Judgments

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Judgment by: O'Donnell J.

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THE SUPREME COURT

74/07

Fennelly, J.
Finnegan, J.
O'Donnell, J.

IN THE MATTER OF KENTFORD SECURITIES LIMITED (UNDER INVESTIGATION) AND

IN THE MATTER OF THE COMPANIES ACT, 1963-2001 AND

IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF CORPORATE ENFORCEMENT PURSUANT TO S.160(2) OF THE COMPANIES ACT, 1990

Between:

THE DIRECTOR OF CORPORATE

ENFORCEMENT

Applicant

-and-

PATRICK MCCANN

Respondent

Judgment delivered by O'Donnell, J. on the 30th day of November 2010.

In 1988 the respondent, Patrick McCann, was a relatively recently qualified accountant working in a junior position in a firm called Chartered Secretarial Company ("CSC"), the principal of which was a Mr. Sam Field-Corbett. As the name perhaps suggests, the company provided company formation and secretarial facilities. The respondent was in his late 20s but by that stage had already established his own accountancy firm. It is recorded in the High Court judgment that it was part of his business plan that persons who dealt with CSC would be approached by him to provide auditing and accountancy services.

One of the companies for which CSC provided services was Kentford Securities Limited ("Kentford"), a company controlled by the late Mr. Desmond Traynor, albeit that Mr. Traynor was neither a shareholder nor a director. Mr. Traynor was a very successful and well connected businessman, and a major figure in relation to the affairs of CSC until he died in 1994. The respondent was, in 1988, a director of Kentford. On the 14th of May, 1992, however, a Notice of Change of Director dated the 13th April, 1992 was filed in the Companies Office, recording the resignation of the respondent as of the 14th March, 1989. Whether the respondent truly resigned on that date, and the notification was simply filed later, or whether, on the contrary, the resignation was made on the 13th April, 1992 and backdated to the 14th March, 1989 was an issue in the High Court proceedings. What is not in dispute is that the respondent was the auditor of Kentford and audited the accounts from 1989 to 1993.

During the proceedings of the McCracken and Moriarty Tribunals dealing in part with the affairs of the late Mr. Charles Haughey, it emerged that Mr. Traynor had operated the so-called offshore "Ansbacher deposits" for a number of persons, including Mr. Haughey, as part of the tax evasion scheme, and that Kentford was a vehicle used by Mr. Traynor for that purpose. During the period when the respondent was the auditor to Kentford, a sum amounting to IR£2.27 million passed through the Kentford accounts as part of the Ansbacher secret deposits being managed by Mr. Traynor.

In June 1998, an authorised officer was appointed to investigate the affairs of Kentford. The respondent was contacted and was interviewed on a number of occasions between 1999 and 2002 in the course of the investigation. He informed the authorised officer that he did not have any books and records relating to Kentford, that he had given all his audit working papers to Mr. Traynor in 1994, and furthermore, that he had resigned as a director in 1989. He sought to explain the fact that after that date he had signed documents, including bank mandates and facility letters in which he was described as a director of Kentford, as "an oversight". Mr. McCann had been succeeded as a director of Kentford by an employee of a related company called Management Investment Services ("MIS"), of which Mr. McCann was also a director. However, that person did not work for MIS in the period from October 1987 to September 1991. Consequently, he gave evidence that he could not have been appointed as a nominee director to the company prior to 1991.

The only document which Mr. McCann did retain relating to Kentford was a letter of the 23rd January, 1990 on Mr. Traynor's notepaper and addressed to the directors of Kentford, in the following terms: -

> *"Re: Preparation of Annual Accounts*
>
> *I understand that it is now necessary to file accounts at the Companies Office when making an annual return.*
>
> *I would appreciate if you could arrange for accounts to be prepared in respect of the year ended 31st of March 1990.*
>
> *Kentford Securities Limited is a trust company and as such does not trade and does not hold any assets or liabilities in its own right. I would appreciate if you would instruct the auditor accordingly.*

If the status of this company should change at any time in the future I will inform you.

Yours sincerely

J.D. Traynor"

On each occasion when he was interviewed by the authorised officer, Mr. McCann maintained that he relied on this letter in the conduct of the audits and, in particular, as justification for not conducting any check of the company's bank accounts which would have revealed the very substantial passage of monies through accounts in respect of which he had signed mandates and facility letters.

A key feature of this case is the fact that the authorised officer was able to determine that the letter could not have been written on the 19th January, 1990 as it purported to be, because the telephone number on the notepaper was a seven digit number which did not become available from eircom until April 1993 at the earliest. When confronted with this at interview before the authorised officer, the respondent, in the words of the trial judge, *"attempted to answer the unanswerable or justify the unjustifiable"*. His answers to the questions, in the words of the trial judge, *"could be characterised as vague and evasive"*. Before the authorised officer, the respondent maintained that the letter was genuine. When these proceedings came to the High Court, the respondent did accept that the letter must have been backdated but contended simply that it was backdated by Mr. Traynor. He did not elaborate on how it came into his possession or what he knew of the circumstances of its production. The trial judge concluded that the respondent must have been aware that the letter was backdated. He did not accept that the respondent had acted bona fide in relation to the letter when he provided a copy of it to the authorised officer.

The respondent also contended before the authorised officer, and again in the High Court, that the notification of resignation was not backdated and that he genuinely had resigned as a director as of 1989. The High Court judge concluded, on the balance of probabilities, that the respondent had not resigned in 1989; rather that he had resigned in 1992 and the form had been backdated in the words of the judgment to *"correct the paper record"*. The trial judge concluded, therefore, that the respondent had acted as an auditor while being a director of the company. This was a breach of s.187(2)(a) of the Companies Act 1990 ("the Act of 1990"). The prohibition on an officer of a company being an auditor of that company is a longstanding provision of company law and was not one of the innovations in respect of corporate governance introduced by the Act of 1990. The trial judge concluded however, on the balance of probabilities, that this was not a conscious breach of the law.

