DEEMED DISQUALIFICATION ORDERS

(UNDER SECTION 160(1) OF THE COMPANIES ACT 1990)

FOLLOWING A DEFENDANT'S CONVICTION ON INDICTMENT FOR "*ANY INDICTABLE OFFENCE IN RELATION TO A COMPANY, OR INVOLVING FRAUD OR DISHONESTY*"

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Introduction

1. My topic in this presentation is a statutory provision which has its home in company law, but whose scope and impact range more widely into the field of criminal law generally. For that reason it should be of interest, I hope, to the majority of criminal law practitioners – not simply to those whose work occasionally involves them with the prosecution or defence of offences under the Companies Acts.

2. At the outset I wish to enter one important caveat. I was invited to speak at this conference about three weeks ago, and have prepared this paper fairly quickly in the interim. However time constraints have not allowed me to seek the input of other ODCE colleagues. Accordingly, the views expressed in the paper do not necessarily reflect those of the ODCE. If/when any instances arise in which any of the issues dealt with in this paper are relevant, and where it is necessary for the ODCE to take a definitive position regarding them, or to exercise or refrain from exercising any of its statutory powers, the ODCE will consider the law afresh; and will come to such conclusions as then seem appropriate. Such conclusions may potentially differ from those suggested by the analysis contained in this paper.

Section 160(1) of the Companies Act 1990 – Deemed disqualification orders following conviction on indictment for certain indictable offences

3. Section 160(1) of the Companies Act 1990 has been in force since 1 August 1991[1] and provides as follows—

> *Where a person is convicted on indictment of any indictable offence in relation to a company, or involving fraud or dishonesty, then during the period of five years from the date of conviction or such other period as the court, on the application of the prosecutor and having regard to all the circumstances of the case, may order—*
>
> *(a) he shall not be appointed or act as an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978;*
>
> *(b) he shall be deemed, for the purposes of this Act, to be subject to a disqualification order for that period.*

4. In short, a disqualification order prohibits a person subject thereto from serving as a company director or secretary, as a statutory auditor, or as an insolvency practitioner. In addition, it prohibits a person from being concerned or taking part in the management of companies.[2] Moreover, the fact that someone has been disqualified under the Companies Acts is also a basis on which disabilities may arise under other legislative codes.[3]

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1 Companies Act, 1990 (Commencement) (No.2) Order, 1991, S.I. 117 of 1991.

2 For what may be meant by *'being concerned or taking part in the management of a company'* see *R. v. Campbell* (1984) 78 Cr.App.R 95 and the Australian case of *Commissioner for Corporate Affairs (Victoria) v. Bracht* [1989] V.R. 821. Note, however, that there does not yet appear to be any Irish case dealing specifically with this issue.

3 These fall into a number of broad categories and the list which follows does not pretend to be exhaustive. *Firstly*, under Section 5(4)(a)(i)(II) of the Powers of Attorney Act 1996 one of the ways in which an enduring powers of attorney will be invalid is if, when executing the instrument creating it, the attorney is *"a person who is or was subject or deemed subject to a disqualification order by virtue of Part VII of [the Companies Act 1990]*". *Secondly*, a number of statutes establishing public bodies provide that disqualified persons are ineligible to serve as members of the body's governing authority. See, for example, Section 33(2)(d) of the Dormant Accounts Act 2001; Section 11(11)(d) of the Ordinance Survey of Ireland Act 2001;

5. As noted in 1992 by Brian Murray, in his article *Director Disqualification and the Criminal Law*,[4] *"there are a number of striking points about this section"*, i.e. Section 160(1).

<u>The automatic nature of the disqualification</u>

6. First amongst these, as noted by Brian Murray, was that *"the operation of the disqualification follows automatically upon conviction"*. This results from the wording of the section, whereby the role of the court appears to arise only when the prosecutor has asked it to consider fixing a disqualification period <u>other than</u> the statutory default of five years from the date of conviction. It follows also from the use of the phrase *"he shall be <u>deemed</u>, for the purposes of this Act, to be subject to a disqualification order"* in the final words of the section. This latter phraseology can be contrasted with that used in Section 160(2) of the 1990 Act, where the operative words are that *"the court may, of its own motion, or as a result of [an] application, <u>make</u> a disqualification order against such a person for such period as it sees fit."*[5]

7. This automatic aspect of Section 160(1) disqualification orders has been confirmed recently by the Central Criminal Court in the case of *DPP v. Duffy*.[6] (This is one of the series of cases that has been brought arising out of a Competition Authority investigation into unlawful activity carried on by certain persons involved in the motor trade, who were members of an association known as the Citroen Dealers Association.) In his judgment of 23 March 2009, McKechnie J stated as follows—

> *"**<u>Ancillary Order:</u>***
>
> *59. There is one other matter which requires mention: it arises out of s.160 of the Companies Act 1990. Under that section Mr Duffy will be prohibited or disqualified from holding any directorship for a period of five years. It is said that such a disqualification is penal in nature and thus reckonable when formulating punishment.*
>
> *60. The first point to be noted is that this is a mandatory consequence of the conviction whether by plea or verdict. It is not the imposition of a discretionary disqualification. In fact, this Court has no involvement whatsoever with it; it follows directly as a matter of law …."*

Section 10(9)(d) of the Family Support Agency Act 2001; Section 20(13)(e) of the Transport (Railway Infrastructure) Act 2001; Section 7(13)(e) of the National Pensions Reserve Fund Act 2000; Paragraph 3(3)(e) of the Schedule to the Education (Welfare) Act 2000; Section 17 of the Údarás na Gaeltachta (Amendment) (No.2) Act 1999; Section 31(8)(d) of the Food Safety Authority of Ireland Act 1998; Section 9(11) of the Industrial Development (Enterprise Ireland) Act 1998; Section 10(3) of the Western Development Commission Act 1998; Paragraph 4(3) of the First Schedule to the National Standards Authority of Ireland Act 1996; Section 18(5) of the An Bord Bia Act 1994. *Thirdly*, Paragraph 3(1)(e) of Schedule 1 to the Asset Covered Securities Act 2001 has the effect that a disqualification order is a barrier to a person being appointed under Part 6 of that Act as manager of a designated credit institution, or, a formerly designated institution.

[4] (1992) Irish Criminal Law Journal 165.

[5] Applications under Section 160(2) arise most frequently in civil proceedings. However note Brian Murray's article (at pages 171/172) where he describes Section 160(2) as *"a broader, discretionary, jurisdiction to disqualify, which was also clearly intended to operate in the course of criminal proceedings."* The DPP has *locus standi* to seek applications under Section 160(2)(a), (b), (c), (d), (e), (f) and (g) of the Companies Act 1990 – but not Sections 160(2)(h) or (i): see Sections 160(4), (5) and (6). This is a topic which undoubtedly merits further examination. However, for the purposes of today's presentation, I propose focussing primarily on Section 160(1).

[6] *The Director of Public Prosecutions v. Patrick Duffy and Duffy Motors (Newbridge) Limited*, Central Criminal Court Bill No. CC 0034/2008, Judgment of McKechnie J delivered on 23 March 2009. A copy of the judgment is available on the website of the Competition Authority at *www.tca.ie/EnforcingCompetitionLaw/CriminalCourtCases/MotorVehicles/Citroen/Citroen.aspx* A shorter link to this webpage is available also from *www.tinyurl.com/rczq5x*

Discretionary nature of pre-1990 Irish provisions

8. This automatic aspect of a post-conviction disqualification under Section 160(1) was one of the many novelties introduced by the Companies Act 1990. The provision replaced Section 184 of the Companies Act 1963, which had previously provided for a form of discretionary disqualification following certain convictions, and then only when triggered by an application from the prosecutor. Section 184 provided as follows—

> *Where a person is convicted on indictment of any offence in connection with the promotion, formation or management of a company or any offence involving fraud or dishonesty whether in connection with a company or not, the court by which he is convicted may on the application of the [Director of Public Prosecutions[7]] at the close of the trial, order that that person shall not, without the leave of the High Court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of any company for such period as may be specified in the order.*

Discretionary nature of the equivalent UK provision

9. In Great Britain and Northern Ireland consequential disqualification orders following certain criminal convictions do not arise automatically. Whether to impose a disqualification order is a matter that lies within the sentencing judge's discretion.

10. In this regard, Section 2 of the UK's Company Directors Disqualification Act 1986 (as amended) provides as follows—

> *Disqualification on conviction of indictable offence.*
>
> *(1) The court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management, liquidation or striking off of a company, with the receivership of a company's property or with his being an administrative receiver of a company.*
>
> *(2) "The court" for this purpose means—*
>
> *(a) any court having jurisdiction to wind up the company in relation to which the offence was committed, or*
>
> *(b) the court by or before which the person is convicted of the offence, or*
>
> *(c) in the case of a summary conviction in England and Wales, any other magistrates' court acting for the same petty sessions area;*
>
> *and for the purposes of this section the definition of "indictable offence" in Schedule 1 to the Interpretation Act 1978 applies for Scotland as it does for England and Wales.*
>
> *(3) The maximum period of disqualification under this section is—*
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> *(a) where the disqualification order is made by a court of summary jurisdiction, 5 years, and*
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> *(b) in any other case, 15 years.*

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[7] The term "Attorney General" was used in the 1963 Act. Under Section 3(2) of the Prosecution of Offences Act 1974 this statutory function of the Attorney was transferred to the DPP.

<u>Discretionary also in Hong Kong</u>

11. The equivalent provisions in Hong Kong are discretionary also. Under Section 168E of the Hong Kong Companies Ordinance it is provided that—

Disqualification on conviction of indictable offence

(1) The court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily)-

(a) in connection with the promotion, formation, management or liquidation of a company; or

(b) in connection with the receivership or management of a company's property,

or any other indictable offence his conviction for which necessarily involves a finding that he acted fraudulently or dishonestly.

