

The Supreme Court

Dunnes Stores Ireland Company and Ors

-v-

The Minister for Enterprise and Ors

Index (not part of judgment)

Pages

1.	The Issue
8.	Discretion and power of the Minister
9.	Ministers reasons for decision
12.	Submissions of Dunnes Stores on Section 19(2)(a)
13-16	Conclusions (Commencement)
14.	Meaning of “corporate governance”
15.	Company regulation and society
16-17	Minister’s supervisory role and the public interest
17.	Minister may take account of standards of corporate governance related to particular circumstances
18.	‘Necessary’, meaning of in 2(a)
19.	Appeal allowed
19.	Remittal to the High Court and possible changes in the law

THE SUPREME COURT

Record No. 280/00

**Keane, C.J.
Denham, J.
Murphy, J.
Murray, J.
Herbert, J.**

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 Murray, J.

By letter dated the 22nd July, 1998 the Second Named Respondent/Appellant (hereafter “The Minister”) wrote to the Third Named Applicant/Respondent, Mrs Margaret Heffernan, informing her of her decision to appoint an authorised officer to examine books and documents of the First and Second Named Applicants/Respondents pursuant to Section 19 of the Companies Act 1990.

In these proceeding the Applicants/Respondents (hereafter Dunnes) have challenged the lawfulness of that decision. In the proceedings before the High Court, the learned High Court Judge found in favour of Dunnes and held that the appointment of the First Named Respondent for the purposes of Section 19 of the Act was ultra vires the powers of the Minister.

Issues concerning the constitutionality of this section were also raised in the High Court and the learned trial Judge, in accordance with established practice, found it

unnecessary to consider this issue having regard to his determination, that, as a matter of law, the appointment in question was ultra vires the powers of the Minister under the Act. Accordingly, there is no issue concerning the constitutionality of the section before this Court.

While I propose to refer to certain essential facts of the case, I adopt the summary of them and of the submissions of the parties which the Chief Justice has set out in his judgment.

Legislative Provisions

The provisions of the 1990 Act which are material to the issues in this case are set out hereunder: -

1(2) This Act and the Companies Acts, 1963 to 1986 may be cited together as the Companies Acts, 1963 to 1990.
(Where appropriate, I will refer to them hereafter as the 'Companies Acts').

8-(1) Without prejudice to its powers under section 7, the court may on the application of the Minister appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court shall direct, if the court is satisfied that there are circumstances suggesting

(a) that its affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person or otherwise fraudulent or unlawful purpose or in an unlawful manner or in manner which is unfairly prejudicial to some part of its members, or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or should be so prejudicial, or that it was formed for any fraudulent or unlawful purpose; or

(b) that persons connected with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members;

(c) that its members have not been given all the information relating to its affairs which they might reasonably expect.

- (2) (a) *The power conferred by section 7 or this section shall be exercisable with respect to a body corporate notwithstanding that it is in course of being wound up.*
- (b) *The reference in subsection 1) (a) to the members of a company shall have effect as if it included a reference to any person who is not a member but to whom shares in the company*
have been transferred or transmitted by operation of law.

19.-(1) *The Minister may, subject to subsection 2), give directions to any body being -*

- (a) *a company formed and registered under the Companies Acts;*
- (b) *an existing company within the meaning of those Acts;*
- (c) *a company to which The Principal Act applies by virtue of section 325 thereof or which is registered under that Act by virtue of Part*
IX thereof;
- (d) *a body corporate incorporated in, and having a principal place of business in, the State, being a body to which any of the*
provision of the said Act with respect to prospectuses and allotments
apply by virtue of section 377 of that Act;
- (e) *a body corporate incorporated outside the State which is carrying on business in the State or has at any time carried on business*
therein;
- (f) *any other body, whether incorporated or not, which is, or appears, to the Minister to be, an insurance undertaking to which the*
Insurance Acts, 1909 to 1990, or regulations on insurance made under the
European Communities Act, 1972, would apply,
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,
at any time, if he thinks there is good reason to do so, authorise any
or may his, on producing (if required so to do) evidence of his
officer of any such body as aforesaid to produce to him forthwith
authority, to require 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, or*
- (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 omission 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 member; or*
- (f) *that any actual or proposed act or omission or series of acts or omission 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.*

