Judgments

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THE HIGH COURT

2005 269 COS

IN THE MATTER OF THE COMPANIES ACTS 1963-2003

AND IN THE MATTER OF NATIONAL IRISH BANK LTD

AND IN THE MATTER OF NATIONAL IRISH BANK FINANCIAL SERVICES LTD

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

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

JIM LACEY

RESPONDENT

JUDGMENT of Mr. Justice Roderick Murphy dated 8th day of April, 2011.

1. Background

1.1 Mr. Justice Blayney and Tom Grace F.C.A. were appointed Inspectors of National Irish Bank Limited ("the Bank") on the 30th of March, 1998, pursuant to s. 8 of the Companies Act 1990. The terms of reference were to investigate and report on the affairs of the Bank relating to:-

(i) the improper charging of interest to accounts of customers of the Bank between 1988 and 30th March 1988;

(ii) the improper charging of fees to accounts of customers of the Bank between 1988 and 30th March 1998;

(iii) the improper removal of funds from accounts of customers of the Bank between 1988 and 30th March 1998;

(iv) all steps and action taken by the Bank, its directors and officers, servants or agents in relation to the charging of such fees or interest or the removal of any funds without the consent of the account holders and their actions arising from the issues when discovered;

(v) the manner in which the books, records and accounts of the Bank reflected the foregoing matters;

(vi) the identity of the person or persons responsible for or aware of any of the practices referred to above;

(vii) whether other unlawful or improper practices existed or exist in the Bank from 1988 to 30th March 1998 which served to encourage the evasion of any revenue or other obligation on the part of the Bank or Third Parties or otherwise.

On the 15th June 1998, again on the application of the Minister for Enterprise, Trade and Employment, the Inspectors were similarly appointed to investigate and report on the affairs of the National Irish Bank Financial Services Limited ("NIBFSL"), relating to:

(a) The effecting of insurance policies through NIBFSL with:

Clerical Medical Insurance Company Limited

Scottish Provident International Life Assurance Limited

Old Mutual International (Guernsey) Limited

(b) The role of NIBFSL, its officers, servants and employees in connection with the effecting of the said policies of insurance.

(c) The purposes behind the execution of the aforesaid policies of insurance.

(d) The knowledge of the management and board of directors of NIBFSL of the effecting of the said policies of insurance.

(e) The identity of the person or persons responsible for or aware of the effecting of or purposes behind the said policies of insurance.

Both Orders were amended on the 31st July 2001. The effect of the amendments was to join the Bank in the Order of 15th June 1998, and make it, as well as NIBSFL, the subject of that Order. The amendments also extended the list of insurance companies set out at (a) above to include CMI Insurance Company Limited, Clerical Medical and General Life Assurance Society and Clerical Medical Investment Group Limited.

Copies of the four Orders are set out at Appendices 1 to 4 of the report

1.2 By order of Shanley J. made the 13th July, 1998, it was declared that persons (whether natural or legal) from whom information, documents or evidence were sought to the Inspectors under the Companies Act 1990, were not entitled to refuse to answer questions put by the Inspectors or to refuse to provide documents to the Inspectors on the grounds that the answers or documents may tend to incriminate him or her or it.

It was further declared that the procedures outlined by the Inspectors in their letter dated 4th June, 1998 were consistent with the requirements of natural and constitutional justice.

The Supreme Court (O'Flaherty, Barrington, Murphy, Lynch and Barron JJ) by order dated the 21st January, 1999 dismissed the appeal of the representative respondent and affirmed the judgment and order of 13th July, 1998 with the addition thereto that a confession of a bank official obtained by the Inspectors as a result of the exercise by them of their powers under s. 10 of the Companies Act 1990, would not in general be admissible at a subsequent criminal trial of such official unless in any particular case the trial judge was satisfied that the confession was voluntary.

1.3 An application by the Bank that the Inspectors' DIRT compliance investigation of the Bank should be limited was refused by the Court by order dated the 19th March, 1999.

1.4 Having dealt with the concerns of potential witnesses and the Bank, the Inspectors reviewed documentation and conducted 234 sworn interviews. The majority of the 142 customers interviewed were investors in CMI policies. There were a further 87 investors with present or former Bank staff including senior executives and directors and six others. The Inspectors, had interviewed 32 of the 113 who had held the position of branch manager during the period.

1.5 The Inspectors then prepared provisional findings and, having set out and communicated the findings that adversely affected those interviewed, including the respondent and invited them to make intended submissions or arguments they might wish to present.

1.6 Having taken such submissions into account, the Inspectors submitted the report to the court on the 9th July, 2004. By order of the court made on the 23rd July, 2004 the report was published.

2. The Application

The respondent was Chief Executive of the Bank for a period of six years from between 1st April, 1988 to 22nd April, 1994 and continued as a Director of the Bank until 30th September, 1997.

The Director of Corporate Enforcement ("the applicant") applied to the court for orders pursuant to s. 160 of the Companies Act, 1990 declaring Mr. Lacey ("the respondent") to be disqualified from being appointed or acting as an auditor, director, or other officer, liquidator, receiver or examiner or being in any way, whether directly or indirectly, concerned in or taking part in the promotion, formation, or management of any company or society registered under the Industrial and Provident Societies Act 1893 – 1978 for such period as the court shall think fit.

3. Notice of Motion

3.1 By notice of motion dated 18th July, 2005, the applicant referred to specific findings in the Report of the Inspectors appointed by the court to investigate the affairs of the Bank.

The applicant pleaded that, insofar as the respondent was concerned, it was evident from the Inspectors' Report that:

> "1. The respondent failed to act at all or act adequately to deter or correct the numerous and regularly reported shortcomings and bank practices and procedures which were brought to his attention in internal audit reports and otherwise;
>
> 2. The respondent failed to arrange for the development and implementation of policies and procedures which would have secured a culture of compliance with law and with professional standards within the Bank, the absence of which clearly contributed to the nature and extent of the improper practices which prevailed;
>
> 3. Responsibility for these practices rested with senior management in the Bank, and by virtue of his position as Chief Executive, the respondent was ultimately responsible for the Bank's associated legal and professional failures."

The applicant on that basis, in seeking the disqualification of the respondent pleaded as follows:

> "In all the circumstances, it is clear that, by his actions and omissions, the respondent, while acting as an officer of the Bank over a period of six years –
>
> breached his duty as such officer in failing to ensure that the company's legal requirements were complied with and in failing to carry out his common law duties with due care, skill and diligence (s. 160 (2) (b));
>
> engaged in conduct which made him unfit to be concerned in the management of a company (s. 160(2) (d) and (e))."

3.2 Section 160(2) and (8) provide as follows:

> (2) 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;
>
> . . .
>
> the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit.
>
> . . .
>
> (8) Any person who is subject or deemed subject to a disqualification order by virtue of this Part may apply to the court for relief, either in whole or in part, from that disqualification and the court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit."

4. Grounding Affidavit

Mr. Dick O'Rafferty, an officer of the applicant, swore a grounding affidavit on 18th July, 2005. The respondent swore four affidavits in reply on 3rd October, 2005, 2nd October, 2006 and 28th February, 2007 and the 9th June, 2009. Mr. O'Rafferty swore a second affidavit on 22nd December, 2006 in response to the first two affidavits of the respondent.

Mr. O'Rafferty, at paragraph 4 of the grounding affidavit, referred to the grounds upon which relief was sought in the notice of motion. He averred:

> "As appears therefrom, the facts referred to in the grounds are facts relied upon by the Inspectors in their report to draw certain conclusions adverse to the respondent. In the circumstances, having regard to the facts set out in the aforesaid report and the opinion of the Inspectors and the conclusions drawn by them and in the light of the provisions of s. 22 of the Companies Act 1990, I ask this honourable court to make an order in terms of the notice of motion."

The grounding affidavit sets out in detail the findings of the report insofar as they related to the respondent.

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

5. The findings of the Inspectors' Report in relation to the respondent

Mr. O'Rafferty's affidavit referred to the adverse findings of the Inspectors, in their report, against the respondent in respect of six elements. These were bogus non-resident accounts, incorrectly or fictitiously named accounts, certain insurance policies, (so called Clerical and Medical policies) special savings accounts, improper charging of interest and improper charging of fees.

5.1 Bogus non-resident accounts

The Inspectors made a number of findings under this heading in respect of the respondent at page 175 of the Report.

As Chief Executive, the respondent had been copied with internal audit reports which referred to deficiencies or "irregularities" which existed in the operation of Deposit Interest Retention Tax (DIRT) introduced by the Finance Act 1986. Many of these audit reports referred to the failure of certain branches of the Bank to hold properly completed declarations for all accounts classified as DIRT-exempt non-resident accounts. Other reports referred to instances where the residential status stated on the non-resident declarations was at variance with other branch records. There were instances where lending to resident customers was secured by letters of lien over deposit accounts with non-resident status.

The Inspectors were of the opinion that these audit reports pointed to the likelihood that the non-resident accounts referred to therein were in fact bogus and that the extent of reported documentary non-compliance was on such a scale that it constituted a further indication that a substantial portion of the non-resident accounts could be bogus.

The Inspectors believed that the "inevitable inference" in these facts was that the respondent should not only have been aware of the failure of the branches to hold properly completed non-resident account declarations but should also have been aware that bogus non-resident accounts existed throughout the branch network.

As Chief Executive, the respondent held "ultimate responsibility" to ensure that DIRT was deducted from interest paid or credited on all accounts subject to DIRT under the Finance Act 1986. The Inspectors found that the respondent failed to discharge this responsibility.

5.2 Incorrectly or fictitiously named accounts

In relation to the opening and maintenance of fictitiously or incorrectly named accounts, the Inspectors made the following findings in respect of the respondent at page 178 of the report.

The Inspectors found that the respondent, as Chief Executive of the Bank during the period 1st April, 1988 – 22nd April, 1994 may not have had knowledge of the existence of fictitious or incorrectly named accounts at the branches. Nonetheless, the Inspectors found that "as Chief Executive he must bear ultimate responsibility for the practice of opening and maintaining fictitious or incorrectly named accounts" during that period.

5.3 CMI policies

The sale of CMI insurance policies had been the subject of two RTE television reports broadcast in January and February 1998. The reports stated that the Bank had been involved in effecting policies of life assurance on behalf of its customers with a number of companies in the Clerical Medical Insurance Group which were not authorised under E.U. insurance legislation to carry on the business of life assurance in the State. Other policies were effected on behalf of customers with other companies said to be unauthorised. The Inspectors' Report summarised the key allegations made by RTE that representatives of the Bank had gathered information on customers holding non-resident accounts, accounts in false names and customers with funds that had not been disclosed to the Revenue and invited those customers to participate in an off-shore life assurance linked investment scheme with CMI. RTE alleged that senior managers in the Bank were aware that the off-shore investment schemes were being used to help customers evade tax and that some of them encouraged customers to evade tax.

In relation to the respondent, the Inspectors' Report stated:

> "Jim Lacey as Chief Executive recruited Mr. (Nigel) D'Arcy to establish the FASD; Mr. D'Arcy reported directly to him. Mr. Lacey was aware of the level of deposits made by CMI with the Bank. He knew or ought to have known how the product was being promoted. Whether or not Mr. Lacey was aware that CMI product was being promoted to persons wishing to conceal, or continue to conceal, funds from the Revenue Commissioners, as Chief Executive of the Bank he has to bear responsibility for the existence of this practice, which served to facilitate customers of the Bank and others in evading tax."

5.4 Special Savings Accounts

The Inspectors found that the respondent may not have had knowledge of the deficiencies of the operation of SSAs at the branches.

As in the case of incorrect or fictitiously named accounts, they found (page 180 of the Report) that the respondent, as Chief Executive, "must nonetheless bear ultimate responsibility for the shortcomings which existed in this area during that period".

5.5 Improper charging of interest

The Inspectors found, at page 188-189 of the Report, that the respondent was Chief Executive of the Bank during the period in which adverse internal audit reports on interest loading were issued, and with which he was copied. They also found, in respect of the Report of April 1990 concerning the Carrick-on-Shannon branch that, while he had acted appropriately in directing that the practice cease, his reaction was incomplete in that it failed to address the issue of refunds to customers.

5.6 Improper charging of fees

The Inspectors made the following findings at page 191 of their Report.

> "Through receipt of branch audit reports, … Mr. Lacey … (was) made aware of consistently reported shortcomings concerning the lack of explanation supporting fee increases recorded on the Fees to be Applied Reports. They were also made aware, through receipt of branch audit reports, that the Customer Action Pad introduced in July 1992 was not being used. It was (his) responsibility to ensure that there was a system in place in the branches for the contemporaneous recording of management and administration time.
>
> Mr. Lacey, during the period he was Chief Executive … bear(s) ultimate responsibility for the failure of the Bank, … to put in place in the branches an appropriate system for recording management and administration time which was chargeable to customers."

6. Respondent's Evidence on affidavit

The general sense of the evidence of the respondent on affidavit in reply to the applicant's affidavits of the 18th July, 2005, and 22nd December, 2006 was that he was unaware of the existence of bogus non resident accounts: that the term was not used in the internal audit reports and that no one in the Bank had informed him of tax issues.

6.1. Affidavit of 3rd October 2005

In his first affidavit of the 3rd October, 2005, at para. 17, the respondent refers to the internal audit function as one of the most important functions available to the board of management of a financial institution. The role was to carry out regular reviews and audits of the internal controlling system and, in particular, to test and establish the level

of adherence to the controls and procedures of the Bank and to ensure that the business was being carried out in line with the relevant regulations and laws.

He averred that the main reason for forwarding all copies to the Chief Executive was to add weight to the audit report especially for the immediate recipient. Follow up action was for the branch or department manager or his superior if necessary. If internal audit were not happy with the corrective action being taken, they had a responsibility to report this to higher levels in the organisation including the board audit committee. Matters arising from internal audit only came to the respondent's attention when serious shortcomings were disclosed. Reports graded "poor" or "unsatisfactory" were carefully considered by him. He paid particular attention to the matters that had primarily contributed to such grading. Less attention would have been given to points identified by the auditors as being of lesser or more minor significance. In his experience this represented best practice in terms of follow up by a Chief Executive on internal audit reports. As the former internal auditor and finance director he was aware of the importance of having proper procedures, systems and guidelines in place to ensure that legal and regulatory requirements were fully complied with. He consistently emphasised the importance of branch managers and employees of the Bank operating in line with legal and regulatory requirements and the Bank's own internal procedures.

In outlining the structure and management of the Bank he said it was important to note that there were two levels of management between him and individual branch managers in the Bank where inappropriate and improper practice that were the subject of the Inspectors' Report happened.

He believed that the Bank had appropriate structures in place to achieve compliance with the various legal and regulatory requirements.

He said it was evidenced that whatever deficiencies the external auditors may have discovered, they were not considered by them to be of such significance that they warranted being brought to the attention of the board in the management letter issued at the conclusion of the annual audit. It was also important, he said, that the Central Bank of Ireland which conducted inspections relating to the activities of the Bank and its compliance with various requirements did not raise any concerns in relation to any of the issues or shortcomings identified by the Inspectors. This belied the conclusion of the Inspectors that the improprieties were so widespread to the branch network that he should have been aware of them. The Inspectors were satisfied that the internal auditors, the external auditors and the audit committee of the board of directors and the board directors all discharged their duties in a satisfactory manner.

He pointed out that the Inspectors were appointed for approximately ten years from 1988 to 1998, and that he was Chief Executive until April 1994.

He believed that the findings of responsibilities as far as they related to him were fundamentally flawed. He disputed the findings of fact of the Inspectors regarding non resident deposit accounts. He believed the expression "bogus non resident deposit account" was apt to mislead. There was a crucial difference between such account and an account in respect of which an appropriate non resident declaration had not been completed. The majority were not "bogus" accounts at all and this was a fundamental error that the root of the unwarranted conclusion by the Inspectors that bogus accounts were widespread in the branch network. He referred to the settlement reached by the Bank with the Revenue Commissioners in 2000 and 2001 following the inquiry by the Public Accounts Committee into DIRT that a majority of non resident accounts were not bogus and that the settlement was principally on the basis of deficiencies in documentation relating to accounts.

He stressed that it was important that non resident deposit accounts were opened and maintained at branch level. It was only at this level that there could have been first hand

knowledge that any particular account was "bogus" or that paper work was deficient.

He referred to special circulars issued on the 18th March, 1986 and the 24th July, 1986, and to routine circular of the 1st April, 1987, and a further special circular of the 11th March, 1993, which drew attention of the staff of the Bank to the obligations imposed by the 1986 Act.

He also referred to letters and memoranda from the general manager from October, 1989 to November 1993.

He referred also to a memorandum of the 24th December, 1992, from the regional manager north west to all branches on the subject of non resident declarations together with a reply from the manager of Bailieborough in response to the 11th and 26th January, 1993.

He said that it was evidenced from that documentation that senior management were very active in informing staff of the requirements in relation to DIRT. If he had been in the position to identify more documents, he believed that the issue was covered by regional managers in their meeting with branch staff. Accordingly the finding of the Inspectors that senior management failed to inform branch staff in clear terms of the relevant provisions of the Finance Act 1986, until May 1995, was incorrect and lacked any evidential basis and flew in the face of the documentation available to the Inspectors.

He said that the position of the Bank was consistent with that of every other deposit taker in the country and that if the Bank erred in the interpretation of the Finance Act 1986, and in its approach to non resident accounts, that that error was replicated right throughout the entire financial sector.

He said that he was not, during his tenure as Chief Executive of the Bank, aware of the existence of any bogus non resident accounts, still less, as charged by the Inspectors, that these were widespread throughout the branch network. The Inspectors had failed to discover or identify any evidence whatsoever that established that he was aware of the existence of bogus non resident accounts. The Inspectors had relied heavily in that regard on the internal audit reports which disclosed deficiency in documentation.

He said he received approximately 200 internal audit reports, none of which made any reference to "bogus non resident accounts" and only 62 made any reference to inadequacies in relation to the maintenance of documentation relating to non resident deposit accounts.

The only reports which he took a detailed interest in where it was graded on an unsatisfactory level in which case he read the report and noted that the recommended corrective action which was to be followed up by executive management.

Of the 62 reports from 1988 to 1994 to which he referred as having references to inadequacies in relation to the maintenance of documentation relating to non resident accounts, only 6 were classified as poor and, according to his analysis, none were unsatisfactory. He did not have copies of the reports, but considered it unlikely that the issue of missing or incomplete non resident declarations from the basis of the grading. Points raised in relation to deficiencies in paper work in non resident accounts were brought up under the heading of "Points of Lesser Significance"

Where residential status on non resident declarations were at variance with other branch records in the five cases put to him by the Inspectors, the internal audit report highlighted that corrective action was being taken. He could only recall one incidence of securing lending against non resident deposits in Castlebar where disciplinary action was taken.

The Finance Act 1986, did not stipulate that the responsibility to ensure that DIRT was deducted from interest was that of the Chief Executive of a bank. The annual returns in relation to DIRT were signed by the secretary of the Bank. The Inspectors had failed to identify any legal or other basis for stating that this was the responsibility of the Chief Executive as opposed to the board of the Bank or any other person.

The respondent said that he was not aware, at any time during his tenure as Chief Executive, that any fictitious accounts had been opened at any of the branches of the Bank or that there was any problem in that regard. None of the internal audit reports made any mention of the existence of fictitious or incorrectly named accounts. The problem came to light in 1995, which post dated his time as Chief Executive.

He referred to the special savings accounts and said that the Inspectors had reached a peremptory conclusion without any explanation as to why responsibility should be attributed to him. These accounts had only been in operation for a little over a year when he resigned as Chief Executive and he was not aware of any problems which were not flagged in internal audit reports or any other documents. The approach adopted by the Bank in relation to the Special Savings Accounts were consistent with customer practice in the financial sector.

The respondent deposed to the background to the sale of CMI and related products by referring to the position of the bank managers being insurance agents and, subsequently the setting up of the financial services division for the purpose of retailing insurance products which was headed by Mr. Nigel D'Arcy.

He said that the Inspectors had not found that he was aware that CMI or other similar products were being marketed or promoted so as to facilitate tax evasion. He had no knowledge whatsoever from Mr. D'Arcy or any other source that the products were being so used. So far as he was aware they were a wholly legitimate financial investment product which suited risk adverse investors. While Mr. D'Arcy reported to him, he was not recruited by him.

He agreed that he was aware of the level of deposits made by CMI but was concerned that the deposits might be moved. He said that internal audit never identified any problems with CMI products.

