Judgments

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THE HIGH COURT

2005 No. 268 COS

IN THE MATTER OF NATIONAL IRISH BANK LIMITED

IN THE MATTER OF NATIONAL IRISH BANK FINANCIAL SERVICES LIMITED IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2003

AND IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF CORPORATE ENFORCEMENT PURSUANT TO SECTION 160 (2) OF THE COMPANIES ACT 1990

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND

MICHAEL KEANE

RESPONDENT

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

1. Background

Mr. Keane, the respondent herein, joined the ICC Bank in 1977 and was employed in corporate lending. In 1984 he joined Northern Bank Finance Corporation in the same area. By 1988, he had become head of marketing when National Australian Bank took over Northern Ireland Bank and its subsidiary, Northern Bank Finance Corporation, whose name was changed subsequently to National Irish Bank and National Irish Bank Financial Services Ltd. (hereinafter together referred to as "the Bank").

On the 3rd April, 1993, he became General Manager – Banking, dealing with corporate and retail banking for a period of over three years. He spent the summer of 1996 with the Bank's headquarters in Australia. He was appointed General Manager – Marketing and Distribution in August of 1996.

2. Pleadings

The Director of Corporate Enforcement ("the Director") sought an order pursuant to s. 160(2) of the

Companies Act 1990 disqualifying the respondent from*, inter alia*, being any way either directly or indirectly concerned or taking part in the promotion, formation or management of any company where the Court is satisfied that:

> 160(2)(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
> 160(2)(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.

Paragraph (e) of s. 160 (2) provides that where the Court is satisfied in any proceedings or as a result of an application under that section, that in consequence of a report of Inspectors appointed by the Court or the Minister under the Companies Acts, the conduct of any person makes them unfit to be concerned in the management of a company.
The respondent was also Director of National Bank Financial Services Ltd., from 30th June, 1994 to 26th May, 1997. Shortly after, he left the Bank to take over a senior position with another financial institution.

3. Findings of the Inspectors

3.1 On 30th March, 1998, Mr. Justice Blayney and Mr. Tom Grace, F.C.A. were appointed by the court to investigate the affairs of the Bank over the period 1988 to 1998 and published a report on the investigation on 23rd June, 2004.
The report concluded that the Bank was involved in a number of improper practices in relation to the maintenance of bogus non-residence accounts and fictitious named accounts enabling customers to evade tax through concealment of funds from the Revenue Commissions; the promotion of insurance policies for funds undisclosed to the Revenue Commissioners and the opening of special savings accounts without properly applying statutory regulations. In addition, the report made certain findings with regard to improper charging of interest and fees to customers.
In these proceedings, there is no allegation made against to the respondent in respect of the maintenance of fictitious named accounts or the improper charging of interest to customers.

3.2 Responsibilities of the respondent

The Inspectors' Report found that the respondent, as General Manager of Banking, was responsible for the entire branch network. He was a member of the Executive Committee and was on the circulation list for all branch audit reports. The respondent, together with Mr. Paul Harte, instigated the first Theme Audit in relation to Deposit Interest Retention Tax (DIRT) in 1994 and, following the publication of the DIRT Theme Audit, they chaired a management meeting on 9th February, 1995. Following that meeting, a special circular was issued in relation to the findings of that audit. The Inspectors made specific findings against the respondent in relation to bogus non-resident accounts and special savings accounts more detailed in 4 and 5 hereunder.
National Bank Financial Services Ltd. was, and remains, a wholly owned subsidiary of National Irish Bank and accounted for the income and expenditure of one of the divisions, the Financial Advisory Services Division (FASD). It is common case that the business of FASD required authorisation by the Insurance Act 1989, though such authorisation had not been obtained during the period that the respondent was General Manager of Banking.
Significantly, from1st January, 1995, Mr. Nigel D'Arcy, the Head of FASD, reported directly to the respondent. The Director maintains that while the respondent was not personally involved with the imputed promotion and sale of certain insurance policies, mainly CMI policies, his responsibility extended for the entire branch network and the activities of FASD in relation to the promotion of these policies. The Inspectors made specific findings in relation to the respondent as detailed in 6 hereunder.
The Inspectors found that the respondent had acted appropriately in relation to fictitious accounts.
They made no findings in relation to the improper charging of interest but did make findings against Mr. Keane in relation to the improper charging of fees to customers. (See 7 hereunder)

4. Bogus non-residents accounts

The Inspectors' report made a number of findings in relation to Mr. Keane and Mr. Brennan, a General Manager who preceded Mr. Keane as General Manager of Retail Banking. Mr. Brennan continued to be responsible for procedures in the branches. The Court has already delivered judgment in relation to Mr. Brennan on 22nd April, 2005.
The Inspectors found that each had been made aware, through internal audit reports circulated to them, of the deficiencies or "irregularities" which existed in the operation of DIRT-exempt resident accounts at branches. The majority of such reports referred to the failure of branches to hold properly completed declarations for all accounts classified as DIRT-exempt resident accounts.
Certain audit reports copied to Mr. Keane referred to instances where the residential status stated on the non-residential declarations was at variance with other branch records; others referred to instances where lending to resident customers was secured by letters of lien over deposit accounts with non-

residence status. In the opinion of the Inspectors, these audit reports pointed to the likelihood that the non-residence accounts referred to therein were in fact bogus.
Mr. Keane was on the circulation list for the DIRT Theme Audit Report and chaired the meeting of the 9th February, 1995.
The Inspectors believed, in the light of those findings, that Mr. Keane, *inter alia,* was not alone aware of the failure of branches to hold properly completed non-resident account declarations, but ought also to have been aware that bogus non-resident accounts were endemic throughout the branch network.
The Inspectors concluded that Mr. Brennan and Mr. Keane failed to ensure that accounts classified as DIRT-exempt non-resident accounts were correctly classified as such and to see that Regional Managers secured full compliance with the statutory provisions relating to DIRT, given that the Regional Managers reported to Mr. Keane. The Inspectors found that he had failed to discharge this responsibility. Even if the primary responsibility rested elsewhere, Mr. Keane, *inter alia,* by reason of being part of senior management, had a responsibility to raise the issue at the meeting, and failed to do so.
In November, 1993, Mr. Gerry Hunt, Head of Financial Control, addressed a Memorandum entitled 'Non resident accounts', *inter alia,* to Mr. Keane with a copy to Mr. Lacey, Chief Executive, noting concerns expressed to him by senior officials in the Department of Finance and in the Office of the Revenue Commissioners regarding "the alleged actions of a number of Bank officials". The Memo expressed the view that a revenue audit focusing on non-resident documentation was likely and noted a difficulty in explaining the significant increases in the level of non-resident deposit held at branches of the Bank in the year ending 30th September, 1993. The Memo stated that Mr. Hunt had spoken with the group of Tax Managers and the Head of Audit and reported that both shared his concerns that the Bank's documentation might be "weak" in the following areas:
1. c/o branch address,
2. Non-resident declaration form was missing, incomplete or inaccurate,
3. Unusual addresses that clearly warrant closer scrutiny, e.g. Main Street, Swansey, (*sic*) Wales,
4. Obvious error, e.g. non-res. deposit and resident loan in the same name.

