OF SLEDGEHAMMERS AND NUTS: THE APPOINTMENT OF INSPECTORS UNDER THE COMPANIES ACT 2014

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I Introduction

1. The limited liability company has been spectacularly successful.* As a means of allowing individuals to pool their capital for the purpose of carrying out a commercial venture, it has no equal. Its features—notably separate legal personality, combined with the ability to raise finance by debt, and the possibility of limiting the exposure of members to losses—have facilitated an explosion in commercial activity.[1]

2. However, the company has not always been fully trusted. The availability of limited liability, which was introduced by the Limited Liability Act 1855 (18 & 19 Vict., c. 133), has been particularly important in this regard. So, for example, in one case (*Re Traffic Group* [2007] IEHC 445, [2008] 3 I.R. 253), the (then future) Chief Justice Clarke remarked that it had been said, at that time, that "*companies amounted to a conspiracy by gentlemen… whereby they met together to decide by how much they would not pay their debts*".

3. Even judges have on occasion allowed their mistrust to get the better of them. There is perhaps no better example of this than the case that is the cornerstone of the modern law of companies: *Saloman v. A. Saloman & Co. Ltd* [1895] 2 Ch. 323 (H.C. and C.A.); [1897] A.C. 22 (H.L.).

4. In the summer of 1892, Aron Saloman of Whitechapel was a wealthy man. Having started with little or no capital of his own, he had over 30 years built up a successful business as a leather merchant and wholesale boot manufacturer, trading on his own account. Four of his sons were working in the business, but they were not partners, merely—to use the nomenclature of the day—servants. They were not happy about this. The oldest was, after all, 30 years of age. They nagged their father to give them a share. As Lord Macnaghten put it ([1897] A.C. 22, p.48): "*So at length Mr Salomon did what*

* I wish to express my gratitude to my colleague, **Colm Ó Néill** LL.B. (Pol. Sc.) (Dubl.), B.C.L. (Oxon.), Barrister-at-Law, who assisted me greatly in the preparation of this paper. However, responsibility for any errors is mine alone.

[1] The historical development of the company, to the modern day, is admirably traced by Dr Thomas Courtney, *The Law of Companies* (4th ed., 2016), Chapter 1.

hundreds of others have done under similar circumstances. He turned his business into a limited company."

5. That same year, a company was formed for the purpose of purchasing the business and carrying it on. The price was a little under 40,000*l*. Mr Saloman was allotted 20,000 of the 40,000 shares of 1*l* each. Six members of his family—his wife, daughter, and the four sons—were each allotted one share. As part payment of the purchase price of the business, Mr Saloman accepted certain debentures issued by the company, on the security of which he obtained a loan of 5,000*l*. These were later returned to the company, cancelled, and with the consent of Mr Saloman as beneficial owner, replaced with new debentures issued to the lender.

6. The business did not prosper. In 1893, the lender sought to enforce his security. A winding up order was made and it emerged that there would be sufficient money to repay the lender and a balance of about 1,055*l* to Mr Saloman, as beneficial owner of the debentures. There would, however, be nothing for the unsecured creditors. In a trial before Vaughan Williams J. (the uncle of Ralph, the noted composer of the same name), the liquidator made various counterclaims against Mr Saloman. In what for counsel representing Mr Saloman must have been a most dispiriting intervention, the judge himself suggested an amendment to the counterclaim, for a declaration that the company was the "*mere nominee and agent*" of Mr Saloman, and in due course granted that relief.

7. In the Court of Appeal, things got even worse for Mr Saloman. Lindley L.J. said ([1895] 2 Ch. 323, p.338) that the other members of the company "*have practically no interest in it, and their names have merely been used by Mr Aron Salomon to enable him to form a company, and to use its name in order to screen himself from liability*". This, he said (*ibid.*, p.339) was one of those companies which "*are mere devices to enable a man to carry on trade with limited liability, to incur debts in the name of a registered company, and to sweep off the company's assets by means of debentures which he has caused to be issued to himself in order to defeat the claims of those who have been*

incautious enough to trade with the company without perceiving the trap which he has laid for them". The whole thing was "*a device to defraud creditors*".

8. Lopes L.J. said (*ibid.*, p.341) that the Joint Stock Companies Act "*contemplated the incorporation of seven independent bonâ fide members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader. To legalize such a transaction would be a scandal.*"

9. It is evident in these judgments that the four eminent judges concerned (Kay L.J. was the fourth) were very mistrustful of Mr Saloman, as they saw it, attempting to cloak himself with the mantle of limited liability, while carrying on his business more-or-less just as before.

10. When the case came before the House of Lords—the unfortunate Mr Saloman now being described as a pauper—the result was very different. The Lord Chancellor, Lord Halsbury, accused Vaughan Williams J. of "*a very singular contradiction*" ([1897] A.C. 22, p.31). Either the limited company was a legal entity, or it was not. If it was, the business belonged to it and not to Mr Saloman. If it was not, there was no person and no thing who could be Mr Saloman's agent.

11. As for the Court of Appeal, the judges there had made their minds up that the whole thing was plainly contrary to the "*intention of the legislature*"—described by Lord Watson (p.38) as "*a common but very slippery phrase*". Lord Halsbury's speech leaves one in no doubt that, in his view, the judges below yielded to their horror of the prospective outcome, by inserting into the legislation prohibitions that had no basis in the text. He also remarked (p.34) that in his opinion, Mr Saloman was "*not shewn to have done or to have intended to do anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own*". So, in the end, he won his appeal.

12. The lesson, however, is that what goes on beneath the veil of corporate personality not infrequently attracts suspicion and mistrust. This is sometimes

deserved. Companies have often been used as the instruments of chicanery, and even fraud. This goes back a long way.

13. One notorious example is the bursting, in 1720, of the so-called "*South Sea Bubble*", leading to the passage of the Bubble Act of the same year.

14. The South Sea Company was a joint-stock company established in 1711. It secured a monopoly contract for trade with the Spanish South Sea, which Britain had obtained as part of a series of agreements among European powers concluding the War of Spanish Succession, following the death without issue of Charles II of Spain in 1700. The trade was expected to be extremely profitable, and a frenzy—of the sort that we have seen many times since—developed, in which all British society, from the lowest to the highest, scrambled to purchase stock. King George himself bought shares. In April of 1720, the stock was selling at 350*l*. By May it was at nearly 500*l*, and it ultimately peaked at around 1,050*l*, before plummeting to 190*l* in late summer, and 124*l* in December. Many were ruined. Sir Isaac Newton lost money. So did Jonathan Swift, who, making lemonade when life sent him lemons, at least managed to write a rueful poem about the experience.[2]

15. As Dr Courtney explains,[3] incorporation has since before the fall of the Roman Empire been regarded as a privilege that can be bestowed only by the sovereign power. In the modern era, it is a privilege that carries with it many benefits, not the least of which is limited liability. And because the privilege can be abused, sometimes to the prejudice of the public, it has long been a feature of British and Irish law that there should exist a mechanism for investigating possible abuses.

16. The appointment of inspectors to investigate the affairs of companies is one such mechanism—and has been a feature of Irish and English law for more than a century. The purpose of this paper is to describe in summary the law governing this aspect of corporate life, and, it is hoped, to offer some insights

[2] See http://www.online-literature.com/swift/poems-of-swift/43/.
[3] Courtney, *The Law of Companies* (4th ed., 2016),

that may be of interest to those concerned with the operation and implementation of that law.