(2) In subsection (1) "the court" ... means the Court of First Instance or the court by or before which the person is convicted of the offence.

(3) The maximum period of disqualification under this section is, where the disqualification order is made-

(a) by a judge of the Court of First Instance, 15 years;

(b) by a judge of the District Court, 10 years;

(c) by a magistrate, 5 years.

(4) Where a disqualification order is made by a magistrate and the Official Receiver or-

(a) the liquidator;

(b) a past or present member; or

(c) a creditor,

of the company affected believes that the facts would justify a disqualification order for a longer period, he may apply to the Court of First Instance for such a disqualification order and it may, if it considers it appropriate in the circumstances, make an order for such longer period as it determines.

<u>… but automatic disqualification appears to be the norm in Australia, New Zealand and South Africa</u>

12. On the other hand, disqualification follows automatically in Australia – just as it does here in Ireland. Under Section 206B of Australia's Corporations Act 2001—

Automatic Disqualification
Convictions

(1) A person becomes disqualified from managing corporations if the person:

(a) is convicted on indictment of an offence that:

(i) concerns the making, or participation in making, of decisions

that affect the whole or a substantial part of the business of the corporation; or

(ii) concerns an act that has the capacity to affect significantly the corporation's financial standing; or

(b) is convicted of an offence that:

(i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months; or

(ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or

(c) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.

The offences covered by paragraph (a) and subparagraph (b)(ii) include offences against the law of a foreign country.

(2) The period of disqualification under subsection (1) starts on the day the person is convicted and lasts for:

(a) if the person does not serve a term of imprisonment—5 years after the day on which they are convicted; or

(b) if the person serves a term of imprisonment—5 years after the day on which they are released from prison.

13. Similarly in New Zealand, Section 382(1) of its Companies Act 1993 provides that—

Where—

(a) A person has been convicted on indictment of any offence in connection with the promotion, formation, or management of a company; or

(b) A person has been convicted of an offence under any of sections 377 to 380 of this Act[8] *or of any crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961; or*

(c) [Repealed]

that person shall not, during the period of 5 years after the conviction or the judgment, be a director or promoter of, or in any way, whether directly or indirectly, be concerned or take part in the management of, a company, unless that person first obtains the leave of the Court which may be given on such terms and conditions as the Court thinks fit.

14. Automatic disqualification following certain criminal convictions appears also to be a feature of South African law. Section 69 of its Companies Act 2008 includes the following subsections—

(8) A person is disqualified to be a director of a company if—

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[8] Section 377 of the New Zealand Act deals with *"false statements"* and is similar in its scope to Section 242 of the Irish Companies Act 1990. Section 378 deals with *"fraudulent use or destruction of [company] property"* and has no exact counterpart in the Irish Companies Acts. Section 379 deals with *"falsification of records"* and is similar in its scope to Section 243 of the Irish Companies Act 1990. Section 380 deals with *"carrying on business fraudulently"* and is similar in its scope to Section 297 of the Irish Companies Act 1963, as substituted by Section 137 of the Companies Act 1990.

a) … [not relevant for present purposes]

b) *subject to subsections (9) to (12), the person—*

i) … [not relevant for present purposes]

ii) … [not relevant for present purposes]

iii) … [not relevant for present purposes]

iv) *has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence—*

aa) *involving fraud, misrepresentation or dishonesty;*

bb) *in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5);*[9] *or*

cc) *under this Act, the Insolvency Act, 1936 …, the Close Corporations Act, 1984, the Competition Act, [1998,] the Financial Intelligence Centre Act, 2001 …, the Securities Services Act, 2004 …, or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004 …*

(9) A disqualification in terms of subsection (8)(b)(iii) or (iv) ends at the later of—

a) *five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or*

b) *at the end of one or more extensions, as determined by a court from time to time, on application by the Commission in terms of subsection (10).*

(10) At any time before the expiry of a person's disqualification in terms of subsection (8)(b)(iii) or (iv)—

a) *the Commission may apply to a court for an extension contemplated in subsection (9)(b); and*

b) *the court may extend the disqualification for no more than five years at a time, if the court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.*

(11) A court may exempt a person from the application of any provision of subsection (8)(b).

(12) Despite being disqualified in terms of subsection (8)(b)(iii) or (iv), a person may act as a director of a private company if all of the shares of that company are held by that disqualified person alone, or by—

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[9] Sections 69(2) and (5) of the South African Act appear to be designed to prohibit persons purporting to act as directors or managers in contravention of a disqualification order, or something equivalent. Accordingly *"an offence in connection with any act contemplated in [those subsections]"* is probably similar in scope to the offence in Irish law contained in Section 161(1) of our Companies Act 1990.

a) that disqualified person; and

b) persons related to that disqualified person, and each such person has consented in writing to that person being a director of the company.

<u>Singapore's hybrid provision</u>

15. Finally, a hybrid provision (which brings together instances of both the automatic and discretionary forms of disqualification, consequent upon certain criminal convictions) appears to exist in the law of Singapore. According to Section 154 of Singapore's Companies Act—

Disqualification to act as director on conviction of certain offences

(1) Where a person is convicted (whether in Singapore or elsewhere) of any offence involving fraud or dishonesty punishable with imprisonment for 3 months or more, he shall be subject to the disqualifications provided in subsection (3).

(2) Where a person is convicted in Singapore of —

(a) any offence in connection with the formation or management of a corporation; or

(b) any offence under section 157[10] *or 339*[11]*,*

the court may make a disqualification order in addition to any other sentence imposed.

(3) A person who is disqualified under subsection (1) or who has had a disqualification order made against him under subsection (2) shall not act as a director of a company or of a foreign company to which Division 2 of Part XI applies nor shall he take part, whether directly or indirectly, in the management of such a company or foreign company.

(4) (a) Where a disqualified person has not been sentenced to imprisonment, the disqualifications in subsection (3) shall take effect upon conviction and shall continue for a period of 5 years or for such shorter period as the court may order under subsection (2).

(b) Where a disqualified person is sentenced to imprisonment, the disqualifications in subsection (3) shall take effect upon conviction and shall continue for a period of 5 years after his release from prison.

(5) A person who acts in contravention of a disqualification under this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both.

(6) An application for leave to act as a director of a company or of a foreign company to which Division 2 of Part XI applies or to take part whether directly or indirectly, in the management of such a company or foreign company may be made by a person

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[10] Section 157 of the Singapore Act has no equivalent in Irish company law. It creates potential criminal liability for a company director who breaches statutory duties to *(i) "at all times act honestly and use reasonable diligence in the discharge of the duties of his office"* and *(ii)* to not *"make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company."* In Ireland company directors have similar duties, but stemming primarily from the common law and equity. The breach of such duties gives rise to civil consequences primarily, rather than specific criminal offences under the Companies Acts 1963-2006.

[11] Section 339 of the Singapore Act deals with the obligation of companies and their directors to keep proper accounting records. As such, it is similar in its scope to Section 202 of the Irish Companies Act 1990.

against whom a disqualification order has been made upon that person giving the Minister not less than 14 days' notice of his intention to apply for such leave.

(7) *On the hearing of any application under this section, the Minister may be represented at the hearing and may oppose the granting of the application.*

(8) *Without prejudice to section 409, a District Court may make a disqualification order under this section.*

(9) [not relevant for present purposes]

What convictions give rise to an automatic consequential disqualification under Section 160?

A trial on indictment is a pre-condition

16. The first matter to be noted here is that under Section 160(1) a deemed disqualification order can arise only consequent upon an accused person being convicted on indictment of certain indictable offences.

17. I will return later to the difficult question of just what are those 'certain indictable offences'. However, leaving aside that question temporarily, it is at least possible to say that where the District Court has accepted jurisdiction in relation to the prosecution of most such indictable offences, any resulting conviction does not carry with it a deemed disqualification order under Section 160(1).[12]

18. In passing it may be observed that under the corresponding UK[13] and Hong Kong[14] provisions, it would seem that consequential disqualification orders may follow when a defendant has been convicted of certain indictable offences, even though they have been tried summarily. By implication, it would seem that summary offences tried summarily do not attract deemed disqualification orders – at any rate under the provisions cited above.[15] However in Australia,[16] the position appears otherwise, if only because of the absence in Section 206B(1)(b) of any reference to *"on indictment"* – in contrast to the inclusion of that term in Section 206B(1)(a). Likewise, the New Zealand provision[17] appears on its face to allow for automatic deemed disqualification orders following summary trials of those offences described in sub-paragraph (b) of Section 382(1). It is not apparent from the South African[18] and Singaporean[19] provisions

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12 Except as regards three specific offences under the Companies Acts. *Firstly*, Section 183(1) of the Companies Act 1963 (as substituted by Section 169 of the Companies Act 1990) provides that an offence is committed by an undischarged bankrupt who acts as a director or other officer of a company. This is an indictable offence. However, even when tried summarily, conviction leads automatically to a consequential deemed disqualification order – but, in this instance, by reason of Section 183(2) of the Companies Act 1963: not Section 160(1) of the Companies Act 1990. *Secondly*, Section 161(1) of the Companies Act 1990 makes it an offence for a person who is subject to a restriction or disqualification order to act contrary to its terms. Again this is an indictable offence. However, when tried summarily, it nonetheless leads to a deemed disqualification order under Section 161(2): not Section 160(1). *Thirdly*, Section 164(1) of the Companies Act 1990 make it an offence for a person, while a director or other officer of a company, to act in accordance with the directions or instructions of another person when the first-mentioned person knows that the second-mentioned person is disqualified, or otherwise restricted under Part VII of the 1990 Act. When this indictable offence is tried summarily, conviction nonetheless leads to a deemed disqualification order, but this arises under Section 164(2): not Section 160(1).