5. <u>Special Savings Accounts (SSAs)</u>
Throughout the period which the respondent held the position of general manager – banking, from 3rd May, 1993 to 18th August, 1996, the Inspectors found that the respondent was made aware, through audit reports circulated to him, of the deficiencies which existed in the operation of SSAs at branches: the failure of branches to hold properly completed declarations for all accounts classified as SSAs and instances of failure to comply with the relevant withdrawal notice requirements. The Inspectors believed that through these reports the respondent was aware of the DIRT and the standard rate was not being deducted as it ought to have been from interest paid or credited where the conditions for the operation of the accounts as SSAs were being breached. The respondent was aware from the DIRT Theme Audit Report and the meeting of 9th February, 1995 of these deficiencies. He had a responsibility to ensure that all accounts classified as SSAs were correctly classified as such and to ensure that DIRT at the standard rate was deducted from interest paid or credited where the conditions for the operation of accounts were breached. He failed to discharge these responsibilities.
6. <u>CMI Products</u>
In relation to the sale of CMI and other policies, the Inspectors noted that on 1st May, 1989, Mr. Nigel D'Arcy was recruited to establish FASD to provide a range of independent financial services, primarily in the insurance and investment related sector, to bank customers and others.
On 17th August, 1994, a Mr. Geoff Bell, Head of Management Services, wrote a Memo to Mr. Brennan with copy to, amongst others, the respondent, regarding the background to the CMI investments as follows:-

> "Scheme launched several years ago by Financial Advice and Services Division (FASD) whereby funds are invested for Irish residents by an insurance company based in the Isle of Man (Clerical Medical International – CMI) in deposits, securities or stocks and shares in accordance with the individual customer's requirements. Funds are introduced by FASD and client confidentiality is of the utmost importance. As part of the scheme CMI reinvest the Irish Pound investments in the original NIB branch…
> Customer decides to invest in CMI following advice from FASD. Funds may be in an existing branch deposit or other but are usually of sensitive nature. Confidentiality is a prerequisite in investment."

The Inspectors accepted the evidence of both Mr. Brennan regarding sensitive funds being channelled into CMI, and of Mr. D'Arcy that the CMI personal portfolio was being used perhaps in a way that

wasn't intended and that it was quite obvious that there were a lot of non-resident accounts that were not genuine non-resident accounts and shouldn't have been classified as such in the first place and obviously "there is a linkage between that and CMI product".
The Inspectors also accepted similar evidence from Branch Managers regarding hot money; money not being declared to the Revenue; non-resident money and that the product was introduced to regularise bogus non-resident accounts and remove them from normal deposits held at the Bank.
The Inspectors found that the respondent was copied with Mr. Bell's Memorandum of 17th August, 1994 and, thus, knew that the CMI policy was being promoted to persons with "sensitive" funds and also knew the extent of the funds deposited by CMI with the Bank. Mr. D'Arcy reported directly to Mr. Keane from 1st January, 1995.
The Inspectors found that Mr. Keane, the respondent, shared responsibility for the Bank's failure to take steps to ensure that the promotion of CMI policies in the manner stated was stopped.
A further series of communications was also referred to by the Director as follows:-
"Fax 19th February, 1994, Rick May to Mr. D'Arcy, copied to respondent;
7th November, 1994, Mr. D'Arcy to respondent;
11th November, 1994 Mr. D'Arcy to respondent and
16th April, 1996 Mr. D'Arcy to Mr. Keane re: Halifax takeover of CMI.

7. Improper charging of fees

The Inspectors found that the respondent, with Mr. Brennan, knew or ought to have known that the Bank's procedures did not contain any guidance on the nature of work and services which should give rise to an administrative or management time charge.
The evidential basis for such a finding related to the introduction of the customer action pad in July 1992, which the Inspectors found to have been a confirmation that there had previously been no system in place recording management time. There was general agreement among those interviewed by the Inspectors that apart from the customer action pad which was rarely used, there was no prescribed system for charging administration and management time from January, 1988 to March 1996. The internal audit reports from March, 1992 to May 1996 referred to the frequent repetition of the problems relating to charging fees.

8. The Director's Case

Branch Audit Reports from April 1993 to September 1995 were copied to the respondent which disclosed instances of irregularities.
The DIRT Theme Audit Report, commenced in December, 1994, seven months after Mr. Barry Seymour became Executive Director of the Bank (from 22nd April, 1994 to 15th July, 1996) summarised these irregularities:
The major findings in that report were as follows:-

> "In general, there is a lack of clear and concise guidelines on DIRT compliance issues. Finance Department are in the process of re-issuing DIRT compliance procedures and we will liaise with Finance to ensure DIRT problems included in this report are covered in the new procedures.
> SSA notice requirements are not being properly imposed – 91% of withdrawals reviewed breached the notice requirements. The profile of this issue needs to be raised again; a number of initiatives should be undertaken including the use of standard documentation. The notice requirements finding in this report should be reviewed by Pricing Committee as an input to future SSA pricing decisions."

There is some evidence that branches have made progress through ad hoc reviews but an unacceptably high proportion of declarations were missing or incomplete – approximately about 40% of non-residents, 20% of SSAs and 53% of charities. Branch responsibility for DIRT documentation needs to be clearly defined and it is our opinion that Finance Department should co-ordinate a regular review to confirm that properly completed documentation is held for all accounts not subject to DIRT at standard rate (27%).
We were surprised to find a very small number of DIRT free company accounts in most branches. This is not a control issue, but branches could improve their customer service by advising more customers of the benefit of DIRT free company accounts.
A significant number of DIRT compliance issues were reported in recent audits of NIIB deposits (June 1994) and during this Theme Audit we did not perform further audit work in these areas and we have accepted assurances from management in both areas that significant progress has been made. We reviewed DIRT compliance in Treasury and found the standard of DIRT documentation to be good.
The summary of the report concluded:
Results of this audit are very disappointing and management must take immediate steps to improve the situation. The structure of the whole area can be improved but the level of non-compliance is too high. It appears that there needs to be an organisation wide change in attitudes to the whole area. This is a

risk area and the penalties for non-compliance at the level shown in this report would be very significant.
The meeting of 9th February, 1995 was chaired by the respondent.