17. In Ireland, the power, formerly vested in a Minister of the Government (and now in the Corporate Enforcement Authority), to apply to the High Court for the appointment of an inspector has been described by Keane C.J. (a noted authority on company law) in *Dunnes Stores Ireland Co. v. Ryan* [2002] IESC 7,[4] [2002] 2 I.R. 60, p.77, as "*one of the most important powers which he or she enjoys*". He went on to say (*ibid*.):

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

18. Notably, in Irish law such appointments can only be made by the courts. By contrast, in England and Wales, appointments of inspectors are made by the relevant secretary of state, although he or she can in certain circumstances be directed by a court to make such an appointment. It is therefore a distinctive feature of Irish law that applications for the appointment of inspectors are made to a court—almost always the High Court—in public, and in circumstances where the company concerned may be heard in opposition to the application. This has resulted in some important decisions concerning the scope and limits of the power of appointment.

19. The jurisdiction is broad, and—as Keane C.J. noted in the passage quoted above—encompasses, circumstances in which a company may have acted in a manner that is prejudicial to a limited class of persons, who may be closely connected with it. However, those cases in which inspectors have in the past

[4] Links: judgment of Murray J; judgment of Keane C.J.; judgment of Herbert J.

been appointed have generally related to large and powerful companies, in respect of matters attracting significant levels of public interest and concern.

20. In this regard, maintenance of public confidence in the system of incorporation itself is treated as an important *desideratum*.

21. In *Dunnes Stores Ireland Co. v. Ryan*, Murray J. (as he then was), noted that the Companies Acts "*govern fundamental aspects of the relationship between companies and the rest of society*", and that "*[m]any aspects of how they conduct their affairs as distinct entities are regulated by law in the public interest*" (p.95). He continued:

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

22. The history notwithstanding, one of the more interesting legal developments of the very recent past has been the advent of applications, not by the Corporate Enforcement Authority, but by private persons, for the appointment of inspectors. Although such applications have long been possible, until *Re WFS Forestry Ireland Ltd* [2022] IEHC 512, none had ever been made. Quinn J. granted the application, potentially opening a new front of corporate lawfare for disappointed creditors who have reason to suspect foul play by company management. There is another case, currently pending before the High Court, in which a similar application has been made. Whether these developments presage a new era for inspections remains to be seen.

II Historical development

23. As Keane C.J. noted in *Dunnes Stores Ireland Co. v. Ryan* [2002] IESC 7,[5] [2002] 2 I.R. 60, the appointment of inspectors has been provided for in Irish law since the early part of the 20th century.

A. THE COMPANIES (CONSOLIDATION) ACT 1908

24. The Companies (Consolidation) Act 1908 (8 Edw. 7, Ch. 69) conferred on the Board of Trade (later the relevant Minister of the Government) the power to "*appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Board direct*" (section 109(1)). Such an appointment was to be made, in the case of a company not being a banking company or a company not having a share capital, on the application of members holding not less than one-tenth of the shares issued. Section 109(2) provided that the application should be "*supported by such evidence as the Board of Trade may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in requiring, the investigation*". Provision was made for requiring the applicants to give security for payment of the costs of the inquiry.

25. Interestingly, it was the applicants who were required to defray "*[a]ll expenses of and incidental to the investigation*", unless the Board of Trade should direct that they be paid by the company (section 109(7)). As we shall see, this differs markedly from the current position, in which the costs of an inspection are, in the first instance, to be paid out of the public purse. One can therefore imagine that the prospect of being met with the inspectors' bills might have given pause for thought to disgruntled members considering seeking their appointment.

26. The Act of 1908 also provided for the appointment by a company itself—by special resolution—of inspectors to investigate its affairs (section 110). It is understood that, from the outset, this was effectively a dead letter.

[5] Links: judgment of Murray J; judgment of Keane C.J.; judgment of Herbert J.

27. Once inspectors were appointed, it became the duty of all officers and agents of the company to produce to them all books and documents in their custody or power, and an inspector had the power to examine the officers and agents on oath in relation to the business of the company (section 109(3) and (4)).

28. The inspectors were obliged to report to the Board of Trade (section 109(6)). Their report was "*admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report*" (section 111). As we shall also see, the corresponding provision under the current law goes much further than this.

B. THE COMPANIES ACT 1963

29. In the Companies Act 1963, the power to appoint inspectors was retained, now being exercisable by the Minister for Industry and Commerce (section 165). The application was to be supported by "*such evidence as the Minister may require for the purpose of showing that the applicants have good reason for requiring the investigation, and the Minister may, before appointing an inspector, require the applicants to give security, to an amount not exceeding £50, for payment of the costs of the investigation*".

30. If that sum seems low to you, you are not alone. In the most recent edition of the English work, *Gower: Principles of Modern Company Law* (11th ed., Sweet & Maxwell, 2021), the editors note (§21-005, n.42) that (at least in English investigations): "*The usual appointees are a QC and a chartered accountant, but less expensive mortals may be appointed in the rarer case when the Department appoints in relation to a private company.*" They also remark on the security for costs provision (now limited to £5,000) and comment, drily (*ibid.*, n.47): "*Under the CA 1948, the sum was only £100 which, even then, would not have kept a competent QC and chartered accountant happy for the time that most inspections take.*" We may note in passing that two of the learned editors were themselves QCs, albeit of the honorary variety, so presumably they knew of which they spoke.

31. Section 166 of the Act of 1963 provided that the Minister *must* appoint one or more inspectors if either the company itself, or the High Court by order,

declared that the company's affairs ought to be investigated. He might (but was not obliged to) make an appointment "*if it appears to the Minister that there are circumstances suggesting*" one of three matters, which may broadly be summarised as: (i) fraud in the business or oppression of members; (ii) fraud, misfeasance or misconduct by promoters or managers towards the company itself or its members; and (iii) failure to provide reasonable information to the members. These are largely replicated in the current provisions, which will be considered further below, as is the threshold test of "*appears… that there are circumstances suggesting*". We can see, however, that the appointment—even when effectively directed by a court—was by the Minister.

32. Under section 169, a report was to be made to the Minister. Section 170 provided for proceedings on foot of an inspectors' report. One provision of particular note was section 170(4), which provided:

> "(4) If from any such report as aforesaid it appears to the Minister that proceedings ought, in the public interest, to be brought by any body corporate dealt with by the report for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation of that body corporate or the management of its affairs, or for the recovery of any property of the body corporate which has been misapplied or wrongfully retained, *the Minister may himself bring proceedings for that purpose in the name of the body corporate*."

33. Section 170(5) provided that the Minister was required to indemnify any such body corporate in respect of the costs or expenses of such proceedings. I am not aware of any such proceedings having been brought.

34. Under section 171, the costs of the investigation fell to be defrayed in the first instance by the Minister, subject to certain provisions allowing recoupment from various parties. This, effectively, remains the position today, a point to which we will return.

35. As in the Act of 1908, section 172 provided that a report was "*admissible in any legal proceedings as evidence of the opinion of the inspectors in relation to any matter contained in the report*".

36. Commenting on the Acts of 1908 and 1963, Chief Justice Keane (Keane, *Company Law* (4th ed., Tottel, 2007), §35.01) stated:

> "[35.01] … These powers were rarely availed of in practice. In many cases, those who wished to see the company's affairs investigated were frustrated creditors and they might have preferred to petition for the winding up of the company. But another factor was undoubtedly the reluctance of successive Ministers to make use of their powers.
>
> [35.01] The 1990 Act introduced sweeping changes in this area."

C. THE COMPANIES ACT 1990

37. Part II of the Companies Act 1990 redrew the parameters of the power to appoint inspectors. One of the chief changes was that section 7 transferred the power of appointment from the Minister to the High Court. An appointment could also be made on the application of a single director or creditor of the company. Section 8 provided, separately, for appointment—again by the court—on the application of the Minister, on grounds similar to those in the Act of 1963.

