuracy of the returns was limited to ensuring that the information submitted by the branches was correctly analysed and collated for the purpose of preparing DIRT returns. He stated that he had no responsibility to assess the accuracy or correctness of the information itself which came from the branches.

Mr. Bowden was asked to confirm to them that that was his view. A short email followed on 9th January from Mr. Bowden to Mr. Byrne's solicitors:

> "I thought I had made it quite clear that the Head of Finance, NIB, be it Patrick Byrne or whosoever from time to time, was, and could only be held, responsible for the correct completion of the DIRT return and paying over the correct amount of DIRT withheld as recorded in the bank's records.
>
> The branches' operating procedures, to my recollection, were such in regard to DIRT that, if the branch applied the correct systems code, would result in DIRT being withheld in appropriate cases and would be correctly recorded in the bank's records.
>
> The line management responsibility for ensuring branch staff implemented bank procedures (DIRT procedures were no different from any other bank procedure) rested with the branch manager and the branch manager's line manager to whom he reported. Neither the finance nor tax functions had management responsibility for branch banking. The finance/tax, having ensured that DIRT procedures were adequate to enable the bank to fulfil its legal obligations in that regard, it was the responsibility of branch managers to implement these procedures.
>
> In short, based on the information in your email of 6-1-2003, I believe Patrick Byrne and myself are in agreement as to his responsibilities as summarised in page 4 of your email. I can see no inconsistency between what I wrote in response to the Inspectors' letter of 15-7-2002 and what you report as Patrick Byrne's contention.
>
> Richard Bowden"

Mr. Bowden does not say that it was he who had responsibility for the correct recording and withholding of DIRT; it was the responsibility of the managers to whom the branch managers reported.

Mr. Bowden does not state that he had taken over the Bank's tax function from Mr. Byrne. His input into and review of Bank procedures appeared to be his only role in relation to this issue. Mr. Bowden's written reply to the Inspectors is therefore not entirely consistent with Mr. Byrne's assertion that when he became Head of Finance in April, 1994, Mr. Bowden was responsible for taxation.

It is clear from the Inspectors' report that the fault had its origin in the bank managers' failure to comply with the provisions of the Finance Act 1986. More particularly, there was a failure to comply with the instructions given by Regional Managers as to the completeness of declarations in respect of non-resident status and, in relation to the special savings accounts (SSAs), to the statutory regulations regarding withdrawals. The issue is who had responsibility to supervise and control compliance.

What is clear from the correspondence above was that Mr. Byrne's Finance Department and Mr. Bowden had an input into and power to review the branch procedures; neither had line management responsibility for branch banking. It does not follow that neither had any responsibility. The responsibility of the finance management is to control, verify and report. The responsibility of the Head of Finance is to ensure that control is effective, verification is accurate and reporting is timely. The making of accurate tax returns is an

integral part of financial reporting.

Mr. Byrne's view was that branch managers had indicated that procedures had been complied with. His evidence was that he was not aware that branch audits, notwithstanding instructions given, had shown persistent non-compliance. The DIRT Theme Audit Report sent in draft form to Mr. Byrne made him aware as to how widespread non-compliance was within the branch network.

It does seem to me that there is no indication of a change in function, as far as Mr. Bowden was concerned, from Mr. Byrne's predecessor to Mr. Byrne in relation to the withholding and returns of DIRT. Nor is there any indication of the tax function being assumed by Mr. Bowden on the European side in relation to the verification of DIRT returns.

4.5 The DIRT Theme Audit Report of December, 1994 was circulated to Mr. Seymour, Executive Director; Mr. Keane, General Manager – Banking; to Mr. Halpin, Head of Treasury and International and to Mr. Byrne, Head of Finance and Planning. It had been approved for issue by Mr. Harte, the Head of Audit.

The note on the issue of the final report indicates that the report was considered as a draft report issued to Mr. Keane, the General Manager and Mr. Byrne, Head of Finance and Planning. It was stated that the Report findings had been accepted in general terms, presumably by both Mr. Keane and Mr. Byrne.

It was noted that Mr. Keane raised certain issues and that Mr. Byrne stated that Finance would continue to work towards a final circular covering the whole DIRT area. Audit and Finance were to work together to ensure that the issues raised in the report were covered in the final circular and responsibilities would be assigned at the meeting of 9th February. Both Mr. Keane and Mr. Byrne had agreed that they should proceed to issue the final Report.