The respondent also dealt with his responsibility for improper charging of interest and of fees. He said that where he became aware of the practice, he took immediate steps to end it and gave clear instructions to the appropriate members of senior management. He noted that the Inspectors acknowledged that his response in relation to the improper charging of interest was incomplete as it failed to address the issue of refunds to customers. He accepted that he did not expressly direct that refunds be made, but he believed that this was implicit in his instructions to the general manager – retail banking.

The audit reports on which the Inspectors placed reliance, pointed to shortcomings concerning the lack of explanations supporting fee increases. He pointed out that most of those audit reports were graded satisfactory and the issue was recorded as a point of lesser significance. It was never signalled by the audit reports that this was a serious or widespread problem. It was treated as an administrative deficiency rather than a major weakness in the bank systems or procedures. As such it was not a matter that was flagged for his attention. Internal audit did not signal that fees were being improperly charged. Although the Inspectors were critical of the system used, he believed that if the system had been properly applied by the branch managers, it would certainly have been possible to accurately record time for the purpose of charging fees.

6.2. Affidavit of 2nd October 2006

A year later, in his second affidavit, the respondent emphasised that his ability to defend

the case was hampered by the fact that he did not have access to relevant documentation and requested that the Bank make discovery of 24 categories of documentation. He referred to the Order of the court (Kelly J.) on the 13th October, 2005, granting him access to all of the documents specified in his letter of the 11th October, 2005. Having reviewed the 184 boxes, solicitors for the Bank located further documents. Notwithstanding, he said that he believed that all of the documents falling within the categories of the documentation specified in his letter of voluntary discovery had actually been made available to him. In particular he referred to follow-up documentation in relation to internal audit reports. He referred to the delegation to Ms. Patricia O'Sullivan Lacy, an experienced bank official, of the task of reading internal audit reports which were copied to him and to bring to his attention any reports graded unsatisfactory or poor or any serious issues raised in reports with a better grading and to ensure that the recommendations made and action points identified by the internal auditors were followed up. He said that no documents created by her such as memoranda prepared by her in relation to internal audit reports had been made available for inspection.

The respondent said that he had advised the Inspectors of the existence of documentation that demonstrated that he had followed up and taken appropriate action in relation to issues such as deficient documentation in relation to non resident accounts. He referred to interviews with the Inspectors on the 8th December, 1988 and the 24th April, 2001. In the course of the latter interview the Inspectors furnished him with copies of relevant documentation, but requested them back.

At a further interview with the Inspectorate on the 7th July, 2003, the respondent said that he expressed his regret that he was not in the Bank with access to information because he knew there was a lot more information and that "some people had not been in the position to find information going back".

Accordingly by letter dated the 7th April, 2006, the applicant's solicitors wrote to the Bank's solicitors seeking confirmation as to whether the additional documentation furnished under cover of the letter of the 28th March, 2006, had been furnished to the Inspectors.

The Bank's solicitors replied that their client did not accept that such a request for confirmation properly arose in the context of involvement in the proceedings which the applicant had brought against him.

The respondent then dealt with compliance at the Bank in relation to internal audit reports. He instanced the follow up to internal audit reports graded "poor".

The audit report for Blanchardstown dated the May 1993 was followed by the respondent's memorandum dated the 22nd June, 1993, to the branch manager.

The respondent referred to the response in relation to the internal audit for five branches, three of which were classified as poor (Blanchardstown, May 1993, O'Connell Street, January 1993, and Swords, January 1993 and two which were categorised as satisfactory (Bailieborough, July 1992 and Malahide, March 1989). The respondent referred to the follow up memorandum that he had sent in relation to the first three and the memoranda and letters sent by senior managers in relation to the last two.

He also referred to the follow up in 21 further branches between 1988 and 1993.

The memorandum of common weaknesses drafted in 1991 provided, he averred, to well established procedures. However, "regretfully some branch managers issued false confirmations of action". He had no reason to believe that internal audit reports were not rectified.

He referred to copies of management letters from KPMG the external auditors for the Bank, for year endings 1990 to 1997. He averred that during his tenure these did not raise any concerns whatsoever in relation to any matter that was the subject of the Inspectors' Report.

The management letter from the auditors for year ending 1994 did raise issues regarding special savings accounts and non resident accounts. This was issued on the 14th December, 1994, eight months after he resigned.

He also said that a previous management letter of the 29th December, 1989, relating to the accounts for year ending 1989 referred to the absence of some DIRT exemption forms under the heading "Points of Lesser Significance Including Responses". He said these were investigated. Mistakes were due to officials' errors.

He said he was entitled to rely on external audit procedure. He also referred to the Central Bank reviews which identified no issues of concern.

The respondent also referred to follow up memoranda by senior managers in relation to non resident accounts where problems were identified from September 1991 to March 1993.

In particular, the memorandum of Gerry Hunt dated the 18th November, 1993, which the Inspectors had highlighted in their report, was referred to as evidence of an insistence in correct documentation. That was followed up by the memorandum of Dermot Bonner, head of retail, to all branch managers in District 1 on the 23rd November, 1993 and by Mr. Brennan, general manager, who wrote to senior management on the 26th November, 1992 and 1993.

He referred to the letter from the Inspectors' solicitors, William Fry, dated the 28th March, 2002, in relation to the Inspectors provisional findings, which stated that:-

> "The Inspectors wish to make it clear that the provisional findings were not intended to convey the impression that your client knowingly encouraged the evasion of revenue obligations by customers of the bank."

He said that none of the internal audit reports referred to or suggested the existence of bogus non resident accounts. The focus on the type of criticisms made was deficiencies and, in come cases inconsistencies in the documentation kept at branch level in relation to individual non resident accounts. These were consistent with poor record keeping and did not lead to an inference of bogus non resident accounts. If the external auditors did not identify any problem in relation to non resident accounts whether from internal audit reports or from their own investigations, he failed to understand how he could possibly be criticised for not having done so.

Internal audit never identified any problems with the CMI products. The minutes of the meeting with the audit committee of the 29th June, 1993, did not disclose any major problems. The report of the head of audit to the audit committee did not consider that there was any issue in relation to the sale of CMI or related policies nor was there any issue raised by the external auditors.

The respondent also dealt with the issues raised by the Inspectors regarding improper charging of interest and of these as well as issues regarding the special savings accounts.

6.3. Affidavit of 28th February 2007

The respondent's affidavit dated the 28th February, 2007, repeated the respondent's concern regarding the lack of documentation provided by the Bank to the Inspectors.

The respondent referred to the grounding affidavit of Mr. O'Rafferty which had referred to the branch network being target driven with limited support by way of systems for training to enable the achievement of targets and managers felt under pressure to meet these targets.

The respondent believed that the Inspectors were incorrect in concluding that there was a limited support system and limited training of managers. It was not correct to say that managers were criticised or humiliated for not meeting targets.

He said that there was no evidence before the Inspectors to suggest that he had put branch managers under pressure to meet targets or had encouraged them in any way to ignore proper requirements or procedures in relation to DIRT or any other matter. The Director had sought discovery by letter of the 2nd March, of any documents indicating that the operation in the environment of the Bank was target driven, that managers felt under pressure to meet various targets, had negligible participation in target setting, that many of them considered targets to be unreasonable and that they feared criticism and possible humiliation before their fellow managers if they did not meet the targets set.

After an exchange of correspondence, the Director accepted that documents in relation to these matters was not relevant to the proceedings and did not pursue his request for discovery in relation to same. There were no findings made by the Inspectors against the respondent arising from any of those matters.

He submitted that although the Inspectors decided that it would be inappropriate to find individual branch managers responsible, they failed to provide any explanation as to why those managers who, on their own admission in many cases, had been responsible for and/or involved in the improper practices, should be exonerated and responsibility attributed to senior manager of the Bank in circumstances where, in his case at least, he had no knowledge of the improper practices at issue. He said that the procedures that were put in place would ensure that such practices did not occur. When they did, appropriate action was taken senior management and the respondent to remind and emphasise the managers and staff of the importance of adhering to proper procedure.

The respondent did not see the relevance of the reaction paper issued by the Bank to the issues raised in the proceedings. The expression of regret contained therein was made a decade after he had resigned as Chief Executive of the Bank and was expressed to be made by the Bank itself. He did not suggest any responsibility on his part for the improper practice.

He said that he believed that it was evidenced from the examination of the report that the Inspectors, in reaching their findings, including their conclusions in relation to the attributes and responsibility to him, had regard to matters and events such as the theme audit which were subsequent to his tenure as Chief Executive. The settlement of the Bank of Revenue liabilities was for a thirteen year period from 1986 to 1999. He was Chief Executive of the Bank for only six of those thirteen years (from 1988 to 1994). The greater part of that settlement related to interest and penalties. He referred to the second report of the Public Accounts Committee of the 2nd November, 2000, which showed that the settlement made by the Bank constituted a mere 3% of the total of €222m which, he said, was less than the Bank market share at that time. No proceedings had been taken by the applicant against the directors of any of the other financial institutions arising out of their settlement of DIRT liabilities.

He also referred to the payment of €12.5m in respect of refunds to customers for overcharging of fees and interest from 1987 to 1996 which included the two and half years during which he was not Chief Executive. The Bank had decided to refund all sums where it could not validate fees and interest charged.

The respondent accepted that delegation did not absolve a director from the duty to

supervise the discharge of delegated functions but he believed that they were proper reporting lines and that he had quickly supervised those functions which had been delegated.

He averred that the applicant had ignored the critical ingredient of knowledge in his argument that he was responsible for the failure of the systems in the Bank which failed to prevent the improper practices.

He repeated that he had as system in place which included the screening of internal audit reports by his executive assistant, Ms. Patricia O'Sullivan Lacy, to ensure that significant matters were brought to his attention. There was no evidence to indicate that the areas identified were not corrected.

The respondent said that Mr. O'Rafferty, at para. 15 of his second affidavit relied on the DIRT theme audit and thus, replicated the error of the Inspectors in relying on the results of that audit in attributing responsibility to him for the matters disclosed by it. He repeated that the DIRT theme audit was planned and carried out after his resignation. Mr. O'Rafferty sought to attribute some significance to the fact that he was still a director of the Bank at the time that the audit was carried out. He averred that it was not brought to his attention as a director and, indeed, first became aware of it during the hearings before the Public Accounts Committee.

During that hearing the then Chief Executive of the Bank, Mr. D. Price referred to the audit on DIRT compliance in 1994, which highlighted that controls needed to be improved. Management responded by issuing clear and explicit instructions and procedures to be adopted. It also introduced a regular certification to monitor that these procedures had been adhered to.

An audit on DIRT compliance at the end of 1998 based on a snapshot of 10 of the 61 branches indicated some weaknesses in administration. Mr. Price gave figures of 0.6% to 1.4% of non-compliance and said that in the previous 18 months the Bank had been through the most intense scrutiny and had introduced comprehensive and widespread changes to improve their procedures.

Their investigation indicated that, CMI policies had been purchased from proceeds of the closure of wrongfully designated accounts or other money where there was a suspicion that such monies had not been declared to the Revenue.

The respondent was examined by the Public Accounts Committee which indicated that two thirds of the internal audit reports referred to DIRT. He said he could not recall any instance where it was ever highlighted in those reports that they were talking about bogus non resident accounts. They were talking about people who had opened non resident accounts who should not have had non resident accounts. It was more in the context of deficiencies in documentation.

He was referred to the DIRT audit report in 21 branches of the Bank during the year August 1993 to August 1994 which referred to non-compliance with requirements laid out in connection with the area of non resident accounts. The report stated that if the Revenue were to conduct an investigation into that area, the current situation would have exposure problems with the Bank. The respondent said that the report was not prepared during his time. He said that he would have seen the (internal audit reports) up to April 1994 and that the summary was prepared sometime after August 1994. He said he was not aware of the summary which he only saw in the course of the documentation for the Public Accounts Committee.

He was asked whether the DIRT theme audit report of 1994 was brought to the attention of the Board of Directors. He replied that he did not know because he was not Chief Executive at that time. However, he was a director, and as such, should have been able to

answer as such. His reply that he did not know whether it was brought to the attention of the Board of the Bank seemed somewhat evasive.

In his second affidavit he referred again to the memorandum of the 18th November, 1993 from Mr. Gerry Hunt, then head of finance which was copied to him. He repeated that the memorandum provided evidence of the appropriate corrective action being taken once a problem, such as one of weakness of documentation rather than of the existence of bogus non resident accounts, have been identified.

While he reiterated that the DIRT theme audit report of 1994 was after his departure as Chief Executive, he referred to the second Dirt theme audit in 1998 which showed that less than 1% of the total of 12,300 non resident accounts had missing forms. He rejected the contention that the Bank had, during his tenure, failed to explain the relevant provisions of the Finance Act 1986.

He rejected the contention advanced by Mr. O'Rafferty that the existence of widespread false declarations was evident from numerous internal audit reports after November 1991.

He rejected as lacking any proper evidential foundation the opinion advanced by the Inspectors and adopted by the applicant that the culture and operating environment of the Bank was not conducive to the creation of a consistent adherence by bank staff to legal and procedural requirements. That view had been formed on the basis of self serving statements by a number of branch managers sought to excuse their admitted wrongdoing and to shift responsibility to others, including senior management. The applicant failed to identify any evidence (and the respondent stated that there was no such evidence) that he was responsible for what he characterised as the "flawed culture and operating environment which permits, or even encouraged in certain instances non-compliance by the bank". The Inspectors had not made any findings or indeed pointed to any evidence which supported such inference.

He said he failed to see how the DIRT theme audit report of December 1994, which resulted from an audit carried out some six months after his departure as Chief Executive, could have been relied on as a basis of criticising him or suggesting inaction on his part. He did not have the benefit of his report during this tenure and had not reason to anticipate its findings.

He noted that the Inspectors had not made any finding in relation to CMI and similar policies that he knew or ought to have been aware of the promotion and sales practices of the Bank. He said that the applicant sought to go beyond the report of the Inspectors. None of the documents that were copied to him indicated anything irregular in relation to the CMI policies.

He did not accept that it was unlikely that the branch would have refunded interest improperly charged without an express direction to that effect and he referred to his memorandum of the 21st May, 1990, of the charges were themselves wrong. Issues in relation to fess been levied on customer accounts were listed as points of lesser significance.

6.4. Affidavit of 9th June 2009

The final affidavit of the respondent sworn the 9th June, 2009, referred to the current work being done by the respondent. Since October 2005, he continued to work extensively with the World Bank and gave details of his assignments since he began working with the World Bank since 1995. He also referred to the detailed banking sector assignment for the government of Vietnam. He was director of two International Financial Services Centre companies.

In all his time carrying out these assignments there had never been any criticism whatsoever of his work, his competence and most importantly his ability and integrity.

7. Respondent's Evidence in Cross Examination

7.1 The respondent agreed that the six areas of improper practice identified by the Inspectors were very important and serious matters in relation to the operation of the Bank. He added:

> "We had our systems and procedures in place. We had defined how these things should be dealt with. The important thing, as far as I was concerned, was if it was ever highlighted that there were issues in relation to some of these, the appropriate action was taken. So you know, the Bank's systems and procedures were organised in a way that it was designed to run the business to the highest standards. That was the standard that I wanted to have when I went to the Bank."

The respondent told the court that he did not become aware of what was found by the Inspectors to be widespread bogus non-resident accounts until he read the provisional findings of the Inspectors' Report. It is clear that the auditing review and control system which the respondent says he put in place did not disclose the CMI malpractices.

He said it was never highlighted that particular managers were actually falsifying declarations or signing that they had declarations which they did not have or allowed some accounts to be opened which should not have been opened. The failure happened at branch level and it was not highlighted by any of the control systems they had.

7.2 Bogus Non-resident accounts

The respondent addressed the issue of bogus non-resident accounts by saying some of the managers may not have been attending to their job as much as they should have been and that this was inexcusable.

He said, in relation to DIRT and non-resident accounts that at that time the Bank had been using a manual system and some errors were made on the filing of forms. These were highlighted in reports but the follow-up action demonstrated that in all cases he saw that action was taken. Forms were found or new forms were obtained. He added that "in no case was it indicated that any of these forms were for somebody who (was not) a proper non-resident".

The respondent agreed that it was a requirement of the s. 32 Finance Act 1986, both to establish that the person was non-resident and that there was a form to support that status to be completed. He agreed that s. 37 required the Bank had to have the declaration properly completed and signed by the deposit holder. However, he said that that did not mean, of course, that if it were not signed that the depositor was not a proper non-resident and that it was not as simple as counsel for the Director of Corporate Enforcement was asserting.

He referred to his evidence to the Public Accounts Committee in 1999 where he said:

> "Every bank at that time was clearly under the impression that, first of all, you had to establish that your depositor was a genuine non-resident, but if there was an error in the form or if the form was missing, provided you obtained that form and followed up and got it, and provided it was for a genuine non-resident, there was no issue in treating it as a non-resident. It was subsequent to that that it was clarified that the Revenue …. that defective forms should have actually led to the re-categorisation of those accounts.

> Now, you know, the Revenue were fully aware of the practice we were following, as indeed they were aware of the practices in all the banks, and it was not until that time that they chose to clarify that all the banks jointly had as a practice of operating s. 32 of the Finance Act 1986 when it came into effect …. that is the practice that came into effect after the Public Accounts Committee, but prior to that, every deposit taker in the country operated on a different basis."

The respondent agreed that he never encountered the internal audit approving unsigned declarations. The reports highlighted declarations as an item that needed urgent attention and in all cases that he saw, this got urgent attention. Some forms would be misfiled, some forms would be mislaid, some forms would be lost but in all those cases the forms were subsequently found or new forms obtained. He added that he was surprised that the Revenue never came near the Bank nor sought to examine any of the non-resident accounts that the Bank had or to look for any declarations.

He stated that some branches at the time would not have required the customer to complete a new declaration because the customer was in England or some other place and had completed the declaration that the account had to be changed because it had matured. The computer which succeeded the manual system was not very good and had some quirks in the procedures.

He agreed that customers had an incentive to seek to non-resident accounts even when they were not entitled to do that, and that he was aware of that potential risk.

He agreed that DIRT was one of the few taxes that the Bank collected for the Revenue Commissioners. He said that they had put in place a system that was designed to ensure that DIRT was deducted from the accounts of a non-resident accounts and charity accounts and he had said that the Bank had taken action to rectify non-compliance.

7.3 Counsel for the applicant referred the respondent to a memorandum dated the 18th November, 1993, from Mr. Gerry Hunt, head of finance to Mr. Brennan, Mr. Keane and Mr. Bonner which was copied to the respondent. The memorandum is included in Appendix 8 of the Inspectors' Report was as follows:-

> "To: F. Brennan, M. Keane, D. Boner
>
> CC: J. Lacey,
>
> From: G. Hunt
>
> Date: 18/11/93
>
> Subject: Non-Resident Accounts
>
> I have recently received three separate phone calls from senior officials in the Department of Finance and Revenue on the 1993 Tax Amnesty and they are clearly unhappy about the alleged actions of a number of bank officials. I am now convinced that the Revenue will commence detailed audits of the major banks in 1994 with particular attention on non-resident accounts. The U.K. Revenue did a similar exercise in Northern Bank in 1990 and made claims for negligence based on inadequate documentation.
>
> Over the past twelve months non-resident deposits in branches have increased from £80,000,000 to £110,000,000 (detailed analysis attached) and it is difficult to explain why such a high proportion of new funds are from non-

residents. I have spoken with R. Bowden and P. Harte and both share my concerns that our documentation may be weak in the following areas:

1. C/O branch addresses.

2. Non-resident declaration forms missing, incomplete or inaccurate.

3. Unusual addresses that clearly warrant closer scrutiny, *e.g.* Main Street, Swansea, Wales.

4. Obvious errors, *e.g*. non-res. deposit and resident loan in the same name.

It is essential to advise all managers of the immediate risks and the personal penalties. There can no longer be excuses for sloppiness in this area and we have been given advance warning."

That memorandum was sent by Mr. Hunt to Frank Brennan, Michael Keane and Dermott Boner and copied to the respondent was entitled "Non-Resident Accounts". Mr. Hunt had calculated, in respect of the 52 branches, the percentage of non-resident deposits as a total of all deposits for 1993.

It showed the branches at Gweedore (57%); Dungloe (53%); Dundalk (49%); Castlebar (45%) and Killarney (44%) as having the highest non-resident deposits as a total of deposits. The average given was 19% with a low of 3% for each of Baggot Street, Clonmel and Howth Road.

The respondent's evidence was that he could not recall receiving it precisely but that it was copied to him and he would have received it. He said he did not know what his reaction was when he received it but was obviously pleased that Mr. Hunt was highlighting an issue that he had some concern about based on discussions he had with the Revenue. He said that he did not know where the bank officials referred to were, or what branches they were in.