(3) *Where by virtue of subsection (1) the Minister or an officer authorised by the Minister has power to require the production of any books or documents from any body, the Minister or officer shall have the like power to require any person who appears to the Minister or officer to be in possession of those books or documents from them; but where any such person claims a lien on books or documents produced by him, the production shall be without prejudice to the lien.*

- (4) *Any power conferred by or by virtue of this section to require a body or other person to produce books or documents shall include power -*
- (a) *if the books or documents are produced -*
 - (i) *to take copies of them or extracts from them; and*
 - (ii) *to require that person, or any other person who is a present or past officer of, or is or was at any time employed by, the body in question, to provide an explanation of any of them;*
 - (b) *if the books or documents are not produced, to require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.*

(5) *If a requirement to produce books or documents or provide an explanation or make a statement which is imposed by virtue of this section is not complied with, the body or other person on whom the requirement was so imposed shall be guilty of an offence but where a person is charged with an offence under this subsection in respect of a requirement to produce any*

*books or
not in his possession
practicable for him to*

*documents, it shall be a defence to prove that they were
or under his control and that it was not reasonably
comply with the requirement.*

- (6) *A statement made by a person in compliance with a requirement imposed by virtue of this section may be used in evidence against him.*
- (7) *Nothing in this section shall prevent the Minister from authorising a person other than an officer of his to exercise the functions which an officer of his may exercise under this section and, where the Minister so authorises, such person shall have the same rights, duties and obligations as if he were such officer.*

The appointment of the authorised officer

It is the decision of the Minister on the 22nd July, 1998 to appoint an authorised officer pursuant to Section 19 of the 1990 Act that is in issue in these proceedings. On that date the Minister wrote to the Third Named Applicant/Respondent in the following terms: -

“... I now write to indicate that I have decided to appoint an authorised officer to examine the books and documents of Dunnes Stores Ireland Company and Dunnes Stores (Ilac Centre) Ltd and to provide such explanations as are appropriate. The legal basis for the appointment to Dunnes Stores Ireland Company is paragraph (a), (b)(ii), (b)(iii), (d) and (f) of Section 19 (ii) of the Companies Act 1990, while that for the appointment of Dunnes Stores (Ilac Centre) Ltd is paragraphs (a), (b) (ii) and (f) of Section 19 (ii) of the 1990 Act. You may know that Section 21 of the 1990 Act contains very strict limitations on the publication or disclosure of any information obtained by me on foot of a Section 19 examination of books and documents.

The authorised officer is Mr George Maloney, F.C.C.A. ...” (On the same date the Minister signed a warrant appointing Mr Maloney as an authorised officer. The warrant was as follows: -

“Companies Acts, 1963 - 1990

Warrant of appointment of authorised officer

11, Mary Harney, T.D., Tánaiste and Minister for Enterprise, Trade and Employment, pursuant to the powers vested in me under section 19 of the Companies Act 1990 and every other power me, thereunto enabling, considering that there is good reason so to do, to hereby authorise George Maloney to require the Company listed hereunder, being a body as defined in section 19 (i) of the Companies Act, 1990, to produce the books and documents specified by him forthwith and to exercise all necessary powers under the said Companies Act, 1990.
Dunnes Stores Ireland Company ”

The warrant was signed by the Minister.

A warrant in the same terms appointing Mr Maloney as an authorised officer in respect of Dunnes Stores (Ilac Centre) Ltd was issued by the Minister on the same date, 22nd July, 1998.

Previous Proceedings

On 4th August, 1998, Dunnes sought and were granted 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 in respect of the said companies. Leave was granted on two principal grounds. Firstly, the failure of the Minister to give any adequate reason for the purported appointment of the authorised officer and secondly, an alleged conflict of interest which vitiated the appointment of Mr Maloney as the authorised officer.

On 10th August, 1998, Mr Maloney resigned as the authorised officer and was replaced by the First Named Respondent in these proceedings, Mr Gerard Ryan. Since then the alleged conflict of interest ceased to be an issue between the parties.