The management summary referred to DIRT compliance issues, principally missing and incomplete documentation, continuing to be reported in branch and other audits on a regular basis. Reference was made to a number of discussions with the Finance Department during the course of the audit and the significant contribution to the process made by the Finance Department with many of their suggestions incorporated into the Report.

The major findings were that there was a lack of care and concise guidelines on DIRT compliance issues, that SSA notice requirements were not being properly imposed and that an unacceptably high proportion of declarations were missing or incomplete.

The management summary of the audit referred to 91% of withdrawals reviewed breaching the notice requirements and approximately 40% of non-residence declarations missing or incomplete.

The management summary concluded that the results of the audit were very disappointing and that management must take immediate steps to improve the situation. It added that structure could be improved but the level of non-compliance was too high. It appeared from the conclusion that there needed to be an organisation-wide change in attitudes to the whole area, as this was a risk area and the penalties for non-compliance at the level shown in the Report would be very significant.

No reference was made to tax evasion; the phrase was not mentioned. The term "non-compliance" is repeated under the heading "major findings and conclusion". Reference is made to a lack of clear and concise guidance on DIRT compliance issues; compliance procedures were being reissued. Breaches of SSA notice requirements were noted. Branch responsibility for DIRT documentation needed to be clarified. A significant number of DIRT compliance issues had been reported in recent audits. The authors of the Report accepted that significant progress had been made. They reviewed compliance in Treasury and found the standard of DIRT documentation to be good.

There was no reference to retrospective reassessment of DIRT. One might interpret the concern in the management summary as being potential (penalties would be very significant) rather than actual.

It is clear that, even in the management summary, what was highlighted was serious non-compliance and breaches with respect to DIRT issues. The audit results were noted as being very disappointing. Management were obliged to take immediate steps to improve the situation.

From the point of view of the Finance Department and, in particular, of Mr. Byrne, the matter should have been of critical concern where it involved the assessment of withholding tax by a bank.

Notwithstanding the allocation of over one-third of the tasks to the Finance Department in the subsequent meeting of 9th February, 1995, there was no mention of any retrospective liability for DIRT.

It was submitted that it was not clear that there was a retrospective liability. It was argued that early withdrawals did not mean retrospective liability in respect of SSAs. It was submitted that this was not part of the function of Mr. Byrne, nor of his responsibility. In particular, he had no responsibility for verifying the data. The Inspectors' Report at p. 173 had found that:

> "It was the responsibility of Mr. Brennan and Mr. Keane, while General Manager – Retail Banking or General Manager – Banking, to ensure that accounts classified as DIRT-exempt non-resident accounts were correctly classified as such and to see that Regional Managers secured full compliance with the statutory provisions relating to DIRT. They failed to discharge this responsibility."

Their findings in relation to Mr. Byrne, Head of Finance, were as follows:

> "The Head of Finance had responsibility for ensuring that the Bank made returns of DIRT to the Revenue Commissioners within prescribed time limits. The accuracy of these returns was critically dependent on the proper categorisation of deposit accounts at branch level between those exempt from DIRT, those liable to DIRT at the standard rate of tax, and those liable at a reduced rate."

It was submitted that the branches had knowledge of the declarations in making their returns and that Mr. Byrne could not interrogate the veracity of the accounts. He believed that he was entitled to assume that the returns were made.

The returns were made on the basis of the setting of flags. Mr. Byrne had to assume that the flags were correct. It is submitted that this was the responsibility of Mr. Brennan and Mr. Keane. Mr. Bowden's role as Head of Tax Europe was different from that of Mr. Keane and Mr. Brennan.

The court finds that, notwithstanding the role of Mr. Bowden as Head of Tax – Europe, Mr. Byrne retained responsibility for making the interim and end of year returns. Whatever about the position prior to the DIRT Theme Audit Report and the meeting of 9th February, 1995; after that point, Mr. Byrne could no longer assume that the returns made by the branch managers were accurate. Returns made, especially after that meeting, without verification from the General Managers as to their accuracy, could not have merited the declarations made.