9. The Respondent's Case

9.1 The respondent said that the Inspectors failed to take proper consideration of a number of actions taken by him during his tenure as General Manager of Banking. He said that during his tenure, he was either unaware of the improper practices or when he became aware he took proper corrective action to ensure these practices were stopped. He was at all times concerned to uphold and implement proper standards of corporate and banking behaviour. He exercised proper supervision over practices and procedures at branch level and at all times complied with his duties of skill, care and diligence in relation to the Bank.
He pointed out that the report covers Bank practices from 1988 to 1998. It was accepted by the Director in this application that the only period for which he was accountable was for the period of over three years from April 1993, when he became General Manager – Banking to the summer of 1996 when he became General Manager – Marketing and Distribution at which time he was not actually involved.
The respondent says he was a director of National Irish Bank Financial Services Ltd., on 30th June, 1994 to 26th May, 1997, (when he left the Bank to become Head of Marketing and Communications with another financial institution). The operation of financial services concerned the activities of FASD. The company of which he was a Director was effectively run as an operating division of National Irish Bank and was supervised by the senior management committees of National Irish Bank. The board of directors met on an annual basis in order to formally approve its annual financial statement.
He outlined the broad range of functions which he had as General Manager of Banking which included branch banking, the supervision of branch business and activities in relation to performance, income etc., as well as corporate banking, business development, product development, new branches, distribution systems, pricing, asset and liability management and payment systems development. He was also responsible for the supervision of FASD from January, 1995.
The activities which formed the subject of the Inspectors' Report, insofar as they related to him, only accounted for approximately ten to twenty per cent of his overall functions. He was not responsible for the overall management structure of the Bank.
9.2 Mr. Keane said he was aware of certain documentation irregularities in relation to bogus non-resident accounts which were of serious concern at management level. Matters were continually being implemented to improve the situation and ensure that branches were fully compliant with statutory DIRT provisions. He was not aware that the irregularities indicated that bogus accounts may have existed throughout the branch network or that there might have been any consequent liability to the Revenue Commissioners. In many cases there were no bogus non-resident accounts behind the documentation irregularities. He referred to the Special Circular S9/93 of the 11th March, 1993, advising branches to examine all non-resident accounts flagged as exempt from DIRT and to ensure that those accounts were valid non-resident accounts with appropriate declarations. In November, 1993, a further review of non-resident account documentation held by branches was conducted by the administrative department reporting to the General Manager, Administration, Mr. Brennan. He referred to a certificate of the manager of the Ballinasloe branch dated 2nd December, 1993.
On 3rd May, 1994, new software updates to the LiveLink system (the Bank's computerised data system) were implemented across the branches. A manual dealing with the new system was designed to highlight inconsistencies with the non-resident status.
Mr. Keane referred to the regular internal reports compiled by the audit department regarding the activities of branches. He said that this fulfilled his responsibility in the monitoring of branches and the introduction of new procedures. He relied on the operation of branch auditing systems to flag problems and monitor branches. He reviewed and improved auditing procedures, reporting and follow up structure. He moved to improve audit coverage and to increase sampling of non-resident accounts. He did not accept the Inspectors' finding that the focus was on documentation only, rather than on the veracity of the declaration made by customers and referred to the Bank's code of conduct of 1993.
From mid 1994 all Bank employees were required to attend workshops dealing with conduct and professional ethics. The operation of the LiveLink non-resident monitoring report was designed to highlight amendments made to non-resident accounts that were inconsistent with the non-resident status. From June 1994 onwards a new statistical analysis was attached to most audit reports, which included a list of repeated items.
Of the 42 audit reports of 1995 which he considered, only six indicated persistent irregularities in non-resident documentation.
Three verbal warnings were issued to branch managers. An existing manager retired. The manager of another branch was demoted and transferred to a non-branch activity.
Where a verbal warning had been given, the manager, following his failure to close the bogus and irregular accounts, accepted that there was no ambiguity in relation to his obligations in respect of non-resident accounts.
In a further case, no disciplinary action was taken as all the non-resident declarations forms were available and the only errors were a number of undated forms or the incorrect forms being used.

Mr. Keane told the court that the disciplinary actions would have been noted throughout the branch network and would have sent a clear warning to branch managers that inappropriate behaviour in this area would not be tolerated.
Mr. Keane said that only five audit reports received by him of thirty five reports in instances where non-resident declarations were at variance with other branch records, were the subject of an action planned by the manager involved. This number was classified by internal audit as weaknesses of lesser significance. He said that he did not believe that there was wide spread problems of bogus accounts throughout the branches. In relation to concerns expressed in audit reports, where isolated incidents were brought to his attention, the managers were disciplined.
9.3 Mr. Keane in his evidence, said that he was unaware of the extent of the irregularities up to the circulation of the DIRT Theme Audit in January, 1995. He then contacted the executive director, Mr. Seymour, discussed a course of action, and called and chaired a meeting on the 9th February, 1995. As a result, the Finance Department prepared Circular 11/95 was distributed to the branches in March, 1995. He did not agree that proper disciplinary action was taken only when it was brought to his attention that branch managers were engaging in improper practices in relation to non-resident accounts.
Mr. Keane said that guidelines from the Revenue Commissioners on the operation of DIRT were not published until 2001. He referred to an extract from the DIRT report published by the Revenue Commissioners on the 19th July, 1999, where it was noted that there was confusion as to when liability for DIRT arose, particularly in the case of undated or late dated declarations. He said he understood, that up to 1999, it was the practice of the Revenue Commissioners not to look for non-resident declaration forms.
Mr. Keane believed that no liability for DIRT would be imposed in cases where the non-resident declarations were not completed or not held and that this practice was acknowledged by the sub-committee of the Committee of Public Accounts in their report on DIRT on the 15th December, 1999.
Mr. Keane also referred to the notes of the audited accounts for AIB and EBS for year ending December, 1999 where the auditors were unable to calculate a retrospective DIRT liability with any certainty.
9.4 Mr. Keane's evidence was that the audit department did not believe that there were bogus non-resident accounts behind the documentation irregularities. He referred to Castlebar and Ballinasloe and to the evidence of Paul Harte, the Bank's head of internal audit, to the Inspectors that it was easy for managers to conceal bogus accounts from the audit department. Mr. Keane implied that Mr. Harte was not aware of bogus non-resident accounts.
In his evidence given on the 11th July, 2000, Mr. Harte told the Inspectors that he believed that managers within the branch network were deliberately trying to conceal the maintenance of "these accounts" from the internal auditors by the use of fictitiously named accounts. He said it was a very difficult thing for an auditor to flush out through the certification process. A physical examination of every transaction at the branch would be necessary. There was also a test to review whether there was any contradiction between the non-resident status and other transactions happening in the branch, but this was quite a difficult thing for an auditor to pick up. He agreed that the reservations revealed in the internal audit caused the DIRT Theme Audit to be carried out. He referred to the personal dissatisfaction he had with the branch process. The branch managers would commit "to doing it and hopefully did it" but it might take three years to get everything right.
Managers, in Mr. Harte's view, were deliberately trying to conceal the nature of these accounts from the internal auditors by the use of fictitiously named accounts.
He says that the Bank's external auditors, KPMG, never uncovered the existence of widespread bogus accounts given the difficulty of identifying such accounts as part of the normal audit testing.
9.5 Mr. Keane's evidence was that:

> "While not directly involved in relation to the issue…..understood that senior management were already taking active steps to address the issue to ensure that proper documentation was being held by the branches and proper practices were followed in relation to non-resident accounts".