He was asked whether Mr. Hunt had line responsibility for this issue and replied that he thought Mr. Hunt was involved with a working group with the Department of Finance and the Revenue. He agreed that Mr. Hunt's reference to "our documentation" was not referring to a generalised problem. He said that Mr. Hunt was saying that "our documentation may be weak in the following areas rather than there was false account problem". He said that Mr. Hunt did not specifically say anything in relation to bogus non resident accounts nor was he saying that they were all wrong.

The respondent said he did not ask Mr. Hunt at the time what he was suggesting. He referred to Mr. Hunt's report saying there was a need to check documentation. He said and reiterated that there were areas in which documentation might be a bit weak. He did not think that the report indicated that there was an endemic problem that had not been resolved by the follow ups which he had described in his evidence and referred to in his affidavits.

In relation to the increase of £30m in non resident deposits over the previous twelve months, the respondent gave evidence that he would have followed it up with Mr. Brennan, Mr. Keane and Mr. Bonner and that he would have sought an explanation. He said he did not know the reasons behind it. He did not have the documentation that came back to him and was not able to recall precisely what explanations were given as he did not get the documentation. None of the documentation had been discovered in the course of the proceedings.

Counsel for the applicant suggested two reasons for the increase; the influx of new non resident customers or a significant increase in a number of incorrectly classified non resident accounts. The respondent replied that there was also the fact that they had opened some branches, but agreed that there were a number of factors like those mentioned by counsel.

The respondent was referred to the detailed analysis attached to the Hunt Memo of 18th November 1993 which dealt with a proportion of non resident deposits expressed as a percentage of total balances for each branch. Some showed a decrease and others very significant increases such as 248% in Skerries. He said that some of them were new branches. Finglas, which showed 62% increase between September 1992 and September 1993 had come from a relatively low base. He said he did not know the precise reason for South Circular Road going up by 147% from £1.5m to £3.8m. He said he would have inquired but he did not have whatever he sent or received to be able to demonstrate that.

Mr. Hunt's memorandum in relation to the detail of analysis attached found that it was "difficult to explain why such a high proportion of new funds are from non residents". He spoke to Ms. R. Bowden, the person responsible for tax at head office in London and Mr. P. Harte who both shared his concerns that documentation might be weak in certain areas.

The overall analysis of the balances showed a 36% increase from September 1992, to September 1993, with highs in Castlebar, albeit from a low deposit basis in September 1992; in Skerries; and in South Circular Road.

Non resident deposit as a percentage of the total deposits was 19% for 1993. This varied from 3% in Baggot St., Clonmel and Howth Road to 57% in Gweedore, 53% in Dungloe, 49% in Dundalk, 45% in Castlebar, 44% in Killarney and 42% in Wilton Terrace.

The respondent said that the only reason he could give for the very high proportion of non resident deposits in Killarney was that many residents in that area would have been abroad and would have returned with money. Places like Gweedore and Dungloe were closer to Northern Ireland. He said that he was aware at the time that the Castlebar branch had a significant problem with non resident accounts.

He said it did not strike him that Killarney with 44% and Walkinstown with 42% had a significant problem with bogus non resident accounts. He said that in relation to Killarney nothing emerged to show that the Bank had the type of problems that was demonstrated in Castlebar. He was not sure that the overall deposit base of the Bank went up by 36% between September 192 and 1993 as had the increase in non resident accounts. The respondent said that it was not really improbable but that it was something that he had meant to look up but had forgotten to do so. He was not even sure that he had sufficient accounts going back to that period.

He said that the properties of non resident accounts in branches in the city should be closer to 10% to 12%.

7.4 Counsel referred to the respondent's evidence before the Public Accounts Committee in relation to Killarney where he had said that there were difficulties in getting deposits in 1989 and 1999. He referred to the other banks having a huge proportion of non resident deposits and that the Killarney branch did not get deposits like it was capable of doing. Some people tried to explain the vast majority of non resident accounts but it did not satisfactorily explain the phenomenon. He said that things had changed in 1986 and that the situation should have been improving significantly.

He agreed that the gist of his evidence was that the branch manager in Killarney was not willing to accommodate incorrectly classified accounts and that he had told him

nonetheless to maintain procedures. The increase of 28% in the year from £2.7m to £3.5m, the proportion of non resident deposits of the total for 1993 was 44%. He said the Killarney was a very big non resident deposit town for reasons that were not altogether very clear. He said that it would not be unusual in a town like Killarney where possibly 80% to 90% of the deposits of other banks may have been classified as non resident. They had a very small share. He did not agree with the statement by counsel that the increase in Killarney was inexplicable by any phenomenon other than that there was an extremely high proportion of false non resident accounts in Killarney of which NIB was accommodating quite a substantial amount. He said that the Bank's share of the deposit market in Killarney at that time was minuscule in a town where there was a high proportion of accounts designated as non resident.

The respondent was clear that some of the deposits in other branches with a high proportion of non resident accounts were not genuine and that was why he wanted to reinforce his position to the manager in Killarney to stick to procedures. He said that he did not recall Killarney having been highlighted as a problem at that time.

7.5 Counsel for the respondent then turned his attention to a letter from Mr. Brennan prior to Mr. Hunt's memo which stated:-

> "You will have seen from our end of year results substantial increases in the banks deposit base over the last twelve months. The rise is welcome, but more recent analysis of the source of new money indicates that a significant proportion of the increase has come from non resident sources. Perhaps in the circumstances, it is timely to then remind all staff of the procedures for opening non resident accounts."

There followed a reference to procedures in relation to the flagging of accounts and that care of branch being the use of the branch as an accommodation address was strictly forbidden.

Mr. Brennan required each branch to review that correct and proper documentation was held for every account and required a certificate to be completed and returned to him as evidence that all non resident, DIRT exempt accounts, have the supporting documentation before the 20th September, 1993.

The respondent said he could not remember seeing that letter. However, he said that he would have contacted Mr. Brennan or Mr. Keane or Mr. Bonner or all three of them in relation to the document from Mr. Hunt. He repeated that he did not have the documentation that he issued or that he received back.

Mr. Brennan referred to the context of the Department of Finance and the Revenue Commissioners with the Bank in connection with the 1993 amnesty and gave the impression that the Revenue still had concerns regarding the validity of the figures of the banks coming through the banks in respect of non resident accounts and the possible loss to the exchequer of DIRT not be deducted where appropriate.

He said he could not say that he was aware of that communication but that it he would have been in correspondence with Mr. Brennan and Mr. Bonner following Mr. Hunt's note.

7.6 The respondent's evidence was that he had been circulated with all the internal audit reports but only read the poor or unsatisfactory ones. Others were read by his assistant. He said the instructions and criteria given to his assistant in identifying reports which were to be brought to his attention was to read the report and, based on experience and knowledge of the Bank and of the overall content of the Report, to bring it to his attention. He did not recall having told his assistant that it was very important that all DIRT compliance issues were brought to his attention. He would not have said that to his

assistant, Ms. O'Sullivan-Lacy. Her task was to review the Report in total and, as he had shown in the documentation attached to his second affidavit, there was a rigorous system of follow-up and attention to that in place.

In his second affidavit sworn on 2nd October, 2006, Mr. Lacey had referred to the term "Bogus Non-Resident Deposit Account" or cognate expressions not being used in any Internal Audit Reports that he read. He averred that the erroneous application of this label to all accounts with deficient paperwork, in turn, led the Inspectors to the unwarranted conclusions that bogus non-resident accounts were widespread in the branch network and that senior management were aware of the existence of same.

He referred to the limited number of documents available to him and, in particular, letters and other memoranda from the Retail General Manager to all Branch Managers and from the Regional Managers to the Branch Managers highlighted the requirement for proper documentation for non-resident deposit accounts. To that list he added the Special Circular S5/86 of 24th July, 1986; Routine Circular R17/87 dated the 1st April, 1987 and the Special Circular S9/1993 dated 11th March, 1993 which were addressed to all the staff requiring them to ensure that non-resident declarations were held and properly completed for each non-resident account. He referred to particular memoranda from September 1991 to November 1993:

- Memorandum of 6th September, 1991 from the Regional Manager North-West to all managers in that region seeking confirmation that all the listed accounts were correctly classified as non-resident;

- Memorandum dated the 11th November, 1991 from Frank Brennan, General Manager, to the Regional Managers seeking confirmation that any irregularities in relation to non-resident accounts had been cleared up;

- Memorandum of 7th December, 1992 from Mr. Brennan to the Regional Managers saying that there could be no ambiguity in the Bank's requirements in the area of paying interest without deduction of income tax;

- Memorandum of 24th December, 1992 Regional Manager Northwest to Managers in that region noting disappointment that the substantial number of accounts were non-resident forms were not held and yet DIRT was not deducted and requiring full compliance before the 31st January, 1993;

- Memorandum of 18th November, 1993 from Mr. Hunt to Mr. Brennan, Mr. Keenan, Mr. Boner regarding telephone calls received from the Department of Finance and the Revenue Commissioners;

- Memorandum dated the 23rd November, 1993 from Mr. Boner to all Branch Managers in District 1;

- Memorandum of the 26th November, 1993 from Mr. Brennan to Senior Managers regarding an attached letter to the branches with a request that he be advised directly as to the response from the branches.

The letter attached to that report asked bank officials to be aware of the need to act prudently in accepting declarations. Incomplete forms were not acceptable and non-resident addresses should be clearly stated. Declarations should not be accepted where the level of detail is obviously incorrect as this letter to the Bank and bank officials liable to penalties imposed by the Revenue Commissioners and possible prosecution.

In his cross examination, the respondent said that the Bank's procedures at the time very clearly stated the importance of complying with the requirements of the 1986 Finance Act

and repeated that they had a rigorous audit system in place with follow-up action system which highlighted weaknesses. He added that some of the managers did not take action or else falsified what they stated and that that, unfortunately, did not emerge until many years later.

It was put to the respondent that the internal auditors did not seem to have any difficulty in understanding that compliance with the Finance Act 1986, was a requirement. He replied that he did not say that he had a difficulty with the requirement. Once it was established that a deposit holder was non resident, it was necessary to have a completed declaration. His evidence was that some of the declarations have mistakes in them and that that was followed up and dealt with.

The respondent said that there had been a much higher level of clerical error in completion of forms at the time. Loss did not occur because the Revenue did not impose any penalties until the Public Accounts Committee clarified the issue of retrospective liability for tax in 1999.

While his evidence was that the internal audits never said clearly that if there was not a valid declaration, then the Bank had to collect DIRT, he explained that if that were the case and that it was categorised as a major issue, then the reports should not be graded as satisfactory.

The respondent said that "bogus" would clearly alert one to the fact that the account was bogus. "Documentary deficiencies" would not clearly alert a reader to the accounts being "bogus".

7.7 The letter of Mr. Brennan to Mr. Bonner on the 4th October, 1989, which was copied to the respondent and exhibited by him in his second affidavit, showed that action was being taken by the general and regional manager. The letter referred to the incorrect flagging of accounts which meant that interest had been paid gross for the previous couple of years. The respondent agreed that that should not have happened.

Mr. Lacey did not know precisely what Mr. Brennan meant when he stated:-

> "Should there be errors through accounts having been set incorrectly initially, please mark these accordingly. I will get back to you as soon as possible to see what action, if any, is required to correct the situation."

The respondent repeated that one would have thought that an account which was incorrectly set up initially was clearly one in which DIRT should have been deducted. But he did not really know what Mr. Brennan was referring to when he said that he would get back as soon as possible to see what action, if any, was required. They were Mr. Brennan's words and he did not know what he meant. He said that they had a system in place in the Bank, a system of follow up, where regional managers and general managers were regularly dealing with the issue.

Mr. Brennan's letter of the 15th of January, 1990, three months letter, followed up his letter to Mr Bonner, relating to deposit interest retention tax, referred to it being apparent from recent returns for branches that non-resident declarations forms could not be located and that some resident accounts had been incorrectly set up originally as being DIRT exempt. He asked that he be advised at the end of January as to the position of each branch. The respondent commented that he did not know anymore what was stated in Mr. Brennan's letter, but then agreed that that communication seemed to have been precipitated by the management letter from the banks accountants to their auditors Touche Ross in respect of the 1989 accounts.

The respondent did not recall having discussed a document of the 7th August, 1991, with

Mr. Brennan which was a formal document which referred to qualification for exempt status for charities and for non-resident accounts. He said he had not been given a copy of that document, which emerged from the Public Accounts Committee document.

He was asked whether Mr. Brennan ever mentioned to him that there was an industry wide problem with regard to bogus non-resident accounts. He replied "no" and that that expression was never used to him. The first he had heard the expression was in the late 1970s or early 1980s in the pre DIRT era when all interest was paid gross and returns had to be made to the Revenue Commissioners of all interest over €70 with the exception of so called Form F accounts. He said it was widely known that a lot of depositors completed false Form Fs.

He said that the change that came about in 1986, was clearly detailed. A non-resident account holder had to have an appropriate declaration to comply. Northern Bank the precursor of the Bank, had a very good culture of compliance.

The document from Mr. Brennan of the 7th August, 1991, referred to the Revenue Commissioners being extremely active with the pursuit of what was termed bogus non-resident accounts. He said he never came across the term in any document reporting on branches. The internal audit function would have highlighted it. The term took more relevance in 1999 when the Public Accounts Committee reported.

He said that Mr. Brennan had a particular responsibility regarding compliance at branch network level. Mr. Brennan had said that from his conversations with the Revenue Commissioners it was clear that their interpretation of the term "normal degree of care," "would stretch to inquiry when the account was opened, but this had not yet been tested". The respondent was asked what he thought Mr. Brennan was saying and he replied that he thought that he was referring to the fact that they had to be satisfied that they were accepting genuine non-residents. There was no need for utility bills or passports – they were not required. It was left to the Bank to satisfy itself.

He was asked what the reference to Mr. Brennan's writing to each branch manager on "this thorny subject" as far back as October 1989 meant. He said, and repeated several times that he did know.

The respondent agreed that it was slightly odd that, five years after the relevant Finance Act, a then recent trawl of the non resident deposit accounts showed a number as either "c/o Branch" or with an address in the Republic of Ireland.

He said he did not know what Mr. Brennan meant when he said: "the whole area of non-resident accounts is a sensitive issue . . ." He said that it was not sensitive to him. He repeated that he did not know what Mr. Brennan meant by "thorny" and he did not know what he meant by "sensitive". While he had an office close to Mr. Brennan's, he had many things to do in the Bank. Mr. Brennan was well capable of handling this issue and was one of the most competent persons in the Bank. The respondent said that a pattern did not emerge in his time in the Bank and certainly, to his knowledge, it did not emerge through Mr. Brennan. If it did, Mr. Brennan never made him aware of the fact that there were false responses coming through. There was no pattern emerging in any of the documentation to indicate that certain managers were making false confirmations. If that were the case, internal audit in subsequent audits would have picked that up. The regional managers in their visits to branches would have been able to confirm that.

The respondent, in response to the suggestion that a wave of letters in January 1999 to branch managers requesting them to check that everything was in order did not form a pattern as suggested by counsel. He responded as follows:-

> "That pattern did not emerge in my time at the Bank, it did not emerge to me and certainly to my knowledge did not emerge to Mr. Brennan or if it did, he

> never made me aware of the fact that there were false responses coming through. He never mentioned that to me. So there is no pattern in that. . . .
>
> There is no pattern emerging in any of the documentation to indicate that these managers were making false confirmations of things. Indeed, if that were the case, the internal audit in their subsequent audits would have picked that up. The regional managers in their visits to branches would have been able to confirm that. That never emerged in any documentation, any conversation, anything during my time there."

He was then asked if the branches had applied procedures correctly and replied that the practice of addresses being "c/o Branch" had been allowed in the 1980s, but was subsequently stopped because the banks were not comfortable with the continuous use of it. He said it was stopped because they were concerned that it could provide somebody in the branch that opened the account with the opportunity to hide the fact that person might not be a genuine no-resident so they stopped it. It was only ripe for abuse if people chose to abuse it. He said that the Bank expected the branch managers to operate to a high standard.

7.8 Department of Finance / IBF meeting note

He was referred to a note from a meeting between the Irish Bankers Federation and the Department of Finance which had taken place on the 26th February, 1988, while the Finance Bill of 1988 was on its way to the Oireachtas. That note referred to the provisions of the then recent budget, placing a greater burden than hitherto on branch managers to satisfy themselves that the necessary requirements were met by non-resident depositors. They were expected to exercise reasonable discretion.

The respondent agreed that it was clear that the Revenue Commissioners considered the banks to be under a duty to inquire as requested by the Assistant Secretary of the Department of Finance in 1986 and again in a document dated August 1991. The respondent commented:-

> "That it was demonstrated that the system was failing, that really it was a job for internal audit to highlight that the system was not working, that branches were actually making false confirmations to some of these things that internal audit should have picked up on because they were on the ground and they were reviewing the accounts and had access to all correspondence in the branch and on no occasion did they ever highlight that there was any problem with the follow up action that was being taken in relation to the recommendations that they made which covered all of these issues."

He said there was no evidence in any of the documents that Mr. Brennan knew that a pattern of reassurance was being sought, obtained and falsified by the subsequent disclosures. No document said "the last return you made was false". He said that one could not jump to the conclusion that the return that was made three years later contradicted the one that was made beforehand. There were differences between 1989 and 1992 and there had been cases where instances were highlighted and action was taken. He repeated that they were dealing with manual systems where inevitably there were mistakes and he could not say that there was any way that one could have prevented such mistakes being made.

Weaknesses of lesser significance were left for the manager to attend to. He thought that there were only the six reports graded unsatisfactory or poor in his time.

He said that if (the branch) did not have a declaration (today) for some reason, it could obtain the declaration tomorrow. The respondent could not certainly recall that the Bank had looked for advice from either internal, legal source or from the Revenue or the

auditors as to how the provisions of ss. 32 and 37 were to be operated. He did not believe that they sought advice from tax experts. He added that he did not know, but certainly had no recollection whatsoever of that.

7.9 The respondent's evidence was that the Revenue never raised the retrospective payment of DIRT as an issue. The Revenue was involved in the discussion regarding the implementation of s. 38 of the Finance Act 1986. The Bank followed the practice that was followed in the industry at large. He had visited some branches and knew what their practice was and he knew people who worked in other banks. He knew that in other banks incorrectly named non resident accounts were reclassified. He could not remember precisely when he spoke to officials in other banks. He never said to them whether they had a problem with incorrectly classified accounts, but did discuss business and the issue of DIRT and circumstances in which a manager or someone in the branch had actually falsified (accounts). He did not ask them if they paid DIRT in respect of the period when the account was opened. Once their accounts were reclassified, DIRT was deducted going forward. There were no retrospective deductions. He could not recall what branches of the Bank he had spoken to. He did remember an incident in Killarney where their manager was highlighting significant difficulties with another bank competing for deposits.

He said that the industry view at the time was, where there was an incorrectly classified account, the account was reclassified. All banks were not making retrospective calculations where an account was incorrectly classified. The key obligation of the Finance Act was to establish that the person was a genuine non resident.

He said that the Revenue had in some instances moved against individual branches as in Milltown Malbay where there were significant issues. He wanted to make sure that their bank was in line and headed the practice that was being followed and that there was nothing that they were missing. Nobody was seeking legal advice. The advice came directly from the Revenue and the Department of Finance working directly with the Bankers Federation. The Revenue wanted to move from the situation where the individuals had to voluntarily disclose their interest to the Revenue pre 1986 to a system that was more cast iron, because the Revenue were not collecting enough tax.

He agreed that he had seen absolutely nothing from the Revenue to the effect that the Bank did not have to worry about arrears of DIRT, but equally he had seen nothing from the Revenue to highlight that arrears were an issue.

He said he did not pick up the phone to his compares in other banks and asked them what they were doing about incorrectly classified or bogus accounts. He had conversations with managers in (other) banks and was told that they corrected the designation of such accounts and moved forward.

He never said to Mr. Brennan or anyone else that they were "ok in doing what they were doing" in not paying arrears on DIRT because all banks were not paying arrears. His purpose was trying to establish what kind of a process they were following. It did not enter his head that by reclassifying an account that there was something wrong about not making retrospective calculations.

He agreed that there was not any reference in his affidavits to the question of payment or non payment of arrears of DIRT. He said that in all of those affidavits he had resolutely maintained the position that he did not know there were such accounts in the Bank. He was referred to para. 44 of his first affidavit which stated:-

> "I also reject as incorrect and lacking any evidential foundation the finding that the senior management were aware of the existence of bogus non resident accounts. For my own part I can categorically say that this was not the position, nor do the Inspectors make any finding that I was so aware."