38. Section 8(2)(a) provided that the power of appointment—on the application of any competent person—could be exercised notwithstanding that a company might be in the course of being wound up.

39. Henceforth, reports were to be made to the High Court (with a copy to the Minister) (section 11).

40. Section 22 introduced an important provision, that remains part of the law to the present day. It provided that an inspector's report was admissible in civil proceedings, not merely as evidence of the opinion of the inspector in relation to a matter contained in the report, but also "*of the facts set out therein without further proof unless the contrary is shown*". In effect, the Act of 1990 created

a major exception to the hearsay rule and, in addition, brought about a rebuttable presumption that facts stated in an inspector's report were true. This made an inspector's report a hugely important document in civil litigation arising from its subject-matter.

D. THE COMPANY LAW ENFORCEMENT ACT 2001

41. The Company Law Enforcement Act 2001 established the Director of Corporate Enforcement as a corporation sole (section 7), to perform the functions conferred on him or her under law.

42. Section 21 of the Act of 2001 provided that the power of the Minister under section 8 of the Act of 1990, to apply to the High Court for the appointment of inspectors, was transferred to the Director, with the further amendment that the inspectors to be appointed might be or include an officer or officers of the Director.

E. THE COMPANIES ACT 2014

43. The Companies Act 2014 brought about a major consolidation and reorganisation of Irish company law. The provisions governing company investigations are now contained in Part 13 of the Act. We will return to particular provisions below.

44. However, it may be noted here that, distinct from the power to apply to the court for the appointment of inspectors, the Director of Corporate Enforcement (now the Corporate Enforcement Authority) was also given the power of directly appointing inspectors to investigate possible share dealing contraventions (section 763), or to determine the true persons who are or have been financially interested in the success or failure (real or apparent) of a company, or able to control or materially influence its policy.

45. While these issues are important and interesting in their own right, this paper is concerned with court-appointed inspectors.

F. THE COMPANIES (CORPORATE ENFORCEMENT AUTHORITY) ACT 2021

46. The Companies (Corporate Enforcement Authority) Act 2021 established the Corporate Enforcement Authority (the "**Authority**"), to replace, and perform the functions previously performed by, the Director of Corporate Enforcement.

47. Under section 944D of the Act of 2014, as inserted by the Act of 2021, the functions of the Authority include:

> "(a) to encourage compliance with this Act,
>
> (b) to investigate—
>
> (i) instances of suspected offences under this Act, and
>
> (ii) instances otherwise of suspected non-compliance with this Act or with the duties and obligations to which companies and their officers are subject,
>
> (c) to enforce this Act, including by the prosecution of offences by way of summary proceedings,
>
> (d) at the discretion of the Authority, to refer cases to the Director of Public Prosecutions where the Authority has reasonable grounds for believing that an indictable offence under this Act has been committed".

48. As well as its enforcement function, the Authority thus has a general remit to encourage compliance with company law, which is consistent with the courts' recognition of maintaining public confidence in corporate activity and governance as a significant aspect of the public interest.

III Other powers of the Authority relevant to inspections

49. The primary subject of this paper is the court's power to appoint inspectors to investigate the affairs of a company. However, since the overwhelming majority of applications leading to such appointments have been made either by the relevant Minister or his statutory successor, the Director of Corporate Enforcement, it is relevant to observe that the Director, and now the Authority, enjoy certain other powers that are in practice highly relevant to an application to the court.

50. Chapter 4 of Part 13 of the Companies Act 2014 is entitled "*Miscellaneous Provisions*". It contains several sections which confer power on the Authority to obtain information from companies.

51. The first such section is section 778, which provides that the Authority "*may give a direction to any company requiring it, at such time and place, and in such manner, as may be specified in the direction, to produce such books or documents as are specified in the direction*".

52. Section 779 provides that a direction of this species may be given where the Authority considers that there are circumstances suggesting the application of one or more of a number of states-of-affairs. The first of these (paragraph (a)) is that "*it is necessary to examine the books or documents of the company with a view to determining whether an inspector should be appointed to investigate the company under this Act*". Save for some minor differences, the paragraphs that follow largely replicate the states-of-affairs that may justify an application for the appointment of an inspector under section 748 of the Act; they are considered in that context below.

53. There are also other powers, including to obtain company books or documents from third parties (section 780, subject to section 782), and to require explanations to be given of any of the books and documents produced—including apparent omissions from them (section 784).

54. What is perhaps more important to note at this point is that the exercise of these powers may well be highly significant in relation to whether or not the Authority proceeds to exercise its further power, to seek the appointment of inspectors. This, indeed, was perceived to be a reason for granting such powers.

55. In the 1962 *Report of the Company Law Committee* (Cmnd 1749), which was chaired by Lord Jenkins, it was noted that the practice of the Board of Trade at that time, when the appointment of inspectors was sought, was to ask the applicants to submit a statement of facts, which the Board would then send to the company for the observations of the directors (see §213). Critics of this approach observed that "*this procedure not merely forewarns the directors of the precise nature of the complaints and thus gives them ample opportunity if they are so minded to destroy or fabricate evidence before the appointment of an inspector, but also, on occasion, leads to lengthy delays while the directors compose their reply*" (§214).

56. The Committee remarked:

> "[215] We fully appreciate the difficult position in which the Board of Trade are placed. The appointment of an inspector to investigate the conduct of a company's affairs is a serious step which can have serious consequences for the company and its members, even when the complaints are eventually shown to be entirely without foundation… We have come to the conclusion that nothing can be done to prevent the appointment of an inspector causing some damage to a company. We do, however, believe that the Board of Trade would find it easier to decide when an inspection is justified—and therefore be less likely to be inhibited from appointing inspectors by fear of causing unnecessary damage—if they had power to obtain documents and information from companies under suspicion with a view to deciding whether or not to appoint an inspector. The provision of such powers would have the further advantage that the Board of Trade would be able to test the complainants' Statement of Facts without necessarily revealing to the directors the case against them and without the delays sometimes involved in awaiting the directors' reply."

57. The ability to obtain documents from the company is therefore important for at least three reasons. First, a request may be made "*out of a clear blue sky*", thereby reducing the risk of destruction or falsification of records. Second, the interaction between the Authority and the company is private, thereby reducing the risk of reputational damage in the event that the Authority forms the view that whatever complaints prompted the request are baseless. Third, by obtaining information from a company through the exercise of such powers, the Authority is in a position to form a preliminary view as to whether those complaints may have merit, which is likely to weigh heavily in its decision whether or not to take the matter further by seeking the appointment of an inspector. In *Dunnes Stores Ireland Co. v. Ryan* [2002] IESC 7,[6] [2002] 2 I.R. 60—which was concerned with a challenge to similar statutory demands under the prior legislation—Keane C.J. observed (p.77) that the powers "*may be availed of as a preliminary to the appointment of an inspector by the High Court to conduct an investigation of a company under the Companies Acts*".

58. The problem of reputational harm, adverted to by the Jenkins Committee, has also been the subject of judicial comment in Ireland. In *Re Independent News and Media plc* [2018] IEHC 488, [2019] 2 I.R. 363, Kelly J. said:

> "[138] The appointment of inspectors is always likely to cause damage to the company to which they are appointed. In *Director of Corporate Enforcement v. DCC plc* [2008] IEHC 260, [2009] 1 I.R. 464, §65, p.479, I cited the observations of Goldstone J. in *Sage Holdings Ltd v. Unisec Group Ltd* [1982] 1 S.A. 337 where he said:–
>
> > 'The company may be caused harm and damage and be put to substantial expense. This is especially so in the case of a large public company where its reputation in the market may become tarnished by the very fact of an investigation being ordered. However, the potential harm and damage from this source is probably less substantial in the case of a non-trading company. This consideration, in my opinion, should temper the natural

[6] Links: judgment of Murray J; judgment of Keane C.J.; judgment of Herbert J.