If it were not clear that there was a retrospective liability even on the narrow grounds contended in respect of early withdrawals from special savings accounts, then advice could and should have been sought. Mr. Byrne had a responsibility to seek such advice. While Mr. Byrne may have had no responsibility with regard to what he did not know before the DIRT Theme Audit, he failed to consider the issue of a retrospective liability to DIRT after the meeting of 9th February, 1995. In respect of the returns made after February, 1995, he ought to have sought verification and obtained advice. He should have notified the Executive Committee and Mr. Seymour, the Executive Director, before Mr. Seymour retired on 15th July, 1996. The court has heard no evidence that Mr. Bowden had any responsibility to notify any of those parties. Mr. Byrne's evidence was that tax issues, such as that encompassed by DIRT, were the function and responsibility of the European Head of Tax. If this were so, then Mr. Byrne should have notified Mr. Bowden that the retrospective liability to DIRT was a concern.

The court does not find it credible that the DIRT Theme Audit Report identified the problem and the solution only in terms of documentary non-compliance above. (One is tempted to wonder whether the phrase "completeness of documentation" was an esoteric euphemism for DIRT compliance.)

The language used differs from that of the memorandum of Mr. Hunt on 18th November, 1993, who was convinced that the Revenue Commissioners would commence detailed audits of the major banks in 1994 with particular attention to non-resident accounts, as had happened in 1990 when Northern Bank was audited by the U.K. Revenue.

Mr. Byrne's evidence was that he was unaware of that memorandum and that he believed that the issue was a matter of completeness of documentation. The issue may indeed have been obfuscated by the reference in the DIRT Theme Audit Report to confusion regarding product design, absence of product training and conflicting information requirements. Whatever the contributing factors, the result of the final Report was that there was a lack of monitoring. Responsibility for financial control and monitoring lay with Mr. Byrne's department.

The management summary concludes, against a background of over 90% of withdrawals from special savings accounts breaching the notice requirements and 40% of non-resident accounts with missing or incomplete declarations, that this was a risk area and that the penalties for non-compliance at the level shown in the report would be very significant. On this basis alone, Mr. Byrne ought to have been aware of serious irregularity.

In evidence, Mr. Byrne consistently stated, both in his several affidavits and in his oral evidence to this Court, that he had no knowledge of the audit reports of the branches which highlighted these issues, that he took the data from Livelink, the Bank's computer system, at face value and did not seek any reassurance regarding the accuracy thereof. This seems to the court to be inconsistent with the findings of the DIRT Theme Audit Report itself. It is even more inconsistent with the opening statement in the minutes of the meeting of 9th February, 1995, where Mr. Brennan referred to possible tax evasion that needed to be eliminated to the greatest degree possible, which required a change of attitude at branch level. While the emphasis seemed to be placed on changing attitudes at branch level, the reference to tax evasion within a bank, even if it were a reference to the mere possibility of tax evasion, was a matter of the utmost gravity for the Finance Department of which Mr. Byrne was head.

It was pointed out to the meeting that circulars had been issued in the past which included a tax angle and which had not been referred to Finance for prior opinion. It was agreed that this should not happen in the future.

Mr. Byrne stated that the new procedure, whereby only three people – the two General Managers and the Executive Director – could sign off a special circular, would address this problem. Both he and Mr. Harte suggested that the approach to resolve the problem would be to issue the circular by the end of February, 1995.

Mr. O'Brien, who reported to Mr. Byrne in the Finance Department, stated that an opportunity existed to reduce the customer's DIRT charge by capitalising interest to the customer's account before the change to the rate of 15% occurred. Reference was made to seeking legal advice to ensure that the Bank was not breaking the terms of their agreement with customers or that it was contrary to tax legislation.

There was no evidence that this capitalisation, in fact, took place nor, indeed, that there was any legal or tax advice received: no reference was made to it in the Inspectors' Report.

Mr. Byrne's evidence was that neither he nor anyone at that meeting had raised the issue of retrospective tax being retained, where the necessary clear documentation was not held. Mr. O'Brien, of the Finance Department, suggested that interest be capitalised before the DIRT tax rate was changed. Whether this referred to SSAs or non-resident accounts is unclear. This appears to be the closest the meeting came to considering the issue of interest already earned in respect of which there was a tax liability.