The respondent confirmed that he was not aware. It was put to him that he took the trouble to discuss it with a number of officers in other banks to see how they were handling those accounts. He replied that he had said categorically that he was not aware and that there was no evidence that there were any before him to make him aware. Nobody in the Bank had advised him of such accounts, so he was not aware of that. He had said that he had picked up in the discussions he had from time to time with managers in other banks more senior executives as to how they were handling their DIRT accounts and that was in an effort to help the court in relation to this whole issue of what the industry practice was in relation to incorrectly classified accounts. He said he did not know of the existence of bogus accounts in the Bank, they were never highlighted as such - they were never highlighted in any of the documents that came before him as such. He did not know of the existence of the accounts because the documentary deficiencies in the action that was taken to remedy them and the follow up did not indicate that the accounts were bogus.

He was referred to the August 1988 report of a Wexford branch which referred to a "report point". A "report point" was categorised or defined as a serious compliance issue which needed to be addressed urgently by the branch and to be followed up by a regional manager or general manager to make sure that it was dealt with. From his recollection, Wexford was not below satisfactory. There was a robust system in place.

He agreed that there was no retrospective payment of debt as the Revenue had not clarified that until 1999 and it corresponded to the practice in the industry. The question of retrospective payments never came up for discussion. It never occurred to him as an issue.

He agreed that if employees' tax was not paid, the arrears would have to be paid. He said that he just could not recall any case in which it was highlighted to him that there were bogus accounts. He agreed that there would not be any difficulty about identifying a need to calculate how much of arrears of tax on employees' income would have to be paid to the Revenue.

He said that the Revenue were aware of the practice of the Bank through the Bankers Federation as to how they were going to implement the 1986 Finance Act.

The first time retrospective payment of DIRT was highlighted was when the Public Accounts Committee clarified that if the status of an account were changed and if the account was wrong *ab initio* a retrospective payment should be made. The practice before that time was that there would not be.

Counsel referred to the heading in the Wexford Report of "potential adverse consequences" which read:

> "This could lead to loss to the Bank resulting from penalties imposed by the Revenue Commissioners for failure to ensure collection of retention tax."

The respondent said that this was so if action were not taken and that it could lead to a loss to the Bank if the Bank were not in a position to get the appropriate forms. He said that the Branch would be given time to get the situation sorted out if the Revenue Commissioners had found forms missing in 1988. The basis for his saying so, was that when he was an accountant with the Revenue, the practice at that time was for the Revenue to give an opportunity to sort things out.

6.10 The managers of the branches were also insurance agents. Though they were employed by the Bank they were in a position to earn considerable commission on insurance business which could exceed their shares from the Bank and selling in shares to people and taking the commission for themselves. The Bank was one of the last of the banks to "buy out that issue", and acquired the agencies for significant sums.

In his evidence, the respondent criticised these managers "because they probably spent more time on that ….. than they spent on the business of the Bank".

National Australia Bank had substantial insurance business in Australia and encouraged the Bank to recruit somebody with experience and knowledge in that area. Mr. Nigel D'Arcy was recruited to develop that business. A Financial Services Division was established within the Bank headed by Mr. D'Arcy. He was recruited in 1989 and reported to the respondent. He also became a member of the Executive Committee together with the General Managers, the Head of the Retail Banking and the Head of Finance.

When questioned about widespread evasion of tax both through fictitious accounts and insurance products such as CMI, he said that he "did not see that as coming through from the Inspectors' Report".

The respondent's evidence was that he did not see any reference in the Bank to widespread evasion of tax. In any documentation that was presented to him in the Bank, either directly or through audit committees, often discussions he had with his managers and senior executives and others on a regular basis, he was never presented with anything to support such a conclusion. He had not seen any evidence to support the fact that the Bank engaged in what was being suggested. No such evidence had been presented to him.

He said that there were some abuses in the way that products were sold. The Inspectors had information that he never had seen that showed that that product was abused.

He would not accept the evidence from the Inspectors' Report that officers within FASD targeted customers with "hot" money in order to sell the CMI product to them. He said that he did not have any knowledge of that himself but that if they did they should not have done it. Had he known that they were doing it, he would have put a stop to it. It was breaching the procedures of the Bank. It would have been a very serious disciplinary matter and it would have been dealt with accordingly.

When asked whether he accepted that the Inspectors found that that was so, he agreed that they highlighted it in their report but he did not accept a lot of what was in the report. He was not aware of what FASD, the Financial Advisors Services Division, were doing in his time at the Bank. He had no knowledge whatsoever of that. It was a matter that he would have addressed if he were aware of it.

He was asked whether it seemed remarkable that a significant number of senior employees within a division of a bank were sending memos to one another identifying potential customers' targets because they had "hot" money and referring to "Revenue sensitive funds" and developing formulae investment checklist that asked whether the funds to be invested were declared or not, was not known to the Chief Executive. The respondent repeated that he did not know. Mr. D'Arcy reported to him. On no occasion did Mr. D'Arcy ever indicate to him that his people were doing that.

The respondent said that he had to put in place an auditing review and control system. One would expect in the normal course that these things should have been highlighted through the process but they were not. He said he first became aware of the CMI malpractices just before the Inspectors were appointed when the issue was publicised.

7.10. Internal Audit Reports

Much of the cross examination related to the internal audit reports already referred to. The court now turns to a general consideration of the respondent's evidence and then to a summary of 24 particular reports.

Internal audit reports on each of the branches were a crucially important control system of the operation of the Bank at local level. During the term of office of the respondent as Chief Executive over six years from 1st April 1988 to 22nd April 1994, there appeared to be 62 such reports which were made available to the Inspectors.

The respondent explained (in paras. 52 – 59) in his first affidavit that report were graded as Excellent, Good Satisfactory, Poor and Unsatisfactory. The first three were regarded as acceptable results. Any action arising was left to branch and regional managers. He said that the only reports which he took a detailed interest in were those graded below satisfactory level.

He had stressed the importance of corrective action being taken by branch managers which was to be followed up by executive management.

In the six years when he was chief Executive (Mid 1988 to April 1994) of this limited sample, only six were classified as poor and none seemed to have been classified as unsatisfactory.

On the basis of evidence of 62 reports made available to the respondent by the Inspectors the grading was:

	Satisfactory	**Good**	**Poor**	**Total**
1988	4	1		5
1989	5	1		6
1990	4	2	2	8
1991	5	2		7
1992	11	3		14
1993	13	3	3	19
1994	2	0	1	3
Total	**44**	**12**	**6**	**62**

Reference was made in cross examination to certain internal special reports memoranda and letters and to correspondence with the Revenue Commissioners and, after the respondent's term of office to the Public Accounts Committee report in 1999.

There was a limited number of reports available as some had, it appears, been mislead. Though all were sent to the respondent he delegated the personnel of almost all other than those categories as "Poor" or "Unsatisfactory" to an assistant or assistants.

According to the analysis of the office of the Director of Corporate Enforcement, which was not challenged by the respondent in any significant way, the total number of reports over the period was 202.

Certain unquantified reports were alleged by the Bank to have been lost.

Frequency of reports: every two weeks (26 per year?)

Time to read reports: 15-30 minutes.

The analysis, over the six years when the respondent was Chief Executive shows that, excepting reporting matters of a minor nature, that of the 121 audit reports the following as analysed by the Director for Corporate Enforcement referred to deficiencies in declarations:

Declarations not held or cited 54 (45%)

Declarations not dated 33 (27%)

Declarations not signed or improperly signed 11 (9%)

Non-compliance with s. 37 21 (17%)

Not complete 36 (30%)

Variance with other branch records 12 (10%)

Address C/O branch 4 (3%)

Irish address 5 (4%)

Fees increase unexplained/inadequate systems 23 (19%)

As there are more than one incident in some cases, the total exceeds 100%.

There is a further breakdown by year. What appears significant is that over 50% of declarations were not held or cited or dated in 1992 and 1993.

The respondent was Chief Executive for four months in 1994 and, accordingly, is not statistically significant from the previous years. What is significant, however, is that all of the audit reports analysed referred to declarations not held or cited: five out of the six were not dated and four out of the six were not complete.

The Director's analysis per branch for the years in which the respondent was Chief Executive shows, on average, 45% of the 121 audit reports referring to declarations not held or cited.

The respondent's submission was that only 43 of the 121 audit reports contained the deficiencies complained of (35%). Even if the court were to accept this lower percentage and ignore that there were deficiencies other than declarations not held or cited it still remains that one third of the 121 audit reports indicated deficiencies.

It is unclear why all of the audit reports were not made available to the Inspectors. If the court were to assume that the approximately 80 reports which were not given to the Inspectors disclosed no deficiency whatsoever, then the percentage non-compliance would be just over one fifth, according to the Director's analysis, and just under one fifth in relation to the respondent's submissions in respect of the one category of non-compliance, that of declarations not held or cited.

However, the analysis shows that there were 199 deficiencies referred to in the audit reports for the 121 available to the Inspectors.

The court notes that 36 referred to "not complete" which, although intended as a separate category of non-compliance, may have overlapped some of the other deficiencies. Excluding that 36 gives the number of 163 deficiencies in 121 audit reports or, on average, over one per report.

The respondent claimed that the findings of the Inspectors' Report were based on incomplete documentation. The discovery of the other extant documents, in the Director's analysis, discloses no significant difference between those documents and the documents

disclosed to the Inspectors.

The respondent submitted that the other findings of the Inspectors, for example, that the respondent ought to have been aware of the practices on the basis of having been copied with the internal audit reports, were inferences drawn from primary facts and were expression of opinion. It was submitted, that the court is entitled to draw different inferences from those findings of primary fact.

The respondent referred to the grading of the internal audit report. The respondent was not the first name on the audit report on each branch where the overall conclusion that was arrived at by the head of audit was satisfactory, the report was not read in detail. He had a few people working in his office who read all the reports and would bring to his attention anything that was of significance. His practice was not alone to read the reports that were poor and unsatisfactory but to take action himself to make sure that something was done and to read whatever was highlighted in some of the other reports brought to his attention.

In his affidavits he had referred to the documentation which he eventually obtained from the Bank which the Inspectors did not have. There was clear follow up system in place. He said that the Inspectors never presented such reports to him even though he requested such documentation on a number of occasions.

In general, he said that where an action was recommended the branch managers agreed that corrections would be made. The respondent said that if one looked at the 150 reports together, some of the items came up as a report point or as a point of lesser significance. He did not ever have an opportunity to see that (pattern) in his time at the Bank.

The respondent could not remember precisely nor was he be able to say whether he had asked his assistant, Ms. O'Sullivan Lacy to bring to his attention where repeat audits had identified the same problems or similar problems even if classified as an item of lesser significance or of overall satisfactory grading. It was unclear from the evidence of the respondent whether he had one or more assistants to read the internal audit reports. Ms. O'Sullivan Lacy did not give evidence.

He said that external auditors reviewed every single one of those reports and had a very much better position than he had because he was not seeing all the reports.

He did not think it was correct to say that the problems were widespread and were recurring in branches. He said he had read in detail the reports that were being graded as unsatisfactory or poor. He had a system in place to ensure that action was taken on other reports. He had an internal audit function in place in the Bank whose job it was to highlight areas that they were concerned about. It did not do that. All of the reports were read. The internal audit function produced those reports and it never highlighted that, as a major item in their quarterly summation of work or in their presentations to the audit committee.

He said that he relied on the auditors with an opportunity to see all of that and that they never brought the matter to his attention in any of the work they did.

He said it was not correct to say that he had deprived himself of an opportunity as he did not deprive himself. He carried out his functions to the highest standard, he had various other independent people looking at the Bank and reporting to him and they did not report on any of those issues.

The respondent's evidence was that he relied on internal auditors whose job it was to highlight areas of concern. He said they did not do that. He said "they read all of these reports, they produced these reports and they never highlighted this as a major item in

their quarterly summation of work or in their presentations to the audit committee".

He referred to the Bank having a process of audit that reviewed the reports and highlighted the significant major items which in their opinion were not being carried out properly. The internal auditors never raised the issue of DIRT compliance as a major issue in their quarterly reports which were sent to the audit committee.

The respondent added that he also relied on the external auditors who were independent and were in a much better position than he was because he had not seen all of the reports. He said that in all the time that they were there they never came across or raised the issue.

The respondent said that he received possibly 30 or 35 audit reports each year – perhaps one a week and that it would take a little longer than 15 minutes to read some of the reports. His focus was to make sure that people were doing something about these issues and that they had a system in place to ensure that the items that were highlighted by the auditors were being actively followed up and dealt with. He was entitled to have systems and procedures in place to support him in doing that.

He agreed that the Inspectors' Report had indicated that in the period 1988 to 1997, 202 branch audit reports were carried out. He was surprised on reading the Inspectors' Report that there were so many internal audit reports missing, 160 had been issued in his time.

Having given evidence on the general approach to identified points of concern in the internal audit reports, counsel for the applicant referred to other branch reports in particular.

8. Analysis of Critical Branch Reports

The respondent's answers to findings of internal audit of specific branches tended to expand to general comments.

8.1. The Boyle Report

The respondent was referred to the Report of December 1988 of the Boyle Branch which referred to obsolete non-resident declaration forms held for specified accounts. The report continued:

> "This could lead to dispute with the Revenue Commissioners – remedial action required. Asked to ensure that any non-resident savings account for which a properly completed non-resident account is not held is designated a resident account subject to retention of tax."

The respondent regretted that the issue of arrears first came to light in 1999 through the Public Accounts Committee. The Bank had been operating the practice that was general across the industry. The Bank was very open with the Revenue who knew what they were doing. They had a procedure, a system in place and the Revenue never raised an issue as to how they were complying with the implementation of the Finance Act 1986.

He referred to the General Manager of the Bank, Mr. Brennan, meeting with the Revenue on a number of occasions.

The respondent said that he did not know precisely what accounts the Revenue wanted to check, he did not have the details. He did not have the precise names on those accounts as it went back 20 years. He said that Mr. Brennan did not keep him informed of every discussion or conversation he had with the Revenue, he, as General Manager, had

responsibility for that area and was diligent in trying to enforce and comply with the requirements.

8.2. The Athlone Report

The respondent was referred to the April 1989 Report on Athlone where he was the first name on the circulation list. It contained a point of lesser significance referring to instances being noted of non-resident forms unsigned, incomplete etc. He said that the follow-up action which existed was that the Assistant Manager was asked to ensure that non-resident accounts forms were reviewed and sorted alphabetically. There was follow-up action which he did not have readily available. Athlone was not a branch which, to his recollection, was rated below satisfactory. He said that it was not a report that he would have seen *per se*.

8.3. Bailieborough

He was referred to the Bailieborough Branch Report where forms were not fully and clearly completed which could lead to a loss to the Bank. He agreed that s. 37 of the 1986 Act required the account holder's name and address to be specified and it was a reference to the address or occupation not being supplied in the Report and said that the item was corrected.

8.4. Skerries

He was referred to the Skerries Report of November 1989 where non-resident charity declarations were not held by the Branch. The reports said that failure could lead to a dispute with the Revenue. The report continued that "otherwise the relevant accounts should be re-designated. The respondent said that that would be so if the form could not be obtained and put in place.

The respondent agreed that the levying of DIRT in respect of the period prior to re-designation was not addressed and that it was not until 1999 that this was clarified for the benefit of all banks.

The response from the Skerries branch referred to compliance being already in hand but regretted to advise that there was some consumer resistance and that some business had been lost as a result. The annotation in handwriting queried:

> "Do we wish to lose any further business?"

The respondent said that he had not seen that report and did not know what grading applied to it. He said that he did not know what it meant because he did not see the report at the time. When asked what he now thought of it, he said that he did not have the experience of discussing it with the Head of Audit to see what his view of it was and he really did not know anything about that. He said that there could have been some difficulty because the account holder may not have been readily available. He did not know why the business was lost.

8.5. Virginia

The respondent was asked to comment on the report of the Virginia branch in November 1989, where some customers were identified as non-resident. He agreed that as one of them was an Irish resident, the account should have been redesignated as a resident account.

He was then referred to the audit report for Virginia, two years later in November 1992.

In that report an item, classified as "not a matter of lesser significance", referred to a significant number of declarations which did not comply with the Finance Act 1986. The report concluded:-

> "The bank could suffer losses as a result of penalties imposed by the Revenue authorities for failure to declare in the correct procedures of administration of DIRT. Where a fully completed non-resident or charity declaration form is not held, then the bank is obliged to deduct DIRT."

The respondent was asked whether that indicated that problems were found on a repeated basis, that though the manager said that all would be dealt with, that problems are then uncovered by the auditors.

The respondent said that he did not have the opportunity to ever see that in his time at the Bank, referred to the practice in other Banks of his counterparts not reading reports. He could not remember precisely whether he asked Ms. O'Sullivan Lacy to identify such problems.

The external auditors were in a much betters position that he was as he was not seeing all of the reports.

He had a system to ensure that action was taken and carried out his function to the highest standard.

8.6. Ballinamore

The August 1991 report on Ballinamore referred to a significant number of non-resident forms not being fully completed as required and a number of completed forms being at variance with other branch records. The respondent said he did not recall seeing that report. He did not known what grading was attached to it, so it was difficult at that stage for him to be able to say anything further on it. He agreed that it could be the case that there was variance in respect of the non-resident declaration forms with other branch records. He said there were reasons to explain why a customer who was a non-resident might have a borrowing in a resident address. He said that there was nothing wrong with that. However, he said he could not recall having made an inquiry where there was such a variance, but that he did know that action was taken to resolve the problem.

8.7. Walkinstown

He was referred to the report of March 1992, for Walkinstown, where two bonus saver accounts were classified as non-resident when letters of lien were held supporting lending on resident accounts in the same name. An explanation could be that the lending was made for a property in Ireland that was supported by a charge over the non-residents deposits at the branch, but he did not know precisely what it was in that case. He did not know where the account statements would have been sent. He did not have the detail and had no way of getting it seventeen years later. Counsel had not shown him what follow up action that was taken. Branch managers were not asked periodically as there was a specific follow up in relation to internal audit reports where the general manager and regional managers followed. These are specifically with the branch managers.

8.8. Carrick-on-Shannon

He was referred to the April 1990 Carrick-on-Shannon report which identified interest charges being increased without legitimate reason or customers knowledge on 20 accounts in November 1989 and 33 accounts in February 1990. The report said that that practice could lead to a loss to the Bank through a customer dispute, litigation or adverse publicity. The remedial action was that interest amendments could only be made to

correct branch errors. The practice of "loading" interest had to be discontinued.

That report had come to Mr. Lacey's attention notwithstanding that the report was marked satisfactory. He said he was quite concerned by the comment and wrote on the topic immediately to the general manager asking him to take action.

8.9. Carndonagh

He was referred to the August 1990 Carndonagh report which noted the same problem. Mr. Lacey could not precisely recall seeing that one.

The October 1993 Carndonagh report also had a poor grading,

8.10. Castlebar

The Castlebar report was one that had a poor grading. The respondent categorised it as a serious report. Disciplinary action was initiated with steps to remove the manager. It was a relatively new branch and had only had two audits in 1992 and 1993.

He agreed that it was a report with a risk grading of 4 stars out of 5.

Out from a random sample, of 47 non resident accounts examined, 11 noted an address at variance with other branch records and seven were noted where there was a mismatch between the name of the account and the exact name of the customer. The figures suggested that there were irregularities in approximately 40% of the non resident accounts in the Castlebar branch. It was recommended that the irregularities would be rectified and a full examination of all non resident forms/accounts would be undertaken within three months.

The respondent said that the manager was removed because of lack of adherence to the Bank's procedures in relation to areas such as DIRT and for generally disregarding procedures. He agreed that it was particularly serious. It was graded poor. It was not comparable to any of the other reports. He agreed that there had been a previous report fourteen months previously in August 1992 which, had been graded satisfactory. He was conscious of the report item which referred to non resident declarations being not fully sighted and a number not fully completed. The next one was in a totally different category with 18 of 47 declarations either at variance with other branch records or a mismatch between the accounts and the exact name of customers.

He said he did not know how it happened that an even more serious series of irregularities had been identified in Castlebar some fourteen months later in the 1993 audit. The branch was expanding very rapidly. Part of the problem was that the manager in the expanding branch totally ignored some of the Bank's procedures. The Manager was removed out of the branch network and demoted. Disciplinary action had been taken against some of the other staff.