He relied on the operation of branch auditing system to flag problems and to monitor branches. He sought to improve the non-resident account irregularities by improving audit procedures through theme audits, by improving reporting and follow up structure, resisting reduction in audit coverage and increasing the sampling of non-resident accounts. He did not accept that branch personnel could have validly believed or in fact believed that it was sufficient to obtain a non-resident declaration without being satisfied as to the veracity of the declaration. The special circulars presented a fair and reasonable attempt to set out the position regarding s. 32(2) of the Finance Act, 1986 in relation to DIRT as it was then understood. The respondent's position was that he ensured that branch managers engaging in improper practices in relation to non-resident accounts were disciplined. The irregularities were noted to have occurred only on six occasions and disciplinary action was taken in respect of five

of the six branches involved.
9.6 He said that the fact that he was aware of documentation irregularities did not operate to, and put him on notice of bogus non-resident accounts. The audit reports treated these irregularities as documentation issues only and the audit department did not believe that there were bogus non-resident accounts behind the irregularities. Bogus accounts were never uncovered by the external auditors.
The respondent confirmed that, upon receipt of an audit report, he would discuss it with regional managers and the head of audit and would *"want to see an action plan in place to deal with the issues that are arising there".* He was the "instrument of action". He stated that his attitude to a report would be dictated by the rating given. He emphasized that if there were a poor audit, he would be inclined to interview the manager involved himself. There were no written procedures as to what his role was on receipt of the audit report.
In relation to non-residents accounts that were not genuine, that is, that were bogus non-resident accounts, the respondent says that where he was so informed, that such accounts were uncovered at branch level, he immediately took appropriate and responsible steps to deal with these branches and accounts. He referred to Galway in February 1996, when the branch manager was written to in strong terms, both by the head of audit and the regional manager, and the branch manager duly confirmed that these accounts would be either re-designated or closed.
Mr. Keane refers to the post-audit correspondence in relation to Blanchardstown in May 1993, Limerick, Castlebar, South Circular Road and Blanchardstown, Mullingar, Ballinamore, where the bank managers confirmed that all issues raised in the audit reports were being attended to.
He emphasized that in many cases, documentation irregularities were just that, and did not hide bogus accounts; follow-up occurred in all cases; accounts re-designated from non-resident to resident. In the absence of a satisfactory response to the follow-up; managers were well aware of the requirement that non-resident accounts should be genuine. His focus, and that of the other banks' general managers, was on correcting documentation problems highlighted in the audit reports; no audit report ever referred to a widespread practice of non-compliance or of failure to ensure that proper DIRT procedures were in place.
Mr. Keane emphasized that he was very instrumental in putting this Theme Audit in place, which was a positive step towards addressing issues in relation to non-resident accounts. The first audit was a Theme Audit undertaken by the Bank and he described the meeting and the circulars emanating as a result of that meeting. He disagreed with the finding that the Bank failed to inform the branch managers that non-resident accounts needed to be genuine and referred to documents emanating from Frank Brennan on the 7th August, 1991, the special circular of September 1993, the letter of Mr. Brennan on the 26th November, 1993, the inter-office memorandum of Paul Harte, on the 10th January, 1995, and the minutes of an area manager meeting on the 21st March, 1996.
The post-audit correspondence demonstrated that branch managers were made aware of that obligation. In relation to his failure to raise the Bank's retrospective DIRT liability, he said his immediate concern was to address issues going towards the future, as opposed to worrying about a retrospective liability, which was the function of rather more qualified individuals who were aware of the issue, in particular, the bank's tax advisors and its auditors.
He believed that there was an overlap between the fictitious accounts and the bogus non-resident accounts and that, while commended for the elimination of the former, believed that he has taken steps to eliminate the latter as well.
The respondent said that the Inspectors made a distinction between bogus non-resident accounts and fictitious accounts and made no findings in relation to the latter which were referable to him. He said there was considerable overlap between the two as a large number of fictitious accounts would also have had bogus non-resident status attaching to them. He found it difficult, accordingly, to accept that he acted appropriately to eliminate fictitious accounts but not bogus non-resident accounts. He had disciplined two managers in that regard on the 4th October, 1995 in relation to fictitious and non-resident accounts. He told them that they were responsible and accountable for satisfying themselves as to the address, in identifying the customers and that this responsibility had been reinforced by the Criminal Justice Act, 1995. He issued a Memo on the 7th December, 1995 regarding fictitious accounts reiterating that they were expressly forbidden and unethical. In March, 1996 the audit report of Waterford had revealed the existence of a number of fictitious accounts and he was obliged to take disciplinary action against the branch manager.
On the 25th April, 1996 Mr. Harte had circulated a Memo confirming the branches that continued to hold fictitious accounts and on the 15th May, 1996 Mr. Brennan and himself had a meeting with Mr. Harte. A Memo was issued on the 30th May, 1996 informing the branches that all fictitious or incorrectly named accounts had to be regularised and/or closed, even if business might be lost. Managers were required to complete and return a declaration to the audit department setting out how the issue of fictitious accounts were to be dealt with.
9.7 <u>CMI Policies</u>
Mr. Keane referred to the findings of the Inspectors and said he was entirely unaware of the inappropriate promotion of the CMI policies which had been set up three years prior to his appointment as general manager of banking. He believed it was a legitimate investment product. He had no idea

that the CMI product should only have been used by non-residents. It was a complex investment product. He was not familiar with the legal background to the operation of the product. Paul Harte shared his view that he was unaware that CMI policies should only have been promoted to non-residents.
He said the documents referred to by Mr. Rafferty in the grounding affidavit in relation to the promotion of CMI products were all documents circulated prior to Mr. Keane's appointment as General Manager – Banking (3rd April, 1993).
The memo of Geoff Bell dated the 17th August, 1994 was copied to him four months before Mr D'Arcy reported to him. However, he had no recollection of seeing the memo, which did not deal with the undisclosed nature of funds being introduced in CMI policies. He was aware that the memo referred to Irish investors. The references to funds being of a "sensitive nature" could not be considered as being sufficient to put him on notice of the inappropriate promotion of CMI products. The Memo was circulated at a time when Mr. D'Arcy and the Financial Advisory Service Department (FASD) reported to Mr. Keane.
The memorandum of the 7th November, 1994, from Paul Harte, merely referred to a possibility that tax structures would have been interfered with, and he saw no relevance of the extract from Nigel D'Arcy's reply of the 11th November, 1994, in proving any issue. He never denied that he was aware of CMI and the extent of its deposits, but that the deposits, while not insubstantial, were not of particular significance in relation to the total deposits of the Bank.
The memorandum of the 16th April, 1996 from Nigel D'Arcy to him, did not relate to a concern on his part relating to the tax status of the CMI deposits, but was rather a concern that as CMI controlled the deposits, CMI would be in a position to move them to another financial institution.
He was not privy to the evidence of either Mr. Brennan or Mr. D'Arcy regarding the movement of sensitive funds into CMI. He reiterated that he did not believe that any of the evidence referred to by Mr. Rafferty could substantiate a finding that he knew that CMI products were being promoted inappropriately. He was not one of the senior managers of the Bank referred to in a report produced by NAB Group audit 22nd April, 1998, which concluded that there was evidence to suggest that certain senior managers at the Bank were aware of accounts containing sensitive funds.
Thereafter, Mr. Keane said that the issues relating to CMI were never highlighted in any internal audit reports. The extent of the deposits had no bearing on the allegation that he knew of the undisclosed nature of funds being invested. Total funds invested were IR£20m out of IR£1,000m on deposit with the Bank.
Although Mr. D'Arcy had reported to the him for approximately eighteen months, Mr. Keane said that these usually monthly meetings did not put him on notice of the inappropriate use of CMI. The meetings dealt with performances. FASD products were customised to individual customers based on their particular circumstances and he was not familiar with a range of a investment products of which CMI was one of forty to fifty products being promoted by FASD, which employed about twelve people compared to six hundred in the branch network.