> inclination the court may have to protect members of the public from those whose control of large companies has become entrenched.'
>
> [139] I recognise that the appointment of inspectors is a serious matter and that it carries implications for the company."

59. It is a matter of public record that, prior to the application of the Director of Corporate Enforcement for inspectors to be appointed to Independent News and Media plc, his office engaged in an extensive, lengthy, and private evidence-gathering exercise, which informed the ultimate application.[7]

60. In *Director of Corporate Enforcement v. DCC plc* [2008] IEHC 260, [2009] 1 I.R. 464, Kelly J. made the memorable remark that has been used in the title of this paper, saying:

> "[66] The appointment of inspectors is a serious matter and such a sledgehammer should not be used to crack a nut."

61. Having the opportunity to consider the material that may be obtained through the exercise of these other powers can give confidence to the Authority that an application for the appointment of inspectors—with its inevitable adverse consequences for the company concerned—is merited. By contrast, where an application is made under section 747 of the Act of 2014 by another person, it is unlikely that the Authority will have had the benefit of such a process. This may contribute to justifiable reluctance to be perceived as taking sides in what, in many such cases, is likely to have something of the character of a dispute between rival factions, and in which allegations are strenuously made and just as strenuously denied.

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[7] In *Re Independent News and Media PLC* [2018] IEHC 488, [2019] 2 I.R. 363, §14, Kelly J. referred to the extensive evidence presented to him, including "*the responses to the Director's statutory demands made on the company*". In *Independent News and Media plc v. Director of Corporate Enforcement* [2018] IEHC 319, §7, Noonan J. noted: "*In the course of his investigation, the respondent made 14 statutory requirements for information and documents pursuant to section 778 of the 2014 Act. The applicant complied with all of these, as it was obliged to on pain of criminal sanction.*"

62. Inspection being a sledgehammer, if the Authority is going to take a swing—or lend its weight to the swing of another—it will be understandably concerned to ensure that it is aiming at something more substantial than a mere nut.

IV Purpose of company law inspections

63. The powers of the Authority in relation to the production and explanation of books and documents have been noted. However, one power that is markedly absent from those enjoyed by the Authority is the power to examine persons on oath. This power is enjoyed by inspectors—under section 756 of the Companies Act 2014—and this distinction is a major reason why the Authority may seek the appointment of inspectors.

64. Irish courts have emphasised that the purpose of appointing inspectors is to find facts, particularly facts which would otherwise be inaccessible. In *Director of Corporate Enforcement v. DCC plc* [2008] IEHC 260, [2009] 1 I.R. 464, §52, Kelly J cited with approval the following passage from *Keane's Company Law* (4th ed., 2006):

> "…the functions of the inspectors are to investigate and report. It is thus in essence a fact-finding exercise which does not of itself affect the legal rights and obligations of any individual concerned, although the publication of the report—and even the fact of an investigation having been ordered—may affect their reputations."

65. Kelly J. also (§53) cited *Re Pergamon Press Ltd* [1970] 3 All E.R. 535, p.540, where Sachs L.J. said that "*the inspectors' function is in essence to conduct an investigation designed to discover whether there are facts which may result in others taking action*". Incidentally, the first judgment in that case, given by Lord Denning M.R., introduced a fraud scandal in which the publishing magnate, Robert Maxwell, played a leading part, with a sentence that ranks as a masterpiece of judicial prose and understatement: "*In the middle of 1969 there was an upset in the city of London.*"

V Appointment of inspectors on the application of the Authority

66. The power of the Authority to apply for the appointment of inspectors is now contained in section 748 of the Companies Act 2014. It provides:

> "(1) On the application of the Authority, the court may appoint one or more competent inspectors to investigate the affairs of a company and to report on those affairs in such manner as the court directs, if the court is satisfied that there are circumstances suggesting that—
>
> (a) the affairs of the company are being or have been conducted with intent to defraud—
>
> (i) its creditors;
>
> (ii) the creditors of any other person; or
>
> (iii) its members;
>
> (b) the affairs of the company are being or have been conducted for a fraudulent or unlawful purpose other than described in paragraph (a);
>
> (c) the affairs of the company are being or have been conducted in an unlawful manner;
>
> (d) the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to some part of its members;
>
> (e) the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to some or all of its creditors;

(f) any actual or proposed act or omission of the company (including an act or omission on its behalf) was, is or would be unfairly prejudicial to some part of its members;

(g) any actual or proposed act or omission of the company (including an act or omission on its behalf) was, is or would be unfairly prejudicial to some or all of its creditors;

(h) the company was formed for a fraudulent or unlawful purpose;

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

(j) the company's members have not been given all the information relating to its affairs which they might reasonably expect."

67. While such applications have in the past always been made to the High Court, the Act of 2014 allows an application by the Authority to be made to the Circuit Court, where a small or medium company is concerned (section 747(5)(b) and (8)).

A. THRESHOLD FOR SUCCESSFUL APPLICATION

68. It is evident from the text of section 748 that the trigger for the Court's power is that it should be "*satisfied that there are circumstances suggesting that*" one (or more) of the states-of-affairs set out in paragraphs (a) to (j) obtains.

69. As noted above, historically, it was the Board of Trade or the Minister who had to be "*satisfied*" that there were circumstances justifying the appointment of an inspector. Under section 779, this remains the qualification on the exercise by the Authority of its power to require document production under section 778. In *Dunnes Stores Ireland Co. v. Ryan* [2002] IESC 7,[8] [2002] 2 I.R. 60, the Supreme Court was considering a precursor of those sections—section

[8] Links: judgment of Murray J; judgment of Keane C.J.; judgment of Herbert J.

19(2) of the Act of 1990—which required that the Minister be "*of the opinion that there are circumstances suggesting that*" one of the enumerated reasons existed. Murray J., who gave the majority judgment, said (p.89) that this "*means no more than that she must have reasonable grounds for her opinion. It is exclusively a matter for the second respondent to form the opinion. It is necessarily a subjective one*".

70. The position is now different, however, because it is the court that must be satisfied. It will fall to the Authority, by evidence, to persuade the court that it should be so satisfied.

71. It must be admitted that the statutory language is somewhat clunky and difficult to interpret. In law, "*satisfaction*" generally connotes proof on the balance of probabilities. However, in this context, what must be proved is that there are "*circumstances suggesting*" something. This, clearly, is not proof of the something, merely of circumstances suggesting the something. And "*suggesting*", in contrast to a word like "*satisfaction*", is a very attenuated standard. It evokes the sense of "*tending or pointing towards*", but not necessarily very strongly. In short, what the language seems to require is proof of something that is, by definition, a long way short of proof.