8.11 The internal audit report for Dungloe in September 1992, noted instances where the residential status and non resident declarations forms were at variance with other branch records. The respondent explained that the account holder had borrowed money to purchase a property in Ireland. This was one of the reasons which could have explained the variance. But he agreed he had not seen nor exhibited any evidence where that could be an explanation. The documentation that he had seen did not go into the reasons why non resident declarations forms were not sighted for some accounts or that they were not fully completed. He said that the auditing process was a very detailed process with a lot of discussion taking place. A report was written and a conclusion was arrived at which was signed off by the head of audit. It was not a bland confirmation: there was a very clear follow up system in place.

He said that, in general, he had no reason whatsoever to doubt the competence of the regional managers and repeated that it was never highlighted in any document that regional managers were incompetent.

The respondent said he could not remember any specific example where Mr. Brennan or any of the regional or general managers had come to him and referred to a discussion that they had with the branch managers as to the reason why internal audit had consistently found that the status of accounts was at variance with other branch records. He said he would have had a discussion if (the reports) were graded poor. He said he did not find out specifically what was behind the accounts in Castlebar where the whole audit highlighted very serious matters most of which could not be explained. He could not specifically recall seeking an explanation for that because Castlebar was such an overall problem that they had to start from the beginning. There were non resident accounts that were not proper non residents accounts.

He said that the Bank did not have the kind of highlighted detail in other cases. The auditors had not come to the conclusion that the other branches had the type of problem that was so serious. He agreed that instances were found in a limited number of audit reports but he had not seen any examples where that level of instances was noted.

The response to the reports on Kingscourt, Lanesboro, Mohill, Monaghan, Virginia, Swords, Bray and O'Connell St. was that improper non resident accounts should not have been designated as being non resident.

He was asked whether these accounts, though not referred to as "bogus", "false", or "illegal", were plainly bogus accounts. He agreed that such accounts should not be designated as such but, while he said he did not know, one of the parties might have been a non resident and the branch should not have allowed it to be classified that way. When it was highlighted then action was taken. The resident should be paid net DIRT. He said that the issue of arrears of DIRT was not clarified under the Public Accounts Committee Report of 1999. Before that, every bank operated the same practice of trying to satisfy itself that the person was a genuine non resident. When they found out subsequently that there were errors or accounts which had been incorrectly classified the practice was to reclassify the account immediately. In 1999 significant payments were made by the banks following the Public Accounts Committee.

The respondent said that the practical life of a branch and pressure of work meant that the branches may not have gone and started looking for declarations for non residents immediately. If there were forms that they had to look for, they might have put that to one side and said "We'll look for that next week". At the time the auditor was there, the branch may not justify physical time to actually do it that day. He could recall instances though he did not know how many, where branch managers had said that account declaration forms that appeared to be missing had in fact been located.

He agreed that there was a distinction between an account where the form was mislaid and subsequently found and an account where the form was not available and a new form had to be obtained.

8.12 O'Connell St.

The O'Connell St. report referred to non resident declaration forms not being sighted for a substantial number of accounts which were paid interest gross of retention tax. Reference was made to the loss to the Bank and to a requirement that DIRT be collected on all accounts. He agreed that the reference to a trawl for missing non resident declaration forms did take place some six months before and that that continued and had not yielded declaration forms in respect of a substantial number of accounts. He said that overall it was not a particularly significant audit and action was taken.

8.13. Waterford

The Waterford report identified weaknesses of a lesser significance in relation to bonus saver accounts which were exempt from DIRT, but where the beneficial owners were Irish residents and were subsequently transferred into an account subject to DIRT in the future. He said that the internal auditors did not use the terminology of "incorrectly classified accounts" as he had used or "bogus non resident accounts" as the Inspectors had used. He agreed that that was an account which was "incorrectly classified as bogus and should not have been classified".

In that case the internal auditors had noted that the deposits were held in support of a letter of guarantee.

The Waterford report noted an incident where a bonus saver account was exempt from DIRT where the beneficial owners were Irish residents that the internal auditors had not used the term "incorrectly classified account" nor "bogus non resident accounts". It had been put to the respondent that once he had read that paragraph he would know that there was yet again an account which was beyond "yea or nay" incorrectly classified bogus. He agreed and said that the account based on the information there certainly should not have been classified but without identifying it as bogus. He accepted that there were two deficiencies in that the holders were Irish residents and that deposits were held in support of a letter of guarantee for lending at the branch.

He agreed that the account could never have properly attracted DIRT exemption. However, he said that most likely he had not seen the report because it was graded as satisfactory.

8.14. Carrick-on-Shannon

He was referred to the report of February 1993, in respect of Carrick-on-Shannon which again referred to weaknesses of a lesser significance in relation to declarations. The report referred to the requirement of s. 37 with regard to the collection and payment of tax.

The respondent, in his evidence, said that where a declaration did not exist, reclassification of the account should take place. However, internal audit did not report that that had to be done immediately. The branch was given an opportunity to get the forms completed. There was no indication that the parties were not genuine non residents. The focus was to establish whether the person was a genuine non resident and to support that a declaration had to be made. If such declaration was missing or incomplete the Bank was required to take action to rectify the position. He agreed that where there was no declaration, there was an obligation to collect DIRT and that a failure to collect DIRT left the Bank open to penalties.

The respondent did not know the basis on which that position was disregarded by the Bank. It was not something that he would choose to disregard. All he could say in that context was that all the other banks did the same thing. He would have been surprised if somebody had made that decision. The whole question of retrospection was not something that was addressed in the context of how DIRT would be collected by the Bank.

He did not disagree that of the 55 branches throughout the period where he was the chief executive, none attempted to account to the Revenue for incorrectly classified accounts. The only reason he could provide was that when the Finance Act was put in place the Bank never highlighted it nor spelt out something that branches should do. He suspected the practice probably came from the previous period of the Form F time and it was just a continuation of that. However, he said he did not know, that was all he knew about it.

8.15. Balbriggan

The Balbriggan report in April 1993 stated:-

> "1. Branches are relying on a number of non resident declaration forms which do not comply with s. 37 of the Finance Act 1986.
>
> 2. Many declarations held are not fully completed or dated as is required.
>
> 3. Declaration forms were not sighted for a few accounts which were paid interest gross."
>
> The same appeared in the report for Dun Laoghaire for the same month.
>
> Reference was made to bank losses, resulting from weaknesses not being dealt with immediately.

8.16. Blanchardstown

The respondent was then asked to comment on the charging of interest without legitimate cause in respect of Blanchardstown. The report of May 1993, referred to an instance at that branch where customer's interest was increased by £300 to offset bad debts of employees by the customer. Not many instances were noted where interest was increased on closure of accounts to cover management time charges. He agreed that the same issue had been identified a number of years earlier in respect of Carrick-on-Suir and Carndonagh. He agreed that on the face of internal audit recommendation there was no suggestion of any repayment of that interest to the customers concerned. He said that was a little surprising in view of the fact that this was highlighted a couple of times earlier. It was a very serious issue in the context of the Blanchardstown branch.

8.17. Letterkenny

Letterkenny, referred to above in relation to the absence of non resident declaration forms for all customers, also noted that fees had been increased or reduced and had not been annotated on the fees to be applied for. In addition a number of incidences were noted where fees calculated by the computer system were amended but no explanation was given and that fee amendments affected were not dealt with by the fees to be applied report.

8.18 Sligo

Deposits were transferred to Clerical Medical International (CMI) in the Sligo branch in October 1993 without first obtaining the permission of the regional office. The audit report noted that:-

> "The Bank's secure position has been weakened on the accounts of (-) as a lien is no longer held over the funds which were transferred to CMI."

The respondent said that he did not know whether they were resident or non resident account holders. He did not know how many non resident customers who had loans from the Bank had given letters of lien over their non resident accounts. He said that the focus of the CMI products was clearly for non residents but there was really no reason why a resident could not invest in it if they wanted to. He did not know that these were residents or non residents. He said the CMI product was to be sold to non residents. The focus of the product was on non residents. He did not think there was anything to prevent a resident from investing in it.

The same report dealt with numerous instances where customer's fees were substantially

increased without legitimate cause or reason. The report continued that in future increases in customer fees should be justified.

819. South Circular Road

References were then made to the South Circular Road branch which noted 15 non resident saving accounts with declarations not sighted and numerous instances where customer's fees noted where customer's fees were substantially increased with no annotation. The customer action pad was not being used to record management time. The respondent said he did not think he saw this report as it was graded satisfactory. He said he had seen Carndonagh and Carrick-on-Shannon which dealt with interest rather than with fees.

8.20 Baggot Street

The Baggot Street report noted three out of fifteen accounts identified as having no declaration forms and two out of fifteen where non resident declarations were not dated. Incorrect forms were used for special savings account declarations. He agreed that if the declarations were not present, that the Bank was not complying with the special savings account requirements. He could not remember precisely what the significant differential between the special savings rate and the standard rate was: it was 10% at one time and 15% at another time, rather than 27% for a standard rate.

Reference was made to instances where fees were increased or decreased without a meaning for explanation. The respondent replied that managers had diaries with recorded appointments.

8.21. Malahide

Reference was made to Malahide's special savings accounts where incorrect forms were used. He agreed that the forms were not sighted. Non resident declaration forms were not sighted for the account of CMI insurance company under the control and advice of the Financial Services Division. Mr. Lacey said that CMI was the deposit holder and it was clear that CMI was a non resident. The financial advice and services division had not provided the branch with the proper declaration, but there was no question that CMI was not a genuine non resident.

The respondent's evidence was that he did not know specifically who had opened the account. He did not know who gave the instruction to open the account. He said that when he became aware that there was £20m to £22m on deposit with the Bank he was concerned that CMI had the right to place it in any bank.

8.22. College Green

Reference was made to the College Green branch where there were problems. Mr. Bonner took up office in that branch in an effort to resolve all of the issues including declarations not being sighted for a significant number of special savings accounts and company DIRT free declarations not sighted in respect of two accounts and there being missing declarations.

9. Affidavit of David Denis Long

Mr. Long, retired banker, swore an affidavit on the 15th May, 2009. He had worked in banking for most of his working life and was appointed general manager, retail banking of Midland Bank in 1985, followed by appointment as group financial controller before resigning in 1988. He was then general manager in the retail bank, Standard Chartered Bank. He joined Credit Lyonnais in 1990, to develop retail banking presence in the UK and

later joined Sabanci Bank plc. In 1992 and in 2004 became a director and chairman of the audit committee of a pension fund trustee up to his retirement in 2007. He said the respondent was known to him for a number of years from the mid 1980s when he was assisted by the respondent in establishing Northern Bank (Ireland) Limited. When the Bank was sold to National Australia Bank in 1987, thereafter he had very little contact with the respondent, meeting him occasionally on social occasions.

He said he had no direct personal knowledge in the matter and subject of the Inspectors' Report. His views were based on a review of that report together with a review of the affidavits previously sworn on the proceedings. He referred to the management structure of the Bank and said that one of the notable omissions from the report of the Inspectors was the structure chart of the Bank, which he regarded as a significant omission. He said that this omission raised a question as to whether the Inspectors fully appreciated and understood the management and reporting structures within the Bank.

He referred to the Board of Directors which conformed to what he would have expected and referred to the background of the members of the Board which he regarded as a strong Board in place of the supervised business of the Bank and complied with all regulatory requirements. He understood from the respondent that the Board had a significant role in formulating relevant Bank policies and approving all policy documents under which the staff operated. He referred to the Board enabling the continuous monitoring process of the performances of the Bank and its executives.

The key responsibility of the audit committee was to ensure the adequacy and competency of the internal audit and control functions. The audit reports should ensure the deficiencies identified were remedial action taken. He would expect that each meeting of the audit committee would consider any internal audit reports and that if outstanding matters were not addressed adequately or in a timely manner, the audit committee would generally take these matters up with the Chief Executive. If the committee were dissatisfied with the response of the Chief Executive, that was a matter that could raised at Board level. He said that each year, after the annual audit, the external auditors meet with the audit committee and there is ample opportunity for the external auditors to raise and bring to the attention of the audit committee, and by extension the Board any perceived deficiencies in the controls and procedures of the Bank, including any non-compliance of legal or regulatory requirements. He noted that the Inspectors were satisfied that the Board, the audit committee and the internal auditors all discharged their duties in a satisfactory manner. Given that conclusion he was surprised at the criticisms levied at the respondent and did not consider them to be justified. He referred to the external auditors relying on the work of the internal auditors in reviewing all the reports produced in the previous year together with audit committee and Board minutes. He was informed by the respondent that the external auditors did not bring to the attention of the audit committee any other matters that were the subject of criticism in the Inspectors' Report. It seemed to him that the conclusion formed in respect of the external auditors was inconsistent with that formed in respect of the respondent.

He agreed with the comments made by the respondent in relation to the role of Chief Executive with the Board and audit committee performing an important role in overseeing the performance of the Chief Executive. He said that in a large organisation, such as a bank, it was not possible for the Chief Executive to be involved in the day to day management of all aspects of the Bank. A Chief executive had to ensure that a proper management structure was put in place with clear and efficient responsibilities and then it delegates responsibilities as appropriate.

He noted the emphasis placed by the Inspectors on internal audit reports which were copied to the respondent as Chief Executive. In his experience it was unusual that copies of all internal audit reports were copied to the Chief Executive in their entirety. Given the workload of the Chief Executive he would not be expected it to read all internal audit reports The internal auditor would be expected to highlight to the Chief Executive the

areas of concern prior to the reports being considered by the audit committee.

The Chief Executive would, in his view, not be expected to take any action on foot of audit reports and would be entitled to assume that any concerns or deficiencies identified therein would be addressed and any required follow up action be taken. It was his view that only if items raised in internal audit reports were specifically brought to the attention of the Chief Executive and that he was informed of these matters were not being addressed adequately or in the timely manner, the responsibility in relation to ensuring that these matters were addressed could be said to rest with the Chief Executive. As he understood the position that was not the case with the Bank.

He agreed with the respondent that his review of these reports represented best practice and that he went much further than most Chief Executives in his experience. In his view the Inspectors' criticisms of internal communications in the Bank and of the respondent's effort to ensure compliance of regulatory requirements were misplaced. The practice in banks at the time, which was adopted by the Bank was to use written manuals, written circulars and policy documents in order to lay down and assimilate to the bank branches that the policies and procedures of the Bank and relevant regulatory requirements. It appeared to him that this was done. The failings that occurred took place at branch level and branch managers and staff in the Bank ignored or failed to follow the policies, procedures and regulatory requirements that had been communicated to them. He said that it was important to note that bank managers at the time enjoyed a considerable degree of autonomy. He failed to see how the respondent could be held responsible in that regard unless he had knowledge of the improprieties in question.

He believed the respondent acted professionally, competently and with all due regard for the proper discharge of his responsibility. In his view the appropriate lines of accountability and responsibility were present and the deficiencies identified by the Inspectors were attributable to the failings of others, particularly at branch manager level.

Mr. Long was of the view that it was entirely reasonable for the Chief Executive to assume that the Board and audit committee were fulfilling their roles without monitoring by management. If management could not make these assumptions it was clearly a systemic failure on the part of those organs. The weaknesses were in the calibre of the management of the branches and their decision to ignore senior management in the policies and procedures of the Bank.

In conclusion, it seemed to him and from reading the report that the Inspectors had an insufficient understanding of the banking and organisational structure of the Bank. He further believed that their criticism of the respondent and the attribution of the responsibility of him for the failings of others was unjustified.

10. Decision of the Court

Application
10.1 The notice of motion of the 18th July, 2005, refers to specific findings of the report of the Inspectors published the 23rd July, 2004.

The Director of Corporate Enforcement, as applicant, pleaded that insofar as the respondent was concerned, it was evidenced from the Inspectors' Report that:

> 1. The respondent failed to act at all or act adequately to deter or correct the numerous and regularly reported shortcomings and bank practices and procedures which were brought to his attention in internal annual reports and otherwise;
>
> 2. The respondent failed to arrange for the development and implementation

> of policies and procedures which would have secured a culture of compliance with law and with professional standards within the Bank, the absence of which clearly contributed to the nature and extent of the improper practices which prevailed;
>
> 3. Responsibility for theses practices rested with senior management in the Bank, and by virtue of his position as Chief Executive, the respondent was ultimately responsible for the banks associated legal and professional failures.

It was on that basis of those findings that the applicant sought the disqualification of the respondent by pleading that:

> "In all the circumstances, it is clear that, by his actions and omissions, the respondent, while acting as an officer of the bank over a period of six years –
>
> > 'breached his duty as such officer in failing to ensure that the company's legal requirements were complied with and in failing to carry out his common law duties with due care, skill and diligence (s. 160(2)(b));
> >
> > and
> >
> > engaged in conduct which made him unfit to be concerned in the management of a company (s. 60(2)(d) and (e))'"

The issues which arise under these paragraphs of subsection (2) are:

> 2(b) Whether the respondent while an officer of the Bank was guilty of any breach of his duty so as to warrant disqualification.
>
> 2(d) Whether the conduct of the respondent as officer makes him unfit to be concerned in the management of a company in circumstances where no specific allegation or lack of commercial probity, nor allegation of dishonesty has been made by the Inspectors.
>
> 2(e) Whether in consequence of the Inspectors' Report his conduct makes the respondent unfit to be concerned in the management of the company.

10.2 Inspectors' Report

As detailed at 5 above the Inspectors Report, had found that branch audit reports were consistently critical of the standard of compliance with the legislative provisions and Bank procedures pertaining to the operation of non resident deposit accounts. The report referred to the Bank's obligation to hold a non resident declaration in the form prescribed or authorised by the Revenue Commissioners pursuant to s. 37 of the Finance Act 1986, for each account designated by the bank as a non resident account.

The Inspectors referred to the deficiencies most commonly reported including the failure to produce non resident declarations forms at the time of audit; charities declarations rather than non resident declarations; obsolete, undated, not fully completed and containing incorrect account numbers.

The Inspectors' report details the use of incorrect forms, the use of the bank's branches as accommodation address, non resident declarations being at variance with other branch records, non resident deposits used as security for resident borrowings and non resident accounts in fictitious names. These had been particularly highlighted in the internal audit reports.

The court had noted that the Inspectors had interviewed 142 customers, the majority of whom were investors in CMI policies. The Inspectors interviewed 35 of the 113 person who held the position of branch manager during the period covered by the investigation.

Branch managers had indicated that they opened and maintained bogus non resident deposit accounts to gain or retain deposits. Frequently they said the only way to gain or keep deposits was to agree that it should be DIRT free. If a valuable customer threatened to withdraw his business, unless facilitated, the account might have been lost. Closing the account because it was bogus would not, in the culture of the time, being accepted as a good reason for losing the deposit (p. 50 to 53 of the report).

The Inspectors found that bogus non resident accounts were opened and maintained by the bank and were widespread in the branch network. They found that the opening and maintenance of such accounts by the bank constituted an unlawful and improper practice which served to encourage the evasion of revenue obligations by third parties, both on the funds deposited and on the interest earned. They concluded that up to May 1995, a year after the respondent ceased to be Chief Executive, senior bank management failed to inform branch staff in clear terms of the relevant provisions of the Finance Act 1986. They also failed to have a review conducted at that time to ensure that all existing non resident accounts were genuine. Senior management was aware of the existence of bogus non resident accounts. The Bank failed to account to the revenue for DIRT properly payable.

The Inspector had found that monies which were undisclosed to the Revenue Commissioner, including funds held in non-resident accounts were targeted by Bank personnel for investment in CMI Policies.

They were promised by the Bank as a secure investment for funds which had not been declared and respective investors were assured that funds invested would be kept hidden from the Revenue thereby engaging in a practice which served to facilitate the evasion of Revenue obligations by third parties with the purpose of such policies were the earning of commission, the retention of deposits, and the gaining of new deposits.

The Inspectors found that the respondent was aware of the level of deposits being made by CMI with the Bank and that he knew or ought to have known how the product was presented. He had to bear responsibility for the practice which served to facilitate customers of the Bank and others in evading tax.

The applicant’s case is focussed primarily on the bogus non-resident accounts and the CMI policies. The court has considered the findings of the Inspectors, the evidence on affidavit and the oral evidence to the court arising from the cross examination of the respondent.

The court first considers the respondent’s submission in relation to delegation of his duty to other staff.