9.8 Special Savings Accounts

The Inspectors found that the Bank failed to deduct DIRT at the standard rate from interest accruing to special savings accounts where the branch did not hold a properly completed declaration form. The Inspectors found that Mr. Keane was aware of the deficiencies by virtue of the internal branch audit reports circulated to him. He had received the DIRT Theme Audit Report and chaired the meeting of 9th February, 1995 and had a responsibility to ensure that the SSA accounts were correctly classified and that DIRT was properly deducted and failed to discharge that responsibility.
The respondent emphasized, that for the most part, the audit reports related to documentation weaknesses in relation to SSA accounts. Where irregularities were identified, the Branch Managers were required to undertake a review of SSA documentation and confirm that all was in order. He referred to instances where this was done. Special Circular S1/93, S27/93, S2/94 and S34/95 all related to provisions to ensure compliance on SSA's in circumstances where there were clear instructions to Branch Managers in relation to SSA procedures. Where he took steps via the DIRT Theme Audit to improve the situation, he maintained that he adequately fulfilled his responsibilities in this regard.
The respondent said he received assurances that the managers were dealing with the issue and referred to extracts from the audit reports for Clonmel in 1994 and Terenure in February, 1995. When it was brought to his attention in June 1995 that problems were occurring, he agreed that it was evident that amendments were necessary.

9.9 Improper charging of fees

In relation to the improper charging of fees to customers, he noted the absence of guidelines in the Bank's procedural manual until the introduction of the consumer action pad which, as far as he was concerned, was the method used to record management time. He had not been aware of any difficulties in the recording of management time before the introduction of the consumer action pad.
He says that the branch audit reports did not highlight the issues as being serious. It was not so listed in the audit reports. He was not made aware through the audit reports that customers were overcharged.

During 1994, the Bank was notified that the Consumer Credit Act 1995 would introduce the requirement for a pre-notification of fees to customers. Accordingly, during that year and early 1995, discussions took place as to how the system could be improved. He liaised with Paul Harte with a view to implementing new systems and referred to a Memo of the 16th March, 1995, where the concern was to tighten up a waiving of fees occurring at branch level as opposed to there being evidence of overcharging of fees. The IT department was instructed to commence a new project entitled "Itemised fees system development" in order to computerise the recording of management and administration time. The Bank deals closely with the Director of Consumer Affairs. In early 1996 two special circulars were circulated to the branch managers by AGM administration. Such computerised system was the exception rather than the norm throughout the industry. The system did not go live until April, 1996, but as early as 1994 within the first year of his appointment as general manger of banking and less than two years after the consumer action pad had been implemented, discussions began as to how to implement a computerised system which took time to design and develop an entirely new system for the Bank.

Mr. Keane referred to the comments made in the affidavit of Mr. Rafferty in relation to the fees. He said that he did not know that fees were being improperly charged but was aware that branches were not properly filling out the report in relation to fees to be applied and took steps to ensure a computerised system, to ensure uniformity.

He concluded by saying that on his appointment as general manager of banking, he had no prior background in branch banking and no prior knowledge of the existence of any of the matters complained of. The supervision of matters raised in the report were only one aspect of his job function. When he became aware of practices he took decisive action and was involved in a number of significant initiatives to improve procedures, namely the development of Theme Audits, review of the role of regional managers making them more accountable to follow up branch audits, the improvement of the operation of branch audits, the appointment of six area managers, his actions to eliminate fictitious accounts and the initiative with Paul Harte and the IT department to computerise the recording of management time.

There was a settling in period when he was appointed. During the first six months the chief executive, Mr. Lacey, was kidnapped and the Bank was very disrupted during this initial period.

Mr. Keane did not believe he was slow to take action or that the improvements should have been implemented at a quicker pace. He said that introducing new procedures throughout a branch network necessarily takes time and the implementation of such improvements during his three years showed a keen regard for his responsibilities towards the Bank. He believed that his actions did not demonstrate unfitness, lack of commercial probity, negligence or incompetence in his role as an officer of the Bank.

10. Decision of the Court

10.1 The respondent, Mr. Keane, became General Manager – Banking, with responsibility for corporate and retail banking, on 3rd May, 1993. He held that position until 18th August, 1996. He was on the circulation list for internal audit reports on the Bank's branches during that period. He subsequently became General Manager – Marketing and Distribution from 19th August, 1996 until he left the Bank on 23rd May, 1997.

He was Director of National Irish Financial Services Limited for almost three years from the end of June, 1994 to his resignation from the Bank in May, 1997.

The respondent ranked directly below the chief executive in the Bank's management structure and, while general manager of banking, the regional managers (later area managers) reported to him.

The Inspectors found that Mr. Keane was either primarily responsible, or had some responsibility for the Bank's failure to deal adequately with four of the five practices indicated by the Inspectors.

10.2 Bogus non-resident accounts and Special Savings Accounts

The Inspectors' found that responsibility for bogus non-resident accounts lay with Bank senior management. While breaches of statutory requirements relative to declarations and withdrawals occurred at branch level, the Inspectors believe that responsibility for adherence to statutory provisions lay at that higher level. Throughout the period, the Inspectors found that Mr. Keane was made aware, through audit reports related to him, of the deficiency which existed in the operation of SSAs at branches.

Mr. Rafferty contrasted the Inspectors' findings together with the respondent's position. The deficiencies or irregularities were believed by the respondent to be a documentation issue only. His position was that he took steps which he considered to be adequate to ensure that branches were compliant with DIRT statutory provisions. He said that he was not aware that bogus accounts may have existed throughout the branch network, behind the documentation irregularities or that there might have been a consequent liability to the Revenue Commissioners.

He believed that senior management were already taking active steps to address the issue of documentation.

