THE SUPREME COURT

KEANE C.J.
DENHAM J.
MURPHY J.
MURRAY J.
HERBERT J.
280 & 291/00

BETWEEN

DUNNES STORES IRELAND COMPANY, DUNNES STORES (ILAC CENTRE AND LIMITED) AND MARGARET HEFFERNAN

APPLICANTS/RESPONDENTS

AND

GERARD RYAN AND THE MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT

RESPONDENTS/APPELLANTS

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT delivered the 1st day of February 2002 by Keane C.J.

Introduction

The facts in this case are largely not in dispute and can be summarised as follows. On the 11th September, 1997, the second named respon-

dent/appellant (hereafter "the Minister") wrote to the third named applicant/respondent (hereafter "Mrs Heffernan") stating:

> *"The report of the Tribunal of Inquiry (Dunnes Payments) has disclosed a number of possible breaches of the Companies Acts 1963 - 1990. As I have responsibility for these Acts, I have decided that my department should proceed to make enquiries of certain companies to clarify what breaches did in fact take place ..."*

The report referred to was that of a tribunal established under the Tribunals of Inquiries Acts, 1921 to 1998, of which the sole member was Mr. Justice McCracken. The remit of the Tribunal was to enquire into certain payments alleged to have been made to Mr. Charles Haughey T.D. and Mr. Michael Lowry T.D. It is not in dispute that payments had been made by the first and second named Applicants (hereafter "the companies") to the two persons concerned and to companies with which they, or members of their family, were associated. This was found to be a fact by the Tribunal in its report and it is also not in dispute that the payments were made at a time when the companies were effectively under the stewardship of Mr. Ben Dunne. The payments came to light as a result of proceedings which were instituted by other shareholders and directors of the companies, including Mrs. Heffernan, against Mr. Ben Dunne. Those proceedings were ultimately the subject of a settlement between the parties. Mrs. Heffernan and her brother, Mr. Frank Dunne had also appointed a firm of accountants, Price Waterhouse, to carry out an independent inquiry into

the manner in which the affairs of the company had been conducted under Mr. Ben Dunne's stewardship. That report was made available both to His Honour Judge Buchanan, who at the request of the government carried out an initial inquiry into the question of the irregular payments, and to the tribunal presided over by Mr. Justice McCracken.

Following the receipt of the letter of 11th September from the Minister, Mrs. Heffernan wrote to her expressing her concern that the companies should be subjected to a further inquiry which, she claimed, was unnecessary and would result in further damaging publicity to the companies. There followed further correspondence between the companies and the Minister's officials concerning her request, in which the companies, while indicating their willingness to co-operate with the Minister and furnishing her with any documents she required, expressed their anxiety at the wide ranging nature of the requests emanating from the Minister and the difficulties facing the companies in meeting her requests. Ultimately on the 22nd July, 1998, the Minister wrote as follows:-

> *"I now write to indicate that I have decided to appoint an authorised officer to examine the books and documents of (the companies) and to provide such explanations as are appropriate. The legal basis for the appointment to Dunnes Stores Ireland Company is paragraphs (a), (b)(ii), (b)(iii), (d), (f) of s.19 (2) of the Companies Act 1990, while that for the appointment to Dunnes Stores (Ilac*

Centre) Limited is paragraphs (a), (b)(ii), (f) of s.19 (2) of the 1990 Act. You may know that s. 21 of the 1990 Act contains very strict limitations on the publication or disclosure of any information obtained by me on foot of a s.19 examination of books and documents."

The letter went on to state that the authorised officer was Mr. George Maloney, FCCA.

Mrs. Heffernan replied on the 22nd July expressing her surprise at the proposal to appoint an authorised officer, but on the same day, Mr. Maloney wrote to her informing her that he had been so appointed by warrants signed by the Minister on that day. The warrants were in the following terms:-

"*Companies Acts, 1963 - 1990*

Warrant of appointment of authorised officer

I, Mary Harney, T.D., Tanaiste and Minister for Enterprise, Trade and Employment, pursuant to the powers vested in me under s. 19 of the Companies Act, 1990, and every other power me thereunto enabling, considering that there is good reason so to do, do hereby authorise George Maloney to require the company listed hereunder, being a body as defined in s. 19 (1) of the Companies Act, 1990, to produce the books and documents specified by him forth-

with and to exercise all the necessary powers under the said Companies Act 1990.

Dunnes Stores Ireland Company.

Mary Harney T.D.

Tanaiste and Minister for Enterprise, Trade and Employment.

22 July, 1998"

Mr. Maloney wrote again on the 24th July, to Mrs. Heffernan enclosing a schedule of documentation which he said he required for the purposes of his examination.