13 See paragraph 10.

14 See paragraph 11.

15 Note, however, that Section 5 of the UK Act allows for disqualification following summary conviction for offences connected with the non-furnishing of returns, accounts or other documents required to be delivered to the UK's registrar of companies.

16 See paragraph 12

17 See paragraph 13.

18 See paragraph 14.

whether the distinction between summary and indictable offences has significance in those jurisdictions. However, it does seem to be the case that an automatic consequential disqualification can follow from certain trials at what must surely be the lower end of the jurisdictional spectrum.[20]

19. Historically, the Irish position was that under Section 184[21] of the Companies Act 1963 a consequential disqualification order could only follow after a trial on indictment. However, under Section 135 of the Companies (No.2) Bill 1987[22] it was originally intended that an automatic deemed disqualification order should follow all instances in which a person was convicted of any indictable offence in relation to a company: including when the indictable offence had been tried summarily. During Committee Stage of the Bill in Dáil Éireann, however, a Government amendment was introduced which confined the operation of the automatic consequential disqualification to instances in which the relevant indictable offence had been tried on indictment.[23]

The wide-ranging scope of offences which may attract deemed disqualification orders, following conviction on indictment

20. The offences which, when dealt with on indictment, come within the scope of Section 160(1) are described therein as—

> *"any indictable offence in relation to a company, or involving fraud or dishonesty"*

21. As noted by Brian Murray in his 1992 article[24]—

> *"… the offences to which [Section 160(1)] applies are very generously defined. The formula* 'in relation to a company' *will obviously include the broad range of offences triable on indictment proscribed by the Companies Acts themselves, such as failing to keep proper books of account, insider dealing, fraudulent trading, the issuing of a prospectus containing untrue statements, being a party to the acquisition by a company of its own shares and indeed, breach of a disqualification or restriction order itself. Yet the Companies Acts also proscribe conduct which might only have a peripheral connection with a company* per se*, and would not necessarily involve fraud or dishonesty, such as failing to produce books or documents when required by investigatory bodies, or obstructing a right of entry or search under the Acts. Once one moves outside the scope of the Companies Acts, it becomes even more difficult to determine whether offences that may well involve companies, can be said to be offences* 'in relation to a company'. *Functionaries can cause companies to breach provisions of the criminal law without any suggestion of fraud or dishonesty such as, for example, the Road Traffic Acts, and by doing so may well themselves commit offences—either under the Acts themselves or as aiders and abettors. Does the mere fact that the breaches of the law have occurred through the medium of, or by virtue of the existence of a company necessarily mean that the offence is* 'in relation to a company'*? There is certainly no particular policy furthered by providing for disqualification in such situations, but the generalised nature of the wording could well bring such offences within the ambit of the legislation.*
>
> *The concept of fraud or dishonesty, although at first glance lacking specificity is probably easier to categorise, and encompasses a finite collection of offences, such as larceny,*

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[19] See paragraph 15.

[20] *e.g.,* in South Africa following conviction for any theft offence in respect of which any sentence of imprisonment has been imposed – Section 69(8)(b)(iv); in Singapore following conviction of any offence involving fraud or dishonesty punishable with imprisonment for 3 months or more – Section 154(1).

[21] See paragraph 8.

[22] The draft legislation most of which, when enacted, became the Companies Act 1990.

[23] See pages 821 and 822 of the Official Report of the proceedings on 29 March 1990 of the Special Committee of Dáil Éireann constituted to consider the Companies (No. 2) Bill, 1987 [Seanad] (other than Parts I and II thereof).

[24] See paragraph 5 for citation details. The extract above is from pages 168 and 169 of the article (with Mr Murray's footnotes omitted.)

> *handling, fraudulent conversion, obtaining by false pretences, embezzlement, conspiracy to defraud and—perhaps most significantly—most revenue offences.*
>
> *Because the disqualification operates automatically, it is of concern that the offences which activate that disqualification are not clearly set forth, generating the potential for severe difficulties, and possibly resulting in a situation where persons may genuinely not know whether they are or are not disqualified ..."*

22. Seventeen years on, it is perhaps surprising that no case yet appears to have come before the Irish courts in which anyone has sought to test the limits of what indictable offences are, or are not, within the scope of Section 160(1). Admittedly, the question whether an offence involves fraud or dishonesty is presumably capable of being answered easily by experienced criminal law practitioners, so the absence of challenge regarding these types of offences is more readily explicable. Nonetheless, for the reasons outlined by Brian Murray, the parameters of what are, or are not, *"offences in relation to a company"* seem much less clear-cut, to the point that if/when a dispute is raised in court the real surprise may be that it did not happen sooner!

23. If/when the Irish courts are called upon to define the limits of this element of Section 160(1) it is likely that some regard will be had to the case law that has emerged in the United Kingdom. However, the extent to which this will be of assistance is uncertain, having regard to the different statutory provisions which operate in that jurisdiction.

24. In the United Kingdom, it will be recalled,[25] consequential disqualifications may follow for persons convicted of offences—

    > *"in connection with the promotion, formation, management, liquidation or striking off of a company, with the receivership of a company's property or with [the defendant having been] an administrative receiver of a company."*

    This class of offences, it is submitted, is probably narrower than that embraced by the Irish concept of *"any indictable offence in relation to a company, or involving fraud or dishonesty"*.

25. Nonetheless it is informative to note the approach taken by the English Court of Appeal in the leading case of *R v. Goodman.*[26] In that case, the defendant had pleaded guilty to a charge of insider dealing in relation to the shares of a company of which he had previously been the chairman. Analysing the question of whether the offence of insider dealing was an offence *"in connection with the management of a company"*, Staughton LJ stated—

    > *"There have been three cases which give some guidance as to those words,* 'connected with the management of the company.' *For present purposes it is sufficient to refer to R. v. Georgiou (1988) 87 Cr App R 207. There the defendant had carried on an insurance business through the company without the authorisation of the Secretary of State under the Insurance Companies Act 1982. It was held that that was an offence connected with the management of the company. The court referred first to R. v. Corbin (1984) 6 Cr App R (S) 17, where the defendant operated a business dealing in yachts through three companies (see 87 Cr App R 207 at 209). He obtained money and yachts by various deceptions. That was held to be an offence in connection with the management of the three companies. The argument the other way was that management meant only the internal affairs of the company, presumably under the Companies Act and such like. That argument was rejected by this court.*
    >
    > *Then there was R. v. Austen (1985) 7 Cr App R (S) 214, also referred to in R. v. Georgiou (at 209), where the defendant had carried out fraudulent hire-purchase transactions through a number of limited companies. That too was to be held to be within the section of the 1986 Act.*

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[25] See paragraph 9.

[26] [1993] 2 All E.R. 789; [1992] B.C.C. 625; [1994] 1 B.C.L.C. 349; (1993) 97 Cr. App. R. 210; [1992] Crim. L.R. 676.

Mann J, giving the judgment of the court in R. v. Austen (at 216) said:

> *'In our judgment the words of the section when they refer to* 'the management of the company' *refer to the management of the company's affairs and there is no reason in language for differentiating between internal affairs and external affairs. Indeed as a matter of policy it may be thought appropriate that management should extend to both internal and external affairs. The section should cover activity in relation to the birth, life and death of a company.'*

Then O'Connor LJ continued in R. v. Georgiou (at 210):

> *'In our judgment carrying on an insurance business through a limited company is a function of management and if that function is performed unlawfully in any way which makes a person guilty of an indictable offence it can properly be said that that is in connection with the management of the company.'*

There are three possible ways of looking at the test to be applied. The first might be to say that the indictable offence referred to in the 1986 Act must be an offence of breaking some rule of law as to what must be done in the management of a company or must not be done. Examples might be keeping accounts or filing returns and such matters. It is clear from the authorities that the section is not limited in that way, although even if there were such a limit it would be arguable that the offence of insider trading, because it requires some connection between the defendant and the company, is an offence of that nature. Another view might be that the indictable offence must be committed in the course of managing the company. That would cover cases such as R. v. Georgiou, R. v. Corbin and R. v. Austen. What the defendants in all those cases were doing was managing the company so that it carried out unlawful transactions.

The third view would be that the indictable offence must have some relevant factual connection with the management of the company. That, in our judgment, is the correct answer. It is perhaps wider than the test applied in the three cases we have mentioned, because in those cases there was no need for the court to go wider than in fact it did. But we can see no ground for supposing that Parliament wished to apply any stricter test. Accordingly, we consider that the conduct of Mr Goodman in this case did amount to an indictable offence in connection with the management of the company. Even on a stricter view that might well be the case, because as chairman it was unquestionably his duty not to use confidential information for his own private benefit. It was arguably conduct in the management of the company when he did that.

We reject the argument that there was no power to make a disqualification order in this case."

26. Walters and Davis-White, the authors of the leading English textbook *Directors' Disqualification & Bankruptcy Restrictions*,[27] set about (at pages 487 - 495) *"[identifying] a range of possible offences for which a conviction may trigger the jurisdiction in [Section 2 of the UK Company Directors' Disqualification Act 1986] and to illustrate the potential width and practical relevance of [Section 2]."* After noting that what follows does not purport to be *"an exhaustive account of every indictable offence that could conceivably fall within s.2(1)"* and that *"the discussion is intended to be illustrative rather than exhaustive,"* the authors proceed to put forward the following examples—

    (i) Offences in the fields of—

    - environmental protection;[28]

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[27] Sweet & Maxwell, 2005.

[28] For a recent instance of the UK criminal courts imposing disqualification orders following a prosecution under environmental law see *R. v. Evans & Others* (23 April 2009) noted on the website of the UK's

- health and safety; and,
- consumer protection.