He told the court that he sought to improve audit procedures by improving reporting and follow-up.

He had referred to six of the forty-two audit reports in 1995 as indicating irregularities of non-resident documentation. Even if these were the only irregularities, it appears to ignore a significant issue and put in question the effect of the remedial measures put in place by Mr. Keane who had, as General

Manager- Banking, responsibility for the entire Bank network.
The court is satisfied that Mr. Keane was well placed, given his senior position, to ensure that the Bank complied with all of its legal obligations in respect of DIRT and SSAS. In his evidence to the court he admitted being aware of the extent of irregularities following the circulation of the Theme Audit in January, 1995. Indeed he was "very instrumental" in putting the Theme Audit in place.
He knew, at the very latest at the meeting of the 9th February, 1995 which considered the DIRT Theme Audit Report, that a fundamental attitudinal change was necessary at branch level with respect to possible tax evasion. Over a year previously, in November, 1993, Mr. Hunt, Head of Financial Control, addressed a memo entitled "Non-resident accounts" to, *inter alia,* the respondent, which referred to the deficiencies or irregularities which existed in the operation of DIRT accounts. The example of the internal audit reports made clear the real nature of the irregularities. Branch audit reports consistently highlighted significant concerns over DIRT, non-resident accounts and SSAs.
Mr. Keane said that he believed that the Revenue Commissioners would not look for and would impose no liability in cases where non-residential declarations were not completed or not held. The court cannot accept that this was a correct understanding of s. 32 of the Finance Act 1986.
It was clear from the results of both the DIRT Theme Audit, and Mr. Keane's acknowledgment that at that stage he knew of the extent of the irregularities, that there was, at least, a prospective liability.
The Comptroller and Auditor General's report of investigation into the administration of DIRT and related matters during the period 1st January, 1986 to 1st December, 1998 was published in July, 1999.
The Revenue's response, at p. 98, was that inspection of declarations would have been of very limited value and low priority for the Revenue given the self-assessment nature of the regime on the one hand, and the very limited ability of the Revenue to get behind them, on the other.
This does not retrospectively justify Mr. Keane's belief that the Revenue Commissioners would not impose any liability.
However, it is clear from the DIRT Theme Audit that the Bank discovered the extent of irregularities in February, 1995. According to the oral evidence of Mr. Keane, it was left to the Finance Department to deal with taxation issues. It is clear that those managers who attended the meeting were aware of irregularities and should have acknowledged a liability in this regard. Whilst the Revenue Commissioners may, undoubtedly, have had some responsibility with regard to the issue of guidelines for the accounting of DIRT, the liability of the Bank still remained in terms of compliance with the legislation, the 1986 Finance Act then nine years on the statute books and, of course in terms of the facilitation of customers to avoid paying DIRT by claiming non-resident status.
Moreover, it is not an excuse – much less a defence – to refer to a subsequent admission of inaction or limited ability to enforce compliance.
The respondent said that being aware of the documentation irregularities did not operate to put him on notice of bogus non-resident accounts. The audit reports treated these irregularities as documentation issues only. In many cases, he said, there were no bogus non-resident accounts behind the irregularities at all.
The respondent's averment in relation to documentation irregularities "did not operate to put me on notice of bogus non-resident accounts" reads somewhat strained and the reference to a majority of instances of incomplete documentation being undated forms or forms not signed by both parties in a joint account, are leading him to say that in many cases, not the majority of cases, that there were no bogus non-resident accounts behind the irregularities at all sounds somewhat artificial in its language.
Mr. Keane said he relied on internal branch audit procedures which never stated that "bogus" accounts existed at a wide spread branch level. Indeed no audit report nor minute of any meeting used the word bogus. It is a term used by the Inspectors. There is no doubt that non-resident accounts did exist in a high proportion of branches, including branches like Killarney which are far from the border areas. To say that the managers had come from Northern Irish Bank may, of course, have been significant but not, perhaps, in the way in which the respondent stated.
The reference to Mr. Harte's evidence of the difficulty in "flushing out" bogus non-resident accounts does not amount to an averment by Mr. Harte that he was not aware that fictitious and bogus accounts existed throughout the branch network. Indeed, it is clear that he was dissatisfied with the manner by which the branches attempted to conceal such accounts.
The respondent dealt with the issue of fictitious accounts, in relation to which there was no finding against him in the Inspectors' report. The Court finds that he did act expeditiously and diligently in this regard. It is unclear why the same action was not taken in relation to bogus non-resident accounts. It would seem that the sanction of the Criminal Justice Act, 1995 which had come into force at the time and in relation to which the Bank was liable, acted as a catalyst in eliminating fictitious accounts.
Notwithstanding the difficulty to which Mr. Harte referred in early 1995, the Bank's auditors, in conducting the DIRT Theme Audit, found that about 40% of non-resident declarations were either missing or incomplete. After Mr. Keane had left the Bank on 26th May, 1997, the European Audit Division of National Australia Bank noted that the Bank's audit of compliance with tax legislation and internal procedures still attracted a non-satisfactory rating. The Inspectors noted that that Theme Audit found that 18% of sampled non-ordinary resident accounts had been found to be erroneous when

tested against current legislative requirements. The problem of non-compliance had, accordingly, not been adequately addressed or rectified.
The Inspectors were satisfied that the problem of that non-compliance was due to the failure of managers of the Bank, including the respondent, to tackle in an effective manner the known deficiencies at branch level. The court accepts the Director's contention that it was not sufficient for the respondent to discharge his responsibility to improve auditing and reporting procedures by relying on branch managers to address identified irregularities.
The respondent claimed that he had no responsibility for raising the question of bank's retrospective liability for DIRT following the findings of the DIRT Theme Audit Report. The court finds that it should have been clear to him that the Bank was facing a potentially serious tax liability. This was evident from the internal memorandum of the 18th November, 1993, from Mr. Hunt to the respondent; the subsequent letter of the 26th November, 1993, by Mr. Brennan to all bank managers and the management summary of the DIRT Theme Audit Report itself.
The evidence given by Mr. Keane to the court does not displace the finding of the Inspectors that Mr. Keane (and Mr. Brennan) did have a responsibility, but failed to raise the question of a potential liability to the Revenue Commissioners for DIRT at the critical meeting of 9th February, 1995.
Mr. Keane acknowledged that he himself "*was the instrument of action".* The court finds that he, as General Manager – Banking, had the main responsibility to address and rectify weakness disclosed in the internal audit process but did not do so. Whatever doubt there may have existed before the DIRT Theme Audit in January, 1995, after that date the extent of the problem had been identified. Yet the problems persisted.