On the 4th August, 1998, the companies were given leave by the High Court to apply by way of judicial review for orders of *certiorari* quashing the decisions of the Minister to appoint Mr. Maloney as an authorised officer pursuant to s. 19 of the 1990 Act on two principal grounds, i.e.

(a) the failure of the Minister to give any or any adequate reasons for the purported appointment of the authorised officer;

(b) an alleged conflict of interest which in any event vitiated the appointment of Mr. Maloney as the authorised officer.

Mr. Maloney at a later date resigned and was replaced as the authorised officer by the first named respondent, Mr. Gerard Ryan, and the alleged conflict of interest accordingly ceased to be of any relevance.

A statement of opposition having been filed on behalf of Mr. Maloney and the Minister, the hearing of the substantial issues came on before Laffoy J. In a reserved judgment, reported sub nom ***Dunnes Stores Ireland Company and Others -v- Maloney and Anor*** at (1999) 3 I.R. 543, Laffoy J granted the relief sought on the ground that the companies were entitled to be informed of the reasons which formed the basis of the Minister's decision to appoint an authorised officer, saying:-

> *"In my view, this is a case in which procedural fairness requires that the Minister give reasons for her decision. The applicants have demonstrated a bona fide belief that the Minister has misused her powers in appointing an authorised officer. Whether that belief is well founded or not, they are entitled to explore the possibility of obtaining redress by way of judicial review. They have made a bona fide request for reasons. In the absence of reasons, they cannot explore the possibility of, or pursue redress by way of judicial review."*

Laffoy J. also held that the extent of the demand for documents made by the authorised officer was excessive and unreasonable, saying:-

> *"Without knowing the reasons why the Minister thought it appropriate to appoint an authorised officer, it is impossible to form any view as to whether even the categories of documents sought which are specific fall within the ambit of the entitlement to seek docu-*

> *ments under s. 19. The inclusion of the categories which are of a general nature gives the demand as a whole the hallmark of a trawl. That being the case, the only reasonable inference is that the demand was excessive in content."*

While concluding that the companies were entitled to the relief which they claimed, Laffoy J. placed a stay on the orders until a specified date in order to enable the Minister, if so minded, to give reasons for her decision. On the 27th November, 1998, Mr. Paul Appleby, Principal of the Company Law Administration Section of the Minister's department swore an affidavit, the Schedule to which set out the purported reasons for the appointment of the authorised officer.

Under the heading, *"Dunnes Stores Ireland Company s.19 (2)(a)"*, the Schedule stated:-

> *"The circumstances outlined under the following headings give substantial cause for concern as to the standards of corporate governance operating in Dunnes Stores Ireland Company and suggest that it is necessary to examine the books and documents of the company to determine whether an inspector should be appointed to conduct an investigation of the body under the Companies Acts."*

Under the heading "s. 19 (2)(b)(ii) of the 1990 Act", the Schedule states:-

> *"There are circumstances suggesting that the affairs of the body have been conducted with intent to defraud the creditors of any other person, in this case the Revenue Commissioners, as follows …"*

There follow details of two payments of £395,107 from Dunnes Stores Ireland Company to finance improvements to Mr. Lowry's house at Holycross and of £27,502.75 from the same company via the Bank of Ireland Marino to Mr. Lowry. In both cases, the report of Mr. Justice McCracken is cited as indicating that these payments were made to assist Mr. Lowry evade tax. It is then stated that:-

> *"In the circumstances, it is necessary to examine the books and documents of Dunnes Stores Ireland Company to determine whether or not payments by or on behalf of the company were made for the purpose of further defrauding the Revenue Commissioners or the creditors of any other person."*

Under the heading "s. 19(2)(b)(iii), s. 19(2)(d) (of the 1990 Act)", the Schedule states:-

> *"There are circumstances suggesting that the affairs of Dunnes Stores Ireland Company have been conducted with intent to de-*

fraud its members or in a manner which is unfairly prejudicial to some part of its members."

There follow references to passages in the report of Mr. Justice McCracken disclosing that a large number of payments were made to various parties from an account in the Marino branch of the Bank of Ireland, which were acknowledged to be the property of Dunnes Stores. It was pointed out that some 63% of the payments were found by the Buchanan Report to have been made beneficiaries could not be identified. The report of Mr. Justice McCracken is also cited as indicating that profits of two companies associated with Dunnes Stores in the far east were remitted to a company called Tutbury Limited which was under the control of Mr. Ben Dunne. The report of Mr. Justice McCracken is also cited as indicating that payments of £182,632 sterling and £282,500 sterling were made from Dunnes Stores (Bangor) Limited for the benefit of Mr. Charles Haughey were which subsequently lodged to a suspense account of the Dunnes Stores Ireland Company, but that no benefit had been received by the Dunnes Stores Group in respect of these payments. This part of the Schedule concludes as follows:-