The authors note that in many instances it is possible[29] for *"a director or manager of a company [to] be prosecuted personally if it can be proved that the offence for which the company is liable was committed with the consent or connivance of, or was attributable to any neglect on the part of that director or manager. If a director or manager is convicted of an offence of this type the court's power to disqualify him under s.2 is bound to arise, as it will be easy to show the required connection between the offence and the management of the company …The trend in recent years has been to criminalise the conduct of directors and senior managers as well as that of the company and so the opportunities for the courts to consider s.2 are likely to increase rather than diminish in the future."*[30]

(ii) Financial crimes such as fraudulent trading, insurance fraud, insider dealing, self-dealing, financial assistance, tax evasion.

(iii) Carrying on unauthorised investment business through the medium of a company.

(iv) Offences under competition law.[31]

27. The most recent reported decision of the English courts concerning Section 2 of their 1986 Act appears to be the case of *R v. Creggy*.[32] In that case the Court of Appeal dismissed an appeal taken by a solicitor, who had pleaded guilty to an offence of money laundering, in relation to his consequential disqualification from acting as a company director for a period of seven years. Certain clients of the solicitor *"were engaged in a substantial fraud"* and a company, Pentagon Securities Limited, *"became the repository for a large part of the dishonestly obtained funds."* It was admitted that, *"suspecting that that very large sum was the proceeds of criminal conduct, [the defendant] had made his client account available to serve in effect as a private bank for Pentagon*".

For the appellant it was argued that the offence of assisting the retention of criminal property through the client account—

> *"was not an offence in connection with the management of a company. [Counsel for the defendant] says that the appellant was not the manager of the company; he was not convicted of operating either that company or any other company for the purpose of the fraud; he has done no more than to receive sums of money and to shelter them, and that it was immaterial to that offence whether he received them from a company or from an individual criminal."*

Rejecting these arguments the Court of Appeal *per* Hughes LJ stated—

> *"The question in the present case is whether this sheltering of criminal property by the appellant had a relevant factual connection with the management of Pentagon Securities. It seems to us that it did. What were being sheltered were the criminal proceeds of fraud*

Environment Agency at *www.environment-agency.gov.uk/news/106785.aspx?style=print* . A shorter link to this webpage is available also from *www.tinyurl.com/r97cu3* In that case the defendants had pleaded guilty to 11 counts relating to illegally depositing and keeping over 175,000 tyres and 290 tonnes of tyre wire at various sites in England and Wales over a two year period. One of the defendants was sentenced to 12 months imprisonment, and disqualified from being a company director for 7 years. A second defendant was sentenced to 8 months imprisonment, and disqualified from being a company director for 5 years. The third defendant received a community service order, and disqualified from being a company director for 3 years.

[29] As is frequently the case under Irish statutory codes also.

[30] See paragraph 10-23 of *Directors' Disqualification & Bankruptcy Restrictions*.

[31] For an Irish perspective on disqualification orders, following breaches of competition law, see David McFadden, *How directors can be disqualified following competition cases*, "Competition" Volume 14, Page 158.

[32] [2008] EWCA Crim 394; [2008] 3 All E.R. 91; [2008] 1 B.C.L.C. 625.

> *obtained through the vehicle of the company. Moreover, the relevant factual connection was with the financial management of Pentagon. The appellant made available his client account as a private banking facility for the assets of Pentagon so that those who managed it could manage its affairs by placing its funds there rather than in the bank. The assets were in fact criminal proceeds. He suspected that they were and he received them in circumstances in which no further disbursement of them could be made by those who managed Pentagon's financial (and criminal) affairs without his participation. That as it seems to us is quite sufficient relevant factual connection between the financial management of Pentagon and the offence which the appellant committed. It is not, as* R. v. Goodman *makes clear, necessary that the offence be committed by the defendant himself using the company as a vehicle for fraud, though that of course is another situation in which a disqualification order is appropriate."*

28. When analysing both *Goodman* and *Creggy* from an Irish perspective it is worth recalling that if similar offences[33] were committed in Ireland, and prosecuted here, the defendants would presumably have become subject to consequential disqualification orders under Section 160(1) on the simpler basis that the offences in question involved fraud or dishonesty. In the circumstances, it would not have been necessary to explore the question whether the offences needed also to be regarded as *"offences in relation to a company"*. Nonetheless, the overall approach of the English court is worth noting, especially the fact that when construing the phrase *"in connection with the management of a company"*, the Court of Appeal opted for a wider test than would have emerged if the Court had adopted either of the other two approaches which were canvassed before it.

<u>The extent to which a consequential disqualification order under Section 160(1) may be relevant when a judge is sentencing a defendant</u>

The Clarkin Case

29. *DPP v. Clarkin*[34] appears to be the earliest of the Irish cases which may be thought to touch on the question of whether, when formulating a sentence, a judge can/should take into account the fact that, following conviction, the defendant will be subject to a disqualification order under the Companies Acts. In that case, the defendant had pleaded guilty in the Circuit Criminal Court to a charge of fraudulent trading[35] and was sentenced to one year's imprisonment, suspended for a period of two years. It appeared to the DPP that this sentence was unduly lenient and, accordingly, he brought an application[36] to the Court of Criminal Appeal for a review of the sentence.

30. In refusing the DPP's application, the Court[37] stated *inter alia*—

> *"The present case is one in which the learned trial Judge heard a considerable amount of evidence and reserved his decision on sentence having heard that evidence. There were a number of matters taken into account by the learned trial Judge in reaching his decision, the principal ones being—*
>
> *(1) The respondent himself ultimately approached Ulster Bank Commercial Services Limited and supplied them with full details of what had been going on.*
>
> *(2) The respondent sold his family home.*

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[33] Insider dealing in *Goodman*; money laundering in *Creggy*.

[34] Court of Criminal Appeal, unreported, 10 Feb 2003

[35] Contrary to Section 297 of the Companies Act 1963, as amended by Section 137 of the Companies Act 1990.

[36] Under Section 2 of the Criminal Justice Act 1993.

[37] Mr Justice McCracken, Mr Justice Kearns and Mr Justice Roderick Murphy.

(3) *The respondent entered into an arrangement with his creditors pursuant to s.87 of the Bankruptcy Act 1988.*

(4) *As part of that arrangement the respondent consented to an order being made against him under s. 160 of the Companies Act 1990 disqualifying him from acting as a director for a period of five years.*

(5) *The respondent was 61 years of age and in the words of the learned trial Judge referring to both the respondent and his co-accused:-*

> *"There is no doubt that they have suffered greatly and repaid money to the best of their ability and deprived themselves of what otherwise may be of some comfort to them in their later years."*

(6) *The respondent obtained no personal benefit and made restitution to the best of his ability.*

(7) *The motive of the respondent was to try to save the company which employed over 50 people.*

(8) *The respondent was highly unlikely to re-offend.*

These were all matters which the learned trial Judge was clearly entitled to take into account as being circumstances peculiar to this particular offence and this particular accused."

(underlining added)

31. Before seeking to interpret for what exactly *Clarkin* stands as authority (so far as disqualification orders under the Companies Acts are concerned), it is important to note that what does not seem to have been at issue here was a deemed disqualification order under Section 160(1) of the Companies Act 1990, arising in consequence of the defendant having been convicted on indictment of *"any indictable offence in relation to a company, or involving fraud or dishonesty."* In fact, as the Court of Criminal Appeal made clear, Mr Clarkin had earlier been the applicant in civil proceedings under the Bankruptcy Acts, within which he had consented to the making of a disqualification order against him under Section 160(2) of the Companies Act 1990.[38]

32. It is apparent from the High Court's judgment in the bankruptcy proceedings that Mr Clarkin became subject to a disqualification order for a five year period running from 26 November 1999. The judgment of the Court of Criminal Appeal indicates that he had pleaded guilty in the Circuit Court on 17 April 2002 and thereafter was sentenced on 14 June 2002 – a date some 2½ years into the existing disqualification period.

33. Although it is not referred to in the judgment of the Court of Criminal Appeal, it would seem to follow that, notwithstanding the existing disqualification order under Section 160(2) running for five years from 26 November 1999, one of the consequences of Mr Clarkin having been convicted on indictment of fraudulent trading was that, by operation of law, he became subject also to a deemed disqualification order under Section 160(1) for five years running from the date of his conviction, i.e., for 5 years from 17 April 2002. For the purposes of Section 160(1), his offence of fraudulent trading was unquestionably one which was *"in relation to a company, or [involved] fraud or dishonesty."*

34. Even allowing for a principle of *autrefois disqualifié*[39] the writer submits that the better way in which to accommodate such a concept within the overall framework of Part VII of the Companies

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[38] For the judgment of Laffoy J in the bankruptcy proceedings see *In the Matter of a Petition for Arrangement by N.C.*, High Court, unreported, 26 Nov 1999 – available at www.bailii.org/ie/cases/IEHC/1999/203.html.

[39] If I may be permitted to coin such a phrase!

Act 1990 involves recalling that the period of a deemed disqualification order under Section 160(1) is—

> *.. five years from the date of conviction or such other period as the court, on the application of the prosecutor and having regard to all the circumstances of the case, may order ..*

In the case where a defendant was already subject to a Section 160(2) disqualification order running from 26 November 1999 to 25 November 2004, one can easily see how a sentencing judge, if the matter had been raised before him, might have taken the view that *"having regard to all the circumstances of the case,"* a consequential disqualification order under Section 160(1), which was to follow in tandem with a conviction recorded on 17 April 2002, should perhaps have been for only the period of 2 years and 7 months (approximately) from 17 April 2002 to 25 November 2004. However it must be emphasised that, in *Clarkin*, there is nothing in the judgment which indicates to what extent (if any) the learned trial judge's attention was drawn to the provisions of Section 160(1), and how (if at all) it should be applied in a situation where a pre-existing disqualification order under Section 160(2) had previously been imposed by the High Court, and was still operative.