In the High Court, the applicant filed a detailed affidavit from Mr. Colm Dunne, a fellow of the Institute of Chartered Accountants in Ireland, who prepared a detailed report on the manner in which the respondent conducted the audit of the Kentford. He expressed the opinion that the respondent was unfit to be concerned in the management of a company. He expressed the view that on the best interpretation of the facts as presented by the respondent, the respondent had accepted appointment as an auditor when there was a significant threat to his objectivity by virtue of his relationship with Mr. Traynor that he failed to mitigate; that he relied on insufficient evidence to express an opinion on the Kentford financial statements; that he backdated his audit opinion for 1990, and that he issued an unqualified opinion on financial statements that was misleading. On the basis of another but less generous interpretation of the facts, it was Mr. Dunne's opinion that the Respondent produced materially misstated financial statements and raised a false audit opinion.

The judgment did not debate these issues in any depth. Instead in the High Court decision, *Kentford Securities (Under Investigation) v. Companies Acts* [2007] I.E.H.C. 1

(Unreported, High Court, Peart J., 23rd January, 2007), the trial judge said at p. 9: -

> *"I do not intend to set out all the detail of the complaint made by the applicant and the authorised officer in his report as to the many ways in which the respondent failed in his duty as an auditor … [b]ut I am also satisfied that the respondent failed in his duty as an auditor of Kentford by signing unqualified reports on the financial statements for the years in question."*

He also stated at p. 10 that he was: -

> *". . . satisfied that he [the respondent] failed in his duty as an auditor by not looking behind whatever assurances that he was given as to the trust nature of the company."*

The judgment concluded at p. 10: -

> *"In respect of all the matters about which the applicant makes complaint against the respondent, I find against the respondent."*

This is a very significant finding albeit one which appears amply justified on the evidence. Nevertheless, the trial judge refused to make the order sought. He did so for what appears to be a number of reasons. First, the events occurred some time ago, and it was apparent that the respondent's business was now successful, and he had testimonials from a number of his financial clients. The judge considered that the matters complained of related to a time between 16 and 20 years prior to the High Court hearing, at a time when the respondent was a junior figure in the organisation and when he was a *"very small and insignificant cog in the larger wheel being turned by Mr. Des Traynor"*. It was Mr. Traynor and his friends and acquaintances who were involved in the tax evasion scheme and who were the beneficiaries of the respondent's *"undoubted naivety, lack of attention to his responsibilities, and carelessness at the time"*. It was also fair to say that the High Court was influenced – quite properly – by the very significant impact a disqualification order would have. Disqualification as a director would not, it seems, pose any real difficulty for the respondent, but disqualification from acting as an auditor could have a significant impact on his business, which was largely involved in auditing work.

Critically, the trial judge considered that there was *"no risk"* of the respondent returning to the *"irregular and improper conduct he was mixed up in all those years ago"* and that he had shown some appreciation of his position. The judge concluded at p. 12 that: -

> *"Whatever shortcomings there may have been, and there were many in my view, in the manner in which the respondent dealt with questions asked of him by the authorised officer in interviews conducted in March 1999, September 2001 and February 2002, he was at last forthcoming as to the reality in which he finds himself facing an application of this kind. His answering of some of the questions put to him during these interviews could be characterised as vague and even at times evasive, and did not display the same candour which was evident to me during his cross-examination in his affidavits."*

The High Court considered that on these findings the law properly applied did not require any order to be made under s.160, or indeed s.150 of the Act of 1990. The Court's reasoning in this regard is set out in an important passage at p. 11 in the judgment:-

> *"The purpose of an order under s.160 of the Act is not punitive in nature, but rather protective of the community. The fact that the Court is satisfied that the respondent during the years in question failed to conduct himself in a manner that was proper and responsible, is not something for which the Court must inflict a punishment. That is not the Court's function under the section. The only function of the Court is to, where necessary, and for such period as*

> *the Court might consider necessary, prevent a respondent from acting as an auditor or other officer of a company, where the evidence is sufficient to demonstrate that as a matter of probability that the person in question would present a current risk to members of the public who may be adversely affected.*
>
> *Under s.160 the Court has a discretion whether or not to grant the order, even where findings of fact are made which are consistent with the respondent being guilty of a breach of his duty as auditor, and/or that his conduct makes him unfit to be concerned in the management of a company. It is important to note the use of the present tense in relation to unfitness to be involved in the management of a company. That is relevant in the present case where the conduct complained of and found to have occurred, did so between twelve and eighteen years ago. The question to be considered is whether at the time of this application the past conduct makes him presently unfit to be so involved. The reason for this being so is, as I have just referred to, that the section's purpose is not to punish the respondent, but rather to ensure as far as possible that members of the public are protected from harm. If the respondent is not somebody against who the public should be protected, then the Court ought not to make the order sought, even if the matters alleged to give rise to disqualification have been established, as they have in this case."*

It appears from this passage, that the High Court found that the applicant had established the grounds for disqualification of the respondent under sections 160(2) (b) and (d) of the Act of 1990 but that the Court was exercising its discretion not to disqualify the respondent.

The trial judge dealt with this case with conspicuous care and sympathy and an impressive willingness to seek to place the respondent and his conduct in the precise context of the time having regard to his age, experience and commercial practice. If this decision could be characterised as merely the exercise of discretion by the trial judge, then I would have accepted it without reservation, notwithstanding my view that the result appears very lenient. However, having considered the argument made by counsel, I am driven to the conclusion that there are in the judgment three interrelated errors of principle which are central to the decision of the High Court, and accordingly, which mean the decision must be reversed.