"Conclusion 37 of McCracken (page 73) indicates <u>inter alia</u> that the large majority of payments considered in its report were made by Mr. Ben Dunne without the knowledge or approval of his co-shareholders. In the circumstances, it is necessary to examine the books and documents of Dunnes Stores Ireland Company to deter-

> *mine whether or not the affairs of the company had been conducted with intent to defraud its members or in a manner which was unfairly prejudicial to some part of its members."*

Under the heading "s. 19(2)(f) of the 1990 Act", the Schedule states that there are circumstances suggesting that a series of acts or omissions of the body or are likely to be unlawful. The particulars given of this are the payments already mentioned from the Marino account, payments made to Streamline Enterprises for the benefit of Mr. Michael Lowry, three payments from Dunnes Stores Ireland Company totalling £180,000 and payable to cash, the ultimate beneficiaries of which were apparently a company called Celtic Helicopters Limited and Mr. Desmond Traynor and the failure of Dunnes Stores Ireland Company to obtain auditor's certificates for the financial period ended 31st December, 1992 and a number of subsequent years. The McCracken Report was also cited for the conclusion that the payment to Streamline Enterprises had been made contrary to the then existing exchange control legislation. This part of the Schedule concludes:-

> *"In the circumstances, it is necessary to examine the books and documents of Dunnes Stores Ireland Company to determine whether or not the acts or omissions of the company or on behalf of the company are or are likely to be unlawful."*

Under the heading "Dunnes Stores (Ilac Centre) Limited; s. 19(2)(a) of the 1990 Act", the Schedule states:-

> *"The circumstances outlined under the following headings gives substantial cause for concern as to the standards of corporate governance operating in Dunnes Stores (Ilac Centre) Limited and suggest that it is necessary to examine the books and documents of the company to determine whether an inspector should be appointed to conduct an investigation of the body under the Companies Acts."*

Under the heading "s. 19(2)(b)(ii)", it is stated that:-

> *"The following circumstance suggest that the affairs of the body have been conducted with intent to defraud the creditors of any other person, in this case the Revenue Commissioners...."*

There follow references to the payments already referred to of £395,107 to finance the improvements to Mr. Lowry's house.

Under the heading "s .19(2)(f)", the Schedule finally states that:-

> *"The following circumstance suggest that an act or an omission of the body is or is likely to be unlawful..."*

There is then a further reference to the payments of £395,107 in respect of the improvements to Mr. Lowry's house, which, it is stated, appeared to

have been falsely charged as capital expenditure in the accounts of Dunnes Stores (Ilac Centre) Limited. The Schedule concludes:-

> *"In the circumstances, it is necessary to examine the books and documents of Dunnes Stores (Ilac Centre) Limited to determine whether or not the acts or omissions of the company or on behalf of the company are or likely to be unlawful."*

The applicants/respondents were dissatisfied with the reasons as thus set out in the Schedule. They also claimed that the Minister's department was disseminating information which it was obtaining from the applicants/respondents to the media without their consent. In addition, they claimed that the demand made by the Minister for the production of documents was unreasonable both in its extent and the time allowed for compliance and that the applicants feared that it would be used as the justification for the criminal prosecution of the applicants/respondents and an application for a search warrant with attendant unfavourable publicity.

On the 22nd December, 1998, the Minister's department responded to a request pursuant to the Freedom of Information Act 1997 by the applicants/respondents as to the reasons of the Minister for appointing an authorised officer. This included a memorandum by Mr. Paul Appleby circulated *inter alia* to the Minister in which he stated that :-

"We have been considering for some weeks now whether or not to initiate an investigation of [the companies]. The primary options are:-

- *An examination of company books and documents by way of the appointment of an authorised officer under s.19 of The Companies Act 1990 and*
- *A more wide ranging investigation of the companies affairs which would require the approval of the High Court to an application by (the Minister) for the appointment of an inspector under s.8 of the 1990 Act."*

In the course of the memorandum Mr. Appleby said:-

"I now favour the use of s.19 in the cases of [the companies]... While s.19 allows for the examination of the books and documents of [the companies] and for explanations to be sought of past and present officers, its scope is clearly not as wide as a s.8 appointment. Nevertheless, a decision on this basis should make some progress and should improve the quality and quantity of information on the companies. The one major advantage of this approach is that if it were to be judicially reviewed (a likely possibility), we would have a very strong defence and a positive decision on any such appeal would make it very difficult for the parties involved to refuse co-operation with the authorised officer. If circumstances

demanded an s.8 application at a later date, we would, it is considered, have stronger grounds to make such an approach."