72. However, this is deliberate, and follows from the nature of the exercise, as described above.

73. We have observed that the purpose of appointing inspectors is to find facts. It seems to follow that, if the facts are already found, an appointment would be otiose. This has been repeatedly accepted by the courts. In *Director of Corporate Enforcement v. DCC plc* [2008] IEHC 260, [2009] 1 I.R. 464, Kelly J. said:

> "[55] Statutory powers can only be exercised for the purposes for which they have been granted. The statutory discretionary power given to this court by section 8 of the Act [of 1990] should only be exercised in circumstances where the statutory preconditions are satisfied and where the exercise of the discretion is likely to achieve the purpose of uncovering facts not already known. Thus, for example, there could be

no justification for the appointment of inspectors if the sole purpose was to provide the Director with a procedural or evidential advantage in the pursuit of disqualification proceedings against persons associated with the companies." (emphasis added)

74. In *Re Independent News and Media plc* [2018] IEHC 488, [2019] 2 I.R. 363, Kelly P. (as he had by then become) endorsed this passage and justified the appointment of inspectors by saying:

> "[116] In the circumstances of this case, as is clear from even the summary of the evidence placed before me, there are a myriad of issues the answers to which are not known. The statutory powers exercised by the Director (he made 14 statutory requirements for information pursuant to section 778 of the Act of 2014) have produced a good deal of information but it is far from comprehensive and considerable mystery still surrounds a number of the issues. It is highly desirable the Director be able to get to the bottom of the issues which he has identified…
>
> [117] I am thus satisfied that the necessary statutory preconditions having been met, the appointment of inspectors would be capable of achieving the statutory purpose. If I were of opinion that no new facts could be gleaned by inspectors I would not appoint them since to do so would be wrong." (emphasis added)

75. In the *Independent News and Media* case, a major factor was the inability of the Director of Corporate Enforcement to resolve disputes between various persons concerning critical issues, which emerged from the materials gathered during the private phase of the investigation. It has been noted above that the Director—and now the Authority—lacked the power to examine witnesses on oath. That power is available under section 756 to inspectors appointed by the court, who are therefore in a much better position to resolve disputes and find the true facts.

76. The matters set out in paragraphs (a) to (j) of section 747(1) encompass fraud, unlawful conduct, unfair prejudice, and a failure to provide information that

ought to be provided. While a detailed exegesis of these paragraphs is beyond my present ambition, it may be noted that, in the *Independent News and Media* case, it was contended on behalf of the company that conduct of its chairman—which formed the basis of certain aspects of the Director's application—did not amount to misconduct in relation to the "*affairs of the company*", this being the phrase used in paragraphs (a) to (e). Kelly P. rejected this argument, holding that "the 'affairs of the company' has a very broad meaning" (§73, quoting *R. v. Board of Trade, ex parte St. Martins Preserving Co. Ltd* [1965] 1 Q.B. 603, p.613). He said that the chairman's ability to carry out the activities alleged "*flowed from the fact that he was chairman of the company and he was therefore, in my view, conducting the affairs of the company even if he acted wrongfully or outside his actual authority*" (§72).

77. It may also be noted that paragraphs (a) to (e) all include the phrase "*the affairs of the company are being or have been conducted*" (emphasis added). Thus, as Kelly P. confirmed in the *Independent News and Media* case (§77), past conduct, which has since ceased, can successfully ground an application. The same conclusion was reached in *Dunnes Stores Ireland Co. v. Ryan* [2002] IESC 7,[9] [2002] 2 I.R. 60, in the context of the power to request production of documents.

78. Insofar as "*unfairly prejudicial*" conduct is concerned (paragraph (d)), in *Independent News and Media*, Kelly P. held (§84) that guidance could be gleaned from the legislation dealing with examinership. He noted (§85) that, in *Re SIAC Construction Ltd* [2014] IESC 25, Fennelly J. said:

> "[73] Whether a set of proposals is unfairly prejudicial to any particular interested party will involve a comparison of the treatment of that party with any similarly situated interested party. The court will also take account of any aspects of either party's individual position which places it at either an advantage or disadvantage. The court will take account of the totality of the circumstances."

[9] Links: judgment of Murray J; judgment of Keane C.J.; judgment of Herbert J.

79. Kelly P. also observed (§87) that "*unfairly prejudicial*" conduct need not necessarily be unlawful.

B. DISCRETION

80. It is well established that, if the court is satisfied that there are circumstances suggesting the existence of one of the enumerated states-of-affairs, it nonetheless retains a discretion to refuse to appoint inspectors. So, for example, if what is suggested is a mere nut, or if some other tool is available to another body that is better suited to cracking it, the court may well decline to swing its sledgehammer.

81. The court's discretion also encompasses the public interest. In *Independent News and Media*, Kelly P. agreed with the Director of Corporate Enforcement that the public interest was a matter that the court was entitled to take into account. He said:

> "[109] This short review of relevant case law demonstrates that the public interest in ensuring the maintenance of proper standards of probity and good governance in companies is one of the major matters which ought to be taken into account on an application such as this. That is so because it is in the public interest that the privilege of incorporation is not abused and that public confidence in how companies conduct their affairs is maintained. It is also important to ensure, particularly in the case of a public company, that its affairs are conducted entirely above board and with proper respect being afforded to the interests of all shareholders and not just some."

82. In that case, the significance of the issues raised in terms of corporate governance and potential abuses was compounded by the prominent position occupied by the company in the media landscape. Together, these factors suggested strongly that the public interest was in favour of, rather than opposed to, the appointment of inspectors.

83. As for the availability of other tools better suited to the task at hand, Kelly P. accepted that it would be proper to consider other investigations that were

being or might be carried out by other bodies, while noting that that the existence of such investigations would not preclude appointment (§119). Their existence could only influence the exercise of the court's discretion. He carefully analysed the nature of the other inquiries—by the Data Protection Commission and the Central Bank—and, having noted certain limitations to which they were subject, concluded that none would "*address the public interest in an adequate way*" (§127).

84. The superior utility of an inspector's report in subsequent proceedings—when compared with reports by other bodies—was an aspect of the matter that influenced him in favour of making the appointment (§§130-132).

VI Applications by persons other than the Authority

85. Section 747 of the Companies Act 2014 provides for the appointment of inspectors on the application of parties other than the Authority. It states:

> "(1) On the application of a person or persons specified in subsection (2), the court may appoint one or more competent inspectors to investigate the affairs of a company in order to enquire into matters specified by the court and to report on those matters in such manner as the court directs.
>
> (2) The court may make the appointment on the application of any of the following persons:
>
> (a) the company;
>
> (b) not less than 10 members of the company;
>
> (c) a member or members holding one-tenth or more of the paid up share capital of the company (but shares held as treasury shares shall be excluded for the purposes of this paragraph);
>
> (d) a director of the company; or
>
> (e) a creditor of the company.
>
> (3) The court's power of appointment under subsection (1) is exercisable notwithstanding that the company is in the course of being wound up.
>
> (4) The court may require the applicant or the applicants to give security for payment of the costs of the investigation.
>
> (5) A person who intends making an application under this section shall give not less than 14 days' notice in writing of his or her intention to

apply to the Authority, and the Authority shall be entitled to appear and be heard on the hearing of the application."

86. The threshold which must be reached for a successful application under section 747 of the Act is remarkably vague. Whereas section 748 sets out detailed hypothetical circumstances of unlawfulness *etc.*, which must be met to allow a court to make an order authorising inspectors to investigate a company, the circumstances in which such an order can be made under section 747 are not specified at all. In this respect, it is much more like the very early legislation. However, unlike under that legislation, an application must still be made to the court, which leaves the judge in something of a quandary: on what basis should he or she decide whether or not to accede to an application?

87. In this context, the decision in *Re WFS Forestry Ireland Ltd* [2022] IEHC 512 was eagerly awaited. This was the first application under section 747, or (it is believed) its predecessor in the Companies Act 1990. It came on for hearing before Quinn J., who, before his appointment to the Bench, was in his practice as a solicitor a recognised expert in corporate insolvency.