First, although the judgment under appeal does not itself cite any authority, it is clear that in identifying the purpose of disqualification it seeks to paraphrase the oft-cited passage from the judgment of Browne-Wilkinson V.C. in *In re Lo-Line Electronic Motors Ltd. and others* [1988] Ch. 477, where he stated at p. 486, that:-

> *"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."*

However the paraphrase contained in the High Court judgment converts the negative *"not the primary purpose"* formula in *Lo-Line* into a positive statement that the *"only function"* of the section is to prevent the respondent from acting as an auditor where the evidence shows as a matter of probability that the person would present a current risk to the public. This is, in my view, significantly different from the *Lo-Line* formulation. The second and related error is the tendency to treat the observations in *Lo-Line* (and a fortiori the paraphrase in the High Court judgment) as a gloss on the statute so as to replace consideration of the words and structure of the statute itself. Not only does this deprive the court of the guidance to be obtained from the entirety of the section in its context, it also means that that the court does not have the benefit of the decision-making structure that the section has been held to require. The third matter is perhaps a consequence of

the first two. It follows, almost ineluctably from the two matters already identified, that the focus of a court taking this approach will be on the possibility of future wrongdoing – something inherently difficult to establish to the satisfaction of a court, particular to the high standard that the disqualification procedure has been held to require. By the same token, a court is almost disabled from considering, or at least giving sufficient weight to, something to which in my judgment the Act of 1990 attaches considerable significance, namely the consideration of a respondent's past conduct and the gravity attaching to it. When such a lopsided posture is adopted, it is much more likely that a court will find it difficult to satisfy itself to the level required that disqualification is necessary, thus leading to decisions which, in my view at least, are more indulgent to respondent wrongdoers than the Act intends. It is necessary to consider each of these matters in some further detail.

The critical passage from the High Court judgment is clearly referable to, and seeks to paraphrase, the well known observations of Browne-Wilkinson V.C. in *In re Lo-line Electronic Motors Ltd. and others* [1988] Ch. 477 at pp. 487-488:-

> *"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 … 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."*

This dictum has been cited with approval in this jurisdiction in *Cahill v. Grimes ("Readymix")* [2002] 1 I.R. 372 and (Murphy, Murray, and McGuinness J.J. concurring); and *In the Matter of Wood Products (Longford) Ltd.* : *Director of Corporate Enforcement v McGowan* [2008] 4 IR 598 (Fennelly, Denham and Geoghegan, J.J. concurring) and *Director of Corporate Enforcement v. Byrne* [2009] 2 I.L.R.M. 328 (Denham, Fennelly and Macken, J.J. concurring). Counsel for the appellant argues however that even on its own terms, the statement that *"[t]he primary purpose of the section is not to punish the individual"* implies that there are other purposes, and that the section cannot be reduced to a question of whether the individual can be trusted to be involved in the running of a company or to act as an auditor of limited companies.

It is, I consider, a significant and unjustified shift to move from the negative and qualified statements that *"the primary purpose of this action is not to punish the individual"* and "*the power is not fundamentally penal"* to a positive and absolute assertion that the *"only function of the Court is to … prevent a respondent from acting as an auditor or other officer … where the evidence is sufficient to demonstrate that as a matter of probability that the person in question would present a current risk to members of the public …".* This shift is not justified by the language of *Lo-Line* (since a *"primary"* purpose necessarily implies other purposes) nor by authority. The courts, both in this jurisdiction and in the United Kingdom, have identified other important purposes of the disqualification regime. First and most importantly, the section manifestly contains a deterrent element. In *Director of Corporate Enforcement v. Byrne* Denham, J. observed at para. 22 (vii) that *"there is an element of deterrence in the exercise of the court's discretion"* and in *In re Wood Products Ltd*., Fennelly J. observed at para. 48 (Denham and Geoghegan J.J. concurring) *"I agree, however, with the written submissions of the applicant who suggests that there should be an element of deterrence in the exercise of the discretion"*. This, in turn, is consistent with United Kingdom authority: see, for example the observations of Hoffman, L.J. (as he then was) in *In re Grayan Building Services Ltd*. [1995] Ch. 241 at 253: -

> *"Parliament has decided that it is occasionally necessary to disqualify a company director to encourage the others."*

Again, in *In re Wood Products Ltd*., Fennelly J. identified a closely related purpose of the disqualification regime - that of improving corporate governance. In that case, at para. 46, Fennelly J. quoted with approval the judgment of Henry L.J. in *In re Grayan Building Services Ltd.* at p. 257 as follows: -

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

Having quoted this passage, Fennelly J. at para. 48 observed that *"it is part of the policy of the section to improve corporate governance" adding that "[c]ourts have become increasingly vigilant and less tolerant in relation to lax standards and disregard of the law"*.

Balcombe L.J. in *Secretary of State for Trade and Industry v. Langridge* [1991] Ch 402 spoke at pp. 413 - 414 to the same effect: -

> *"In my judgment the scope and purpose of the [Act] is clear. The ability to trade through a company with the protection of limited liability, and with the use of capital subscribed by third parties, is of great economic advantage and confers considerable privileges on persons so enabled. These privileges involve corresponding responsibilities and the public (in the form of creditors shareholders and employees.…) needs to be protected from persons whose conduct has shown that they have abused those privileges … [a]ccordingly the purpose of the [Act] is to protect the public and its scope is the prevention of persons who have previously misconducted themselves in relation to companies, or who have otherwise shown themselves as unfit to be concerned in the management of a company, from being so concerned."*

It is also this mix of factors, and in particular the importance of deterrence as a factor, which explains why the process of fixing a period of disqualification is most closely approximated to the sentencing process. In *Director of Corporate Enforcement v. D'Arcy* [2006] 2 I.R. 163, Kelly J., at p. 179, quoted with approval the observations of Lord Woolf M.R. in *Re Westmid Packing Ltd* [1998] 2 All E.R. 124 at pp. 131 – 132, where, having quoted the well-known dictum of Browne-Wilkinson V.C. in *Lo-Line*, he continued: -