35. In passing, in so far as the scope for any plea of *autrefois disqualifié* is concerned, the English case of *Secretary of State for Trade and Industry v. Tjolle*[40] is worth noting. There, the respondent Mr Tjolle had been the director of a company which collapsed in circumstances where fraudulent conduct was a contributing factor. In due course Mr Tjolle was charged with fraudulent trading, pleaded guilty and was sentenced to nine months' imprisonment and disqualified under Section 2 of the UK's Company Directors' Disqualification Act 1986 for 10 years. (This, it will be recalled,[41] is a provision under which English courts *may* impose disqualification orders when sentencing for certain indictable offences – in contrast to the Irish equivalent under which disqualification follows automatically following conviction for certain offences tried on indictment.)

The maximum period of disqualification permitted in English law is 15 years[42] and the Secretary of State was of opinion that, in Mr Tjolle's case, the 10 year period imposed in the criminal courts was not enough. Accordingly, the Secretary of State took separate disqualification proceedings in the civil courts. In due course Mr Tjolle consented to being disqualified in those civil proceedings for the maximum period of 15 years.

In the subsequent civil proceedings it appears to have been accepted that there was jurisdiction for the court to make an order, notwithstanding the earlier order of the criminal court. However, regarding the earlier criminal proceedings, Jacob J appeared to have some concerns. He stated as follows—

> *"I do not know whether the criminal court was aware of the 'sentencing guidelines' laid down by the Court of Appeal in Re Sevenoaks Stationers (Retail) Ltd [1991] BCLC 325, [1991] Ch 165.*[43] *It is highly desirable that criminal courts should be aware of this guidance, for it is self-evident that civil and criminal courts should be applying the same standards: the purpose of disqualification (to protect the public from the activities of persons unfit to be concerned in the management of a company) is the same in both kinds of court. The period of disqualification is perhaps not always seen as of major concern in a criminal trial where the defendant is also to be punished for some kind of dishonest activity and is likely to be imprisoned. Nonetheless it is important in the public interest. It may also be important in the interests of the defendant to see that he is in fact disqualified for an appropriate period. If he*

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40 [1998] 1 B.C.L.C. 333; [1998] B.C.C. 282.
41 See paragraph 10 above.
42 There is no maximum here in Ireland.
43 *Sevenoaks* is the leading case in the UK in which the Court of Appeal – Civil Division gave guidance as to how periods of disqualification ought to be determined.

> *is under-disqualified then he may find himself on the receiving end of a civil application by the Secretary of State for which, if he loses, he will have to pay the costs. The present case is a good example of what may happen. The prosecution accepted Mr Tjolle's plea of guilty to fraudulent trading for a period of just three months or so. He in fact admitted before me to 'significant failings' in his 'duty as a director and steward of Land Travel Ltd during the period of July 1990 to 1992' (his words). That is a very substantial period, and particularly so having regard to the size of the business being conducted. I was told that if a 15-year period of disqualification had been imposed at the criminal trial that would have been an end of the matter as far as disqualification is concerned. As it was the Secretary of State, rightly in my view, felt that in the public interest he should seek a longer period. In the end Mr Tjolle consented to an order of 15 years' disqualification and paid an agreed figure for costs."*

36. Returning to *DPP v. Clarkin*, it seems to the writer that the absence of consideration as to what order under Section 160(1) followed automatically in consequence of conviction, makes it questionable whether the case stands as authority for the proposition that a trial judge is entitled to take a Section 160(1) deemed disqualification into account when sentencing. The case is certainly authority for the proposition that a trial judge is entitled to take into account that, in separate but related civil proceedings, a defendant has consented to the making of a Section 160(2) order against him. It might be said, however, that what such an approach on a defendant's part indicates is that his/her decision to plead guilty before the criminal court was not some belated step in terms of facing up to his/her responsibilities, but part of a pattern of responsibility which began earlier when the civil proceedings were underway; for which the defendant deserves credit over and above that which he/she would ordinarily have received in any event for pleading guilty when arraigned.

The Dalton case

37. The next case in which Section 160(1) appears to have featured conspicuously is that of *DPP v. Dalton*[44] - a case concerning a defendant who had pleaded guilty to an offence under competition law. The offence in question occurred prior to the coming into force of Section 11 of the Competition Act 2002,[45] with the result that the defendant was tried before the Circuit Criminal Court.

38. In the Irish Times report of the case it is stated that—

> "*[Judge Delahunt] noted that [the defendant's] plea meant that he would be disqualified from acting as a director of Corrib Oil and acknowledged that this would be a significant penalty for him."*

39. It is not apparent from the newspaper report to what extent, if any, the learned trial judge mitigated the sentence which she would otherwise have imposed, in consequence of the deemed disqualification. The judge fined Mr Dalton €10,000 arising from the offence to which he had admitted.

The Duffy Case

40. A lengthy analysis of the relevance of Section 160(1) for a sentencing judge is contained in the recent decision of the Central Criminal Court in the case of *DPP v. Duffy*[46] - a judgment delivered just two months ago today. Here again this case arose of the work of the Competition Authority.

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[44] See Irish Times, 24 January 2007.

[45] Under which all persons indicted for offences under the Competition Acts are now to be tried before the Central Criminal Court.

[46] Cited above at footnote 6.

41. The Duffy case is notable in that, prior to sentence, the trial judge (Mr Justice McKechnie) invited both the prosecution and the defence to deliver written submissions dealing *inter alia* with the question of what relevance the Court should give to Section 160(1) of the Companies Act 1990 when determining sentence.

42. Such submissions were in due course delivered but, having considered them, Mr Justice McKechnie ultimately concluded that it was not necessary for him to form a definitive view regarding the question whether a Section 160(1) disqualification is penal in nature, and thus reckonable when formulating sentence.

43. Nonetheless, Mr Justice McKechnie's analysis of the question is the most extensive yet in any of the Irish cases. For that reason, the relevant extract from his judgment is reproduced in full in Appendix III. In summary McKechnie J concluded that—

    - even if applicable,[47] the disqualification must be weighted in the individual context of each case;

    - in the instant case, the disqualification would not have *"any real or substantial disabling effect on [the defendant]"* because—

        - the disqualification was for a limited duration;

        - most probably the defendant would continue to work for the company almost exactly as he did prior to conviction; that he would not lose his job; and that the disqualification would simply mean that he could no longer act as a director;

        - in the circumstances of this case, where there was a family run business and where the only other director and shareholder was the defendant's brother, *"it is most likely that both the business and [the defendant] will continue much like the present"*.

Other Irish criminal cases in which disqualification under Section 160(1) featured

44. Although *DPP v. Clarkin* (2003) is the earliest of the cases dealt with in the survey of Irish cases above, a search of the Irish Times online digital archive[48] yields two other criminal cases in which reference was made to consequential disqualification orders under Section 160(1).

45. In the first case, *DPP v. Goodwin & Butler*, Irish Times, 6 October 1995, it was reported that two executives of a beef processing company were disqualified under Section 160 of the Companies Act 1990 from serving as company directors, auditors or managers for six years. The defendants had pleaded guilty to charges that they conspired with a named third-party, and with a person or persons unknown, *"to defraud the Minister for Agriculture by misappropriating beef from the intervention line at [a named meat processing plant], thus exposing the Minister to loss or*

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[47] It is assumed that McKechnie J is dealing here not with the question whether the particular offences under the Competition Acts to which Mr Duffy had pleaded guilty were *"[offences] in relation to a company."* At paragraph 59 of the judgment McKechnie J states unequivocally that "*Under [Section 160] Mr Duffy will be prohibited from holding any directorship for a period of five years."* The contention which the court went on to analyse was whether *"such a disqualification is penal in nature and thus reckonable when formulating punishment."* In the circumstances it would seem that *"even if applicable"* is probably used here in the sense of *'if it is applicable for the disqualification to be treated as something penal in nature and thus reckonable when formulating punishment'*.

[48] For the search term (disqualified AND director).

damage." Aside from being disqualified, the defendants each ultimately received suspended sentences of six years' imprisonment.[49]

46. The second case, *DPP v. Synnott*, Irish Times, 8 May 1996, concerned a former insurance and investment broker who pleaded guilty to one charge of fraudulent trading and two charges of fraudulent conversion. In addition to receiving a custodial sentence,[50] the defendant was also disqualified for 10 years from acting as a company director, auditor or manager.

47. The newspaper reports of these cases offer no clue as to whether the fixing of lengthy disqualification periods was a factor in the determination of the sentences imposed by the relevant judges[51] for the crimes which the defendants admitted. The cases are interesting, however, for an entirely separate reason – namely that the imposition of 6 and 10 year disqualification periods demonstrates that these were instances in which the DPP must necessarily have applied to the sentencing judge to impose a disqualification period other than the statutory default of 5 years. It will be recalled from Section 160(1)[52] that this is something which the prosecutor is entitled to do.

48. One other case which deserves mention here is *DPP v. Fogarty*.[53] This was a case that arose out of the work of the ODCE. The defendant pleaded guilty to 13 offences contrary to Section 40 of the Companies Act 1990 in connection with permitting or authorising a company of which he was a director to make certain monetary loans to himself, which were of an amount or extent prohibited under Part III of the Companies Act 1990. Judge Delahunt imposed a 2 year suspended sentence on one of the counts and fines of €34,000 on the other, ordered that the defendant should carry out 240 hours of Community Service. As regards consequential disqualification under Section 160(1), the court, having heard submissions from both prosecution and defence, imposed a six-month disqualification.