Whether the issue of retrospectivity was indeed latent in that suggestion is a matter, in respect of which the court need make no finding. The clear evidence of Mr. Byrne was that he did not consider it necessary to raise the issue of the retrospective liability for DIRT. He believed that he was entitled to take the non-resident accounts as genuine and to make returns from the data in Livelink.

4.6 On 16th January, 1996, almost a year after the DIRT Theme Audit, Mr. Byrne wrote to all Branch Managers, with copies to Kevin Curran, Head of Retail Banking, and Paul Harte, Head of Audit, seeking the declaration of DIRT Compliance Report from the listed Bank Managers, which was due on 31st December, 1995. Mr. Byrne, stressing the importance of the declaration, continued:

> "Lack of documentation, or incomplete documentation, exposes the Bank to potential loss. The completion of the Compliance Report ensures that all incorrect classifications are corrected immediately".

While the potential loss is not particularised, it can only be a potential loss to account for the tax not deducted. It is not consistent with an understanding that all non-resident accounts were *bona fide* and that the only issue was inadequate documentation.

While Regional Mangers and the General Manager to whom they reported were responsible for compliance in general, and the elimination of irregularities in particular, it does not follow that the Head of Finance had no responsibility to verify the accuracy of the data inputted to the returns to the Revenue Commissioner. Mr. Byrne's evidence would seem to imply that the role of the Finance

Department was no more than a mechanical collation of returns being made from the branches through the computerised Livelink. It would seem to me to be a misunderstanding on the behalf of a finance department and, more particularly, of the Head of Finance, to assume that the figures appearing on Livelink could be simply aggregated and downloaded by the computer into a statutory return to the Revenue Commissioners. Mr. Byrne's evidence seems to suggest that such returns were automatic and that his department had no function, whether professional or otherwise, to verify the accuracy of the data. It seems to the court that, in the exercise of his function, Mr. Byrne as Head of Finance could not regard the data as given to be accurate.

It seemed strange, whether or not such matters were on the agenda or, indeed, minuted, that an opportunity was not sought by the Head of Finance to inquire as to the accuracy of the data after the DIRT Theme Audit. There was no evidence that Mr. Byrne referred the matter thereafter to the Executive Director, to the Audit Committee or to the Board. Indeed, it seemed as if the findings of the DIRT Theme Audit had required no significant action from Mr. Byrne or his department, notwithstanding the six actions assigned to his department at the meeting of February, 1995. (see 3.2 above)

The court, having heard the evidence of Mr. Byrne, confirms the Inspectors' finding that Mr. Byrne ought to have known that the reference to non-compliance affected the accuracy of the returns of DIRT being made by him, or persons under his control, to the Revenue Commissioners.

4.7 The Inspectors criticised Mr. Byrne in relation to what they considered to be defects in the circular S11/95 which the Finance and Planning Department drafted as part of the tasks assigned at the meeting of 9th February, 1995. The circular introduced documentary requirements in relation to the opening of new non-resident accounts but did not address the position in regard to accounts which had been opened previously. It required that a valid declaration must be held "which has been signed, dated and in all respects fully completed by the customer". However, it did not inform the branches of the provisions of s. 32(2) of the Finance Act 1986 which requires that:

> "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."

Subsection (1) of s. 32 deals with the deduction of tax from interest and in the following terms:

> "Where a relevant deposit taker makes a payment of relevant interest it shall deduct out of the amount of the payment the appropriate tax in relation to the payment; and the person to whom such payment is made shall allow such a 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."

The section involved a radical treatment of tax on deposit interest in a manner analogous to the PAYE system a generation beforehand.

In order not to deduct tax, the relevant deposit taker (the financial institution) had to be satisfied, *inter alia*, that:

> "(i) no person who is ordinarily resident in the State is beneficially entitled to any interest, and
>
> (ii) a declaration of the kind mentioned in section 37 has been made to the relevant deposit taker…" (See s. 32(1)(f))

Section 37 requires that such declaration must be in writing and made to the financial institution and which also specifies that the declaration:

> "(a) is made by a person (hereafter in this section referred to as 'the declarer') to whom any interest on the deposit in respect of which the declaration is made is payable by the relevant deposit taker, and is signed by the declarer,
>
> (a) is made in such form as may be prescribed or authorised by the Revenue Commissioners,
>
> (b) declares that at the time when the declaration is made the person who is beneficially entitled to the interest in relation to the said deposit is not, or, as the case may be, all of the persons who are so entitled or not, ordinarily resident in the State,
>
> (c) contains as respects the person, or, as the case may be, each of the persons, mentioned in paragraph (c)–
>
> (i) the name of the person,
>
> (ii) the address of his principal place of residence, and
>
> (iii) the name of the country in which he is ordinarily resident at the time the declaration is made,
>
> (d) contains an undertaking by the declarer that if the person, or, as the case may be, any of the persons, referred to in paragraph (c) becomes ordinarily resident in the State, the declarer will notify the relevant deposit taker accordingly, and
>
> (e) contains such other information as the Revenue Commissioners may reasonably require for the purposes of this Chapter..."

There was a proviso that notice served on or before 29th January, 1986 and in a form authorised by the Revenue Commissioners under certain statutory provisions, would be deemed to be a declaration of the kind mentioned in the section.

No argument has been advanced by or on behalf of the respondent that related to this proviso.

The court has considered the submission that there were no cases where disqualification was sought on such narrow grounds as alleged defects in a circular. The criticism in the defect in drafting the circular was, it was submitted, a matter of style and not a

ground for disqualification. The court considers this matter, not in isolation, but as part of a continuum of lack of compliance with the provisions of s. 32 of the Act of 1986.

Mr. Byrne ought to have known the consequences of non-compliance after the DIRT Theme Audit Report and the meeting of 9th February, 1995.

5. Disqualification application
The question then arises whether the findings of the Inspectors, in the light of the evidence to this Court relating to Mr. Byrne, justify disqualification.

It is clear that the findings of the Inspectors are relevant to the disqualification procedures as provided for in s. 160(2)(e) of the (1990) Companies Act.

The Director has, of course, also relied on other grounds of subs. (2) of that section. Notwithstanding Mr. Byrne's being on the Board of Directors of some of the Bank's subsidiaries, he was not a director either of National Irish Bank Limited or of National Irish Bank Financial Services Limited which were the subjects of the investigation. Moreover, it does not seem to me that he was in the position of director notwithstanding his role in the Executive Committee. As the name implies, that committee deals with the putting into effect of policies and decisions of the Board.

Mr. Byrne was, at all material times, the Head of Finance and Head of Financial Planning and, as such, a senior manager of the Bank as well as being a professionally qualified accountant.

He had the means to inquire, to seek advice and to refer issues to the European Head of Tax, to the Executive Committee and to the Board.

Mr. Byrne had the benefit of the DIRT Theme Audit Report; the meeting of 9th February, 1995 and the tasks assigned to the Finance Department, which he headed. Notwithstanding these, the Inspectors found evidence of non-compliance persisting in relation to bogus non-resident accounts and to special savings accounts. He was aware of the extent of non-compliance in the operation of DIRT-exempt non-resident accounts. He shared responsibility for defects in Circular S11/95 issued on 8th March, 1995. He failed to raise the issue of potential retrospective liability for DIRT due in respect of interest on accounts wrongly classified as DIRT-exempt.

Did this failure amount to a lack of commercial probity? Does it go far enough that it should be categorised as being grossly irresponsible or being a danger to the public? Or is such failure ordinary commercial misjudgement?

5.1 The court has considered the following cases:

> *In the Matter of Vehicle Imports Ltd. (In liquidation)* (Unreported, High Court, 23rd November, 2000).
>
> *Re NIB Ltd: Director of Corporate Enforcement v. Seymour* [2007] I.E.H.C. 102.
>
> *Re NIB Ltd.: Director of Corporate Enforcement v. Curran* [2007] I.E.H.C. 181.
>
> *Re NIB Ltd.: Director of Corporate Enforcement v. Brennan* [High Court decision of 22/05/08]
>
> *In the Matter of Tralee Beef and Lamb Ltd. (In Liquidation): Kavanagh v. Delaney & Others* [2008] I.E.S.C. 1.
>
> *Re Barings plc and Others (No. 5), Secretary of State for Trade and Industry v. Baker and Others* [1999] 1 B.C.L.C. 433.

6. Barings
6.1 In *Barings plc*., Jonathan Parker J. referred to certain propositions (which were approved of in *Vehicle Imports*, in *Kavanagh v. Delaney* and in *Seymour)* in relation to the disqualification of bank directors.