> *"[o]ther factors come into play in the wider interests of protecting the public i.e. a deterrent element in relation to the director himself and a deterrent element as far as other directors are concerned. Despite the fact that the courts have said disqualification is not a 'punishment', in truth that is the exercise being engaged in is little different from any sentencing exercise. The period of disqualification must reflect the gravity of the offence. It must contain deterrent elements. That is what sentencing is all about and that is what fixing the appropriate period of disqualification is all about. What Vinelott J. (in Re Pamstock Ltd [1994] 1 B.C.L.C. 716 at 737) called ' tunnel vision' i.e. concentration on the facts of the offence, is necessary when considering whether a director is unfit. In relation to the period of disqualification the facts of the offence are still obviously important but many other factors ought (and in reality do) come into play … [w]e do not consider it would send out a wrong*

> *message to fix the period of disqualification by starting with an assessment of the correct period to fit the gravity of the conduct, then allowing for the mitigating factors, in much the same way as a sentencing in court would do."*

I observe that the approach of fixing a period by reference to the gravity of the conduct is not easily reconciled with an approach that the protection of the public in the future is the *"only function"* of the Act. Indeed, the judgment in *Lo-Line* itself recognises, at p. 486, the effect of disqualification is penal at least in part:- *("Since the making of a disqualification order involves penal consequences for the director…"*). That is why the Court considered that elaborate fair procedures, protecting the interests of the respondent, had to be followed before a court could properly make an order of disqualification. It does not seem realistic to argue otherwise or indeed to contend that this obvious effect of such disqualification was not contemplated by the legislature.

In my view these observations in the decided cases are wholly consistent with the content and structure of s.160 of the Act of 1990. It seems to me that on consideration of the section as a whole, it is a significant error to characterise the section as having only a single purpose, that of protecting the public from the respondent in the future.

It is, I think, important to consider the disqualification regime in its entirety. Section 160 (as amended by ss. 14 and 42 of the Company Law Enforcement Act 2001) provides a number of circumstances in which a person may be disqualified from acting as an auditor, director or other officer of a company. Section 160(1) provides for mandatory disqualification for a period of five years from the date of conviction on indictment *"of any indictable offence in relation to a company, or involving fraud or dishonesty".* Section 160 (1)(A) provides for mandatory disqualification of a person who fails to comply with s.3(A) (1) of the Companies (Amendment) Act 1982 or s.195(8) of the Principal Act (which relate to notification of the disqualification in another country). Section 160(2), as amended, is discretionary and provides as follows: -

> *"Where the court is satisfied in any proceedings or as a result of an application under this section that:-*
>
> *(a) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors; or*
>
> *(b) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner; or*
>
> *(c) a declaration has been granted under section 297A of the Principal Act (inserted by section 138 of this Act) in respect of a person; or*
>
> *(d) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company; or*
>
> *(e) in consequence of a report of inspectors appointed by the court or the Director under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company; or*
>
> *(f) a person has been persistently in default in relation to the relevant requirements; or*

(g) a person has been guilty of 2 or more offences under section 202(10); or

(h) a person was a director of a company at the time of the sending, after the commencement of section 42 of the Company Law Enforcement Act, 2001, of a letter under subsection (1) of section 12 of the Companies (Amendment) Act, 1982 , to the company and the name of which, following the taking of the other steps under that section consequent on the sending of that letter, was struck off the register under subsection (3) of that section; or

(i) a person is disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking and the court is satisfied that, if the conduct of the person or the circumstances otherwise affecting him that gave rise to the said order being made against him had occurred or arisen in the State, it would have been proper to make a disqualification order otherwise under this subsection against him."

Section 160(3) provides for conclusive proof that a person has been persistently in default in relation to the relevant requirements under s.160(2)(f) by proof that in any five year period he has been adjudged guilty of three or more defaults in relation to those requirements. Sections 160(3)(a) and (3)(b) make consequential provisions in relation to subsections (h) and (i) respectively. Subsection 8 provides for relief from an order of disqualification or deemed disqualification either in whole or in part. Section 160(9)(A) provides for the alternative of a declaration under s.150 restricting a person from acting as a director of a company other than on the terms set out in the section. Subsections (a) to (f) of s.160 were contained in the Act of 1990 and ss. (g) to (i) were added by the Company Law Enforcement Act 2001.

It seems clear that the complexity and variety of s.160 cannot be reduced to a single touchstone whether identified as the *"primary purpose"* or the *"only function"* of the Act. Instead, the Act ranges from very serious matters requiring mandatory disqualification to matters which might, in certain circumstances, be regarded as regulatory, posing no immediate or obvious threat to the public. It is also significant in my view that the deemed disqualification under s.160 (1) is mandatory. The consequence of mandatory disqualification follows upon the conviction irrespective of the nature of the matters giving rise to the conviction, their age or any prediction as to the future risk to the public from the individual concerned.

It is clear, therefore, that the section contains a number of different elements. Reducing this section to a single function excludes a number of factors which are plainly intended objectives of the Act and renders the consequent application of the Act likely to be unbalanced and one-dimensional.

In my view, it is a related and perhaps a more significant error to seek to apply the disqualification regime by reference to a single gloss on the provisions of the Act, whether phrased as *"primary purpose"* or *"only function"*. For reasons already touched on, such an approach risks a misconstruction of a system of disqualification which is complex and contains many elements reflecting different legislative concerns. Such a starting point also leads almost inevitably to an approach which treats the legislation as if it contains a single one-step test which is largely forward-looking and essentially discretionary, rather than the structured approach which in my view the legislation requires. In *Director of Corporate Enforcement v. Byrne*, Fennelly J referred at para. 64 to the judgment of Dillon L.J. in *Re*

Sevenoaks Stationers Ltd. [1991] Ch. 164 at p. 176 where he deplored the tendency to treat the *Lo-Line* passage as *"judicial paraphrases of the words of the statute, which fall to be construed as a matter of law in lieu of the words of the statute"* when the true question to be tried was one of fact. Those observations are particularly apposite here.