49. So far as the shorter disqualification period imposed in this case is concerned, it should be noted that substantial points of mitigation were put forward by the defence, the underlying elements of which were essentially accepted by the key prosecution witness – an accountant from the ODCE. Furthermore it should be noted that an offence under Section 40 of the Companies Act—while undoubtedly *"an offence in relation to a company"*—is not an offence involving fraud or dishonesty.

50. It is quite possible that there may have been other Irish criminal cases (during the approximately 18-year period since the provision came into force) in which Section 160(1) featured to a greater or lesser extent at the sentencing stage. However, if so, no such cases have emerged in the course of my researches for this paper.

In the civil context, Irish courts treat disqualification orders as primarily protective, and not fundamentally penal

51. A significant number of cases concerning Section 160(2)[54] of the Companies Act 1990 have come before the High Court, and a smaller number before the Supreme Court.

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49 Irish Times, 8 July 1997.
50 Imprisonment for 4 years and 3 months.
51 Judge Moriarty in the *Goodwin* case, Judge Cyril Kelly in the *Synnott* case.
52 See paragraph 3.
53 Irish Times, 29 May 2008. See also a note concerning the case on the ODCE's website at www.odce.ie/en/court_prosecutions_article.aspx?article=e7433e08-8c79-4668-aac4-6a25ddb802b2. A link to this webpage is available also from www.tinyurl.com/qbc6b6
54 See footnote 5 above.

52. The leading case, for present purposes, is *Cahill v. Grimes*[55] in which the Supreme Court endorsed the view taken in the English courts[56] that the primary object of disqualification orders is to protect the public, and not to punish the respondent. In that case Mr Justice Francis D Murphy[57] stated as follows—

> *"The appropriateness of the sanction imposed by the learned trial Judge must be considered in the light of the conduct of the respondent and the purpose for which the section was enacted.*
>
> *In* In re Lo-Line Motors Ltd. *[1988] Ch. 477 Browne-Wilkinson V.C. provided a general approach to the application of the United Kingdom disqualification provisions in the following terms at pp. 485 to 486:—*
>
>> *"What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the cases to which I have been referred is broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies has shown them to be a danger to creditors and others. Therefore, the power is not fundamentally penal. But, if the power to disqualify is exercised, disqualification does involve a substantial interference with the freedom of the individual. It follows that the rights of the individual must be fully protected. Ordinary commercial misjudgment is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."*
>
> *That passage was quoted with approval by the trial judge and likewise was adopted by Shanley J in* La Moselle Clothing Ltd. v. Soualhi *[1998] 2 I.L.R.M. 345 by McGuinness J in* Re Squash (Ireland) *[2001] 3 I.R. 35 and in the judgment of McCracken J in* Re Newcastle Timber Ltd *[2001] 4.I.R. 586.*
>
> *It is I believe a correct statement of the law and represents a proper approach to the application and interpretation of s.160 of the Companies Act 1990.*

53. It will be recalled that, in the extract at paragraph 35 above from the English case of *Secretary of State v. Tjolle*, Jacob J classified it as *"self-evident"* that civil and criminal courts should be applying the same standards so far as disqualification orders are concerned. If such a consideration commends itself to the Irish courts, the approach of the Supreme Court in *Cahill v. Grimes* would seem to provide strong grounds for contending that a Section 160(1) disqualification ought not to be regarded as penal in nature.

Whether post-conviction consequential disqualification orders are viewed as punishment in other jurisdictions

54. In the UK it would appear that post-conviction disqualification orders imposed by the criminal courts under Section 2 of the 1986 Act[58] are regarded as punitive in character.[59] In this regard,

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55 [2002] 1 I.R. 372.

56 Regarding disqualification orders made in civil proceedings. Note paragraph 54 concerning the different approach of the English courts to disqualification order imposed by the criminal courts.

57 With whose judgment Mr Justice Murray and Mrs Justice McGuinness agreed.

58 See paragraph 10.

59 But not disqualifications in the civil courts. See the extract from the *Lo-Line* case referred to in the judgment of Murphy J cited at paragraph 52.

Walters and David-White[60] cite the authority of *R. v. Young*[61] - a decision of the Court of Appeal, Criminal Division.

55. However, Walters and Davis-White go on to note[62] that the Australian equivalent of Section 2 of the UK's 1986 Act has been regarded by the Australian courts as being primarily concerned with protection of the public. In this regard they cite the case of *Re Magna Alloys & Research Pty Ltd*[63] a decision of the Supreme Court of New South Wales. In that case Bowen CJ stated as follows—

> *"The policy to which s. 122*[64] *gives effect is that a person convicted of an offence of any of the types specified in that section is not to be permitted to act as a director or to take part in the management of a company. The section is not punitive. It is designed to protect the public and to prevent the corporate structure from being used to the financial detriment of investors, shareholders, creditors and persons dealing with the company. In its operation it is calculated to act as a safeguard against the corporate structure being used by individuals in a manner which is contrary to proper commercial standards."*

56. At paragraph 12 above it was noted that the Irish Section 160(1), dealing with automatic post-conviction disqualification orders, is probably more comparable with its Australian counterpart, than with its UK equivalent. In consequence the UK decision in *Young* is possibly less relevant, when considering the question from an Irish viewpoint, than might at first be assumed; and the Australian jurisprudence more important.

<u>Procedural steps ancillary to a Section 160(1) disqualification order</u>

57. Section 167 of the Companies Act 1990 provides *inter alia* that—

> *Where a court—*
>
> *(a)* ... [not relevant for present purposes]
>
> *(b)* ... [not relevant for present purposes]
>
> *(c) convicts a person of an offence—*
>
> *(i) which has the effect of his being deemed to be subject to a disqualification order, or*
>
> *(ii) under section 161(1) or 164*[65]
>
> *a prescribed officer of the court shall cause the registrar of companies to be furnished with prescribed particulars of the order, relief or conviction at such time and in such form and manner as may be prescribed.*

58. Under Regulation 3(2) of the Companies Act 1990 (Parts IV and VII) Regulations 1991[66] the following personnel of the Courts Service are amongst those prescribed for the purpose of Section 167—

- in the case of proceedings or an application in the Central Criminal Court, the Registrar of the Central Criminal Court;

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[60] See sections [10-85] to [10-92] of their textbook, referred to at paragraph 26 above.
[61] [1990] B.C.C. 549; (1990-91) 12 Cr.App.R. (S.) 262; [1990] Crim. L.R. 818.
[62] At paragraph [10-92].
[63] (1975) 1 A.C.L.R. 203.
[64] Which seems to have been the provision in New South Wales' Companies Act 1961 that appears to have been the precursor of the currently applicable provision of Australian law cited at paragraph 12 above.
[65] As to which, see footnote 12 above.
[66] S.I. 209 of 1991.

- in the case of proceedings in the Special Criminal Court, the Registrar of the Special Criminal Court;

- in the case of proceedings in the Circuit Court, the County Registrar for the county in which the proceedings are heard.

59. Under Regulation (4) of the same 1991 Regulations a "Form H8" is prescribed as the means by which the Companies Registration Office must be notified by county registrars etc of persons who, by virtue of a criminal conviction, have become subject to a deemed disqualification order under Section 160(1) – and of the period for which the disqualification is to apply.[67]

60. Regulation 4(2) of the 1991 Regulations prescribes a 21-day period within which the required particulars must be furnished to the Companies Registration Office.

<u>The Register of Disqualified Persons</u>

61. This is a register kept by the CRO pursuant to Section 168 of the Companies Act 1990. Section 168 provides as follow—

    (1) The registrar shall, subject to the provisions of this section, keep a register of the particulars which have been notified to him under section 167, and the following provisions of this section orders shall apply to the keeping of such a register.

    (2) Where the particulars referred to in section 167 (b) comprise the grant of full relief under section 160 (8), the registrar shall not enter such particulars on the register referred to in subsection (1), but shall, as soon as may be, remove any existing particulars in respect of the person concerned from the register.

    (3) The registrar shall also remove from the register any particulars in relation to a person on the expiry of five years from the date of the original notification under section 167, or such other period in respect of which the person concerned is deemed to be subject to a disqualification order, unless the registrar has received a further notification in respect of that person under this section.

    (4) Nothing in this section shall prevent the registrar from keeping the register required by this section as part of any other system of classification, whether pursuant to section 247 or otherwise.

62. Appendix II to this paper is an example of the contents of the Register of Disqualified Persons[68] in the case of a convicted defendant who is and remains the subject of a Section 160(1) disqualification. It is perhaps worth observing that all the Section 168 register indicates is that the individual in question *"was convicted of an offence which has the effect of his being deemed subject to a disqualification order"* – but no further details of the offence in question are included. Under the 1991 Regulations[69] the *"prescribed particulars of the .. conviction"* which the county registrar furnishes to the CRO do <u>not</u> include any statement of the charges on foot of which the defendant was convicted.

63. Some years ago it became apparent to the ODCE that, notwithstanding the Section 167 obligation, notifications of deemed disqualification orders under Section 160(1), following convictions on indictment for relevant offences, were occurring only infrequently. As a result, we commenced a very fruitful dialogue with the Courts Service which led to new procedures being implemented. Moreover county registrars embarked on an exercise to review their records to ensure that, where

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67 A blank copy of Form H8 appears in Appendix I to this paper.
68 Downloaded from www.cro.ie, the website of the Companies Registration Office.
69 See paragraph 58.

appropriate, the CRO was belatedly notified of any such disqualifications during the preceding five year period which had mistakenly not been notified within 21 days of the underlying conviction.