10.3 CMI Products

Mr. Keane's evidence to the court was that he was entirely unaware of the inappropriate promotion of the CMI policies or that they should only have been promoted to non-residents.
His evidence that the monthly meetings with Mr. D'Arcy from early 1995 did not put him on notice of the inappropriate use of CMI sits uneasily with the series of memoranda from August, 1994 to November, 1996.
The reference to "sensitive funds" should have been sufficient to put Mr. Keane on notice of funds possibly being undeclared to the Revenue Commissioners. The memorandum of the 17th August, 1994, by Geoff Bell had been copied to him. The memorandum of the 7th November, 1994 by Paul Harte to the respondent and others and the reply of the 11th November, 1994 by Nigel D'Arcy, read in that light, should have put him on inquiry. The extract of a memorandum of 16th April, 1996 from Nigel D'Arcy to Mr. Keane together with the previous memoranda should have been sufficient to alert Mr. Keane of the inappropriate use of CMI.
Mr. Keane was at that time a Director of National Irish Bank Financial Services Limited, whose business through FASD was to manage CMI among other products. The court also notes that Mr. D'Arcy reported to the respondent. Mr. D'Arcy was fully aware of the manner in which CMI policies were being promoted and his acknowledgement that he could have stopped the practice but did not do so. (See *Director of Corporate Enforcement v. D'Arcy*) [2006] 2 I.R. 163.
While it is not evidence against Mr. Keane, the court also notes that Mr. D'Arcy, in his evidence to the Inspectors, agreed that Mr. Grace, the inspector, had given a fair summary of how CMI was perceived by bank managers, senior management and FASD consultants in that the policy included benefits for the bank as follows:
"The retention of deposits, the regularisation of bogus non-resident deposits, the earning of commission for the bank, the securing of new deposits for the bank, finding a safe haven for revenue-sensitive funds."
Mr. D'Arcy believed that it was "not conceivable that (senior management) would not have known what the source of a lot of those funds were before they went into CMI".
The court is satisfied that Mr. Keane as Director and as having sight of the above memoranda, ought to have been aware of the inappropriate use of CMI which appeared to have been directed at bogus non-resident accounts.

10.4 Special Savings Accounts

The Inspectors found that the respondent was made aware, through audit reports circulated to him, of deficiencies in the operation of SSA's at branches; and the failure of branches to hold properly completed documentation for all accounts classified as SSA's; and instances of failure to comply with the relevant withdrawal notice requirements. Moreover, the respondent was on the circulation list for the DIRT Theme Audit Report of December 1994. He chaired the critical meeting of the 9th February, 1995.
He had a responsibility to ensure that all accounts classified as SSA's were correctly classified as such, and to ensure that DIRT at standard rate was deducted where interest paid or credited and failed to discharge these responsibilities.
Mr. Keane said that where issues relating to SSA's were categorised as significant in the audit reports, he received assurances from bank managers that they were dealing with the issues. He took steps to ensure that the system applicable to SSA's was amended to enable staff to ascertain more readily that SSA requirements were complied with. The improvements made by him in relation to bank audits were

also relevant to SSA's. Once he was aware of DIRT irregularities, he took appropriate steps. However, the Theme Audit Report found that declarations were missing or incomplete in relation to approximately 20% of SSA's. More significantly, 91% of withdrawals, reviewed for the purpose of the DIRT Theme Audit, breached the notice requirements for withdrawal. Notwithstanding the respondent's statement that he took proper steps to address the inadequacies highlighted by the DIRT Theme Audit Report, the later Theme Audit of compliance with tax legislation and bank internal procedures, conducted by the European Audit Position of National Australia Bank in late 1998 after Mr. Keane had left the Bank, still attracted an unsatisfactory rating. It would seem to follow that the procedures intended to secure compliance, for which the respondent claims responsibility, were seriously ineffective. It must follow that the respondent did not take appropriate or sufficient steps to deal with irregularities relating to the SSA's and to the deduction of DIRT which continued.
The court notes that Mr. Keane says that his attention was not alerted to the problem until June, 1995. This was, of course, some four months after the DIRT theme meeting of February, 1995. Mr. Keane knew of the issue beforehand. He referred to assurances given by managers that they were dealing with the issue. He failed to assure that the matter was dealt with.

10.5 Improper charging of fees

The Inspectors had found that the respondent was made aware through receipt of branch audit reports, of the consistently reported lack of explanations supporting adjustments on the fees to be applied, and from September 1993, of the failure of the 1992 introduction of the Consumer Action Pad to bring about an improvement in the situation. They ascribe responsibility to Mr. Brennan and to Mr. Keane for the Bank's failure to put in place an appropriate system for recording management and administrative time which was charged to the customers.
Mr. Keane said that he was not aware of difficulties in relation to the recording of management time before the introduction of the Consumer Action Pad. The branch audit reports did not highlight issues in relation to the charging of management time as *"a serious issue":* senior managers were not expected to read whole audit reports when the issue was not recorded as being a serious one. Mr. Keane had said he was initially not aware of the recording of management time and fees as being a serious concern. He was not aware, through the branch audit reports, that customers were being over-charged. Notwithstanding this, the respondent sought to improve the system for pre-notification of fees to customers. A new IT system for itemised fees was developed and became operational in early 1996 when two circulars were addressed to branch managers by the general manager of administration, Mr. Brennan. The computerised system went live in April 1996. The respondent says he fulfilled his responsibilities once he became aware of the necessity to improve procedures.
Mr. Keane, as General Manager – Banking, had a responsibility not only to improve procedures but to monitor and resolve the difficulties which had arisen. Given his responsibilities and experience, it was not adequate to claim that this weakness had not been identified as serious and not read. It was not correct to say that it had never been brought to his attention. He ought to have been aware of the improper practice. Reference was made to the audit report for Sligo in October 1993, Dundalk in November 1993, and South Circular Road also in December 1993. It was clear that the improper charging of fees was a systemic weakness within the Bank, of which the respondent was regularly notified. In his evidence to the Inspectors on the 24th March, 2000, he accepted that the manner in which fees were calculated had been inconsistent based on a *"guesstimate"*. Though labelled by internal audit as being of *"lesser significance",* the practice is one which resulted in consumer accounts being improperly charged, to the benefit of the Bank.

10.6 Documentary Issues

The court expresses some concern in relation to documents available to the respondent. Certain documents which had not initially been provided by the Bank for inspection by him, were subsequently made available. Mr. Keane was concerned as to whether such documents had been made available to the Inspectors appointed to investigate the affairs of the Bank. He sought confirmation from the Bank as to the precise documents which had been furnished by it to the Inspectors. The Bank indicated, while maintaining the position that he was not in fact entitled to such confirmation, that it was not in a position to confirm the precise documents which had been made available by it to the Inspectors.
He had been provided with an affidavit of Paula Whelan, sworn on the 27th June, 2006, setting out the methodology applied by the Bank in seeking documentation requested from it on third party discovery. This affidavit referred to the material relevant to the High Court inspection being gathered in a central location, electronically catalogued, and made accessible to the Inspectors. In February 2006, thirty-eight boxes relevant to the proceedings were found in the Bank's central storage activities. Ms Whelan confirmed that these boxes did not form part of the catalogue created in 1998 for the purpose of the High Court inspection. This documentation relates to follow-up correspondence between senior management and the branch managers in the aftermath of each audit report. Mr. Keane submitted that the correspondence showed the action taken by regional and general managers in the wake of an audit report, to ensure that any failings identified therein were addressed and rectified by the branch managers concerned.
Mr. Keane considered that the Inspectors must not have had access to the entire corpus of documents relevant to his tenure as general manager – banking, and, in particular, did not appear to have had

access to the post-audit follow-up correspondence.
While the shortcomings in relation to documentation raise a concern in relation to what may have been sighted by the Inspectors, the respondent was in a position before this Court of referring to more extensive documentation. Even if there were more documentation sent by the respondent to regional or area managers or to the branch managers, the issue of effective control remained: problems of non-compliance persisted even after the implementation of special circular of 1995 after the Theme Audit Report.