88. The essential facts were that the company, WFS Forestry Ireland Ltd, solicited investments from the public in what was presented as a business of growing and supplying Christmas trees. Very attractive returns were offered. The applicant made several investments with the company but gradually became suspicious when returns falling due were not paid. As explained by Quinn J. (§5), he made "*a series of allegations in relation to the assets and activities of the Company and its sole shareholder and director and claims that the circumstances outlined in his evidence are suggestive of the Company having been formed for the purpose of engaging in a fraudulent scheme involving the soliciting of loans and other investments to fund fictitious forestry projects and to defraud creditors*".

89. Quinn J. acknowledged (§34) that: "*No threshold criteria are stated in section 747*". He went on to consider whether, given the silence of section 747, "*criteria analogous to those which are stipulated in section 748 should be applied*" (§40). He noted that in *Director of Corporate Enforcement v. DCC*

plc [2008] IEHC 260, [2009] 1 I.R. 464, Kelly J. had observed that the power under section 7 of the Act of 1990 (the equivalent of section 747) was wider than that under section 8 (the equivalent of section 748), saying (as quoted in the *WFS Forestry* case):

> "Section 7 [now section 747], which is in the same part of the Act of 1990 permits the court to appoint one or more competent inspectors to investigate the affairs of a company in order to enquire into matters specified by the court and to report thereon as the court directs. It is to be noted that unlike section 8 [now section 748], this section does not describe the circumstances in which the court is empowered to make such an appointment. The court is at large to exercise its discretion in determining whether there are circumstances which warrant investigation. The application has to be supported by such evidence as the court may require including such evidence as may be prescribed. No regulations have been made prescribing such evidence [this is a reference to a wording regarding regulations in section 7 which was not continued in section 747]. It is clear that the jurisdiction conferred on the court by section 7 is wider than that which is given under section 8." (emphasis added)

90. However, Quinn J. noted (§42) that in *Conroy's Companies Act 2014* (2018), it was stated that it is "*reasonable to assume that similar criteria will be applied in considering whether to appoint an inspector as those which pertain pursuant to section 748*".

91. To similar effect, Dr Courtney, *The Law of Companies* (4th ed., 2016) was also quoted (§43) as saying:

> "Presumably the court would wish to be satisfied that there was at least *prima facie* evidence of some irregularity in relation to the company's affairs… Indeed the court might have regard to the grounds for appointment enumerated in section 748(1) which apply where the Director is the applicant, but it is clear that the jurisdiction conferred on the court by section 7 (now section 747 of the Act) is wider than that

> which is given under section 8 (now section 748 of the Act). It seems unlikely that the court would order an investigation where it is clear that no useful result is likely to be achieved but no doubt it would be difficult for the court to determine at the application stage whether a useful result is likely or not. To this end, section 747(4) seeks to deter vexatious applications by empowering the court, if it so chooses, to require applicants to put up security for the cost of the investigation. The net effect of section 747(4) may be to deter all but the most assured of potential applicants from seeking the appointment of an inspector, an effect which rather militate against the purpose of having an investigation procedure in the first place."

92. Quinn J. (§44) expressed his agreement with the first sentence of this passage, *i.e.* that evidence of some irregularity would be required. He went on to say:

> "[52] It does not necessarily follow that the requirements in section 748 are more onerous than for section 747. If anything, it might be said that the use of the phrase 'circumstances suggesting' in section 748 sets a lower threshold in terms of the evidence which would justify an appointment. Having said this, it is clear from the comments of Kelly J. in *DCE v. DCC*, and the commentary by Messrs Conroy and Courtney, with which I agree, that a court can at least draw assistance by reference to section 748 and caselaw concerning it. Even applying a wider test for section 747, there must at least be evidence before the court of the existence either of a state of affairs comparable to those identified in section 748 or other evidence of irregularity or unlawful conduct which would justify the appointment of an inspector whose task will be to ascertain the facts."

93. In summary then, while section 747 is more open than section 748, any application under the former provision will likely rely on the paragraphs in section 748(1) as a roadmap for the sort of circumstances that could justify the appointment of inspectors.

94. Quinn J. commented that his function was not to make findings of fact, but rather "*to determine whether there exists evidence of a state of affairs which would warrant the appointment of an inspector whose statutory function is to find facts*" (§54).

95. A significant feature of the *WFS Forestry* case was that the company appeared to be insolvent. Quinn J. noted (§140) that the affidavits filed disclosed:

> "(2) That repayment dates in relation to a number of the loans and other investments have passed without repayments having been made.
>
> (3) That the company had relationships and transactions with a number of other companies which have impacted its ability to honour its debts.
>
> (4) The last available reported financial statements disclose the company as being insolvent on a balance sheet basis."

96. Having regard to this, the Director of Corporate Enforcement had suggested that a more appropriate remedy might be the winding up of the company, and that it would be a waste of resources to incur the costs of an investigation—costs which, under section 762 of the Act, would have to be defrayed in the first instance by the Minister for Justice (see §145). It was also suggested that it was not in the public interest to pursue an investigation, when the applicant's real remedy was to sue the company for the debt and, if appropriate, to seek to have it wound up. For her part, the Minister for Justice—who was also heard by the court—raised the possibility of a flood of aggrieved creditors seeking appointment of inspectors, rather than themselves incurring the costs of a winding up.

97. Quinn J. noted (§158) that a petition under section 569 of the Act of 2014 for the winding up of a company was a more straightforward application than one seeking the appointment of an inspector. He said (§159): "*There is, therefore, no reason to believe that applications pursuant to section 747 are likely to be more cost effective and therefore become more popular for aggrieved creditors generally, at least in the first instance*".

98. Quinn J. went on to say:

> "[162] If I were persuaded that the only motive of the applicant is to avoid the cost of liquidation, I would consider exercising my discretion to refuse the application. The applicant has fairly acknowledged that the cost of a liquidation is one which his client is either unwilling or unable to bear. He says, however, that this is not a one dimensional application relating only to his debt.
>
> [163] I am not persuaded that the principal objective of the applicant is not the return of his own money. However, the applicant has provided evidence relating to the investment by at least seventeen others in addition to himself. Evidence has been provided concerning the manner of solicitation of investments through a website and brochure…
>
> [164] Even if this application were motivated initially by a desire to secure the return of the applicant's money, [it] is not devoid of a public or multiparty dimension. At least 18 investors are said to be affected and the evidence is that they have made investments exceeding €1.4 million, of which the applicant's investment is only a small portion. Therefore, it cannot be said that there is no wider public interest or public dimension to the case.
>
> …
>
> [166] Having noted all of the above, it is also clear that however more appropriate the Director, the Minister, or even this Court may consider liquidation as a remedy on the facts of this case, the applicant has no obligation to pursue this route. I do not find that he is acting vexatiously or frivolously or, more importantly, for an improper motive, even where he has openly acknowledged that his decision not to petition for a winding up is informed by unwillingness or inability to bear the cost associated with liquidation."

99. Quinn J. observed that he did not have jurisdiction, on the material before him, to make a winding-up order; that would arise only upon a report being

presented by an inspector. For these reasons, he decided to accede to the application and appoint an inspector.

100. In a hypothetical case where an inspector is appointed on the application of a creditor who claims to have been defrauded, and produces a report substantiating those claims, the report may prove to be a valuable weapon in later litigation by a disappointed creditor.

101. It has previously been remarked that an inspector's report is "*admissible in any civil proceedings as evidence… of the facts set out in it without further proof, unless the contrary is shown*". This is now provided for in section 881 of the Act of 2014.