In *In re Wood Products Ltd*., Fennelly J. also identified an error in the decision under appeal, which in my view is instructive in the present case. There, the trial judge had decided not to disqualify the director in question holding that on balance, the director had not been shown in the event to be unfit to be a director and in the exercise of the Court's discretion, the Court decided not to disqualify the director because of, inter alia, the impact of disqualification on a company which had a number of employees. It may be noted therefore, that the High Court in that case applied a single broadly discretionary test akin to considering whether it was in the public interest to disqualify the particular respondent. As Fennelly J. observed, this was an illogical departure from the structure of the Act. The Act requires a two-stage inquiry. First, the court must consider whether one or more of the subparagraphs of s.160(2) have been established. These in the words of Fennelly J., are *"jurisdictional triggers"* or as counsel in this case put it *"gateways",* to the second stage of the inquiry which is a consideration of the court's discretion. In that case, there had in fact been no finding of unfitness, and as Fennelly J. pointed out at para. 32 of his judgment *"in the absence of a finding on fitness, the judge has not established jurisdiction to make a disqualification order. It was not logical for her to proceed to consider the exercise of her discretion"*.

The Act of 1990, as Fennelly J. observed, requires a two-stage inquiry. First, the court must determine as a matter of objective forensic inquiry, whether one or more of the criteria under the subparagraphs of s.160(2) has been established to the degree and level required. These are the *"gateways"* to the second stage, which is the exercise of the court's discretion.

It is, I think, important to follow the decision-making structure thus implied in the Act, particularly when the inquiry involves such broad and general concepts as future unfitness to be concerned in the management of the company. Such an approach highlights the important fact that this case does not concern a single issue of unfitness under s.160(2)(d) but also a more focussed issue of breach of duty under s.160(2)(b).

A consideration of the structure of the subparagraphs of s.160(2)is useful in seeking to interpret the subparagraphs in issue in any individual case. It is noteworthy that only subsections (d) and (e) refer expressly to the concept of unfitness. It has been observed that in one sense s.160(2)(d) can be said to encapsulate all the other grounds. Looked at in another way, this subsection could be said to be a catch-all provision capturing conduct not specifically identified in the other subsections, but which may nevertheless justify disqualification subject to the court's discretion. It is important, therefore, that the Act specifies conduct in the other subsections of s.160(2) which the Act itself appears to consider to render a person, presumptively at least, unfit to be a director. In that way, subsection (d) sheds light on the other subsections. By the same token, the other subsections gives some indication of the type of conduct unspecified in subsection (d) itself, which would justify the making of a disqualification order under that subsection. Given the vagueness of the concepts being discussed, the perspective thus provided offers a valuable degree of focus to an inquiry under s.160 of the Act of 1990.

If this two-stage structure is adopted, it will necessarily facilitate scrutiny of the decision in the future. More importantly, it would make the decision-making process itself more rigorous. In this case, for example, it would focus attention on the specific breaches of s.160 (2)(b) which, it must follow, the trial judge had found to have occurred. It would also make it more difficult to characterise all of the defaults complained of as occurring "so long ago" or at a time when Mr. McCann could be described as a relatively junior employee (albeit a fully qualified accountant with his own practice) and under the influence of Mr. Traynor and Mr. Field-Corbett. On the contrary, it is apparent when the details of the individual matters are considered, that one of the most serious matters

complained of – the repeated assertion by Mr. McCann to an authorised officer that the Traynor letter was genuine – occurred over an extended three year period between 1999 and 2002 at a time when Mr. McCann's business was well established, when Mr. Traynor was long since deceased, and when, moreover, it was publicly known that Kentford – a business of which Mr. McCann had been both director and auditor – had been the vehicle used by the late Mr. Traynor for a sophisticated and extensive scheme of tax evasion.

A further important consequence follows, in my view, from the matters already identified. If the Court adopts a single, forward-looking test derived from a gloss upon the observations of Browne-Wilkinson V.C. in *Lo-Line*, then in my view it is almost inevitable that the inquiry will be focussed almost exclusively on the future conduct of the respondent. Such an inquiry is something a court will almost always consider to be somewhat speculative. At the same time, if the matter is approached on the assumption that the Act of 1990 has no penal consequence or deterrent function, then almost of necessity the past conduct of the respondent becomes much less relevant. However, the consideration of the behaviour of the respondent in the past and whether or not it can be established as a matter of fact, and if so the assessment of the gravity of such conduct, are all matters which fall more naturally within the powers and experience of the court. In my view, it is clear from an analysis of the Act, that the Act directs attention to that past conduct as certainly the best, if not the only, guide to the necessity for disqualification. It will be apparent therefore, that a test of future unfitness either detached from, or at least considerably distant from, an assessment of the gravity of past conduct, is a test which is skewed in favour of potential respondents. It has also been observed, that given the penal consequences of a disqualification order for any director or other officer, that a court must feel a high degree of confidence before making any such disqualification order. In such circumstances, it becomes increasingly likely that a court adopting the approach of a single, forward-looking test of future unfitness, and properly requiring a high degree of proof, will come to a conclusion which will not achieve the statutory objectives.