The result is that, as of 18 May 2008, the Register of Disqualified Persons contained approximately 2,800 entries – the vast majority of which, it is understood, relate to persons subject to deemed disqualifications under Section 160(1) of the Companies Act 1990, rather than disqualifications under Section 160(2).[70] Unfortunately I am not able to say the precise number of individuals who have entries on the register, because sometimes the same person appears more than once – presumably because they were convicted of more than one offence to which Section 160(1) applied.[71]

Should the prosecution and/or defence be raising issues regarding deemed disqualification orders under Section 160(1) at sentencing hearings?

64. Superficially it might seem that, except in those cases where the DPP considers that a period of disqualification is appropriate other than the statutory default of five years, there is little of a basis for either the prosecution or the defence to be raising Section 160(1) with a sentencing judge. Such a viewpoint could possibly be justified on the basis of McKechnie J's statements in *DPP v. Duffy*[72] that the Section 160(1) deemed disqualification—

> *is not the imposition of a discretionary disqualification. In fact, this Court has no involvement whatsoever with it; it follows directly as a matter of law …."*

65. However, even if there is no need for the matter to be raised in court, it would seem to the writer that the defence lawyers acting for a client who, by operation of law following his/her conviction for certain offences, becomes subject to a deemed disqualification order under Section 160(1) of the Companies Act 1990, ought to so advise their client: both as to the fact of the deemed disqualification, and of its effect. In particular clients who become subject to deemed disqualification orders under Section 160(1) ought surely to be advised that if they breach the terms of the order they may potentially face further criminal prosecution,[73] and a prolongation of their deemed disqualification.[74]

    It is undoubtedly the case that in many instances the likelihood of the defendant having any opportunity to become a company director, or to become concerned in the management of a company, may be minimal to non-existent.[75] Nonetheless even in those cases a cautious defence lawyer should presumably operate on the basis that he/she cannot say with certainty what his client may want to do, or have the opportunity of doing, in (say) four years time. Accordingly in every case it would seem advisable for a defence lawyer, whose client has become subject to a deemed disqualification order, to advise him of where he now stands under Part VII of the Companies Act 1990. It would seem particularly important to do so in cases where the defendant is already involved in business, or is likely to be embarking on a business career.

66. In some cases defence lawyers may also wish to raise the issue, left unresolved by all the Irish cases to date,[76] whether—to borrow McKechnie J's summary of the contention made before him

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[70] The ODCE has secured some 70 disqualifications under Section 160(2) in the last five years, and a smaller number of such applications would also have been obtained on applications brought by company liquidators.

[71] For example, the individual whose details appear in Appendix II has two entries in the register. In another instance I have seen five entries which all relate to the same person.

[72] See paragraph 7 above, and Appendix III below.

[73] Under Section 161(1) of the Companies Act 1990.

[74] Under Section 161(3) of the Companies Act 1990.

[75] Consider, for example, the typical case of an offender from an economically disadvantaged community, with poor educational achievements, who has pleaded guilty in the Circuit Criminal Court to an offence of theft.

[76] See paragraphs 29 to 50.

in *Duffy*—a deemed disqualification order under Section 160(1) is penal in nature, and thus reckonable when formulating punishment.

On the other hand, in many cases[77] the extent to which the deemed disqualification is likely to have any *"real or substantial disabling effect on [the defendant]"*[78] may be such as to reduce the benefits which are likely to accrue from the making of such a submission.

67. From a prosecutor's perspective it is obviously the case that Section 160(1) will have to be raised before the Court in those cases where the DPP is of opinion that a period of disqualification other than the statutory default of five years is appropriate. Examples of such cases are those of *Goodwin & Butler*, *Synnott* and *Fogarty* mentioned above.[79]

68. It may also be appropriate to wonder whether the fact that a Section 160(1) deemed disqualification order arises following a conviction, is something about which a sentencing judge should be informed having regard to the considerations outlined at paragraph 8.14 of the DPP's *Guidelines for Prosecutors*. Does Section 160(1) come within the scope of *"legislation that may assist [the court] in determining the appropriate sentence"* within the meaning of sub-paragraph (e) of paragraph 8.14? Clearly it would be wrong for me, in present company especially, to purport to offer an interpretation of the DPP's Guidelines. Accordingly I will confine myself to saying merely that I can see arguments both for and against the proposition.

69. One other reason one clear instance in which either or both of the parties might wish to raise Section 160(1) before a sentencing judge is where there is uncertainty as to whether the offence for which the defendant has been convicted is *"an indictable offence in relation to a company, or involving fraud or dishonesty"*.[80] From a defendant's perspective it may be vital to have this clarified, as otherwise he/she may inappropriately have their name entered in the Register of Disqualified Directors. Although I know of no precedent in this regard, I venture to suggest that the judge dealing with a conviction in consequence of which a Section 160(1) disqualification may operate, must have some inherent jurisdiction to make a ruling deciding the question. Quite apart from the extent to which this is an important matter from the defendant's perspective, the law imposes a duty on one of the court's own officers[81] (usually the county registrar) to furnish information to the CRO depending on whether a conviction has been for an offence *"in relation to a company, or involving fraud or dishonesty"*. Common sense would suggest that, where there is uncertainty as to whether an offence falls within that category, the court must have some jurisdiction to resolve the question, so as to clarify whether there is, or is not, a reporting obligation on its own officer.[82]

70. For all these reasons the writer would suggest that it might be prudent for prosecuting counsel, when preparing for a sentence hearing (following a trial on indictment) concerning any charge

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[77] Such as the sort of case mentioned in footnote 75. Note also the *Duffy* case in which the impact of disqualification was not considered significant, even though the defendant was already involved in business and an existing company director.

[78] *DPP v. Duffy*, paragraph 62.

[79] At paragraphs 45 to 49.

[80] See paragraphs 20 to 28.

[81] See paragraphs 57 to 60.

[82] In this regard, despite the significant improvements alluded to in paragraph 63, the ODCE has continued to hear of some instances in which there have not been notifications to the CRO following convictions which *would appear* to have given rise to deemed disqualifications under Section 160(1). The problem in those cases may be that there remains uncertainty as to whether the offence in question can properly be described as having arisen *"in relation to a company"*. Where such uncertainty is an issue, it would seem desirable if rulings on the matter could be sought, whenever necessary. If the parties themselves do not see the question as an issue, but it is one which is troubling the county registrar at sentencing stage, perhaps the appropriate step would be for the registrar to signal the uncertainty, and for the court to ask the parties to make submissions in relation to the question, so that the judge can then give a ruling.

that may possibly come within the scope of the term *"an offence in relation to a company, or involving fraud or dishonesty",* to specifically consider the question of Section 160(1) and whether there is any need for it to be raised; or to anticipate the possibility of it being raised by the defence. In many instances the answer to both those questions may be *"No"*, but asking oneself the questions would seem advisable nonetheless.[83]

Relief from disqualification

71. The effect and scope of a disqualification order was outlined above at paragraphs 3 and 4. It is important, however, to draw attention also to Section 160(8) of the Companies Act 1990 under which—

> *Any person who is subject or deemed subject to a disqualification order … may apply to the court*[84] *for relief, either in whole or in part, from that disqualification and the court may, if it deems it just and equitable to do so, grant such relief on whatever terms and conditions it sees fit.*

72. Accordingly the position is always that, where a defendant has become subject to a deemed disqualification order under Section 160(1), following his conviction on indictment for certain offences, he nonetheless has a right thereafter to apply to the High Court for relief from that disqualification.

73. No such relief application has, so far as I am aware, ever yet been brought before the High Court arising from a deemed disqualification order under Section 160(1). If/when such an application is brought the approach of the New South Wales Supreme Court in the *Magna Alloys* case[85] may be worth noting—

> *"The court is given jurisdiction to grant leave to a person, notwithstanding the prohibition, to act as a director or to take part in the management of a company, but an applicant who comes seeking leave bears the onus of establishing that the general policy of the legislature laid down in the section ought to be made the subject of an exception in his case (*Re Ferrari Furniture Co. Pty. Ltd., *[1972] 2 N.S.W.L.R. 790 ;* Re Magna Alloys & Research Pty. Ltd.*, 18 October 1973, Street, V.J., in Eq.;* Re Macquarie Investments Pty. Ltd. *(1975), 1 A.C.L.R. 40;* Maelor Jones Pty. Ltd. *(1975), 1 A.C.L.R. 4).*
>
> *The court in exercising its discretion will have regard to the nature of the offence of which the applicant has been convicted, the nature of his involvement, and the general character of the applicant, including his conduct in the intervening period since he was removed from the board and from management. Where, as here, the applicant seeks leave to become a director and to take part in the management of particular companies the court will consider the structure of those companies, the nature of their businesses and the interests of their shareholders, creditors and employees. One matter to be considered will be the assessment of any risks to those persons or to the public which may appear to be involved in the applicant's assuming positions on the board or in management."*

74. It is not entirely clear who should be the respondent to any such relief applications brought by a person in respect of their deemed disqualification under Section 160(1). Under the Rules of the Superior Courts Order 75B Rule 3(z) deals with relief applications under Section 160(8), as well

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[83] A gentle reminder to the court registrar of their obligation under Section 167 may also be a good idea in some cases. This is something which could, perhaps, be done informally by the prosecution solicitor prior to or immediately after the sentencing hearing. In this regard it might helpful to have available a blank copy of Form H8.

[84] Under section 2(1), as amended, of the Companies Act 1963, "the court" when used in the Companies Acts generally means the High Court.