Following a request by the first named respondent for a meeting with officers of the companies to discuss the provision of books and documents, the solicitors for the companies, on the 6th January, 1999, sought a meeting with the first named respondent. This suggestion was rejected by the first named respondent. On the 18th January he wrote to Mrs. Heffernan requesting the production of various categories of documents.

The present proceedings were then instituted beginning with an application to the High Court for leave to apply by way of an application for judicial review for specified reliefs. These proceedings, in addition to seeking inter alia relief by way of certiorari quashing the decision of the Minister to appoint the authorised officer, also claimed declarations that the provisions of s.19(5) and (6) of the 1990 Act were invalid having regard to Articles 38.1 and 40.1 of the Constitution.

The High Court having given the leave sought by the applicants, a statement of opposition was filed on behalf of the respondents. The hearing of the motion having come on before the High Court, the claim on behalf of the applicants that the appointment by the Minister of the first named respondent as an authorised officer was invalid was rejected. It was also concluded, however, that the first named respondent had acted unreasonably in requiring the books

and records specified by him and, since that relief had not been claimed on behalf of the applicants, they were given liberty to amend their statement of grounds so as to include that claim. The High Court judge made no finding as to the constitutionality of the 1990 Act and an appeal was brought to this court. This court set aside the order of the High Court in its entirety, in a written judgment delivered on the 8th of February 2000, and the proceedings were remitted to the High Court for a determination of the issues in respect of which leave to apply for judicial review was granted including, if necessary, the constitutional issue.

That hearing came on before Butler J. in the High Court and the evidence adduced at the hearing consisted of, in addition to evidence on affidavit, a transcript of the evidence at the earlier hearing in the High Court. In a written judgment delivered on the 29th of July 2000, the learned High Court judge concluded that the applicants/respondents were entitled to an order of certiorari in respect of the decision of the Minister purporting to appoint an authorised officer to examine the books and records of the companies and the decision of the first named respondent by which the first named respondent purported to require from Mrs Heffernan the books and records set out in a letter dated the 18th of January 1999. From that judgment and order, the first named respondent and the Minister now appeal to this court.

The High Court Judgment

In his judgment, Butler J. having set out the relevant statutory provisions, said that the essential issue was as to whether the reasons ultimately furnished by the Minister sustained her decision to appoint an authorised officer. He found that there was no evidence that it was "necessary" to examine the books and documents of the company in order to determine whether an inspector should be appointed to conduct an investigation of Dunnes Stores Ireland Company under the Companies Acts. He further found that the reason given by the Minister that it was necessary to examine the books and documents of the same company in order to determine whether payments by or on behalf of the company were made for the purpose of further defrauding the Revenue Commissioners or the creditors of any other person was unsustainable. The learned judge said that the Minister had no right to pass on any information gained as a result of such an examination, since the revenue was not listed as a "competent authority" under s.21 of the 1990 Act, which empowers the Minister to furnish information obtained as a result of such an examination to a number of specified bodies.

As to the Minister's statement that there were circumstances suggesting that the affairs of the company had been conducted with intent to defraud its members or in a manner which was unfairly prejudicial to some part of its members, the learned judge accepted the contention made on behalf of the applicants/respondents that it was "stretching credulity too far" to contend that the Minister had appointed an authorised officer out of concern for members of

the Dunnes family who, long before the 22nd July 1998, had compromised their differences and gone their separate ways. He rejected as invalid the reason given by the Minister that she was entitled to examine the books and documents of Dunnes Stores Ireland Company because of unlawful acts or omissions on the part of Dunnes Stores Ireland Company, i.e. their breach of exchange control legislation and their failure to obtain auditor's certificates for a number of specified periods. He held that the provisions of s.19(2)(f) merely entitled the Minister to make an appointment in respect of acts or omissions which are or are likely to be unlawful and that this envisaged contemporaneous or ongoing illegality and not illegality which had happened in the past.

The learned judge said that in deciding whether the Minister had acted unreasonably in making the appointment on these grounds he had applied the test laid down by this court in ***The State(Keegan) -v- Stardust Victims Compensation Tribunal*** (1986) I.R. 642.

The learned High Court judge went on in his judgment to consider the other grounds on which leave had been granted to seek judicial review, but said that he was satisfied that the applicants/respondents had not established that the Minister had failed to have due regard for the principles of natural and constitutional justice and/or fairness, had undertaken an enquiry which was disproportionate and excessive in its ambit or had served a demand for documentation which was unreasonable and/or ultra vires and/or vexatious.