The judicial review proceedings referred to above came on for hearing before Laffoy, J. and the learned High Court held that the exercise by the Minister of her powers pursuant to Section 19 of the Act could be the subject of judicial review proceedings

(Dunnes Stores Ireland Company -v- Maloney [1999] 3.I.R 542). In her judgement Laffoy, J. also held that the principles laid down in **East Donegal Co-operative -v- Attorney General [1970] I.R. 317** and **The State (Lynch) -v- Cooney [1992] I.R. 337** applied to the exercise of powers by the Minister pursuant to Section 19 of the 1990 Act.

It is well established that where a Minister is given a statutory power which may be invoked by him or her in the due exercise of a discretion conferred by that statute, such a discretion cannot be exercised arbitrarily or contrary to the principles of constitutional justice.

In **East Donegal Co-operative -v- Attorney General [1970] IR 317 at 343**

Walsh J. held, when considering the powers accorded to a Minister under the Livestock Marts Act 1967, held, *“all the powers granted to the Minister by s.3 which are prefaced or followed by the words “at his discretion” or “as he shall think proper” or “if he so thinks fit” are powers which may be exercised only within the boundaries of the stated objects of the Act; They are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or unqualified or an arbitrary power to grant or refuse at his own will”*. While the nature of the power granted to the Minister under that Act was different and not purely investigative as in the case of Section 19 of the Act in issue here, the principle is the same. In **The State**

(Lynch) -v- Cooney [1982] IR 337 at 380, which considered the exercise of the powers of a Minister pursuant to Section 31 subsection 1 of the Broadcasting Authority Act 1960

Henchy, J held *“it is to be presumed that, when it conferred the power, parliament intended the power to be exercised only in the manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design. This means, amongst other things, not only that the power must be exercised in good faith but that the opinion or other subjective conclusion set as a precondition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful - such as by misinterpreting the law, or by misapplying it through*

taking into consideration irrelevant matters of fact or through ignoring relevant matters. Otherwise, the exercise of the power would be held to be invalid for being ultra vires.”

In the light of those principles Laffoy, J. held that in order to ensure that parties in the position of the Applicants would have an effective recourse to judicial review the principles of constitutional justice required that the Minister should give reasons for her decision.

I agree fully with the conclusions reached by Laffoy, J. in his regard.

The discretion of the Minister

In the context of these principles the requirement in Section 19 (2) that the Minister be “*of the opinion that there are circumstances suggesting that*” one of the reasons enumerated at (a) to (h) of the subsection exist means no more than that she must have reasonable grounds for her opinion. It is exclusively a matter for the Minister to form the opinion. It is necessarily a subjective one.

In the light of the foregoing considerations it seems to me that in exercising her powers under Section 19, the Minister, without intending to be exhaustive as to all the elements which may be taken into account, must do so, so that:

- (a) It is exercised for a purpose contemplated by the Act and within the terms of the Section;
- (b) Reasons are given for her decision;
- (c) The decision to do so must be rational, and neither arbitrary nor disproportionate.

Reasons for the Minister’s decision

Following upon the decision of Laffoy, J. the reasons given by the Minister for the appointment of an authorised officer under this section in respect of the First Named Applicant Company were as follows: -

**SCHEDULE OF REASONS FOR THE APPOINTMENT OF AN
AUTHORISED OFFICER UNDER SECTION 19 OF THE COMPANIES ACT, 1990 TO DUNNES STORES
IRELAND COMPANY AND DUNNES STORES (ILAC CENTRE) LTD.**

“Dunnes Stores Ireland Company

1 Section 19(2)(a)

The circumstances outlined under the following heading 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.

2. Section 19(b)(ii)

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:

Payments totally about £395,107 from Dunnes Stores Ireland Company to finance the refurbishment/extension of Mr Michael Lowry’s house at Holycross. Conclusion 14 of McCracken (page 69) indicates inter alia that this must have been made to assist Mr Lowry evade tax. The undated letter of Mrs Heffernan responding to the Tanaiste’s of 19 September, 1997 attaches copies of the relevant cheques.

Payments totally £27,502.75 from Dunnes Stores Ireland Company via Bank of Ireland Marino to Mr Michael Lowry. Conclusion 12 of McCracken (page 69) indicates inter alia that this was made to assist Mr Lowry evade tax.

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.