10.3 Finding on Delegation Policy

The respondent had averred that he was not aware that there were bogus non-resident accounts in the Bank. He submitted that, as Chief Executive, he was necessarily required to delegate responsibilities, such as the reading of the internal audit reports. His evidence was that it was a reasonable practice and involved no dereliction of duty. He submitted that the Inspectors made no finding that he had failed to keep himself informed of the affairs of the Bank by failing to read all the internal audit reports and that the applicant could not ask the court to go beyond the Inspector’s findings. Thus, the respondent submitted, the inferences drawn by the Inspectors in their Report were not reasonable.

The court is not satisfied from the evidence of the respondent, that there was a proper system in place or that he properly supervised the delegation of reading the internal audit

reports. Indeed, given their importance as a control of the performance of the branches, their limited number and relative brevity, it is surprising that he only read those few categorised as poor or unsatisfactory.

While the respondent was entitled to delegate it did not follow that he was not under any duty in relation to the discharge of that delegated function, notwithstanding that the person to whom the function had been delegated appeared both trustworthy and capable of discharging the function. Where a delegation had taken place he, as delegating Chief Executive and director, remained responsible for the delegated function or functions and had a residual duty of supervision and control.

In this particular case the respondent was the Chief Executive, director and a member of the Executive Committee of a licensed bank. He was the most senior manager of the Bank

In *Re National Irish Bank Ltd: Director of Corporate Enforcement v. Seymour* [2007] I.E.H.C. 102, the respondent's immediate successor was also the most senior and responsible employee of the Bank. Within a short period after his appointment he had commissioned the DIRT Theme Audit Report to investigate the extent of non-compliance. Notwithstanding this, some levels of non-compliance continued. Mr. Seymour could have prevented non-compliance but he did not. This Court disqualified Mr. Seymour.

In the present case, the respondent, notwithstanding delegation was copied with six years of internal audit reports, which referred to repeated non-compliance with the provisions of s. 37 of the Finance Act 1986, in relation to DIRT.

In *National Irish Bank Ltd. Director of Corporate Enforcement v. D'Arcy* [2006] 2 I.R. 163 at 177, Kelly J. referred to Mr. D'Arcy as being "in the upper echelons of bank management" and, while he was not at the very top level of management, he was just one remove from it. The court disqualified Mr. D'Arcy for his role in CMI.

Kelly J. also referred to the special position of banks in society:

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

Mr. D'Arcy though not a director of the Bank, was responsible as a senior manager.

Gower and Davies, *Principles of Modern Company Law*, 8th Ed., Sweet & Maxwell 2008, refers to delegation as follows:

> "Provided the articles of association permit such delegation, as they may inevitably will in large organisations, delegation in itself is not evidence of unfitness. However, the responsible director may be found to be unfit if there is put in place no system of supervising the discharge of the delegated functions or if the director in question is not able to understand the information produced by the supervisory system. In other words, in large organisations directors must ensure there are in place adequate internal systems for monitoring risk."
>
> . . .
>
> ". . . the proposition that directors 'have a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors' applies not just

> to delegated duties but also to reliance by directors on their board colleagues to take responsibility for particular functions and duties. Although such reliance is again in principle acceptable, so that there can be a division of functions of the board, most obviously between executive and non-executive directors, all directors must maintain a minimum level of knowledge and understanding about the business so that important problems can be identified and dealt with before they bring the company down".

In *the Barings Bank (No. 5)* [1999] 1 B.C.L.C. 433, Jonathon Parker J. at 486 referred to the duties of directors in the following terms:

> "Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them. Lord Woolf M.R. in *Re Westmid Packaging Services Ltd, Secretary of State for Trade & Industry v. Griffiths & Ors.* [1998] 2 B.C. L.C. 646 at p. 653 said:
>
> > 'It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a company director should realise that these are inescapable personal responsibilities.'"

Some degree of delegation is almost always essential the company's business to to be carried on efficiently. Jonathan Parker J. at p. 487 made reference, in an earlier *Barings* hearing, to Sir Richard Scott V.-C. who said, when making a disqualification order, against on the respondents in that case:

> "Overall responsibility is not delegable. All that is delegable is the discharge of particular functions. The degree of personal blameworthiness that may attach to the individual with the overall responsibility, on account of a failure by those to whom he has delegated particular tasks, must depend on the facts of each particular case. Sometimes there may be a question whether the delegation has been made to the appropriate person; sometimes there may be a question of whether the individual with overall responsibility should have checked how his subordinates were discharging their delegated functions. Sometimes the system itself, in which the failures have taken place, is an inadequate system for which the person with overall responsibility must take some blame."

In summarising the duties of directors, Parker J. said at p. 436:

> "The extent of the duty, and the question whether it has been discharged, depended on the facts of each particular case, including the director's role in the management of the company."

The issue in that case was not whether the conduct of the respondents fell below some accepted practice in investment banking but rather whether the respondents acted incompetently (at p. 494).

The following summary of the propositions of Jonathon Parker J. in *Barings* (see pp. 486 – 489), was adopted by this Court *in Re. Matter of the Vehicle Imports Limited (In Liquidation)* (Unreported, 23rd November, 2000):

> (a) Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them.
>
> (b) Subject to the articles of association of the company, the Board of Directors might delegate specific tasks and functions. Some degree of

delegation was almost always essential if the company's business was to be carried out efficiently: to that extent, there was a clear public interest in delegation by those charged with the responsibility for the management of a business.

(c) The duty of an individual director however does not mean that he might not delegate. Having delegated a particular function it does not mean he was no longer under any duty in relation to the discharge of that function, notwithstanding that the person to whom the function had been delegated appeared both trustworthy and capable of discharging the function.

(d) Where delegation has taken place the Board (and the individual directors) remained responsible for the delegated function or functions and retained a residual duty of supervision and control. The precise extent of that residual duty will depend on the facts of each particular case, as will the question of whether it has been breached.

(e) A person who accepted the office of Director of a particular company undertook the responsibility of ensuring that he understood the nature of the duty a director was called upon to perform. That duty would vary according to the size and business of that particular company and the experience or skills which the director held himself or herself out to have in support of appointment to the office. The duty included that of acting collectively to manage the company.

(f) Where there was an issue as to the extent of a directors duties and responsibilities in any particular case, the letter of reward which he was entitled to receive or which he might reasonably have expected to receive from the company might be a relevant factor in resolving that issue. It was not that the unfitness depended on how much he was paid. The point was that the higher the level of reward, the greater the responsibilities which might reasonably be expected (prima facie at least) to go with it.

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

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

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

(iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it had been discharged, depended on the facts of each particular case, including the director's role in the management of the company. (As summarised on page 436)

Where delegation has taken place the Board (and each individual director) will remain responsible for the delegated function or functions and will retain a residual duty of supervision and control. It is clear that the duty will vary according to the size and business of the particular company and the experience or skills which the director held

himself or herself out to have had in support of appointments to the office.

The Inspectors received no evidence that any of the improper practices investigated were brought to the attention of the Board of the Bank, all of the other members of which appeared to be non-executive. In the circumstances the Inspectors were of the opinion that the Board could not have been held responsible for the existence of these practices. The respondent had a responsibility to ensure that he understood the nature of the duty which he had to perform in acting as Chief Executive and as director to manage and supervise the operation of the Bank.

10.4 Systemic Non-Compliance

In *Seymour* this Court held that it was not a necessary proof of disqualification that the director's conduct involved the commission of wrongdoing. Nonfeasance in relation to systemic non-compliance was sufficient. The clear evidence was that after the DIRT Theme Audit in December 1994, Mr. Seymour, did know of the recurrent problems and, at least in respect of the bogus non-resident accounts could have re-designated these as resident accounts, accounted for the DIRT unpaid and disciplined senior and branch management for non-compliance. The failure to do so was, in the opinion of the court, a lack of a proper standard of conduct.

The respondent had, of course, ceased to be Chief Executive in May 1994 when Mr. Seymour succeeded him before the DIRT Theme Audit was commissioned.

The respondent's evidence was that he did not know the extent of the non-compliance notwithstanding receipt of the internal audit reports, the memorandum of Mr. Hunt and the concerns of Mr. Brennan and other senior managers of the Bank.

There is no doubt, however, that if he had so known he would have been in a position to and had authority to bring about a cessation of the systemic improper practices.

In *DCE v. Curran* [2007] I.E.H.C. 181 this court was satisfied that Mr. Curran, a regional manager of the Bank, was aware, from internal audit reports, of the "deficiencies and irregularities" in relation to the non-resident, DIRT-exempt accounts held at branches at his region and that he ought to have been aware, at least since his promotion to the Head of Retail Banking, of the widespread existence of bogus non-resident accounts. However, this Court was satisfied that he did not have the authority to bring about a cessation of the improper practices. While the court might have expected a more assiduous approval to compliance when Mr. Curran had become Head of Retail, the court was satisfied that he did not have the authority to bring about cessation of the improper practices and, accordingly, held that it was not appropriate to make a disqualification order.

10.5 Internal Audit Reports and DIRT Compliance

The internal audit reports were concise statements of performance compliance of the branch network. There seems no doubt that the function of internal audits was critical to the monitoring of the performance of the Bank and to the management and supervision of the branch network.

The respondent referred in his affidavit to 62 reports from 1998 to 1994 during his six year term as Chief Executive. The Bank had advised that there were 164 reports extant for the period 1988 to 1997 which extended beyond the respondent's terms of office. It is common case that there were at most 24 (in 1989) and an average of about 20 per year.

It was significant that Ms. O'Sullivan Lacy did not give evidence. The respondent when asked did not say what her delegated role was in relation to the internal audit reports.

The analysis by the applicant of the 121 internal audit reports available over six years when the respondent was Chief executive was not controverted.

During that period 45% of reports referred to some declarations no been sighted. Reference was made to reporting of declarations being undated (27%), not signed (9%) and 30% being not complete.

While it might be expected that these deficiencies had occurred in earlier years (1988 – 1989) it is significant that 1992 – 1994 had a higher rate. Reports referring to declaration not being sighted ins 75%, 60% and 100% in 1992, '93 and '94 albeit on a small sample of 6 reports sent to eh respondent before the end of his term as Chief Executive in May 1994.

The analysis of incomplete declarations reported per branch showed that in most cases these deficiencies persisted.

The respondent had said that the only reports that he took a detailed interest in were those graded below the satisfactory level. On the respondent's analysis of the 62 reports there were only six reports (2, 3 and 1 in years 1990, 1993 and 1994 respectively) which were classified as poor. No report was classified as unsatisfactory. He agreed that the reading of the reports would take a little longer than 15 minutes. It is clear that this was not an onerous task.

Counsel for the respondent had queried how the Inspectors could criticise the respondent on the reading of the internal audit reports in circumstances where they had not criticised the auditors. This seems to this court to miss the point made by the Inspectors. The Inspectors had noted that the internal audit staff had identified and reported instances of improper practices to senior management of the Bank. They concluded that the Bank's internal audit personnel performed their function in a satisfactory manner.

It is not clear whether the submission relates to the Inspectors not criticising the internal auditors or the external auditors. If it is in respect of the latter, the Inspectors had found that, in carrying out their audits, the external auditors were aware of, and placed reliance on the work of internal audit, and they concluded that internal audit was competent. The external auditors were satisfied that internal audit reported the issues to management. They did not consider it necessary to modify their audit plans to specifically examine the areas reviewed by internal audit. The Inspectors were of the opinion with one exception that these judgments were appropriate. The one exception dealt with at pp. 57 and 58 related to the DIRT-theme audit report which was commissioned after the respondent's term of office of Chief Executive. This concluded that "this is a risk area and the penalties for non-compliance at the level shown in this report would be very significant". The Inspectors found that this put the auditors on notice of a potential or potentially material liability which should have led them to ask management to quantify the potential retrospective liability to the Revenue Commissioners. The Inspectors were of the opinion that, if the external auditors had requested that this potentially material liability be quantified, this would have emphasised its importance to senior management and that it was unlikely that they could have ignored it, as they did.

This shortcoming would seem to have only come to light with the DIRT-theme audit report of December 1994, some eight months after the respondent ceased to be Chief Executive though still remaining on the Board as a Director of the Bank.

The court accepts that the Inspectors had made no finding that the respondent had failed to keep himself so informed in relation to the internal audit reports. However the Inspectors did find that the respondent was copied with the internal audit reports and had notice of the deficiencies or "irregularities" which existed in the operation of DIRT exempt non-resident accounts at branches. The issue is, accordingly, not whether the respondent

read some or all of the reports but whether he had notice of the reports.

The court is satisfied from the evidence given in cross examination that the respondent had notice of some of the reports such as to be aware of issues of non-compliance with DIRT legislation.

On this basis it seems to the court that the inference drawn by the Inspectors that the respondent should not only have been aware of the failure of the branches to hold properly completed non-resident account declarations but should also have been aware that bogus non-resident accounts existed throughout the branch network, was a proper inference.

The respondent, in his evidence, had said that the requirement of the Finance Act 1986, was not as simple as the Director of Corporate Enforcement stated and that the requirements were not clarified until 1999, is in contrast to the respondent's previous evidence of his own understanding of the provisions of the non resident declarations.

It is unclear from the respondent's evidence what needed to be clarified by the Public Accounts Committee in 1999, thirteen years after the Finance Act 1986. Section 37 required a declaration in writing and signed by the non resident deposit holder. In his earlier evidence to this Court he was of the view that the provisions of the section were clear.

The respondent in his second affidavit of 2nd October, 2006, had referred to listed documents available to him and in particular to seven memoranda from September 1991 to November 1993. Six of these were dated November/December of 1991, 1992 and 1993, from Mr. Brennan, General Manager and from the regional managers. None of these documents originated from the respondent nor do they appear to have been initiated by him.

These memoranda reinforced the content of the Special Circulars of 1986, 1987 and 1993 referred to at pp 25 – 28 of the Inspectors report where they criticised the circulars, inter alia, as not dealing with existing accounts.

The respondent referred to internal audit reports of the branches as examples of an operating system to ensure compliance. The court accepts that action was taken, but, non-compliance continued and was not comprehensively tackled until late 1994, when the DIRT Theme Audit Report was instigated when the respondent's successor, Mr. Seymour was appointed. The Court acknowledges that the respondent did not have the advantage of this audit but is satisfied that the respondent had notice of non-compliance, had received memoranda of Mr. Brennan and Mr. Hunt which gave an overview of non-compliance.

The issue of retrospective payments of tax on DIRT was not raised during the respondent's period as Chief Executive.

The court accepts that non-compliance was not limited to the respondent's term of office from 1988 to 1994. The report of the Public Accounts Committee in 1999 refers to non-compliance having continued after the DIRT Theme Audit. There appears to have been widespread ambivalence in relation to the implementation of the requirement of the DIRT provisions and a disregard of the logical consequences of non-compliance.

It is unclear from the respondent's evidence what his assistant, Ms. O'Sullivan-Lacy was expected to bring to his attention. His evidence was that he did not instruct her to report on DIRT compliance issues which, it is assumed, would have encompassed compliance with non declaration provisions. The respondent's evidence in relation to the criteria given to his assistant was, insofar as any instruction was given, vague. His assistant did not

give any evidence. There was no evidence of what memos or reports there was which were not available from the Bank's discovery. There was no evidence of "a rigorous system of follow up and attention" in relation to the delegation of this task to his assistant. The court concludes that, in this regard, there was a failure of management, supervision and control by the respondent.

The audit reports of Virginia in December 1990 and November 1992 and the reports of Skerries branch in November 1989 and December 1992 showed a continuation of incomplete declarations. The respondent agreed that when one looked at the reports together that there were remaining weaknesses. However, he said that he did not ever have the opportunity to see that in his time at the Bank.

The report for Virginia in December 1990 referred to an account being redesignated. Two years later the internal auditors referred to a number of customers with unspecified declarations or which were not satisfactory and warned that the Bank could suffer loss.

The response that he did not have an opportunity to see that at his time at the Bank and that he could not remember what he said to his delegates belies the respondent's assertion that he carried out his function to the highest standard.

His evidence that the external auditors were in a better position to read the internal audit reports appears to confuse the function of audit with that of control, management and supervision.

The Court finds the reply by the respondent to counsel's reference to the Skerries Report of November 1989 that he did not know why business was lost and that he did not have the experience of discussing it with the Head of Audit as somewhat disingenuous. While it accepts that the respondent said he did not see the Report at the time, the question was what he thought of it when he was being cross-examined, it would appear to be clear from the findings of the Inspectors and indeed from the evidence given by the respondent himself that customers had an incentive to declare their deposit accounts as being non-resident insofar as they would be paid interest gross; that the practices of the banks, on his evidence, was that retrospective tax was not paid until 1999.

The respondent's evidence does not appear to correspond to operating to the highest standard or to having a rigorous system of follow up and attention in place. It does not accord either with the statement that the Bank procedures at the time had stated very clearly the importance of complying with the requirements of the 1986 Finance Act.

The respondent maintained that he carried out his function to the highest standard. He had said that, while items of weakness were being highlighted and action requested, some of the managers did nothing or else falsified what they stated. That never emerged, he said, until many years later. It would appear from the audit reports that the matter did emerge and not just as a matter of lesser significance in the case of the Virginia report in November 1992 The internal auditors did, as is clear from an examination of the Virginia reports in 1990 and 1992, report on non-compliance and on the continuance of non-compliance.

There was no evidence given of quarterly summations of work or any documents relating to the internal auditor's presentations to the audit committee. The court accepts that the respondent may not have been aware of the extent of absent declarations or errors arising in non resident accounts immediately after he became Chief Executive in 1988. However, as the analysis of the report shows the problems persisted even in some of the same branches.

10.6 The General Manager, Mr. Brennan, in his letter of the 4th October, 1989 referred to accounts being incorrectly flagged as non resident accounts which did not have

declaration forms. Branch managers were required to identify accounts and report those which were incorrectly flagged. From his evidence the respondent seemed unclear what action, if any, was required to correct the situation. The respondent was adamant and repeated several times to the court that he did not know what Mr. Brennan meant by saying that he would "see what action was required to correct the situation". The court infers that there was no clear policy of compliance in 1989. The respondent's insistence that he did not know what Mr. Brennan meant, even with the benefit of the hindsight, is curious.

Moreover, to maintain under cross examination and, in the light of the Inspectors' findings, he did not know what Mr. Brennan meant in his letter by "errors" and "this thorny subject" of Revenue concerns or "the whole area of non resident accounts is a sensitive issue" borders on incredulity.

Even if this remark were too acerbic the respondent's evidence in this regard belies the assertion that there was a system in place dealing with the issue of bogus non resident accounts. To say that regional and general managers were dealing with that issue is inconsistent with an assertion that he did not know what Mr. Brennan meant.

Such system as there was does not seem to amount to a coherent system to remedy a critical issue or indeed evidence of any direction or policy by the respondent as Chief Executive as to how the matter was to be addressed.

It would appear somewhat strange that the chief executive of the Bank would not immediately know what was being referred to by Mr. Brennan in communicating with regional managers and branch managers. It is even more surprising that at the time of this hearing and with the benefit of hindsight, that the respondent would repeatedly say that he did not understand what Mr. Brennan meant and could not read his mind. It was not a question of reading Mr. Brennan's mind but of construing the words he used.

The respondent agreed that the Bank had a duty to inquire of non resident deposit holder whether they were non resident and to require them to so declare in writing. He had not agreed "that it was demonstrated that the system was failing" but that it was "really a job for internal audit". He said that branches were actually making false confirmations which internal audit should have picked up. This does not accord with his evidence that there was a very clear follow-up system being in place.

While seeming to blame internal audit, the respondent acknowledges that it seemed that the system had been failing. He suggested that mistakes were inevitable: "manual systems inevitably have some mistakes".

Moreover, as was clear from a consideration of reports from Virginia, November, 1990 and November 1992, problems persisted. The reports of certain other branches (Athlone, Baileborough, Boyle, Skerries and Wexford) emphasised the consequences of lack of or problem declarations.

The court finds that such issues would and should have been addressed by the respondent as Chief Executive if there was an appropriate system of follow-up. It is clear that internal audit reports were a crucial control system addressed to senior management and to the Chief Executive. In so far as delegation was deemed necessary it should not, in the view of the court, abrogate the responsibility of the respondent as Chief Executive.

The respondent had explained that Castlebar was a relatively new and rapidly expanding branch, (audit report 1992 to October 1993) and that the problem was that the manager having totally ignored some of the Banks procedures was disciplined. He did not believe that this was typical of the managers in other branches. Yet in Kingscourt (September 1992) and Lanesboro report (October 1992) Monaghan, (November 1992) Virginia

(November 1990 and November 1992) and Bray (December 1992) internal audit identified similar problems even though these were characterised as ones of lesser significance. It appeared that in other branches that there were examples of non-compliance. Moreover, the respondent's evidence was that the issue of arrears of DIRT did not appear to have been fully addressed or clarified until the report of the Public Accounts Committee in 1999, some five years after he ceased to be Chief Executive.