In that case it was felt that unfitness might be shown by conduct which was dishonest, including showing want of probity, or by conduct which was merely incompetent. In each case, the function of the court in addressing the question of unfitness is to decide as to 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, a 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, (in the sense that the standard did not vary according to the company's business or the nature of the respondent's role in the management of that business) that standard has to be applied to the facts in each particular case.

It was not a prerequisite for a finding of unfitness that a respondent was guilty of misfeasance or of breach of duty in relation to the company. Unfitness might be demonstrated by conduct which did not involve a breach of any statutory or common law duty.

It would appear that no challenge of any kind was made as to the honesty and integrity of any of the respondents in *Barings*. The case against them was based solely on incompetence. Incompetence was defined as a departure from the ordinary standards of conduct expected of a director or officer.

The Court held, at p. 497, as follows:

> "… in assessing the conduct . . . 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. That 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 that time".

6.2 There was no commercial catastrophe in the Bank, in this case, settling with the Revenue Commissioners for a sum of IR£3.5 million in relation to DIRT which had not been accounted for (in the years in which returns had been made and in respect of years when no returns had been made).

This Court views the conduct of Mr. Byrne in light of the knowledge that the Inspectors imputed to him after the DIRT Theme Audit; his knowledge of the meeting of the 9th February, 1995 and on the basis of his evidence to this Court.

The definition of incompetence as a departure from the ordinary standard of conduct expected of a director or officer should, it seems to this Court, be no different from the definition of incompetence as a departure from the ordinary standard of conduct expected of a senior manager who was functional head within a bank licensed by the Central Bank.

There appears to have been a systemic corporate failure of tax compliance within the Bank which was disclosed by the DIRT Theme Audit. The court accepts that this represented an oversight on the part of Mr. Byrne as Head of Finance who had responsibility for tax liability. However, the court, having heard the evidence of Mr. Byrne, confirms the findings of the Inspectors. Moreover, as Head of Finance and Planning, Mr. Byrne was held to share responsibility for the deficiency in circular S11/95. Mr. Byrne's conduct would appear to be a departure from the ordinary standard of conduct of a professionally qualified Head of Finance.

It is this departure from ordinary standards of conduct, rather than any misfeasance or specific breach of duty to the company, which underlies s. 160(2)(d) and (e) of the Act of 1990 and which renders a person unfit to act as director or other officer of a company.

7.1 The Court has also considered *Re Ansbacher: Director of Corporate Enforcement v. Collery* [2007] 1 I.R. 580 which involved a financial institution and a disqualification order under s. 160(2)(e).

The principal findings of the Inspectors were as follows (outlined at p. 586 of the judgment):

> "In view of the information available to Mr. Collery from his previous position in Guinness and Mahon, the inspectors have concluded that there is evidence tending to show that Mr. Collery was during this period assisting Ansbacher in:-
>
> a) carrying on an unlicensed banking business;
>
> b) failing to furnish to the registrar of companies the information required by ss. 352, 353, 355 and 357 of Part XI of the Companies Act 1963;
>
> c) evading tax due on its own activities;
>
> d) assisting others to evade tax."

There was, therefore, in the opinion of the Inspectors, evidence tending to show that Mr. Collery knowingly assisted Ansbacher to conduct its affairs in this jurisdiction in such a manner as to defraud creditors (that is the Revenue Commissioners), or other persons (those Ansbacher clients whose accounts he serviced).

At p. 587, the Inspectors' conclusions with regard to events after the death of Mr. Traynor (whom Mr. Collery replaced) are outlined.

Later in the Report the Inspectors deal with the events after the death of Mr. Traynor and conclude:

> "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."

Mr. Collery, in that case, had not sought to put any evidence before the Court in response to the application of the Director of Corporate Enforcement. On his instructions, Counsel on his behalf, did not seek to contest any of the findings in the Inspector's Report, nor dispute the contents of the Report. It was in those circumstances that the Court acceded to the applicant's submission that the findings evidenced a lack of commercial probity on the part of the respondent, to such an extent that it makes him unfit to be concerned in the management of a company within the meaning of s.160(2)(e).

The Court, accordingly, made a disqualification order for a period of nine years and made no order as to costs.