However, having reached the conclusion that the appointment of the authorised officer was unlawful the learned judge was of the view that he should not go on to consider whether the relevant provisions of the 1990 Act were invalid having regard to the provisions of the Constitution. It is not contested that his decision not to do so was in accordance with the accepted jurisprudence of this Court.

Submissions of the Parties

It was submitted on behalf of the appellants/respondents that the Minister was entitled to appoint the authorised officer where she was of the opinion that there were "circumstances suggesting" that it was necessary to examine the books and documents of the body with a view to determining whether an inspector should be appointed to conduct an investigation under the Companies Acts and that the various payments referred to in the Report of Mr Justice McCracken constituted such circumstances. It was further submitted that the fact that the Revenue Commissioners were not a "competent authority" did not preclude the Minister from appointing the officer on the ground that the affairs of both companies were being conducted with intent to defraud the Revenue Commissioners, who were clearly "creditors of another person" within the meaning of s.19(2)(v)(ii). The Revenue were entitled to be supplied with information pursuant to s.21(1) of the 1990 Act with a view to the institution of

criminal proceedings. That was confirmed by the fact that the Director of Public Prosecutions was also not named as a "competent authority" under s.21(1).

It was further submitted that the making of a complaint by any members of a company was not a necessary precondition to an authorised officer being appointed where there was a concern that the affairs of the company were being conducted with the intent of defrauding any of its members. It was also submitted that there was in any event no evidence of proceedings concerning differences between members of the company - as distinct from members of the Dunne family - having been previously compromised.

It was further submitted that the fact that the relevant wrongdoing had been committed in the past did not prevent s.19(1)(f) from having effect. A completed act, it was said, does not cease to be unlawful once it has been committed: it is in a continuing state of unlawfulness.

It was finally submitted that the finding by the learned High Court Judge that the decision of the Minister to appoint an authorised officer "plainly flew in the face of fundamental reason and common sense" within the formulation in Keegan was wholly dependent on his construction of s.19(2). If, as was submitted on behalf of the first named respondent and the Minister, his construction of the provisions, as they are to be applied to the present case, was erroneous, then the appointment was clearly justified and the criteria laid down in Keegan were not relevant.

It was submitted on behalf of the applicants/respondents that the Oireachtas clearly did not intend a direction under s.19 or the appointment of an authorised officer to be a licence to range at will through the books and records of a company. Where, as here, an authorised officer had been appointed, he had to identify specific documents to be produced: he could not be appointed so as to conduct what Laffoy J. had correctly described as a "trawl" through the company's books and documents. It was clear from the documents discovered under the Freedom of Information Act, 1997 that the Minister did not require the production of books and documents so as to ground an application to the Court for the appointment of an inspector: she had deliberately chosen to go down the route of an application under s.19 because, on the advice of her officers, she thought it would be more immune to a judicial review challenge.

As to the claim that the examination of the books and records was required in order to determine whether or not payments had been made for the purpose of defrauding the Revenue Commissioners, it was submitted that the Minister had no functional responsibility for tax collection and that there was nothing to indicate that there was any concern on the part of the revenue as to the tax status of the applicants/respondents: it had been expressly conceded on behalf of the Minister that there had been no evasion of tax by any of the companies in the group.

It was further submitted that it had never been contended on behalf of the applicants/respondents that an appointment could only be made on the grounds specified in s.19(2)(b)(iii) where the members of the company had lodged a complaint: merely that, in determining whether the decision of the Minister was rational and factually sustainable, the court was bound to have regard to the fact that the members of the companies concerned had compromised their differences and there was no longer any ground for holding that the company was being conducted in a manner which required any intervention by the Minister. It was also submitted that the contention on behalf of the Minister that there was no evidence that the members of the Dunne family were in fact members of the company, was a wholly unjustifiable attempt to bolster the reasons already furnished by the Minister: it had been uncontroverted at every stage of these and the earlier proceedings that the applicant/respondent companies are members of the Dunnes Stores Group and that the ownership of that group is ultimately vested in the surviving members of the Dunne family, with the exception of Mr Ben Dunne.

It was further submitted that the learned High Court judge was correct in his construction of s.19(2)(b): the draftsman must be presumed to have deliberately used the present tense in that provision, in contrast to the past tense used in the other provisions and, accordingly, it is properly construed as having regard to ongoing unlawfulness.

As to the submission that the applicants/respondents were estopped from challenging the validity of the appointment by virtue of the letters written by their solicitor on 5th and 6th January 1999, it was submitted that this was without any legal foundation: the first named respondent and the Minister would have to demonstrate that they had acted in some way to their detriment on the faith of the alleged representations and a delay of some ten working days in seeking to act on foot of the purported appointment could not conceivably be regarded as such detriment.