10.7 Respondent's responsibility

The respondent says he undoubtedly had a certain *"responsibility"* (in the sense that the supervisory management role of jurisdiction) in relation to the four areas referred to, in which improper practices were disclosed. This Court agrees that he was by no means the only party with such *"responsibility".* He had a broad range of functions. The activities, the subject of the Inspectors' report, accounted for no more than 10%-20% of his overall function. I have no doubt that he considered that he performed his functions in an honest and proper manner. Responsibility, however, requires effective control and resolution of non-compliance.
The Inspectors' report concluded that responsibility for improper practices which existed within the Bank, rested with senior management of the Bank rather than with individual branch managers. The Inspectors reviewed that senior management had a duty to ensure these improper practices did not exist and that senior management had the authority to put an end to them. The respondent says that in all cases where he became aware of improper practices, he took immediate and comprehensive steps to deal with them, including conducting disciplinary meetings with the bank managers concerned. He made significant improvements to branch procedures to ensure proper standards were adhered to and problems were identified. The Bank issued two instructions to the branch managers who were well aware of their obligations. The Inspectors accepted that branch managers did not adhere to Bank practices. The respondent said that they did more than that: they deliberately concealed the fact that they had operated these practices or did not tell the truth on numerous occasions by confirming to senior managers, after branch audits, or at the taking of disciplinary actions, that matters had been rectified, where, in many cases, it subsequently emerged that they had not. Effective control would not have allowed such concealment to have remained undetected.
The court cannot accept Mr. Keane's explanation that he did not have extensive experience in branch banking and, in particular, in the area of deposits, at the time of his appointment as General Manager – Banking. Once he accepted such a senior position, as indeed the position of Director of the National Irish Bank Financial Services Ltd., he had a responsibility to acquaint himself with the functions of those offices.
The statement of Mr. Keane that he was not aware, prior to the Theme Audit Report, that there was an extensive problem with regard to debt, as he did not have the same banking background or level of knowledge about bank practices as individuals such as Mr. Brennan, Mr. Boner or Mr. Curran, who had worked their way up through the bank structure through junior positions, is, the court feels, a double-edged sword. He may not have known the pressures of the management of the branch, but he was part of the senior management of the Bank itself, with an overview gleaned from the audit reports in relation to the deficiencies in all the branches. The regional, and later area managers, reported to him. Moreover, there were no audit reports in relation to CMI, nonetheless, not alone did Mr. D'Arcy report to him, but he had also an overview of the growth of the investment products. While there was no analysis done on the growth of CMI, relative to the wane of bogus non-resident accounts - indeed, the evidence was that that problem persisted, at a lesser level - one would have expected senior management, such as the respondent, to have made some correlation between the growth of deposits generally and the presence of irregularities. The court is mindful that his background was in marketing, which, of course, gave him a different perspective, that of what consumers demanded by way of products and services from the Bank.
The respondent says that he noted that Mr. Rafferty didn't refer to any documentation pre-dating the meeting of the 9th February, 1995. However, it is clear that there was extensive reference to the Bank branch audit reports. The confusion he refers to, between documentary irregularities and bogus non-resident accounts, where documentation was not in order, could not be explained by them being genuine non-resident accounts.
While the follow-up documents referred to by him, to explain the efforts that he made in having branch managers address the significant problems that were identified in the audit reports, the less than significant problems did not appear to get any priority. In any event, the problems persisted.
The respondent was the senior manager who reported to the chief executive (Mr. Lacey) and then to the executive director of the Bank (Mr. Seymour) in relation to failure under those four headings. He was aware of the persistence of non-compliance. The court finds that he failed to discharge properly his responsibilities in his position as general manager – banking, from 1993 to 1996.
This failure by a senior manager was particularly serious in a licensed bank which occupied a unique position of trust with its customers and creditors and which was required to adhere to the highest possible standards of conduct.
Mr. Keane occupied the position of General Manager Banking from May 1993 to the time he went to

Australia with National Australian Bank in the summer of 1996. He was a senior manager who reported to the Chief Executive (Mr. Lacey) and to his replacement (Mr. Seymour). During those three years he was a member of the Executive Committee, chaired by Mr. Lacey which met monthly. When Mr. Seymour replaced Mr. Lacey, the Executive Committee, though not disbanded did not function. The Committee made decisions on interest and assets and liabilities, mix of funding and balance sheet management. Its remit extended to the retail and corporate banking.
He agreed that the findings of the Inspectors were serious matters and agreed entirely that they should not have happened. He said that he tried to devise a strategy to deal with the issues but said he had little autonomous authority. The budgets were dictated by National Australia Bank and by London. He had no role in policy.
He was a Director of National Irish Bank Financial Services Ltd from the 30th of June, 1994 to the 25th of May, 1997, he attended the AGM and approved the financial statements each year. Whether limited time was necessary, Mr. Keane assumed the responsibility of a director of this company within the Bank Group. The source of income of NIBFSL was the FASD profits.

10.8 The court has considered the findings of the Inspectors, the Director's comparison with the position of Mr. Keane relative to those findings and the evidence given by Mr. Keane to the court by way of cross-examination and re-examination.
The court has expressed some reservations regarding the facilitation to Mr. Keane of documentation from the Bank. The court is concerned that some of that documentation may not have been available to the Inspectors.
The court has considered the documentation referred to by Mr. Keane and by the Director. It considers that, even if Mr. Keane sent more memoranda regarding non-compliance, the problems persisted; audit reports where deficiencies were categorised as of lesser significance were not regarded as significant.
Mr. Keane was General Manger – Banking and a board member of National Irish Bank Financial Services Limited which was also under investigation, though no specific findings were made by the Inspectors in relation thereto. He was a member of the executive committee.
As such, Mr. Keane was an officer of that company as well as a senior manager of National Irish Bank. He was part of its central management.
There is no evidence that he failed in making returns or breached specific administration provisions of the Companies Acts. Accordingly, the court will not accede to the Director's application to disqualify Mr. Keane under s. 160(2)(b).
The court, for the reasons referred to above, is mindful of making a disqualification order under s. 160 (2)(d) and (e). The court will hear counsel as to the period of such disqualification.

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