102. In *Countyglen plc v. Carway* [1998] 2 I.R. 540, Laffoy J. held that an inspector's report is given presumptive evidentiary effect, in that such a report is admissible to give all findings of primary fact clearly expressed therein the status of proven fact, unless disproved. On this basis, the company could rely upon the report to ground an application for a *Mareva*-type injunction against persons alleged to have defrauded it. This, as we have also observed, is a striking exception to the hearsay rule, which would ordinarily render such a report inadmissible as evidence to prove the truth of its contents.

103. The existence of the presumption means that, in an action founded on an allegation that has been upheld in an inspector's report, the plaintiff may well start by serving at 30- or even 40-love up. It will be for the defendant to disprove what the inspector has found. In forensic terms, this is a potentially massive advantage for a plaintiff.

104. A related point is that the expenses of the investigation are, under section 762 of the Act of 2014, to be "*defrayed in the first instance*" by the Minister for Justice. So, while Quinn J. is undoubtedly correct in saying that an application for the appointment of inspectors is a more complex—and, therefore, more expensive—matter than an application for winding up a company, it is not irrelevant to note that, in an inspection, the costs will be borne by the public, whereas in a winding up, the costs of any investigation conducted by a liquidator will be borne by the (usually unsecured) creditors. Mindful of the

understatement, mentioned above, of the learned editors of *Gower's Principles of Company Law*, it is suggested that the costs of the investigation are likely to be a good deal greater than the costs of the application for the investigation.

105. A creditor who believes he may have been defrauded in relation to an investment in an insolvent company may therefore wish to weigh carefully whether it would be in his best interests to petition for the winding up of the company, or to seek to have an inspector appointed, who might find facts in his favour that could then be used as a launch pad for further proceedings—not necessarily proceedings against the company itself, but perhaps its promoters or management.

106. In this connection, if the company's assets are seriously depleted—as appeared to be the case in the *WFS Forestry* case—there may also be the difficulty of finding anyone who would be prepared to act as a liquidator. In *WFS*, no such person could be found, as Quinn J. recognised in a further judgment given after an inspector had been appointed and had given an interim report to the court: *Re WFS Forestry Ltd* [2023] IEHC 258, §68. Having considered the judgment of Laffoy J. in *Re Davis Joinery Ltd* [2013] IEHC 353, [2013] 3 I.R. 792, Quinn J. held that the lack of a suitable candidate to act as liquidator meant that it would not be appropriate to make a winding up order in respect of the company, notwithstanding its clear insolvency (§78).

107. The facts as set out in the more recent judgment indicate that a winding up would have been unlikely to make any headway in investigating the complaints of the *WFS* applicants, unless they (or some other third party) were willing to fund the investigation. However, an investigation was underway, with the costs being charged to the Department of Justice. The judgment records that, by May 2023, the Department had discharged invoices relation to the investigation amounting to over €500,000 (including VAT) (see §49).

108. In the first *WFS Forestry* judgment, the Minister for Justice had submitted to the court that, as the applicant seemed to be the party most likely to gain from the appointment of an inspector, it would be an appropriate case in which to require him to give security for the costs of the application, as provided for in

section 747(4) of the Act of 2014. That subsection provides simply: "*The court may require the applicant or the applicants to give security for payment of the costs of the investigation*." There is no monetary limit specified. Quinn J. refused to make such an order, saying:

> "[185] The concept of security for costs is that security be given by a party potentially liable for those costs. In the scheme of this Act, the potential liability of the applicant arises under section 762(2), *i.e.* a potential liability to repay the Minister the expenses (I note that the word 'expenses' is used in section 762, whereas the word 'costs', which may be more limited than expenses, is the phrase used in section 747(4)).
>
> [186] I am reluctant to speculate on the circumstances or conditions in which an order may be made against the applicant pursuant to section 762(2) should the Minister ever make such an application. It has not been said that the application of this case is frivolous or vexatious. The height of the criticisms made in the course of submissions was that the applicant, and perhaps other investors, advanced money and credit without undertaking due diligence. No evidence has been advanced to support that submission.
>
> [187] It has fairly been said that, based on the evidence of insolvency before the court, there is a high risk that any order for reimbursement made against the company would not lead to recovery of the expenses. There is force in that assertion, but I am not persuaded that in this case that factor would of itself justify ordering the applicant now to provide security for costs."

109. A further potential advantage of inspection for a creditor who may have been a victim of fraud is that, should a report vindicate his allegations, it seems that he would be free to take whatever proceedings he wished, in his own name and pursuing his own interests. By contrast, if a dishonest scheme were uncovered by a liquidator, then any action he might take would be in the name of the

company, for the benefit of classes of creditors, who would usually rank *pari passu* among themselves.

110. It is always difficult to predict the future, and the implications of the *WFS Forestry* case remain unclear. In particular, whether concerns about floodgates will prove to be well-founded remains to be seen. However, what can be said is that, where a creditor believes on reasonable grounds that a fraud may have been perpetrated against him by or through a company, and the company may not have sufficient assets to entice an insolvency practitioner to accept an appointment as liquidator, an application for the appointment of an inspector, with a view to obtaining a report that can later be deployed in private litigation, has become at the very least an option worth considering.

VII Powers of inspectors

111. When a successful application for the appointment of inspectors is made, the powers granted to such inspectors are broad and comprehensive. The rights of persons affected by such inspections appear to fall in the grey area between administrative applications and court hearings.

112. The general rule is that investigations are carried out by the inspectors in private, with Murphy J. in *Re Countyglen plc* [1995] 1 I.R. 220 holding that the majority of such applications were administrative applications rather than administrations of justice and that, accordingly, the Constitution did not require them to be heard in public.

113. With the court's approval under section 750 of the Companies Act 2014, inspectors may extend their investigation into any other body corporate which is "*related*" to the company being investigated, and beyond, with the Supreme Court holding in *Desmond v. Glackin (No.2)* [1993] 3 I.R. 67 that "*[i]f every time an inspector ran into a corporate shareholder, which happened to be a company registered outside the state, he had to cry 'halt' it would make the section inoperable*."

114. The officers and agents of any relevant company are under a duty to produce all books and documents relating to the company in question in their custody and power, to the inspector, under section 753(1)(a) of the Act. The inspectors may require the officers and agents of the relevant companies and any other person whom they consider may be in possession of the information just mentioned, to attend before them, where they may be examined on oath, under sections 753(1)(b), 754(2)(b) and 756 of the Act.

115. The Authority is empowered under section 787 of the Act to obtain a warrant to search premises (including a dwelling) in the District Court.

116. In *Re National Irish Bank Ltd (No.1)* [1998] IEHC 116, Shanley J. considered that, as an inspection is not an adversarial process, but rather has a fact-finding purpose, the inspectors appointed are not obliged to afford the same legal

protections that would be appropriate for an adversarial process, holding at p.29 as follows:

> "I propose therefore to answer the first question which is addressed to the court in the motion paper as follows, namely, that persons (whether natural or legal) from whom information documents or evidence are sought by the Inspectors in the course of their investigation under the Companies Act, 1990 are not entitled to refuse to answer questions put by the Inspectors or to refuse to provide documents to the Inspectors on the grounds that the answers or documents may tend to incriminate him, her or it."

117. However, where an investigation reaches a stage where adverse conclusions may be drawn, persons affected will have rights to fair procedures.[10]

118. In *Desmond v. Glackin (No.2)* [1993] 3 I.R. 67, the Supreme Court held unconstitutional a provision of the Companies Act 1990 that allowed inspectors to certify a refusal to produce a document, attend before them or answer a question, and for the court then to punish the offender "*in like manner as if he had been guilty of contempt of court*". However, a person who fails to comply with an order of the court made under the substituted provisions can, of course, be attached for contempt in the normal way.

119. The wide powers of investigation afforded to inspectors are augmented by the significant adverse consequences which may flow from such an investigation.