It seems clear to me that the Act of 1990 considers that past conduct is the key to disqualification, and which conduct, in itself, demonstrates either the breaches of duty or general unfitness which can justify disqualification unless the court, in the exercise of discretion, considers that such an order should not be made. This is a more focussed inquiry, and one which is rooted in the Act. It is an approach which has been repeatedly invoked in judgments of the courts both in this country and in the United Kingdom. Thus for example, the well known passage in *Lo-Line* identified the primary purpose of the section as protecting the public against *"the future conduct of companies by persons whose past records as directors… have shown them to be a danger to creditors and others"* (Emphasis added). In the judgment in *Secretary of State for Trade and Industry v. Langridge* [1991] Ch 402, already referred to above, Balcombe L.J. stated, at p. 414, that the purpose of the Act was to *"protect the public and its scope is the prevention of persons who have previously misconducted themselves in relation to companies, or have otherwise shown themselves as unfit to be concerned in the management of a company from being so concerned"*(Emphasis added). In the judgment of Finlay-Geoghegan J. in *Re Ansbacher (Cayman) Ltd Director of Corporate Enforcement v Collery* [2006] I.E.H.C. 67, a number of principles were set out for the determination of an appropriate disqualification period, one of which was expressed as follows at para. 31: -

> *"The period of disqualification should reflect … the gravity of the conduct as found by the inspectors which makes the respondent unfit to be concerned in the management of a company."* (Emphasis added)

This aptly encapsulates the close link which the Act, in my view effects between the past conduct inquired into, and the unfitness or other default justifying disqualification.

In this regard, counsel referred us to the judgment of Hoffman L.J. (as he then was) in *In re Grayan Building Services Ltd.*, at p. 254, where he approved the approach of Vinelott J. in *Re Pamstock Ltd* [1994] 1 B.C.L.C. 716 at p. 736 where he said that it was his duty to

disqualify a director whose conduct *"fell short of the standard of conduct which his today expected of a director of a company which enjoys the privilege of limited liability"*. On that basis Hoffman L.J. considered that the only thing that the court could have regard to was the conduct charged. This is the *"tunnel vision"* referred to in some of the decisions. While the decisions of the U.K. Courts have been shown to be of considerable assistance in this field, they still must be read against the different statutory background where disqualification is mandatory but where the disqualification process is generally only triggered by insolvency. It may be therefore, that the observations of Lindsay J. in *Re Polly Peck International Plc. (No.2)* [1994] BCLC 574, although disapproved of by Hoffman L.J. in *In re Grayan Building Services Ltd*., as a matter of English law, may nevertheless be closer to the approach required under the Irish Act. Lindsay J. would have permitted a more broad ranging inquiry, but it is significant that it was still an inquiry into past conduct, rather than a necessarily vague and unspecific speculation as to future conduct. He suggested at p. 584 that *"evidence of past conduct … which would justify a present finding of past unfitness to the required level may, unless the respondent otherwise satisfies the court, be taken by the court also to prove a present unfitness to that same required level"*. Lindsay J. also cites at pp. 578 – 579 of that judgment the following useful statement of Gibson J. in *Re Bath Glass* [1988] B.C.L.C. 329 at 333, which was specifically approved by the Court of Appeal in *Re Sevenoaks Stationers Ltd.* [1991] Ch. 164 at p. 183, identifying the conduct and behaviour which constitutes such past, and present, unfitness:-

> *"To reach a finding of unfitness the court must be satisfied that the director has been guilty of a serious failure to perform those duties which are attendant on the privilege on trading through companies with limited liability."*

That is a useful test, and one which the respondent, on the trial judge's findings, must be said to have comprehensively failed.

It follows, and with respect to the learned High Court judge, that I consider that it was an error of analysis to address the case as if there was a single discretionary and forward-looking test i.e. whether the respondent would pose a danger to creditors in the future. The true test is contained in the words of the section. The section poses a two-stage test. First, whether conduct falling within any of the subcategories of s.160(2) has been established as a matter of fact. Second, whether the court in the exercise of its discretion should proceed to disqualify. Had this approach been taken in this case, it would, in my view, have revealed that the conclusion to which the trial judge came was unduly indulgent. Indeed I think it can be fairly said that it was the framing of the question as one of proof of future dangerous behaviour which led the Court to the conclusion to which it came.

In the first place, it must follow from the trial judge's findings in favour of the applicant with regard to all the matters in respect of which he made complaint, that subparagraphs (b) and (d) of s.160(2) were satisfied and that it had therefore necessarily been established that the respondent was in breach of his duty both as a director and auditor and that on that basis, and otherwise, he was by definition unfit to be involved in the management of a company. It is only after, and in the light of, such a finding that the court should come to a consideration of the exercise of its discretion. The exercise of identification of the particular breaches of duty and the conduct amounting to unfitness in this case is a sobering exercise.

First, the respondent was plainly in breach of his duty as a director of the company. The fact is that the trial judge found the respondent was probably unaware even of the very nature of the company's business activity. Nor was this a case of a director making wrong, even reckless, decisions in the course of running a genuine business which had run into financial difficulties. Nor indeed was the inaction of the respondent due to ignorance, laziness or a foolish trust in other directors to run the business. The purpose of the respondent becoming a director was to provide the appearance of compliance with the

requirement of corporate governance under the Companies Acts and to carry out those tasks – such as the signing of bank mandates – which the law or prudent business practice, or both, require to be carried out by directors.

It follows from the judge's findings that the respondent while auditor of the company, was also a director of the company. That is a breach of a statutory obligation imposed by s.187(2)(a) of the Act of 1990, and one of the few obligations imposed upon an auditor by the Act of 1963. It follows, that this matter in itself satisfied section 160(2)(b).

It is also an unavoidable conclusion from the findings of the trial judge, that the respondent was in breach of his duty as an auditor for each of the years during which he was the director of the company. Again, this is not merely a case of errors, however serious, in the carrying out of a genuine audit. There is, in truth, no objective evidence that any audits were carried out, since the respondent claims to have handed all his audit working papers to Mr. Traynor. But if any audit was carried out, it was perfunctory at best. Perhaps the most telling finding is the judge's observation made, in excusing the respondent from any knowledge of the illegality which was taking place in relation to Kentford, that the respondent was (while director and auditor) unaware of the nature of the company's business activity. As the trial judge found, the respondent did not carry out his basic duty as an auditor. There was the appearance of compliance with the statutory formalities: there was no performance of the substance. This was a plain and complete breach of s. 190(6) of the Act of 1990. Accordingly, this also satisfied section 160(2)(b).