3. Section 19(2)(b)(iii)/Section 19(2)(d)

There are circumstances suggesting that the affairs of Dunnes Stores Ireland Company have been conducted with interest to defraud its members or in a manner which is unfairly prejudicial to some part of its members, viz:

The McCracken Tribunal (e.g., pages 19, 20, 24 and 26) discloses that a large number of payments was made to various parties from an account in the Marino Branch of the Bank of Ireland. These are acknowledged to be the property of Dunnes Stores. At least a portion of the funds in this Account was apparently supplied by a series of cheques drawn by Mr Ben Dunnes on the Ulster Bank account operated by Dunnes Stores Ireland Company in College Green Dublin. Despite the efforts of the Dunnes Stores Group to establish the

beneficiaries of payments from this Account and a number of similar accounts, some 63% of the payments were found by the Bunchanen Report to have been made to beneficiaries who could not be identified.

The McCracken Tribunal Report (pages 26/27) refers to a company called Tutbury Ltd. which was also under the control of Mr Ben Dunne. Again, it is acknowledged that these funds were the property of Dunnes Stores and originated from profits made by companies associated with Dunnes Stores in the Far East, e.g., Wytrex, Carica. It appears that Mr Ben Dunne negotiated in many instances the price which Dunnes Stores Ireland Company paid to Wytrex for its purchases in the Far East thus enabling Wytrex to make substantial profits on its trading at the expense of Dunnes Stores Ireland Company. According to the evidence of Mr Ben Dunne accepted by the McCracken Tribunal, the "profits" of both Carica and Wytrex were remitted to Tutbury Ltd.

The payments of Stg£182,630 and Stg£282,500 from Dunnes Stores (Bangor) Ltd. for the benefit of Mr Charles Haughey were subsequently lodged to a suspense account of Dunnes Stores Ireland Company. Conclusion 36 of the McCracken Report (page 73) indicates inter alia that there is no evidence of any benefit having been obtained by the Dunnes Stores Group for the payment of Stg£182,630 and for other payments mentioned in its Report.

Conclusion 37 of McCracken (page 73) indicates inter alia 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 determine 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.

4. Section 19(2)(f)

There are circumstances suggesting that a series of acts or omissions of the body are or are likely to be unlawful, viz:

As indicated earlier, Dunnes Stores Ireland Company was apparently the source of some of the funds in the Marino Account. Having regard to the nature of this Account and the failure acknowledged in the Buchanes Report of the Dunnes Stores Group to trace the beneficiaries of these funds, it appears that proper books of account may not have been kept by or on behalf of Dunnes Stores Ireland Company.

Payments totalling £27,502.75 payable to Bank of Ireland were apparently recorded in the books of account of Dunnes Stores Ireland Company as having been made to Streamline Enterprises, although they were paid to the benefit of Mr Michael Lowry. It appears therefore that proper books of account may not have been kept by or on behalf of Dunnes Stores Ireland Company and/or that the books may have been falsified. Conclusion 12 of McCracken (page 69) also indicates inter alia that the payment of

these funds (which had been of Man) was made contrary to the being.

lodged to an offshore account in the Isle exchange control legislation then in

Three payments from Dunnes Stores Ireland Company, totalling £1180,000 and payable to cash, were initially lodged to an account in the Bank of Ireland Rotunda Branch, but the ultimate beneficiaries were apparently Celtic Helicopters Ltd. and Mr Desmond Traynor. Having regard to the manner and have been Stores Ireland Company. circuitous nature of these payments, these payments may not properly recorded in the books of account of Dunnes

The failure of Dunnes Stores Ireland Company to obtain Auditor's Certificates for the financial period ended 31 December, 1992 and a number of subsequent years indicates a breach of the statutory requirement to lay audited accounts before the annual general meeting of the Company in every calendar year.

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."

Dunnes Stores (Ilac Centre) Ltd

The reasons given by the Minister for the appointment of an authorised officer in respect of Dunnes Stores (Ilac Centre) Ltd were confined to Section 19(2)(a), (2)(b)(ii) and (2)(f). Determination of the validity of the exercise of the Minister's powers in relation to Dunnes Stores Ireland Company will govern the issues which arise in respect of Dunnes Stores (Ilac Centre) Ltd.