120. Under section 758 of the Act, the inspectors may, and if directed by the court shall, make interim reports in the course of the investigation and a final report at the conclusion of the investigation. Section 759 provides wide powers to the courts to distribute such reports "*in such form and manner as it thinks fit*".

121. On foot of an inspector's report, the court has wide-ranging powers, and may make such orders as it deems fit in relation to matters arising from the report. Outside of imposing penalties—which would require the court to afford an

[10] *Re Haughey* [1971] I.R. 217.

individual the protections of a criminal trial—there is no qualification on the court's powers.

122. Under section 760(2)(b) of the Act, the court may make an order for the purpose of remedying any disability suffered by a person whose interests were adversely affected by the company's conduct of its affairs, but it must also have regard to the interests of any other person who may be adversely affected by the order.

123. On consideration of the report, a court may order the winding up of a company, of its own motion under section 760(2) of the Act, or on the presentation of a petition by the Authority under section 761 of the Act. However, interestingly, in *Re National Irish Bank Ltd (No.3)* [2004] 4 I.R. 186**,** neither the Director (now, the Authority) nor the inspectors sought the winding up of the bank, despite grave findings in the inspectors' report that the bank had colluded with customers in opening bogus non-resident accounts in order to evade tax and had exacted charges to which they were not entitled from customers. In his judgment, Kelly J. stated that, although consideration should be given to the views of the Director and the inspectors, the final decision on whether a winding-up order should be made in the public interest ultimately rested with the court (§48). Kelly J. further emphasised that the bank had put in place a procedure to correct its past wrongs and thus, it would not be in the public interest to make the order for the winding-up of the company (§47).

124. In *Re Ansbacher (Cayman) Ltd* [2004] 3 I.R. 19**,** the Revenue Commissioners sought an order giving them access to material in the inspectors' possession which would enable them to pursue their investigations into tax evasion by particular individuals. The court was satisfied that the Revenue had been adversely affected by the bank's conduct and would be disabled by the absence of the material, with Finnegan P. granting the order, but confining it to persons named in the report.

VIII Use in other matters of information obtained in investigations leading to appointment of inspectors

125. We have already touched upon section 881 of the Companies Act 2014, whereby an inspector's report is admissible in civil proceedings as presumptively true evidence of the primary facts it finds. In this section, I note some recent caselaw concerning the use in other proceedings, not of an inspector's report, but of material gathered in the course of an investigation leading to the appointment of an inspector. These cases all emerged from the Independent News and Media plc matter.

126. In *Re Independent News and Media plc* [2019] IEHC 467, the applicants (who featured as persons potentially adversely affected by certain conduct of the company) applied to the High Court seeking permission to use documents furnished to them in the proceedings for the purpose of pursuing litigation against the company, and possibly other persons for *inter alia* breach of privacy and data protection rights.

127. Granting the application, Kelly P. had regard to his previous decision in *Roussel v. Farchepro Ltd* [1999] IEHC 78, [1999] 3 I.R. 567, where he held that the courts have discretion, where special circumstances exist, to allow the collateral use of discovered documents in other litigation.

128. The court had a further recent opportunity to clarify the position in *Re Independent News and Media plc* [2020] IEHC 384, where a similar application was made. Simons J. followed the approach of Kelly P. in the decision mentioned above. He had particular regard to the fact that the content of the disputed material was in the public domain and the parties providing the disputed material did not object, concluding at §68 that to grant the order sought was "*in the interests of justice and does not confer any improper litigation advantage on the moving parties*".

IX Conclusion

129. Drawing matters together, we have seen that incorporation and limited liability being significant advantages to the economy and, thereby, to the public, but that they are privileges that are open to abuse and, in consequence, can breed mistrust. Because of the crucial economic function of limited companies, maintenance of public trust and confidence in the system of corporate regulation and governance is a high priority for the State. Hence the need for machinery to investigate possible abuses, dispel rumour and innuendo, and promote high standards of conduct.

130. The appointment of inspectors to investigate and report upon a company is one of the most significant powers available for this purpose. However, it is regarded as a very serious step, not lightly to be taken, and in fact taken, it seems, on only seven occasions since 1990.

131. Historically, the power has developed from one exercisable by a Minister of the Government to one now exercisable by the High Court or, at least in theory, by the Circuit Court in relation to smaller companies.

132. In every case but one in Ireland, inspectors have been appointed at the instigation of the Authority or one of its statutory predecessors—the Director of Corporate Enforcement or a Government Minister. Such applications are frequently preceded by an information-gathering phase, in which the Authority exercises other powers to obtain documents and explanations from officers of a target company, with a view to determining whether a complaint addressed to it appears to be well-founded. This is a prudent approach, recommended by the Jenkins Committee in 1962. The absence of such a private investigation in cases where a third party applies to the court for the appointment of an inspector may make it difficult for the Authority to take a position on the merits of such an application.

133. Where such an investigation has taken place, and its results have been disclosed to the court as part of an application for the appointment of

inspectors, the court may be prepared to allow persons affected by that information to deploy it in other proceedings that they may wish to bring, provided this does not visit an unfairness on other parties.

134. The purpose of an appointment is for the inspectors to find facts. There must, therefore, be facts to be found. If all the relevant answers are already known, appointment of inspectors would not be justified. A paradigm example of where an appointment may be necessary is where an investigation by the Authority reveals conflicts between potential witnesses. As the Authority does not possess the power to take evidence on oath, it may be difficult or impossible for it to resolve such conflicts. By contrast, inspectors are clothed with greater powers in this regard.

135. Where an application is made, the threshold to be surmounted is low. The Authority need prove only that there are circumstances suggesting the existence of certain identified states-of-affairs involving varying types of wrongdoing, whether or not strictly unlawful. However, where the threshold is met, the court retains a discretion as to whether or not to make the appointment. In this regard, the public interest can be expected to weigh heavily.

136. The High Court has recently, and for the first time, granted an application for the appointment of an inspector on an application brought by someone other than the Authority or its predecessors. The advent of this decision means that creditors who have reason to believe they may have been the victims of fraud will need to give consideration to whether it would be more advantageous to seek such an appointment, as against the more traditional remedy of a winding up petition. In this regard, it is potentially significant that the costs of an investigation are to be paid out of the public purse, whereas the costs of an investigation by a liquidator must usually be borne by the creditors of the company concerned. In the case in which the appointment was recently made, no person could be found who was willing to act as a liquidator, due to the parlous state of the company's finances. However, more than €500,000 in costs was incurred in the investigation.

137. If an applicant creditor's suspicions are vindicated by an inspector's report, that report could become a powerful weapon in the creditor's hands, as it would be admissible as evidence in civil proceedings against both the company and others who may have been involved in fraud, and the facts as set out in the report would be taken to be true, unless the defendant could prove otherwise.

138. Thus, the possibility is held out of a creditor going a long way towards proving his case, by virtue of a process in which the public bears most of the expense. While security for costs may be required from an applicant for the appointment of inspectors, the most recent authority suggests that this will rarely be demanded.

139. Once appointed, inspectors enjoy significant powers, including the power to take evidence on oath.

140. It has long been acknowledged that an inspection may have serious consequences for a company that is its object. These include reputational harm from the fact of an application for appointment of inspectors becoming public knowledge and extend to legal and other costs associated with dealing with an investigation. Hence the description by Kelly J. of the power as akin to a sledgehammer. That hammer has only rarely been swung. Whether applicants other than the Authority will now look to swing it more frequently, and whether their targets will be treated as mere nuts, or not, by the courts, remains to be seen.

Neil Steen SC