The trial judge found that the respondent's resignation as director did not occur on the 14th March, 1989 as he maintained, but rather was backdated to that date. It is not stated in the judgment, but it is an unavoidable conclusion that the purpose of that backdating was to seek to conceal the breach by the respondent of his obligation under s.187(2)(a) of the Act of 1990 as an auditor, not to be a director of the company. I do not think that the conduct can be excused by a general reference to a culture of backdating documentation *"in order to correct the paper record"*. The backdating of the respondent's resignation did not *correct* the paper record: it created one and one which it must be said was false and intentionally so. The respondent maintained throughout the High Court hearing that he had in fact resigned as of March 1989 and furthermore, had procured correspondence from Mr. Field-Corbett and his daughter, both then resident in the Isle of Man, and which purported to confirm his resignation as of March, 1989. The trial judge rightly placed no faith in that correspondence. The judge would have been entitled to consider the entirety of the respondent's behaviour in this regard as conduct which fell below the standards of behaviour required of a director and auditor and thus justifying a finding under section 160(2)(d).

Significant though the foregoing matters were in themselves, and in the picture of activity, or more accurately, deliberate non activity, which they revealed, there is no doubt in my mind that the purported letter of the 23rd January, 1990 is the most serious matter in this case, and was perhaps the catalyst in leading the Director of Corporate Enforcement to bring this application. It bears repeating that this was the only Kentford document retained by the respondent. It is plain that it was created in 1993 or later and backdated. The trial judge found that the respondent *"must have been aware that the letter was backdated"*. Yet the respondent repeatedly maintained to the authorised officer that the letter was genuine and that he had had it in his possession when he carried out his first audit. The trial judge's finding that the respondent did not act *bona fide* when he handed a copy of the letter to the Inspector is damning but unavoidable. There is no doubt that conduct in dealing with an official investigation can itself be seen as conduct aggravating particular wrongdoing, and it was argued that such conduct could also justify a finding of unfitness since the respondent appeared before the authorised officer in respect of his function as a director or auditor. (See *Secretary of State for Trade and Industry v. Reynard* [2002] 2 B.C.L.C. 625). It is not necessary to resolve that issue, since it is plainly a matter which can be taken into account in the exercise of the court's discretion. It is, in my view, a most serious matter. The finding of lack of *bona fides* is certainly a finding of lack of probity and honesty, occurring in the very significant context

of the interaction with an authorised officer. Moreover, the trial judge drew the inevitable conclusion that the purpose of producing the letter had been to provide support for the respondent's assertion that he was at all times aware that Kentford was a trust company. It bears repetition that the respondent maintained this stance over a period of three years. This makes the respondent's behaviour all the more serious and makes even more damning his failure to explain the circumstances in which he came into possession of the letter which must have been in or after 1993, and how it was, that of all the Kentford documents held by him, the one document which had survived was bogus, and yet, was intended to provide assistance to him. The terms of the letter are themselves unintentionally eloquent as to the true position. On its face, here was a letter from a person who had no official connection to the company, whether as shareholder or director, and directed to the directors and auditor of the company informing them of the nature of the business of the company. It also seems clear from the terms of the letter itself, that it was prompted by a need to demonstrate apparent compliance with the somewhat more demanding requirements as to corporate governance which had been introduced by the Act of 1990.

Had the exercise of considering the precise gateways established on the evidence been carried out, it seems clear that the implicit finding made by the trial judge, that the complaints under s.160(2)(b) and (d) had all been made out, would have been explicit and detailed. It necessarily follows that the respondent would had been found to have fallen below the standards of behaviour expected of a director and auditor of a limited liability company, and was thereby unfit to be associated with and to be concerned in the management of a company unless they were matters which would justify the Court in exercising its discretion in this favour. Once these matters had been analysed in this way, the height of the hurdle facing the respondent would have been apparent. Furthermore, it would have been clear that not all the matters complained of could have been characterised as occurring *"so long ago"* and when the respondent was in relative terms, a junior accountant. In particular, the most serious matter being the respondent's conduct in respect of the use, maintenance and deployment of the letter of the 23rd January, 1990 occurred much later and at a time when Mr. Traynor was dead and the respondent was no longer beholden to him. While less serious, it was also the case that the respondent had maintained to the very end and in the teeth of the evidence that he had not been a director of the company between 1989 and 1992, even though it was self-evident, that he had acted as such.

The trial judge found, however, that the respondent had displayed some candour, at least in relative terms, during his cross-examination in the High Court, which allowed the Court to conclude that his conduct was *"a thing of the past, and that the experience of being caught up in other peoples' deception and illegality has been a chastening one for him and one to which he will never risk returning"*. This finding was central to the Court's conclusion that the case for disqualification, or indeed any restriction, had not been made out. It is clear that this conclusion was almost entirely dependent on the Court's perception of s.160 as solely concerned with future risk of misbehaviour by the respondent.

It is axiomatic that the assessment of a witness is a matter for the trial judge. Here however, counsel for the Director referred us to extracts from the cross-examination. The starting point must be the trial judge's finding that the respondent's decision before the authorised officer was not *bona fide*. Furthermore the respondent maintained stoutly that he had truly resigned as a director in 1989 – a claim rejected by the trial judge. It might be expected therefore, that if the respondent had experienced a change of heart in respect of the position he had adopted, it would be apparent from the content of the evidence which he gave. I think it can be fairly said, however, that there is nothing in the content of the testimony which would justify a description of the evidence itself as candid and/or repentant. The following extract from the cross-examination on Day 2 is illustrative:-

> *"56 Q. We know your view that persons can be directors of companies and have no idea what sort of business is carried on by the company. Is it common*

in your experience for auditors of the company to have no idea what business is being carried on by the company?

A. I was engaged to do the audit of Kentford Securities and I was told this was a trust company. The activities of the trust or the actions being carried on by the trustees that I was not aware of.