It seemed from the evidence of the respondent that the designation of non-compliance under heading of weaknesses of a lesser significance allowed non-compliance to remain unsupervised by the respondent. The court is not satisfied that this excuses oversight. Those matters were highlighted in reports categorised as unsatisfactory and, as such, were read by the respondent. The issue of arrears of DIRT were neither considered nor addressed during the respondent's tenure as Chief Executive. Given the scale of non-resident accounts and the degree of non-compliance this constituted a potential liability for the Bank and a delay and loss to the Revenue. The Hunt memorandum of November 1993, which will be dealt with in detail below, refers to an increase of non resident accounts from £80m to £110m in the previous year.

The evidence from the reports was that there were improperly designated non resident accounts even though the reports simply referred to non declaration forms not being sighted. When the respondent was asked in cross examination to distinguish between non resident accounts without such declarations being subsequently provided with declarations and those which never had such declarations, his answer suggested that the non declaration forms had either been in the Bank but not available or that declarations were subsequently made. He did not address, what appeared to be implicit in the audit reports, that there were non resident accounts in respect of which there were never any non resident declarations. He added that in some cases the forms were lost, mislaid and action was taken when that happened. He agreed that the reason why the process was in place was that otherwise, as a bank, they would have no way of actually demonstrating that the branch has carried out the first test (to establish whether the account holder was a genuine non resident) if they did not have the second test (the declaration in writing).

It was put to the respondent that he was saying that if there were no forms, or that the forms were incomplete or inaccurate that it did not follow that they were not non resident. They would have effectively satisfied neither test. He replied that the account was reclassified if as a result of the action it was established that the person was not a genuine non resident. The respondent did not reply to the question put and referred to reclassification where it was established that the holder was resident. This ignored the clear requirements of the DIRT legislation.

The court finds that treating accounts as non resident even where they did not comply was a practice of which the respondent had notice, ought to have been aware and, in some cases was aware. He ought to have known that such practice facilitated the evasion of DIRT by the Bank.

The respondent stressed that the Revenue did not highlight those arrears as an issue. This ignored the Bank's obligation under the 1986 Act.

10.7 In acknowledging that there were incorrectly classified accounts highlighted and, indeed, that the Castlebar audit highlighted very serious matters most of which could not be explained, it would seem that the respondent was relying on a semantic distortion between non documented and "bogus" non resident accounts. While that term was not used in the internal audit reports it is clear what was meant by the Inspectors. While the term "incorrectly classified accounts" seems less noxious, as the term "bogus non resident accounts" it equally signifies non-compliance.

The respondent's averments in his first affidavit were confirmed by his evidence to this Court. He rejected as incorrect and lacking any evidential foundation the finding that

senior management was aware of the existence of bogus non resident accounts. His evidence was emphatic that he was not so aware and that there was no evidence that ever came before him to make him aware. Nobody in the Bank had ever advised him of such accounts. He had, however, referred to incorrectly classified accounts. While he had referred to discussions he had with other banks regarding the issue of DIRT he had indicated to the court that this did not amount to an admission that he was aware of bogus non resident accounts in the Bank.

It had been put to the respondent that once he was referred to incorrectly classified accounts he would know that it was an account which was beyond "yea or nay" incorrectly classified and, accordingly, bogus. He agreed and said that such an account should not have been classified as non resident but he would not identify it as bogus. He accepted that where the holders of non resident accounts were Irish residents and that deposits were held in support of a letter of guarantee for lending at the branch that it was doubly deficient.

The court accepts that the term "bogus" was not used by the internal auditors. However, it seems to strain understanding that the respondent, even at this juncture, would attempt to deny his knowledge of non-compliance because of the use of the term "bogus" not being referred to at his time as Chief Executive.

Bogus has the meaning of sham, counterfeit, spurious, fictitious (Collins Concise Dictionary 1997). As qualifying "non resident account" it implies a false declaration by the account holder. As is clear from the analysis of the reports, in many cases there was no declaration in respect of non-resident accounts. It is not known whether account holders claiming to be non resident were not prepared to make false declarations. It was the Bank as deposit taker who had to have a completed declaration and who was none compliant and should not have paid interest without deduction of DIRT.

The reality is, of course, that whether called incorrectly designated or bogus the Bank did reclassify some of the accounts. That could only have been on the basis that they were not genuine non resident accounts. To distinguish between the opinion of the bank manager as to whether they were non residents and the declaration of the account holder is, to a certain extent spurious. It was the obligation of the Bank to deduct DIRT where written declarations were not in place irrespective of whether the account holder was resident or non resident. It was logical that where interest had been paid gross that under the provisions of the Finance Act 1986, the Bank should account for DIRT due.

The respondent appears to have focused on the designation "bogus non resident accounts" in order to suggest that he was not aware of the non-compliance resulting from the non availability of declarations. This appears to the court to be somewhat disingenuous given that his evidence was that, in that case of the few reports that were poor, the accounts were reclassified.

No evidence was given of the typical average period of time from the opening of such incorrectly classified accounts to their redesignation. The court is satisfied, however, that the period of time was not minimal, given the evidence of the respondent with regard to the pressure on the branches and their inability to deal with the matter when the internal auditors were present. Indeed, there was evidence that non-compliance continued to be a recurring item of report for some branches though not necessarily involving the same depositor. These accounts were allowed in several cases to continue without redesignation. The evidence in relation to declarations obtained when declarations had been mislaid also points to a time lapse.

Subsequent to the respondent's period as Chief Executive a DIRT team audit report uncovered the extent of the problem in December 1994 some years before the Public Accounts Committee "clarified" the position with regard to retrospective payments of DIRT in 1999.

It is also significant that the reports of the internal audit noted that DIRT should have been deducted and that there could be a resulting loss to the Revenue by reason of the Bank's failure to collect DIRT. Significantly neither the word "retrospection" nor the word "arrears" was used. However, it is clear that the DIRT element of interest paid ought to have been provided for. The respondent agreed that where there was no declaration then there was an obligation to collect DIRT and that a failure to collect DIRT left the bank open to penalties.

The respondent explained that he suspected that the practice of not attempting to contact the Revenue for incorrectly classified accounts came from the previous period before 1986, when the banks were obliged to make returns in respect of deposit holder's interest over £70 but did not have to account for tax. This may explain, but in the view of the court, does not excuse non-compliance with DIRT legislation.

The cross examination proceeded on the basis of audited reports of branches during the period 1998 to 1994 when the respondent was Chief Executive of the Bank. As already found in the Inspectors Report and in evidence to the court, there were deficiencies in relation to declarations as to residency of the account holders.

The court is satisfied that this was communicated and highlighted to the respondent by the internal auditors over the period when he was chief executive. A pattern of non-compliance emerged from those reports. While the wording of the reports may not have used the term "bogus" in relation to the non-compliance with the requirement of have declaratory forms it is clear that non-compliance remained a problem.

The respondent in his first affidavit sworn on the 3rd October, 2005, rejected as incorrect and lacking in any evidential foundation that senior management were aware of the existence of bogus non resident accounts. He further asserted in cross examination that he was not so aware of the existence of such bogus accounts. The court has already referred to what seems to be a pedantic distinction between "bogus" accounts and non-compliance with the provisions of the Finance Act 1986.

The respondent referred to the lack of documentation to deal with issues such as the increase in the non resident accounts at the Banks branches between September 1992 and September 1993 which showed an overall increase of over one third.

The court has considered the respondent's evidence with regard to the difficulty of getting documents from the Bank and, indeed, his affidavits had averred to this lack of documentation as being a problem for him. Yet the court (Kelly J.) granted this application for 24 categories of Bank documents to be made available to him on 13th October, 2005 and, it appears there was no application for discovery or any indication to this Court of what documents the respondent says were not given to him.

The respondent had been given booklets relied on by counsel for the Director in relation to the issues that were being raised.

From the evidence given in cross examination the court finds that the respondent was aware that non-compliance continued to a significant extent. The court also finds that the ignoring of an obligation to account for retrospective tax when the accounts were redesignated would seem to confirm a degree of complacency on the part of the respondent with regard to the implementation of the provisions of the Finance Act 1986. The court finds that the respondent failed as Chief Executive and as director of the Bank to exercise a proper duty of care in relation to tax compliance.

This court in *Seymour* held that:

> "It seems to the court that, broadly complying with obligations under the

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

10.8 Non-compliance was highlighted in the memo of Gerry Hunt to the respondent and others on the 18th November 1993, the year before he ceased to be Chief Executive but remained as a director of the Bank.

The respondent said he could not recall having received Mr. Hunt's memo in November 1993. Mr. Hunt had referred in his memorandum to three phone calls from the Revenue and the Department of Finance. The 1993 tax amnesty which was a noteworthy event was the context of the Revenue concerns regarding alleged actions of a number of bank officials. Mr. Hunt had found it difficult to explain why such a high proportion of new funds had come from non residents over the previous twelve months when their deposits increased from £80m to £110m.

Mr. Hunt had explained that "The UK Revenue did a similar exercise on Northern Bank in 1990 and made claims for negligence based on inadequate documentation". The respondent's evidence to the court was that while he could not recall having received Mr. Hunt's memo and did not know what he reaction was when he received Mr. Hunt's memo, he was "obviously pleased that he (Mr. Hunt) was highlighting an issue that he had some concern about based on discussions he had with the Revenue and that he was beginning to highlight it to people as an issue that needed to be reinforced".

That does not appear to have addressed the concern of Mr. Hunt which pointed to the possibility of Revenue audits of non resident deposit accounts. It was difficult to explain how such accounts had increased by £30m from £80m the previous years to £110m in 1993.

Given the importance of the content of Mr. Hunt's memorandum and the context if the 1993 tax amnesty it is not credible that the respondent's evidence was that he did not recall having received the memorandum.

The respondent's evidence was that Mr. Hunt's memorandum of November 1993 did not say specifically anything in relation to bogus non resident accounts but referred to that documentation being weak. The court observes that this is again a semantic distinction.

The analysis attached to Mr. Hunt's memo of the 18th November, 1993 showed very significant increases, albeit in some cases from a low base, in non resident savings accounts in the year to September 1993. To say that he would have sought an explanation as a result of the memo; that he would have followed it up but that he did not have the documentation to recall precisely what the explanations were seemed to the court to avoid the question being put as to the reasons behind the increases. The question regarding the reasons for the increases and the statement by Mr. Hunt, that "it is difficult to explain why such a high proportion of new funds are from non residents", was not answered by the respondent.

The respondent said that the only reason he could give for the 44% (£3.5m) proportion of non resident deposits to total deposits in Killarney was that a lot of residents in that area "would have been abroad and would have come back with money". Places like Gweedore (57% £3.7m) and Dungloe (53% £9.2m) were closer to Northern Ireland.

The 45% proportion of non resident accounts in Castlebar was accounted for by an increase from £44,000 in September 1992 to £7.4m in September 1993. He categorised

that as a significant problem.

The respondent replied that it did not strike him that Killarney with 44% had a significant problem with bogus non resident accounts. Nothing emerged to show him that the Bank had the type of problems there that was demonstrated in Castlebar. The respondent said he was not sure whether the over all deposit base of the Bank went up by 36% between September 1992 and September 1993. This was the figure by which the non resident accounts had reached. He said that the proportion of non resident accounts in city branches was closer to 10% to 12%.

The court finds it difficult to understand how the respondent, as Chief Executive, should not be able to recall, even seventeen years later why such an overall significant increase had occurred particularly where this had been highlighted by Mr. Hunt on the 11th November, 1993. The view of the court was that the respondent's evidence was evasive and less than helpful

The Inspectors have found that the respondent had notice of what they termed deficient or irregularities which existed in the operation of DIRT-exempt non resident accounts at branches from the internal audit reports.

The Inspectors were of the opinion that these audit reports pointed to the likelihood that non resident accounts referred to therein were, in fact, bogus. The extent of documenting non-compliance was on such a scale that, in the Inspectors opinion, it constituted a further indication that a substantial proportion of the non resident accounts could be bogus.

The Inspectors found that the respondent held ultimate responsibility to ensure that DIRT was deducted from interest paid or credited on all accounts subsequent to DIRT and failed to discharge that responsibility.

Mindful of the distinction of findings of fact and of opinion by the Inspectors and having regard to the evidence of the respondent in cross examination the court is of the view that not alone that the respondent failed to discharge his responsibility under the Finance Act 1986, but that he failed to ensure a culture of compliance with law and with professional standards within the Bank. As a result he failed to deter or correct extensive shortcomings reported to him.

The court finds that the respondent by his actions and omissions breached his duty as officer of the Bank in failing to ensure that Bank's legal requirements were complied with and that he failed to carry out his duties of care, skill and diligence.

10.9 CMI Policies

The evidence of the respondent on affidavit and under cross examination was that the Bank had been a loss making subsidiary of Midland Bank and had been "pushed onto National Australia Bank by Midland" when it was selling some of its subsidiaries in England and Ireland. When the respondent was made chief executive in 1988 discussions regarding "new products" took place.

The managers of the branches had up to then been insurance agents and, according to the respondent's evidence, were earning £20,000 to £30,000 per year before the agencies were bought out by the Bank on the 1st January, 1990. The respondent's evidence was that National Australia Bank, who had an involvement in insurance business, encouraged the Bank to become involved in such business in Ireland.

Part 5 of the Inspector's report entitled "Evasion of Revenue of Obligations: The Sale of

CMI, Scottish Provident International and Old Mutual International Policies" referred to Mr. Nigel D'Arcy commencing employment with the Bank on the 1st May, 1989, to establish the financial advice in the services divisions ("FASD") of the Bank in order to provide a range of independent financial services, primarily in the insurance and investment related sector, to Bank customers and others.

The Bank used a wholly owned subsidiary, National Irish Bank Financial Services Limited, to account for the income and expenses of the FASD relating to the sale of life assurance and investment type products. The subsidiary but not the Bank, was authorised as an insurance intermediary under the Insurance Act 1989, in its capacity as a broker. The Scottish Provident International Policy shared the key features of, and was promoted in the same manner as, the CMI personal portfolio product. References by the Inspectors to CMI products were taken as references to the Scottish Provident International product also. The sales brochure issued by FASD, who, according to the Inspectors' Report, introduced life assurance business to CMI from March 1990 onwards, referred to the proceeds of the investment being available immediately on death with no foreign probate requirement. Confidentiality and the continuation of the investment in the event of death was stated to be of vital importance. In the opinion of the Inspectors, a more important advantage from the investors' point of view, which would have been known to Mr. D'Arcy, was the absence of the need for probate. This meant the funds could be kept concealed from the Revenue Commissioners.

When questioned about widespread evasions of tax both through fictitious accounts and insurance products such as CMI, the respondent said that he "did not see that as coming through from the Inspectors Reports", and that he was never presented with any documentation, either directly or through audit committees to support such a conclusion. He did not see any reference in the Bank to widespread tax evasion.

In particular, he did not accept the evidence from the Inspectors report that officers within FASD targeted customers with "hot" money in order to sell the CMI products to them. He said that he did not have any knowledge of that himself but that if he did, they should not have done it. Had he known he would put a stop to it. It breached Bank procedures. It would have been a very serious disciplinary matter and it would have been dealt with accordingly. He said he was not aware of what FASD was doing in his time at the Bank. He said he had no knowledge whatsoever of that. On no occasion did Mr. D'Arcy, who reported to him, indicate that his staff had been targeting customers who had "hot money".

However, it was clear that Mr. D'Arcy reported directly to the respondent. The respondent has acknowledged that he was aware of the level of deposits made by CMI with the bank. He submitted that his concerns in this regard were entirely and properly treasury concerns that such funds could possibly be moved at short notice and the fact that the bank could not become over reliant on them.

His concerns were based on an awareness of the level of deposits made by CMI with the Bank. This should have put the respondent on enquiry of the source of such funds.

The court acknowledges that the Inspectors do not make any finding in relation to the respondent's awareness of the product being promoted to persons wishing to conceal, or continue to conceal, funds from the Revenue.

While the court accepts the respondent's evidence that he was not aware that CMI was promoted so as to facilitate tax evasion, he was aware of its promotion to non resident account holders and of the growth and investment.

The Inspectors had already noted that internal audit did not deal with the manner of promotion of the CMI policies and the Inspectors were of the view that the manner of

promotion of those policies was not within the remit of internal audit.

The court notes that the respondent had referred to the "wide range of policies offered by the Bank" of which he had to keep himself informed and that he could not be criticised for not knowing the purpose of promotion of the CMI product. No evidence was given of the wide range of policies offered by the Bank.

The court is aware of the products being offered by the Bank within the normal course of the banking business. It would appear to be part of the responsibility of the chief executive of a bank to be aware of the nature and performance of such products.

However the use of the word "policies", which may be unintended in the submissions, would appear to refer to insurance business for which the Bank was not licensed. Given that the very essence of banking business involves the holding of a banking licence it would seem to follow that in pursuing assurance or insurance business, a chief executive should be aware of the need for appropriate licensing.

The conclusion of Part 5 of the Inspectors' Report was that monies which were undisclosed to the Revenue Commissioners, including funds held in bogus non resident accounts, were targeted by bank personnel for investment in CMI policies as a secure investment for such monies. The Inspectors found that this practice served to facilitate the evasion of Revenue obligations by third parties.

The respondent said that he put in place an auditing, review and control system which should have highlighted such practices but did not. His evidence was that he first became aware of the CMI malpractices just before the Inspectors were appointed. This would appear to evidence a lack of awareness of an important element of the Bank's business.

The policies were off shore investment schemes used to evade tax by way of a single premium as an alternative to maintaining bogus non resident accounts or incorrectly of fictitiously named accounts. These had been the subject of the RTE exposure in 1998. The programme had alleged that senior managers in the Bank were aware that these schemes were used to evade tax. The Inspectors were appointed to examine these allegations.

The court is satisfied, from the evidence of the respondent, that Mr. D'Arcy was recruited not by the respondent personally but through the normal recruitment procedures. The respondent agreed that Mr. D'Arcy reported directly to him. The Inspectors found as a fact that the respondent was aware of the level of the deposits made by CMI with the Bank. His evidence to the court confirmed this awareness. There was no evidence of actual knowledge of how the product was being promoted.

The Inspectors opinion was that the respondent knew or ought to have known how the product was being promoted. This is a less emphatic finding than that in relation to the bogus non resident accounts.

It is not a finding of fact in the sense of the distinction made by s. 22 of the 1990 Act, much less a finding of lack of probity.

The respondent in his evidence in cross examination noted that the Inspector had not made any findings that he knew or ought to have been aware of the promotion of CMI and sales practices by the Bank.

It is necessary to examine the distinction between facts and opinion.

Section 22 of the Companies Act 1990 provides that a document such as the Report of the Inspectors is admissible in any civil proceedings as evidence both of the facts set out

therein without further proof unless the contrary is shown and also of the opinion of the Inspectors in relation to any matters contained in the Report. It seems clear that the opinion of the Inspectors is admissible in such proceedings in the absence of contrary evidence. In the Supreme Court, Fennelly J. stated at p. 360 of *Director of Corporate Enforcement v. Byrne* [2009] I.E.S.C. 57, that the Inspector's findings "should be accepted, unless they are clearly shown to be incorrect".

In *Countyglen plc v. Carway* [1998] 2 I.R. 540 at 550 – 551, Laffoy J. held that on a literal interpretation of s. 22 the word "facts" means primary or basic facts and no secondary or inferred "facts". The words "without further proof" indicated that the legislative intended was that facts which would be provable by witnesses in the ordinary way and not deductions from facts found or admitted, should acquire the status of proven facts under section 22.

The court in that case referred to the judgment of Henchy J. in *V.C. v. J.M. & G.M*. [1987] I.R. 510 at 522 which distinguished primary or basic facts as found depending on the assessment by the judge on the credibility and quality of the witness: such facts will not normally be reversed on appeal. Secondary or inferred facts were held not to follow directly from an assessment or evaluation of the credibility of witnesses or the weight to be attached to their evidence, but derive from inferences drawn from the primary facts.

The Inspectors had referred to the CMI Personal Portfolio being targeted principally at customers of the Bank, many of whom held bogus non resident accounts and certain persons who ere not customers of the Bank but were known. In relation to the respondent's knowledge of this practice the Inspectors found that he was aware of the level of deposits made by CMI with the Bank and knew or ought to have known how the product was being promoted. The Inspectors found that whether he knew or not he had to bear the responsibility for the existence of this practice which served to facilitate customers of the Bank and others in evading tax.