Section 19(2)(a) - Submissions of Applicants/Respondents

Dunnes firstly take issue with the Minister's decision based on Section 19(2)(a) primarily on the grounds that a general concern about corporate governance is not a ground for appointing an authorised officer or an inspector. It was pointed out that the Minister had refused to define what she meant by corporate governance, which was too vague a term to be relied upon.

It was further submitted on behalf of the Applicant Respondent's that "corporate governance" embraces a range of features of the system by which Companies are directed and controlled including the contractual duties owed by the Directors and/or the company to its member or shareholders pursuant to the Memorandum and Articles of Association; the common law duty owed by Directors to their shareholders to exercise their functions with reasonable care and skill; the fiduciary duty owed by the Directors to their members and shareholders generally. It was submitted that these features are over and above the duty to act in compliance with the Companies Act. Accordingly the Minister, it was submitted, could not ground an appointment under Section 19 upon general concerns as to the standards of corporate governance. It was further submitted that rather than having a general responsibility for corporate governance, the Minister's responsibility, for the purposes of Section 19 was confined to securing compliance with the Companies Acts and not with any perceived "best practice" criteria.

In short, the Ministers responsibility under the Act was considerably narrower than a concern for corporate governance which could not constitute a ground within the meaning of Section 19(2)(a) for the appointment of an authorised officer.

It was also submitted that all the circumstances relied upon by the Minister as giving rise to concerns about standards of governance relate to matters disclosed in the 'McCracken' and 'Buchanan' reports. These reports had been available to the Minister for a considerable period of time. In the meantime the Applicant/Respondents had rectified the abuses referred in those reports. It had not been shown that the appointment of an authorised officer was "necessary" within the meaning of Section 19(2)(a).

Conclusions

The condition identified in paragraph (a) of subsection 2 of section 19 differs from the conditions referred to in any of the other subparagraphs of that subsection. Paragraph (a)

does not refer to any suspected wrongdoing, whether criminal or civil, but to the necessity 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 Act 1963-1990.

The reasons given by the Minister for the exercise of her power under paragraph (a) ought to be considered together. I do not think it can be accurately said that the Minister relied simply on a general concern for breaches of standards of corporate governance.

As has been seen the reasons which the Minister has given for relying on that provision refer to substantial breaches of standards of corporate governance by reference to specific circumstances arising out of findings made by McCracken, J. and Buchanan, J. in the inquiries conducted by them. Those specific circumstances include the making of substantial payments in a manner so as to assist a third party to evade income tax liability, the disbursement of various substantial funds of the company by a director of the company to the benefit of Third Parties, most of whom could not be identified, with no evidence of any benefit having been obtained by the Dunnes Stores Group and the failure of the company to keep proper books of accounts which made it impossible for most of the beneficiaries of the funds dispersed to be traced. Those matters are referred to in the reasons given by the Minister for relying on Section 19(2)(a) by reference to the circumstances which are outlined in relation to the other paragraphs of Section 19(2) referred to in the schedule of reasons.

In my view the nature of the power conferred upon the Minister by subsection 2(a) of Section 19 is deliberately expressed in wide and general terms, relating as it does to a form of preliminary inquiry which would enable the Minister to best determine whether there are sufficient grounds for the appointment of an Inspector to conduct an investigation of the company in question. This contrasts to the very specific occasions for such intervention by the Minister instanced in Subsections 2(b) to (h).

It seems to me that the phrase “standards of corporate governance” in its ordinary and natural meaning refers to the standards according to which the affairs and business of the company are conducted by reference to the obligations and standards imposed upon them by law as well as the Memorandum and Articles of Association. (*‘governance: the action or manner of governing: conduct of business behaviour.’* New Shorter Oxford Dictionary).

The very nature of public regulation of Companies, such as that found in the Companies Acts (as well as other legislation) is to ensure and reinforce certain standards of governance of corporate bodies. As a matter of policy companies may look to generally accepted “best practice” criteria in the conduct of their affairs.