[85] See paragraph 55

as applications for discretionary disqualification orders under Section 160(2). Rule 3(z) provides *inter alia* that—

> *Such an application shall be served on the person in relation to whom the disqualification order is sought and on any other party to the proceedings and on the applicant for the original disqualification order, as the case may be.*

75. Because Section 160(1) deemed disqualification orders generally take effect automatically, some doubt may exist as to whether there was any *"applicant for the original disqualification order"* within the meaning of this rule. If not, perhaps the High Court might be minded to remedy this possible lacuna—in an appropriate case—by joining the DPP as a notice party; or in the event that the DPP thought it inappropriate to be involved in that capacity, the Director of Corporate.[86]

Concluding comments

76. Notwithstanding Brian Murray's pioneering work in 1992, Section 160(1) remains a somewhat under-explored territory, both from the perspective of the criminal lawyer and the company lawyer. Nonetheless, as I have attempted to demonstrate in this paper, it is by no means some eccentric and largely peripheral provision which somehow just *"made its way"* into Irish law. The policies to which it gives effect are worthwhile and valid in their own right, and recognised also (to a greater or lesser extent) in the laws of other comparable jurisdictions, including the United Kingdom, Australia, South Africa, New Zealand, Hong Kong and Singapore.[87]

77. For my own part I must confess to having known much less about Section 160(1) up to a few weeks ago, when I was invited to speak here today. In researching this paper I have come around to the view that it is a provision which is more important and deserving of attention, than I, for one, would previously have recognised as fully.

78. I hope that I have succeeded in adequately communicating those aspects in this paper, and I look forward to the possibility that these issues will be teased out more in the ensuing Q & A session. Alternatively if people have further or alternative views in relation to the matter, or find themselves in future involved with cases where Section 160(1) is an issue, I would be very grateful to hear from them. In this regard I can be contacted by phone on **01-8585838** or by email at **kevin_oconnell@odce.ie**

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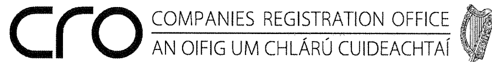
[86] See *Carolan v. Fennell* [2005] IEHC 340 for an instance in which the High Court thought it permissible and appropriate to join the Director of Corporate Enforcement as a Notice Party to an application (under Section 152 of the Companies Act 1990) for relief from a restriction declaration (under Section 150 of the Companies Act 1990).

[87] There may be other jurisdictions also, whose company law codes I have yet had a chance to examine.

APPENDIX I

Appendix I
Sample H8 Form



Particulars of a disqualification order
Pursuant to section 160 of the Companies Act 1990; a conviction which has the effect of a person being deemed to be subject to a disqualification order under section 160, 161 or 164, or section 183 of the Companies Act 1963 (inserted by section 169 of the Companies Act 1990); or a conviction under section 161(1) or 164

Companies Acts 1963 to 1990

H8

Please complete using black block capitals or typewriting

To Registrar of Companies

I hereby notify you *note one* that the following person:

Surname
Forename

Date of birth   Day   Month   Year

of
note two

note three

☐ is the subject of a disqulification order

☐ was convicted of an offence which has the effect of his being deemed to be subject to a disqualification order

☐ was convicted of an offence under section 161(1) of the Companies Act 1990

☐ was convicted of an offence under section 164 of the Companies Act

The period for which the disqualification, or deemed disqualification, is to apply is

From   Day   Month   Year   To   Day   Month   Year

Date of Court decision   Day   Month   Year

note four   Name *Block letters please*

Official Stamp

Signature

Date

note one Notification must be made within 21 days of the court decision

note two Insert usual residential address

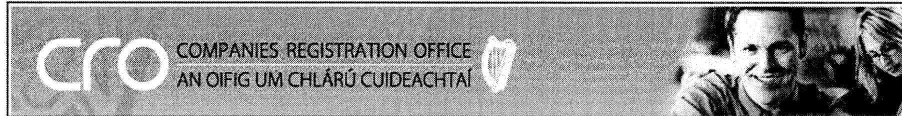
note three Tick the appropriate box

note four This form is to be completed by an officer of the court, prescribed for the purpose pursuant to section 167

APPENDIX II
An Extract from the Register of Disqualified Persons

Companies Registration Office

Page 1 of 2



TOOLS: company search site search Other Tools ------ newsletterlinkssitemapcontact us

Home About CRO Business Registration Post Registration Annual Return Business Termination Online Services Downloads What's New Disclaimer

Online Services

- E-Filing
- Company Search
- CORE
- Duplicate Certificate
- Late Penalty Calculator
- Auditor Search
- Auditor Search Tips
- Restricted/Disqualified Persons
- Deposit to a Customer Account

Your search has returned the following disqualified/restricted person details. Please click the 'New Search' button would like to perform another search.

Found: 2

Name	Address	Limit Type	Applies From	Applies To	Act Section	Note
STEPHEN PEARSON	NORTH ESK, GLANMIRE, CORK	Disqualified	29/06/2005	28/06/2010	WAS CONVICTED OF AN OFFENCE WHICH HAS THE EFFECT OF HIS BEING DEEMED TO BE SUBJECT TO A DISQUALIFICATION ORDER	
STEPHEN PEARSON	NORTH ESK, GLANMIRE, CORK	Disqualified	28/02/2005	27/02/2010	WAS CONVICTED OF AN OFFENCE WHICH HAS THE EFFECT OF HIS BEING DEEMED TO BE SUBJECT TO A DISQUALIFICATION ORDER	
Name	**Address**	**Limit Type**	**Applies From**	**Applies To**	**Act Section**	**Note**

New Search

Home|About CRO|Business Registration|Post

http://www.cro.ie/search/disqualindexe.asp

18/05/2009

APPENDIX III

Extract from the Judgment of Mr Justice McKechnie delivered in the Central Criminal Court on 23 March 2009 in the case of *DPP v. Patrick Duffy and Duffy Motors (Newbridge) Limited*

…

Ancillary Order:

59. There is one other matter which requires mention: it arises out of s.160 of the Companies Act 1990. Under that section Mr Duffy will be prohibited or disqualified from holding any directorship for a period of five years. It is said that such a disqualification is penal in nature and thus reckonable when formulating punishment.

60. The first point to be noted is that this is a mandatory consequence of the conviction whether by plea or verdict. It is not the imposition of a discretionary disqualification. In fact, this Court has no involvement whatsoever with it; it follows directly as a matter of law. In those circumstances, it might seem a little surprising to say that it should be taken into account in finalising sanction, as to do so might appear to be almost self-defeating to the section. Such a view however has not been determinative and as a result some judicial attention has been given to the correct designation of what has loosely been described as "ancillary orders". However as none of these cases are quite on point with the instant issue, I will deal only with some of them, and then briefly so.

61. (A) *Conroy v. Attorney General and Anor.* [1965] IR 411: where the issue was whether a mandatory disqualification from holding a driving licence for 12 months, following a s.49 conviction (Road Traffic Act 1961 – incapable of driving due to drink), which otherwise carried a maximum of 6 months and £100 fine, or both, was such as to render the offence "non-minor" for the purpose of Article 38 of the Constitution. The Supreme Court held that the ancillary order, although potentially having punitive consequences, was not a punishment when considering the "gravity" of the offence, but rather was essentially a finding of unfitness.

(B) *The People (DPP) v. Redmond* [2001] 3 I.R. 390: Having pleaded guilty to 10 charges of wilfully failing to make tax returns, the accused was fined a total of £7,500. The DPP sought to review the "unduly lenient" nature of the sentence under s.2 of the Criminal Justice Act 1993. The evidence showed that Mr Redmond, in respect of undeclared income of £249,000 (to cover the offending and other years), had settled all his outstanding revenue liabilities for the sum of £782,000, which included interest, penal interest and revenue penalties. In dismissing the application the Court of Criminal Appeal held that the cumulative amount paid could be taken into account when considering the proportionality of the final penalty.

(C) *The People (DPP) v. N.Y.* [2002] 4 I.R. 309: When sentencing a person who had pleaded guilty to two counts of rape, the Court of Criminal Appeal, having held that the distinction between primary and secondary punishment related to the distinction between minor and non-minor offences (*Conroy's* case), accepted that the notification requirements of s.10 (to the Gardaí) and the obligation of s.26 (to prospective employers if the employment involved children) of the Sex Offenders Act 2001, could *"constitute a real and substantial punitive element"* and so were matters *"to which the court is entitled to have regard"* (*ibid* at 319).

(D) *Enright v. The Attorney General* [2003] 2 I.R. 321: This was a case where the notification requirements of the Sex Offenders Act 2001 were again at issue. The High Court, whose judgment was delivered a day before that given in *N.Y.*, held, having reviewed a number of authorities, including the influential U.S. Supreme Court decision in *Kennedy v. Mendoza-*

> *Martinez* (1962) 372 U.S. 144 at 148, that such provisions were not punitive, either in purpose or effect. Notwithstanding this conclusion however, the Court was of the view that a judge, when sentencing, is "probably" entitled to have regard to them, although given the *"minimal nature of the burden imposed"* these are not likely to *"materially"* affect sentence.
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> 62. Given the diversity of purpose behind these decisions and noting in particular that the reasoning and conclusions of each Court are specific to the issue in question, it is difficult to extract general principles and apply them to a restriction not dealt with in any of these cases. Since no authority has been opened on s.160 of the Companies Act 1990, I do not believe that a definitive view should be given on its provisions unless it is necessary to do so. In my opinion it is not because even if applicable, the disqualification must be weighted in the individual context of each case. In the instant one, I do not believe that it has any real or substantial disabling effect on Mr Duffy.
>
> 63. I say this because it must be borne in mind that the disqualification is for a limited duration and that most probably Mr Duffy will continue to work for the company almost exactly as he does at present. The disqualification will not cause him to lose his job; it simply means that he can no longer act as a director. In the circumstances of this case, where there is a family run business and where the only other director and shareholder is his brother, it is most likely that both the business and Mr Duffy will continue much like the present. I therefore propose to defer expressing a view on the point until the facts are more appropriate.
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> …

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