The Applicable Law

Section 19 of the 1990 Act provides inter alia

"(1) the Minister may, subject to sub-section (2), give directions to

...

(a) a company formed and registered under the Companies Acts

...

requiring the body, at such time and place as may be specified in the directions, to produce such books or documents as may be so specified, or may at any time, if he thinks there is good reason so to do, authorise any officer of his, on producing (if required so to do) evidence of his authority, to require any such body as aforesaid to produce to him forthwith any books or documents which the officer may specify.

(2) directions may be given by the Minister if he is of the opinion that there are circumstances suggesting that

(a) it is necessary to examine the books and documents of the body with a view to determining whether an inspector should be appointed to conduct an investigation of the body under the Companies Acts; or

(b) that the affairs of the body are being or have been conducted with intent to defraud -

(i) its creditors,

(ii) the creditors of any other person,

(iii) its members; or

(c) that the affairs of the body are being or have been conducted for a fraudulent purpose other than described in paragraph (b); or

(d) that the affairs of the body are being or have been conducted in a manner which is unfairly prejudicial to some part of its members; or

(e) that any actual or proposed act or omissions or series of acts or omissions of the body or on behalf of the body are or would be unfairly prejudicial to some part of its members; or

(f) that any actual or proposed act or omission or series or acts or omissions of the body or on behalf of the body are or are likely to be unlawful; or

(g) that the body was formed for any fraudulent purpose; or

(h) that the body was formed for any unlawful purpose."

The section goes on to provide in s.s.(5) that it is to be a criminal offence for a person or body not to comply with the requirements made under the section.

S.21 of the 1990 Act provides that no book or document obtained under s.20 is to be published or disclosed without the consent in writing of the body concerned except to a "competent authority" unless publication or disclosure is required for one of a number of specified purposes. These are, broadly speaking, the institution of criminal proceedings in relation to companies, the Exchange Control Acts, 1954-1986, or the Insurance Acts, 1909-1990, complying with requirements made with respect to reports by inspectors appointed under the Act, the institution by the Minister of proceedings for the winding up of a body and proceedings under s.20, relating to the entry and search of premises.

The expression "competent authority" is defined in sub-section (3), but does not include the Revenue Commissioners: they were, however, added as a competent authority by s.21 of the Companies (Amendment) Act, 1999.

Conclusions

Although the powers conferred on the Minister by s.19 may be availed of as a preliminary to the appointment of an inspector by the High Court

to conduct an investigation of a company under the Companies Acts, it is clear that this is not the only context in which those powers may be invoked. The Oireachtas has given the Minister a general supervisory jurisdiction over companies formed under the Acts and undoubtedly one of the most important powers which he or she enjoys is that of applying to the High Court for the appointment of an inspector under s.8(1) of the 1990 Act. However, the Acts - and, in particular, the 1990 Act - also confer other important powers on the Minister, including the power to investigate the ownership of companies (s.14) and to obtain a search warrant from the District Court and seize books or documents whose production has been required under other provisions (s.20). The Minister is also normally the prosecuting authority in respect of summary offences created by the Acts.

The Oireachtas thus has assigned to the Minister, as the appropriate officer of State, significant powers to ensure that companies incorporated under the Act do not abuse the privileges which incorporation confers on them to the detriment of their members, their creditors or indeed the public in general. That has been a recognised function of the Minister and her statutory predecessor since the first decade of the twentieth century.

Such statutory powers can only be exercised for the purposes for which they have been granted and, as Laffoy J. held in ***Dunnes Stores Ireland Company and Ors -v- Maloney and Anor***., they are liable to be set aside by the

High Court in judicial review proceedings where their invocation is not justified. In particular, the exercise by the Minister of the powers conferred by the section can be set aside when the reasons given for invoking the section make it clear that they are being used for a purpose not contemplated by the Oireachtas. It is also clear that they can be set aside where, as indicated by this court in Keegan, the relevant authority has sought to operate them in a patently irrational fashion.

The power conferred on the Minister by s.19 is two fold: either to direct herself the production by the company of the specified books or documents or, if she thinks there is good reason so to do, to authorise any of her officers to require the body to produce books or documents specified by that officer. While the limitations indicated by s.s.(4) as to the circumstances in which the Minister may properly give such directions do not, in terms, extend to the appointment of an authorised officer under s.s.(4), it seems unlikely in the extreme that the draftsman envisaged that the Minister, by appointing an authorised officer rather than by giving directions herself, could secure the production of books or documents in circumstances other than those set out in s.s.(2). However, in any event, the reasons given in the Schedule for the appointment of the first named respondent all relate to the circumstances specified in s.s.(2).