The court is satisfied from the respondent's evidence to the court that he had a responsibility to acquaint himself with the practice and its propriety given the relative size and growth of the investment following his awareness of the extent and persistence of the so called bogus non resident accounts.

The Inspectors noted in each of the areas the subject of the investigation, with the exception of the manner of promotion of the CMI policies, internal audit staff identified, and reported to senior management in the bank, instances of improper practices. The Inspectors were of the view that the manner of promotion of the CMI policies was not within the remit of internal audit.

The Inspectors also accepted that it was not the function of internal auditors to correct improper practices or deficiencies in procedures discovered by them.

To that extent it appears to the court that the conclusion of the Inspectors that the respondent as Chief Executive of the Bank bears responsibility for the existence of the promotion of the CMI product is appropriate.

Despite some unanswered questions, the court is of the view that the findings of the Inspectors in this regard do not on their own justify the orders sought by the applicant.

Under s. 160(2)(e) however, the court is of the view that the respondent had a duty as officer of the company to familiarise himself with the business of the Bank to adhere to and comply with statutory provisions and while delegating to take ultimate responsibility to discharge the Bank's statutory obligations.

Notwithstanding many of the internal audit reports continued to refer to non-compliance.

While the court accepts that the Bank's procedures referred to compliance with the requirements of the 1986 Finance Act, there was not any evidence of a "rigorous audit system" in place with follow up action to which the respondent alluded. The respondent, in his evidence in cross examination, added that some managers failed to take action and some falsified documents. He did not say why this was not detected and did not emerge until many years later. The court concludes that there was a failure to supervise and control compliance.

10.10 Fictitious or Incorrectly Named Accounts

The Inspector's Report found that the respondent may not have had knowledge of the existence of fictitious or incorrectly named accounts at the branches as distinct from bogus non resident accounts. Nonetheless the Inspectors found that, as Chief Executive, he had to bear ultimate responsibility for the practice of opening and maintaining fictitious and incorrectly named accounts during the period that he held his position.

The court accepts in this case that there have been no facts found in the Inspectors Report or adduced in cross examination that the respondent knew of the existence of such accounts.

The Inspectors found that that respondent had to bear ultimate responsibility for the practice. The court is of the view that, in the absence of evidence of actual or constructive knowledge, there can be no finding of a breach of duty or unfitness on this ground.

10.11 SSA Accounts

The court agrees with the submissions of the respondent that the Inspectors did not make a finding that he had knowledge of the deficiencies in the operation of the SSAs in the branches.

Nonetheless the Inspectors conclude that he must nonetheless bear ultimate responsibility for the shortcomings which existed in this area during the period.

On the basis of the principles enumerated in *Barings*, the respondent had a responsibility to supervise the tax compliance of such accounts to inform himself of the irregularities, and to take remedial measures where necessary. This he failed to do.

10.12 Improper Charging of Interest

The court has taken into account the submissions of the respondent in relation to the Inspectors' findings which relate to the adverse internal audit reports on interest loading which the respondent had received. The Inspectors also referred to the respondent's reaction to receipt of the April 1990 report on Carrick-on-Shannon as being appropriate in that he directed that the practice cease. However the Inspector's believed that the reaction was incomplete in that it failed to address the issue of refunds to customers.

The court is of the view that the consequence of awareness and action should have prompted a consideration and a repayment of interest overcharged. While this might be said to be based on hindsight, it would seem to the court that the Bank had an obligation towards its customers to ensure that not alone no improper interest be charged but that such interest be returned. The respondent was not entitled to assume that such interest loading would be refunded by the branches.

He failed to manage the charging of interest and supervise the refunding of interest improperly charged.

10.13 Fee Increases

The Inspectors found that the respondent was made aware of consistently reported shortcomings and the lack of explanation for fee increases recorded.

The Inspectors also found that the respondent was made aware, through receipt of branch audit reports, that the Customer Action Pad introduced in July, 1992 was not being used. It was his responsibility, the Inspectors held, to ensure that there was a system in place in the branches for the contemporaneous recording of management and administration time. Such a system was introduced in March 1996 after the respondent had ceased to be chief executive following pressure from the Director of Consumer Affairs.

The court is satisfied that the respondent had notice of the consistently reported shortcomings regarding fee increases and the failure of the branches to use the Customer Action Pad which, in recording increases, may have exposed the practice.

While the subsequent pressure by the Director of Consumer Affairs after the respondent had ceased to be Chief Executive changed the practice, it seems to the court that having had notice of deficiencies that the Inspectors were entitled to conclude that the respondent should bear ultimate responsibility for the failure of the Bank to put in place in the branches an appropriate system for recording management and administration time which was chargeable to customers.

The respondent had notice of shortcomings and did not remedy the deficiencies.

10.14 Bank's Management Structure

The court notes the legal submissions in respect of the assertion that the Inspector's Report was flawed in its lack of understanding of the bank's management structure. The respondent also submitted that the Inspectors had absolved the audit committee, the Board and the external auditors of any fault and, accordingly, could not fault the respondent.

This submission, it appears to the court, ignores the responsibility of the Chief Executive and Director in relation to the governance, supervision and control, of the Bank.

The position of the internal auditors has already been referred to above. Internal audit staff identified and reported to senior management in the Bank, instances of improper practices. The Inspectors had accepted that it was not the function of internal auditors to correct improper practices or deficiencies in procedures discovered by them. This, the court believes is the function of the Chief Executive or his delegate.

The respondent submitted that the internal audit function was independent of the executive function. That is no in relation to their independence. However, the implementation of their recommendation is a matter for the executive.

The Inspectors also noted the duties of the Board of Directors and noted that the Board had appointed a committee to deal with audit matters, had an internal audit function in place with independent access to the Board and had an audit committee.

The Inspectors had received no evidence that any of the improper practices being investigated were brought to the attention of the Board. In those circumstances, the Inspectors were of the opinion that the Board of the Bank could not be held responsible for the existence of improper practices.

The Inspectors' reference to the external auditor's reliance on internal audit satisfied the

Inspectors (with the exception already referred to).

It is clear that the thrust of the Inspectors' findings were in relation to the senior management of the Bank, including its Chief Executive.

It does not appear to this court that the report is flawed in its understanding of the Bank's management structure and the respondent's place within that structure. It appears to this court that the reasoning of the Inspectors in relation to the entities referred to was neither flawed nor inappropriate.

The submissions of the respondent in relation to placing trust in the management systems and procedures and in the delegated functions omit reference to the control of the systems and procedures and the overall responsibility of monitoring and controlling in relation to delegation which was referred to in the judgment of Jonathan Parker J. in *Barings*. Each individual director owes duties to the company to inform himself of its affairs and to join with his co-directors in supervising and controlling them. It follows that a managing director or Chief Executive has particular duties in this regard.

Moreover the reference to non-compliance being common through the banking industry generally cannot constitute a defence to the application against the respondent, but rather confirms the existence of improprieties, shortcomings and deficiencies within the Bank among other banks and the awareness of the respondent of the prevalence thereto.

In relation to the bogus non-resident deposit accounts the Inspectors had found that during the time when he was Chief Executive of the Bank from 1988 – 1994 the respondent was copied with internal audit reports and accordingly had notice of the deficiencies or "irregularities" which existed in the operation of DIRT-exempt non-resident accounts at branches. They referred to "the majority of such reports".

The opinion of the Inspectors was that the audit reports pointed to the likelihood that the non-resident accounts referred to in the majority of the reports were in fact bogus. In addition, the extent of reported documentary non-compliance was on such a scale that, in the opinion of the Inspectors, it constituted a further indication that a substantial proportion of the non-resident accounts could be bogus.

Thirdly, the Inspectors believed the inevitable inference from the above was that the respondent should not only have been aware of the failure of the branches to hold properly completed non-resident account declarations but should also have been aware that bogus non-resident accounts existed throughout the branch network.

The Inspectors conclude that as Chief Executive, the respondent had ultimate responsibility to ensure that DIRT was deducted from interest paid or credited on all accounts subject to DIRT under the Finance Act 1986 and that he failed to discharge that responsibility. This is an inference from the fact that the internal audit reports were copied and received by the respondent. The court must therefore assess the evidence of the respondent in consideration of his evidence on affidavit.

10.15 Mr. Long's Evidence

It is clear that Mr. Long has had extensive experience in banking. Equally he was not personally familiar with the structure and reporting lines within the Bank and, indeed, that there was little contact with the respondent after 1987. Hereafter the respondent became Chief Executive of the bank. He admitted that he did not have any direct personal knowledge of the matters the subject of the Inspectors' Report. His views were based on a review of the report and of the affidavits sworn in the proceedings. He was not cross examined on his affidavit.

He criticised the absence of a structure chart of the Bank in the Inspectors' Report. The court agrees that this would have been helpful. His remarks in relation to the Board of Directors, the Chief Executive Officer, the audit committee and the external auditors are understandably general and not based on an examination of the structure of the Bank.

He referred to the work load of the Chief Executive without reference to the number of branches and the relative infrequency of reports. He averred and said that it would not be expected that a Chief Executive would read all internal audit reports. He said that the general practice at the time was to furnish the Chief Executive with a summary of the reports highlighting significant issues.

This is to ignore the relevant infrequency of audit reports and, given what he regarded as the autonomy of branch managers, of the necessity that control of branch operations be monitored by the Chief Executive as well as by the audit committee.

It would appear that Mr. Long may have relied upon what the respondent told him. It is not clear on what basis he concluded that the respondent went much further than most Chief Executives in his experience in relation to the review of the internal audit reports. On the basis that only six audits reports identified as poor, were carefully read by him and that there were no reports categorised as unsatisfactory, it seems that the respondent’s evidence does not accord with what Mr. Long assumed or was told.

To attribute the deficiencies identified by the Inspectors to others, particularly at branch management level, does not excuse the responsibilities of a Chief Executive. The assumption which Mr. Long ascribed to the independence of the audit committee raises questions about the overall role and function of Chief Executive. There would be a systemic failure on the part of the organisation, particularly a licensed bank if internal audit reports were not considered by and responded to by the Chief Executive.

To say that the weakness was owing to the calibre of the management of the branches and their decisions to ignore senior management in the policies and procedures of the Bank is to beg the question as to what controls there were to report on the extent of this and to eliminate this weakness.

The court has considered the affidavit of Mr. Long regarding the concerns identified in the internal audit reports. Mr. Long believed that these were to be addressed and remedied by the internal auditors and the audit committee.

There was no evidence between the Court as to how these responsibilities were to be discharged. What is clear is that the respondent was the first named recipient of the internal audit reports.

Mr. Long’s evidence was in relation to banking practice in general and not to the practice of Irish banks or, more appositely, the Bank. He understood, notwithstanding, that it was not the position that concerns were brought to the attention to the respondent such understanding did not derive from his own knowledge. Indeed, he said that he had no direct personal knowledge of the matters referred to in the Inspectors' Report

The double condition suggested by him was that the responsibility of a Chief Executive depended on items being specifically brought to his attention and his being told that these matters were not being addressed adequately or in a timely manner.

The evidence in this case, to the contrary, was that the matters were brought to the specific attention of the respondent in the reports which stated matters of non-compliance were not being addressed adequately or in a timely fashion or, in a few cases, at all.

Mr. Long believed that the respondent’s review of the reports represented best practice

and went further than most Chief Executives in his experience. He averred to the fact that the respondent considered all of his reports personally below a certain rating was, in his view, commendable.

The evidence, however, was that there were relatively few reports that were unsatisfactory or poor and, indeed, that the number of reports received each year had not imposed a great burden on the respondent, even if he had read all of them as there were fewer than one per week. There was no evidence of any alternative overview or any evidence of the supervision, control or performance of each branch by the respondent.

The court is satisfied that the failure to provide such governance in relation to tax compliance, in particular during the respondent's term of office justified the Inspector's findings in relation to the conduct of the respondent. The respondent had sought to explain why there might have been discrepancies in relation to Virginia (1990 and 1992), Ballinamore (1991) and Walkinstown (1992) while, at the same time, saying that he did recall seeing the reports or having details or, in one case, having had an opportunity to consult with the head of audit or of not being shown by counsel what follow up actions had been taken.

Mr. Long's evidence did not deal with governance, management or supervision or responsibility for tax compliance.

10.16 Case Law

Re Lo-Line Limited [1988] Ch. 477, a leading English case, has been cited with approval by the Supreme Court in *Re. C.B. Readymix Ltd: Cahill and Grimes* [2000] 1 I.R. 373, and subsequent cases in this jurisdiction, including the recent *Director of Corporate Enforcement v. Byrne* [2009] I.E.S.C. 57.

In that case Browne-Wilkinson V.C. held at 486:

> "Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

The judgment in *Lo-Line* recognised that disqualification does involve a substantial interference with the freedom of the individual even if the power is not fundamentally penal.

The observation of Lord Woolf M.R. in *Re Westmid Packing Limited* [1998] 2 All E.R. 124, have been cited with approval on a number of decisions of the High Court. At 132 of that case it was stated:-

> ". . . other factors come into play in the wider interest of protecting the public, i.e the deterrent element in relation to the Director himself and a deterrent element as far as other Directors are concerned. Despite the fact that the courts have said disqualification is not a 'punishment' in truth the exercise that has been 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."

This Court in *Re. National Irish Bank Limited*, *Director of Corporate Enforcement v. Seymour* [2007] I.H.E.C. 102 said that:-

> "It is clear that an order made under s. 160 is not penal in nature – it is not a

> criminal sanction nor a determination of liability in respect of any losses that proved to members, creditors or the regulatory authorities – but an indication of a lack of commercial probity in relation to the management of the company. In addition to the objective of protecting the public, disqualification orders may also have a deterrent purpose."

The Supreme Court *In the Matter of Kentford Securities Limited: Director of Corporate Enforcement v. Patrick McCann*, 30th November, 2010, referred to the system of disqualification being complex and containing many elements reflecting different legislative concerns and referred to the act requiring a two stage inquiry of findings of unfitness which establishes jurisdiction to make a disqualification order as was observed by Fennelly J. in *Re. Wood Products (Longford) Limited: Director of Corporate Enforcement v. McGowan* [2008] 4 I.R. 598.

The Supreme Court was of the view that it was clear from an analysis of the Act that it directed attention to the past conduct and certainly the best, if not the only, guide to the necessity for disqualification and that past conduct was the key to disqualification. O'Donnell J. referred to the useful test 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. Seven Oaks Stationers Limited* [1991] Ch. 164 at 183, identifying the conduct and behaviour which constitutes such past, and present, of 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 of trading through companies with limited liability."

The court is satisfied that the respondent has been guilty of a serious failure to perform his duties as Chief Executive and as director of the Bank in respect of his continual failure to ensure compliance with the statutory requirements regarding non resident deposit accounts and CMI policies. The court is satisfied that the findings of the Inspectors of this Court that the respondent had breached his duty in failing to ensure whether the company's legal requirements were complied with failed to carry out his common law duties with care, skill and diligence engaged in conduct which made him unfit to be concerned in the management of a company.

In *Barings plc: Secretary of State for Trade and Industry v. Baker (No. 5)* [1999] 1 B.C.L.C. 433, the applicant's case was that each respondent was guilty of serious failures as management in relation to the activities of Nick Leeson which lead to the insolvency of Barings Bank. The failures of management demonstrated incompetence of such a high degree as to justify a disqualification order.

Section 6 of the English Act imposes a duty on the Court to make a disqualification order, however the respondent was or had been a director of a company *which had become insolvent* and his conduct as the director of that company made him "unfit to be concerned in the management of company".

The burden on the applicant was to satisfy the Court that the conduct complained of was demonstrated incompetence of a high degree by reference to the director's role in the management of the company.

The Court in that case, held at 435 in the context of s. 6, that the standard of competence had to be applied to the facts of each case. It was possible to envisage a case where the respondent had shown himself to be completely lacking in judgment as to justify a finding of unfitness, notwithstanding that he had not been guilty of misfeasance or breach of duty.

In this jurisdiction, the relevant s. 160 is of more general application in that it applies to

directors and officers. The pre-requisite of the company being or becoming insolvent applies to a restriction order under s. 150.

The principle enumerated in *Barings* derives from the duty of directors to exercise skill and diligence in the discharge of that duty (See: Keane: *Company Law*, 3rd Ed. (Dublin 2000) at 357). *Barings* has been referred to by this Court *Vehicle Imports Ltd*. (Unreported, 23rd November, 2000) and cited with approval in *Re. Tralee Beef and Lamb Ltd; Kavanagh v. Delany* [2005] I.L.R.M. 34, where the Supreme Court (Hardiman J.) distinguished between executive and non executive directors.

Re. SPH Ltd; Fennell v. Shanahan [2005] I.E.H.C. 152, Finlay Geoghegan J. held that the directors know or ought to have known of the accrual of significant tax liability. They were obliged to inform themselves about financial affairs of the company and to supervise and control the delegation of that function that the court held that the respondents had not satisfied the court that they had acted at all times responsibly in relation to the affairs of the company.

Ahern, ("*Directors' Duties*", Roundhall. 2009) on Directors Duties characterises *Barings* as being a radical shift in judicial thinking and the most significant judgment since *Re. City Equitable* [1925] Ch.. Whatever limited application may be made to the director of such a small family company, there is little doubt that *Barings* is relevant to the present case.

10.17 Conclusion

The Court is required by s. 160(2)(d) and (e) of the Companies Act, 1990 to satisfy itself, in relation to the application of the applicant, and the conduct of the respondent makes him unfit to be concerned in the management of the company or that, in consequence of a report of Inspectors appointed by the Court on the Companies Act, the conduct of any person makes him unfit to be concerned in the management of company.

The Court has identified a number of breaches of duty on the respondent's part.

The respondent's evidence in cross examination tended to criticise and blame branch managers while at the same time maintaining that it was never highlighted that particular managers were actually falsifying documentation. The respondent maintained that the failure happened at branch level and was never highlighted by any of the control systems including, presumably, the vigorous systems which he put in place.

He said he did not know that senior employees were communicating with one another regarding "hot money" and Revenue sensitive funds.

He said he was not aware of what FASD was doing at his time at the Bank.

He said that had he known he would have put a stop to it.

He said he saw no reference to widespread tax evasion and was never presented with anything to support the conclusion that there was tax evasion.

Turning to the Inspectors' Report he said that they had information which he did not have and also that they did not have all of the documents in relation to his responses to the internal audit reports. However, he did not say what those documents might indicate. The court is satisfied that the follow up of the audit reports showed continuing non disclosure.

The Hunt memorandum of the 18th November, 1993, pointed to Revenue consequences. The respondent in saying that he was unable to explain his reaction to that memorandum appeared to confirm that he did not inform himself about a critical element in the affairs of the bank.

He said that there was no reference to widespread tax evasion in the internal audit reports. He would appear to have not seen the pattern of internal audit reports as pointing to anything more than documentary deficiencies.

In relation to the Inspectors' Report he did not see references to tax evasion "as coming from the Inspectors' Report". He said he did not accept a lot of what was in the Report.

The court is satisfied that his responses themselves indicated a failure. He failed to follow up identified deficiencies notified to him. He failed to react to the concerns expressly communicated to him by the Hunt memorandum in November 1993 in the year before his term of office came to an end though he remained a director.

In *D.C.E. v. Seymour*, this Court held that;-

> "(A) director must familiarise himself or herself with the business of the company in order to carry out his or her duties. The business of banking requires adherence to and compliance with the statutory provisions relating to deposit taking. While a director may rely on delegating to others, there remains an ultimate responsibility (on the directors) to the discharge of the statutory obligations."

The Revenue Commissioners and the regulatory authorities place very considerable trust in the banks' strict compliance with the law.

The Court regards these breaches of duties by the respondent as Chief Executive and director as grossly negligent. Taking all of the matters as pleaded by the applicant in the Notice of Motion, the Court is satisfied that the applicant has discharged the substantial burden of establishing that the respondent was grossly negligent, in breach of his duty and that his conduct as the Chief Executive and Director of the Bank had fallen below the required standard and constituted a fundamental failure of governance. Such a failure must also lead to a finding of breach of duty as officer under s. 160(2)(b) of the Act.

The Court also finds that the respondent is "unfit to be concerned in the management of company", within the meaning of section 160(2)(d) and (e). The court will answer each of the three issues in the notice of motion in the affirmative.

In the light of that conclusion the court is obliged to make a disqualification order in respect of the respondent.

No submissions have been made with regard to the length of such disqualification order. The Court will hear counsel's submissions in relation to the appropriate length of the disqualification order and in relation to any applications to the court for relief pursuant to section (8) of section 160.

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