The O.E.C.D. Principles of Corporate Governance (SG-CG (99) 5) acknowledges in its preamble that “*the Corporate Governance framework also depends on legal, regulatory, and institutional environments.*” The World Bank report on Corporate Governance (published September 1999) acknowledges that “*in its narrowest sense, (emphasis added) corporate governance can be viewed as a set of arrangements internal to the corporation that define the relationships between managers and shareholders.*” but even, “*these arrangements may be embedded in Company Law, Securities Law, listing requirements, and the like ...*” That report also acknowledged that external rules have a direct effect on corporate governance including “*... the legal machinery for enforcing shareholders rights, systems for accounting and auditing, a well regulated financial system, ...*”

In any case, apart from the foregoing citations, any ordinary and reasonable interpretation of the notion of standards of corporate governance relates to the manner in which a corporate body’s officers govern the corporation and must in my view include compliance by companies and directors with any regulatory regime, such as the Companies Acts, governing the conduct of their affairs.

I think it can be said that corporate governance has an internal and external dimension. It is only in its narrowest sense that corporate governance can be viewed as a set

of arrangements internal to the corporation that define relationships between managers and shareholders. Such internal arrangements may, as was submitted, be governed by the Memorandum and Articles of Association and companies may choose to follow certain “best practice” criteria. The error, as I see it, in the submissions of the Applicants/Respondents is to confine their perception of corporate governance to such an internal dimension. The external dimension comprises those standards or obligations laid down by external sources such as statutes or statutory regulations.

While the Companies Acts generally include provisions relating to the incorporation, registration and structure of companies as well as such matters as duties of directors towards their members, they also govern fundamental aspects of the relationship between companies and the rest of society. The advantages of trading or conducting business through a corporate entity, such as a company with limited liability, are self-evident. Companies have a legal personality separate and distinct from its individual members. Many aspects of how they conduct their affairs as distinct entities are regulated by law in the public interest. The Companies Acts are the primary source of that regulatory regime even though there are other statutes which may regulate how a company or its directors conduct its affairs such as the Competition Acts, certain provisions of the Finance Acts or the Central Bank Acts. Statutory measures specifically directed at companies, in particular the Companies Acts, define, *inter alia*, obligations specific to companies and their directors with which they are bound to comply in the public interest. They set standards for corporate governance.

It is not in issue that the Minister has a role under the Companies Acts in supervising compliance by companies with such statutory provisions governing, *inter alia*, the conduct of their affairs. Summary proceeding in relation to an offence under the Acts may be prosecuted by the Minister. As regards the Companies Acts, 1990, the Minister may apply to the court, pursuant to section 8, for the appointment of an inspector to investigate the affairs of a company and to report thereon. She may appoint an inspector to investigate and report on

the membership or ownership of a company pursuant to section 14 of that Act. In addition to her powers under Section 19, the focal point of these proceedings, the Minister also has certain powers to investigate share dealings of a company pursuant to Section 66.

Thus the Oireachtas has conferred on the Minister, as the member of Government responsible for the Department of Enterprise, Trade and Employment, significant powers to ensure, *inter alia*, that companies who have availed of the right to incorporate and register under the Acts and the advantages which such incorporation confers, do not abuse those advantages to the detriment of their shareholders, creditors and, in particular, the public interest. I do not think the statutory duties and obligation imposed on companies and directors can be viewed simply as an end in themselves for their benefit since those duties have a function in preventing abuses of their corporate status which may lead to consequences which are not just breaches of the Companies Acts per se, but may have other far reaching consequences of public interest. Therefore, I do not think the concerns of the minister in exercising her supervisory role pursuant to the Acts can be said to be limited to simply whether a particular company has breached a particular provision of the Companies Acts at a particular point in time. The Minister must also be concerned with the damage which such breaches have on public confidence in how companies conduct their affairs particularly where such breaches may be extensive and have a potential consequence of undermining confidence in corporate status and its governance.

In this sense one of the purposes of the Companies Acts is to confer on the minister a responsibility to be concerned with and oversee the standards of corporate governance in companies as laid down or reinforced by those Acts.