The first of these is - adopting the wording of s.19(2)(a) - the circumstances outlined under the heading which follow which, it is said, gave sub-

stantial cause for concern as to the standards of "corporate governance" operating in Dunnes Stores Ireland Company and suggested that it was necessary to examine the books and documents in order to determine whether an inspector should be appointed to conduct an investigation under the Companies Acts. This reason, of itself, couched as it is in such general terms, could not justify the appointment of the authorised officer and, as its wording suggests, it is necessary to examine the reasons subsequently given to determine whether they afford a sufficient basis for the appointment.

The first of the following grounds is that there are circumstances suggesting that the affairs of Dunnes Stores Ireland Company have been conducted with intent to defraud the creditors of another person, i.e. the Revenue Commissioners. Assuming that the Revenue Commissioners are properly described as a "creditor" of a person who is in default in the payment of tax, I am satisfied that the stated reason could not have afforded any basis for the appointment of an authorised official to examine the books and records of the company. Mr Justice McCracken had found in his report that the relevant payments had been made by the company in order to assist Mr Lowry to evade tax and an examination of the books and documents of the company was superfluous if it was for the purpose of establishing whether the payments had been made for that purpose. While it may be possible to envisage circumstances in which even the ample powers available to the Revenue Commissioners are not sufficient to enable them to ascertain whether the affairs of a company are being

carried out in order to evade the payment of tax, and the examination by the Minister of the books and documents of the company may in the result be justified under s.19(2)(b)(ii), this was certainly not such a case.

The next reason is that there are circumstances suggesting that the affairs of the company have been conducted with intent to defraud its members or in a manner which is unfairly prejudicial to some part of its members. It is, of course, not in dispute that there were serious differences between the members of the Dunne family as to the manner in which the affairs of the Dunnes Stores Group of companies had been conducted during the period of Mr. Ben Dunne's stewardship. Those differences led to proceedings in the High Court which were ultimately the subject of a compromise. Since then, Mr Ben Dunne has severed his links with the Dunnes Stores Group of companies. There is no indication of any sort that any of the members of this company or any of the Dunnes Stores Group of companies have any continuing concern with the manner in which their affairs were conducted in the past. It might seem surprising that powers conferred by the Oireachtas on the Minister to interfere in the affairs of a private company by examining their books and documents could be invoked in circumstances where none of the members had any complaints as to the manner in which its affairs were being conducted and any complaints that existed in the past had been the subject of a final settlement. It is to be noted, however, that the Minister's powers under the section arise, not merely where the affairs of the body <u>are being</u>, but also where they <u>have been</u>, conducted in

such a manner. I shall return at a later point to the question as to whether the circumstances were such as to justify the Minister's invocation of her powers on this particular ground.

The next reason given was that there were circumstances suggesting that a series of acts or omissions of the body "are or are likely to be unlawful". The first category of acts or omissions relied on are the payments made from the Marino branch of the Bank of Ireland to beneficiaries some of whom have not been identified. The same suggestion is made in respect of the payments to Streamline Enterprises, Celtic Helicopters Limited and Mr Desmond Traynor. It is also suggested that the payments to Streamline Enterprises may have been made contrary to exchange control legislation in force at the time. It is also stated that Dunnes Stores Ireland Company failed to obtain auditor's certificates for a number of subsequent years.

The Minister is the competent prosecuting authority in respect of summary offences created by the Companies Acts. If offences in relation to the keeping of proper books of accounts or the laying of audited accounts before the Annual General Meeting of the company in each calendar year have been committed by the company, she is the appropriate body to institute such proceedings. While she has no function in relation to the exchange control legislation which was in existence at the time of the payments to Streamline Enterprises, she is in a position to furnish to the appropriate authorities the information in

her possession as to the apparent breach of those regulations, if indeed those authorities are not already aware of the possible breaches since they are manifestly in the public domain as a result of the publication of Mr Justice McCracken's report. There is no indication as to what purpose would be served in this context by an examination of the books and documents of the company by an authorised officer. There is no suggestion in the Schedule that, at the time the Minister appointed the authorised officer, the company was not keeping proper books of account, was not laying its audited accounts before the Annual General Meeting or was acting in breach of the exchange control regulations. The language used in s.20(2)(f), using as it does the present tense in contrast to the past tense employed in other subparagraphs, makes it clear that the examination of books or documents authorised under that subparagraph is related to continuing or future illegal acts or omissions of the company and not to acts or omissions which have occurred in the past. I am satisfied this reason affords no basis for the appointment of an authorised officer to examine the books and documents of the company.

There remains the question as to whether the invocation by the Minister of her powers on the ground that there were circumstances suggesting that the affairs of the company had been conducted in a manner which was unfairly prejudicial to some part of the members was justified.