57 Q. I am sorry, the question I asked you Mr. McCann is this: is it unusual for a person to be an auditor of a company and have no idea what business is carried on in the company?

A. In relation to Kentford, I had asked Mr. Traynor for sight of the trust documents so I could see. The trust document was not made available to me but I took Mr. Traynor at his word. I made a judgment call and I relied on Mr. Traynor's word that this was a trust company. The activities of the trust I was not aware of.

58 Q. Is it unusual, Mr. McCann, for a person to an auditor of a company and have no idea what sort of business that company is carrying on?

A. The business of Kentford Securities was a business of a trust company, and that is as far as I was aware. It was a trust company.

59 Q. I am going to ask you a lot of questions about Kentford, but before I ask you anything more I just want you to answer this general question. It is a general proposition. It is either yes or no. Is it unusual for a person to be an auditor of a company and to have no idea what business is carried on by the company?

A. If a company is in the business of manufacturing you know what goods it is manufacturing. If it is a service you will know it is a service company. So in this instance I was told it was a trust company and I didn't make more detailed inquiries in relation to the trustees."

Ultimately and after further exchanges, Mr. McCann eventually conceded *"I should have found out more about what it does so to answer your question, no, it would not be sufficient"*. Subsequently he observed that *"It would be desirable to have sight of the trust documents to see what the nature of the trust was"*. This answer reveals starkly, the abject failure to conduct any proper audit in this case. It was correct, if easy, for the respondent to say that he should have found out *"more"*: that was because he knew almost nothing, even though he was the auditor with the unintended benefit of also having been a director. However, nothing in the content of his evidence appears to deserve the adjective "candid". Certainly, we have not been referred to any passage in the evidence which suggests an epiphany on the part of the respondent. What is notably absent from his evidence is any ready acceptance that what the trial judge described as unacceptable behaviour was improper or any explanation of why he had taken the course he did, particularly in relation to the Traynor letter. It seems therefore, that the trial judge's finding of relative candour and his conclusion that there was no recurrence of unacceptable behaviour, likely came from the trial judge's assessment of the demeanour of the respondent while in court and under cross-examination.

Lord Atkin once observed in *Société d'Avances Commerciales (Société Anonyme Egyptienne) v. Merchants Marine Insurance Company (The Palitana)* (1924) 20 LI L Rep 140, at p. 152 that "an ounce of intrinsic merit or demerit in the evidence [was] worth pounds of demeanour", but I do not doubt that the trial judge was fully entitled to consider, in a searching and sympathetic way, the disposition of the respondent. The point here is rather different. This case is itself a vivid illustration of what I consider was the

flaw in the approach of the High Court which was unduly weighted in favour of the prediction of future misbehaviour and thus deflected attention from the evidence of past misconduct and its significance. As already discussed, prediction of future behaviour is a necessarily imprecise art. Here however, an ounce of demeanour outweighs the very substantial evidence of fact found by the Court after the painstaking forensic process of investigation by the Director of Corporate Enforcement and by the calling and testing of evidence before the High Court, which by definition showed the respondent was in (i) breach of his duty as director and auditor, (ii) had fallen below the standard expected of a director and auditor of a company having the privilege of limited liability, and (iii) was thereby unfit to be concerned in the management of a company unless there were matters which could lead the Court, in the exercise of its discretion, not to disqualify him. This result could only occur where the calculus used ascribes great, indeed overwhelming, weight to the prediction of future risk.

It seems that the trial judge was particularly influenced by the significant impact that a disqualification could have upon the respondent's present business. Because the legal test was framed solely in terms of protection from future misconduct and because disqualification is likely in this case to have in some respects a penal effect, the Court seems to have considered that such a consequence was to be avoided. The disqualification regime as interpreted by the Supreme Court in *Cahill v. Grimes* [2002] 1 I.R. 372, is flexible, both as to the terms and conditions of any disqualification, and as to the tariff. In addition, there is the possibility of substituting an order of restriction under section 150. It is possible, therefore, even in the absence of a positive statutory regime for undertakings, to devise orders which reasonably and accurately reflect the different considerations which arise in any case, and the degree of gravity and the countervailing circumstances which a court discerns in the conduct of a particular respondent. In this case however, no order of any nature, however qualified, was imposed. Making every allowance in this case, I do not believe that the section can achieve its purpose in deterring misbehaviour, improving corporate governance and even protection of the public, if such a result were permitted to stand.

The trial judge dealt with this case carefully and sympathetically. He was fully entitled, in my view, to make considerable allowances for the position of the respondent, the culture of the times, the fact that the respondent was a small cog in an operation, and did not directly benefit from the illegality of Kentford. He was able to point to a very considerable period during which he had practised without any adverse finding by his own professional body. Furthermore, he had in the words of the High Court judge, provided testimonials from worthy individuals who were clients. The trial judge was entirely correct, I think, on the unfairness of judging a person's character by reference solely to events in the past, and by reference to the standards of today rather than those which applied at the time. If the respondent had frankly acknowledged to the authorised officer his part as it was in the provision of services to Kentford, which allowed Mr. Traynor to operate the business and had given a full explanation, then this case might have been very different. However, that is not what occurred here and in my view the cumulative effect of these matters is very grave. If the approach taken by the High Court in this case were to become the standard for these applications it would significantly reduce the effectiveness of s.160 as a protection of the public, both in respect of the individual directors and auditors, and as a deterrent to others.

I would, however, be prepared to accept that the whole experience has been a chastening one for the respondent and that the process of court proceedings over a significant period of time has been in every respect a costly one and furthermore, that the impact of disqualification may be particularly severe on him in his business as an auditor. Accordingly, I would propose re-entering the matter with a view to considering whether a short period of disqualification and the conditions that might be attached to it by way of limitation to specific clients or limitation on sole practice as an auditor or otherwise, might meet the merits of this case, and still achieve the objects of the Act.

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