Accordingly, I have come to the conclusion that breaches of standards of corporate governance as laid down or reinforced by the Acts may be taken into account by the Minister when considering whether to exercise her powers under Section 19(2)(a). An expression of general concern with breaches of such standards would not constitute a sufficient statement

of her reasons for exercising her power under that paragraph. As I have already pointed out the Minister relates her concern to specific circumstances of abuse and misfeasance disclosed by the reports of McCracken, J. and Buchanan, J. The reasons given are sufficient to disclose a reasonable and rational basis for the Minister's decision pursuant to paragraph (a)

One cannot lose sight of the fact that the whole purpose and object of paragraph (a) is to enable the Minister to decide whether she has sufficient grounds to proceed with an application for the appointment of an Inspector pursuant to Section 8(1), (a), (b) or (c) of the Act. The abuses disclosed by the two reports and relied upon by the Minister are clearly relevant to the grounds upon which a Court might be asked to make an appointment pursuant to Section 8(1).

I have come to the conclusion, therefore, that the reasons stated by the Minister for the appointment of an Inspector pursuant to Section 19(2)(a) come within the terms of paragraph (a) and she was entitled to rely upon them.

“Necessary”

Much argument was directed to the use of the word “necessary” in subparagraph (a). It was contended on behalf of Dunnes that it was not “necessary” to examine any of the books or documents of Dunnes in the circumstances which exist in the present case. Clearly paragraph (a) anticipates an application by the Minister under s.8 of the 1990 Act for the appointment by the Court of an inspector in the exercise of the discretion which the Court would possess in the event of the Court being satisfied as to the existence of any of the circumstances identified in paragraphs (a) - (c) of subsection 1 of section 8 aforesaid. That being the case the word “necessary” clearly relates to the requirement that the Minister should satisfy herself that appropriate circumstances exist in which to make such an application and the Court being provided with appropriate information to prove, first, compliance with the statutory conditions and, secondly, adequate information on which to

base the exercise of the discretion conferred upon it in relation to such an appointment. The word “necessary” could not be read as an absolute condition precedent to the making of an application to the Court for the appointment of an inspector, but the practical necessity of obtaining sufficient information to justify the decisions which would be involved in making an application to the Court which could have damaging effects for the company in respect of which the application was made.

Where, as in the present case, it is established that serious abuses took place in the past I can readily see the necessity of examining certain books and records to ensure that the position has been fully rectified and not repeated and that there are reasonable grounds for assuming that there would be no further recurrence.

Decision

Having regard to the nature and extent of the abuses relied upon by the Minister in the reasons which she gave, it has not been established that the appointment of the authorised officer on Section 19(2)(a) was either irrational or disproportionate.

Having regard also to my earlier conclusions, I am satisfied that the Minister’s decision, so far as Section 19(2)(a) is concerned, was an exercise of her powers for purposes contemplated by the Companies Acts and within the terms of the section.

Accordingly I would allow the appeal on this ground.

Other Issues

As regards the Minister’s reliance on other paragraphs and subparagraphs of Section 19(2) I agree with the judgement of the Chief Justice and would allow the appeal also in respect of the appointments made by the Minister pursuant to Section 19(2)(d).

Remittal

In the circumstances this matter must be remitted to the High Court so that the issue as to the constitutionality of the relevant statutory provisions should be determined. This will

unavoidably delay a final determination of the issues between the parties in these proceedings. The learned High Court Judge properly exercised his discretion not to deal with this issue for the reasons stated at the outset of this judgement. I do not propose to consider in this case the circumstances in which the High Court, as opposed the Supreme Court, might in my view, consider an issue concerning the constitutionality of an Act even where the proceedings are also determined in the High Court on another legal basis. I do however think it appropriate to recall that the Committee on Court Practice and Procedure in its 11th Interim Report published in 1970 made the following recommendation:-

“There should be expressly conferred on the Supreme Court jurisdiction to try in the first and final instance, on consent of the parties, net constitutional issues initiated in the High Court concerning the validity of Act of the Oireachtas or issues arising under Article 50, Section 1, of the Constitution for the resolution of which no decision on any disputed question of fact is required, or any other net issue of law of importance initiated in the High Court.”

Again, I do not wish to enter upon the merits of the entire ambit of this recommendation but it does seem to me that where a net constitutional issue concerning the validity of an Act or part of an Act of the Oireachtas arises in proceedings for the resolution of which no decision on any disputed question of fact is required, there is a great deal of merit in conferring on this Court, at least with the consent of the parties, the power to determine that issue in circumstances such as have arisen in this case rather than remitting it again to the High Court when the common experience is that such issues are almost invariably further appealed to this Court for final determination.