The purpose of an inspection in such circumstances is not solely to determine whether the affairs are being so conducted: the power may arise in a case where, as here, it is beyond argument that they had been so conducted in the past. They may be invoked in such circumstances because the Minister, in the exercise of her supervisory jurisdiction over companies, may be concerned to establish how such a misuse of the privilege of incorporation took place with a view to ensuring, so far as possible, that similar abuses do not take place in this, or indeed any other companies regulated by the Acts, in the future.

The argument advanced on behalf of the applicants/respondents, while superficially attractive, rests essentially on the fallacious proposition that, because the controlling shareholders in the companies have taken the necessary steps to put an end to the conduct of the companies which they regarded as detrimental to their commercial interests, the interest of the Minister is also at an end. That is clearly not so: the Minister remains under a statutory duty to take whatever steps are open to her to satisfy herself as to the reasons which led to the use by the person then in control of those assets for purposes which, in terms of the relevant Acts and the constitution of the companies concerned, were clearly unlawful. It is unnecessary to embark in this case on a consideration of the circumstances, frequently a matter of controversy, in which payments may be made on behalf of a company which are of no discernible, immediate and direct benefit to the company: it is sufficient to say that, in the light of the findings

of Judge Buchanan and Mr. Justice McCracken the payments made in the present case could not be regarded as having any conceivable legal justification.

The Minister was clearly entitled to conclude that an examination carried out by her of the books and records of the company would throw greater light on an issue which was not of any great significance in the context of the inquiry being conducted by Mr. Justice McCracken, i.e., as to how, given the complex and detailed requirements of the legislation as to the keeping of records by companies, the auditing of their accounts and the access of directors to the companies records, it was possible for these payments to be made without the knowledge or approval of the other directors and the companies auditors. The results of such an examination might, in turn, lead the Minister to the conclusion that the existing safeguards, however detailed, in the legislation against such abuses of the privilege of incorporation, were not adequate. The fact that the conduct which the other directors and shareholders saw as being inimical to the their interests had now ceased would not necessarily be a relevant factor in the Minister's determination as to whether such an inquiry should be undertaken by her.

That inquiry is justified, in terms of the section, where inter alia there are circumstances suggesting that the affairs of the body have been conducted in a manner which was unfairly prejudicial to some part of its members. That precondition was, beyond argument, fulfilled in the present case.

The documents sought pursuant to s.19 are described in a letter dated 18th January 1999 from Mrs. Gerard Ryan to Mrs. Margaret Heffernan as follows:

> *"(I) All documentation relating to all payments from the period of incorporation to 31st December 1994 in excess of £5,000 made by or charged to Dunnes Stores Ireland Company which had been brought to the attention of the directors or auditors of the company and for which value was not received by the company.*
>
> *(II) All documentation and correspondences relating to all issues which were relevant to the delay, until 1988, by the auditors in signing the auditors reports of Dunnes Stores Ireland Company for the years 1990 - 1994:*
>
> *(III) All documentation relating to all transfers of monies from Dunnes Stores Ireland Company through the bank account, referred to in the report of the tribunal of inquiry (Dunnes payments) as the "Marino account" together with all documentation relating to rebates due to Dunnes Stores Ireland Company which monies were directed by Mr. Bernard Dunne into the "Marino account" up to the end of 1994:*

(IV) Copies of the audited accounts of Dunnes Stores Ireland Company for all the years since its incorporation."

It may be that this requirement which is couched in necessarily general terms may cause particular problems for the companies in some areas: if that is the case, any difficulties can be identified by the companies and I see no reason to suppose that the authorised officer, if satisfied that the difficulties were real, would not endeavour to meet any legitimate concerns of the company. I am satisfied that the range of documents sought is not unduly extensive, having regard to the scale of the misuse of the company's assets which has already been identified.

In the judgment which he will delkiver this morning, Herbert J analyses the circumstances in which the Minister may give a direction such as was given in this case in exclusive reliance on s 19(2)(a) of the 1990 Act. I agree entirely with what he says and have nothing to add. In his judgment, Murray J discusses the question as to whether this court should consider the question of the constitutionality of an Act even where the case can, as here, be disposed of on other grounds. I agree that this matter may require reconsideration: I am also of the view that any such reconsideration should extend to the question as to whether the High Court is necessarily and invarianbly precluded from reaching the constitutional issue where the case can be decided on other grounds. I would, however, reserve both questions to a case in which they are fully argued.

I would, accordingly, allow the appeal on those grounds. Since, however, the issue as to the constitutionality of the relevant statutory provisions remains to be determined, I would remit the matter to the High Court so that that issue can be resolved.