7.2 The circumstances in the present case differ insofar as the respondent herein contested the findings of the Inspectors. The Court has considered the respondent's submissions in this regard. In *Re Ansbacher: Director of Corporate Enforcement v. Collery* there were clear findings of tax evasion and of assisting others to evade tax. The Inspectors found that Mr. Collery assisted the Bank to defraud the Revenue Commissioners. However, a finding was made that, in view of his experience, Mr. Collery ought to have been aware of the wrongs of Ansbacher's Irish operation.

No such findings were made in relation to Mr. Byrne.

The court finds no evidence of gross negligence or total incompetence, nor a danger to the public.

8.1 I have also considered the decision of Laffoy J. in *Director of Corporate Enforcement v. McGowan* [2005] I.E.H.C. 41, which related to the provisions of (d) and/or paragraph (f) of s.160(2) of the Companies Act 1990. Section 160(2)(d) relates to the conduct of any person, *inter alia*, as officer of a company, making him unfit to be concerned in the management of a company. Section 160(2)(f), as amended by s. 42(b)(i) of the Company Law Enforcement Act, 2001, concerns circumstances where a person has been persistently in default in relation to the relevant requirements. In *Director of Corporate Enforcement v. McGowan* there were outstanding tax returns, listed in an order of the Court of the 14th May, 2001, which had not been furnished to the Revenue Commissioners on the date that the proceedings commenced in November, 2003, notwithstanding an order extending the period, made in October, 2003. Laffoy J. held that the respondents had not been in persistent default since they had not been adjudicated guilty of any default by a court. The Supreme Court, in dismissing the Director's appeal, (judgment delivered 6th May, 2008) commented at para. 50 that the position might have been different if the court had to consider the matter under the heading of unfitness. The present application is not made under s. 160(2)(f).

8.2 On the facts of the present case, the Bank had remedied its breaches of the Companies Acts and the taxation code. However, it seems to this Court that the situation in relation to Mr. Byrne is different from in *McGowan* for three main reasons: Mr. Byrne was the professionally qualified Head of Finance, in an authorised financial institution, with a responsibility in relation to DIRT. Moreover, the application of the *Director of Corporate Enforcement v. McGowan* under paragraphs (d) and (f) of sub-section (2) did not arise out of a Report of Inspectors appointed by the High Court. A higher standard of conduct should be expected on that basis alone.

The question which must be determined by the court here is whether the conduct complained of displays a lack of commercial probity, or, in the words of Jonathan Parker J. in *Barings*, "a departure from the ordinary standards of conduct expected of a director or officer".

Probity derives from the Latin *probitatem* from *probus* meaning good, through the French *probié*, honesty, sincerity, integrity, uprightness, rectitude. (See Castell's Latin Dictionary translates "probitas" as probity. Collin's French Dictionary translates "probe" as upright/honest, and "probité" as probity.

Such probity is required, not alone in regard to the discharge of one's responsibility to the company, but also to its creditors. The creditors include, of course, the Revenue Commissioners. The court observes that in relation to DIRT, as within the accounting for Value Added Tax, and also under a different system, the accounting for tax on payments to employees, the taxpayer has an obligation which is discharged through designated employees. There was no evidence before the court of Mr. Byrne's responsibilities with regard to returns for other taxes. However, it is clear that the Finance Department and, in one incidence, he himself, made returns in relation to DIRT, signing the declaration that the return was correct and complete to the best of his knowledge and belief. That return, made on 18th April, 1997, followed the payment on account the previous October, with a declaration in similar terms but with an additional statement that "the correct method of calculation has been applied".

Mr. Byrne told the court that no-one raised the issue of tax evasion or of irregularity with him in relation to non-resident accounts and special savings accounts. He stated that the DIRT Theme Audit Report did not mention tax evasion. References to non-compliance were understood by him as being documentary in nature. He felt that declarations were a matter for branch managers and tax was a matter for London.

The court, for the reasons given, is not satisfied with such explanation. It believes that, in the circumstances, following the meeting of 5th February, 1995, Mr. Byrne had the responsibility to raise the issue and failed to do so.

The court finds that Mr. Byrne, in the circumstances, displayed a lack of commercial probity.

Accordingly, the Court is mindful of making an order under s.160(2)(e) and will hear Counsel in relation to a period for such disqualification.