Neutral Citation: [2014] IEHC 525

THE HIGH COURT

COMMERCIAL

[2012 No. 3279P]

[2013 No. 75 COM]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED AND IRISH NATIONWIDE BUILDING SOCIETY

PLAINTIFFS

AND

JOHN S. PURCELL, DAVID M. J. BROPHY, TERENCE J. COONEY, CORNELIUS P. POWER AND MICHAEL P. WALSH

DEFENDANTS

AND

CENTRAL BANK OF IRELAND

FIRST THIRD PARTY

AND

KPMG (A FIRM)

SECOND THIRD PARTY

JUDGMENT of Mr. Justice Cregan delivered on the 24th day of October, 2014

Introduction

1. This is an application brought by the Central Bank of Ireland (as a third party in these proceedings) seeking the dismissal and/or striking out of the first named defendant's third party statement of claim against the third party. The application to strike out the first named defendant's proceedings is brought pursuant to the inherent jurisdiction of the High Court and/or pursuant to Order 19 rule 27 and/or rule 28 of the Rules of the Superior Courts and/or pursuant to Order 16 rule 8 (3). The grounds upon which the application is brought is that the first named defendant's third party statement of claim discloses no reasonable cause of action against the third party and/or that the claims are frivolous and/or vexatious and/or an abuse of process and/or are bound to fail.

2. The third party and the first defendant have filed numerous affidavits in this application and have also filed legal submissions. The matter was at hearing for four days.

The parties to the proceedings

3. The first named plaintiff (IBRC) is a limited liability company incorporated in the state. IBRC was formally known as Anglo Irish Bank Corporation Ltd but on 7th February, 2013, a special liquidation order was made pursuant to section 4 of the Irish Bank Resolution Corporation Act 2013 for the purposes of winding up IBRC. Kieran Wallace and Eamonn Richardson of KPMG were appointed as joint liquidators of IBRC. As is stated at paragraph 8 of the affidavit of Sean Barton dated 5th June, 2013, (sworn on behalf of the plaintiffs) "In accordance with the provisions of regulation 17 (4) of the European Communities (Reorganisation and Winding up of Credit Institutions (Regulations) 2011, IBRC (in special liquidation) is operating with the consent and under the supervision of the Central Bank of Ireland."

4. The second plaintiff - Irish Nationwide Building Society - is a building society registered under the Building Societies Act 1989 with its registered office at Grand Parade, Dublin 6 within the state. INBS was one of the financial institutions whose debts were guaranteed by the State in September, 2008. Between 2008 and 2010 it suffered financial losses in excess of 6 billion euros arising from bad loans. INBS was effectively nationalised on 31st March, 2010.

5. On 1st July, 2011, the High Court made a transfer order (pursuant to an application by the Minister for Finance) whereby all the assets and liabilities of INBS were transferred by INBS as beneficial owners to IBRC. The assets and liabilities which were transferred to IBRC included all causes of action, that related to any period prior to the transfer time which INBS were entitled to make against any person, in respect of any negligence, or wrongdoing on any ground whatsoever.

6. The first named plaintiff – IBRC – therefore joins in the proceedings as the person entitled, pursuant to the transfer order to prosecute the causes of actions and claims set out in the statement of claim. INBS also joins in the proceedings as a plaintiff to the extent necessary having regard to the terms of the transfer order.

7. The first defendant Mr. Purcell is a company director and he was an executive director of Irish Nationwide Building Society from 30th December, 1994, to 31st March, 2010. In addition Mr. Purcell was Chief Financial Officer (CFO) and secretary of INBS from the 5th May, 1993, to 31st March, 2010.

8. The second named defendant is also the company director and was non executive director of INBS from February, 2006 to April, 2009.

9. The third named defendant was a non executive director of INBS from April, 2001 to June, 2009.

10. The fifth named defendant was chairman of the Board of directors of INBS from May, 2001 to February, 2009 and also a non

executive director from April, 1995 to February, 2009.

11. The proceedings have been discontinued as against the fourth named defendant in the proceedings Dr. Cornelius P. Power.

12. The Central Bank of Ireland was joined to the proceedings as a third party by order of the High Court (Kelly J.) made on 18th November, 2013, on the application of the first named Defendant. Thereafter a third party notice was served dated the 5th December, 2013. An Appearance was entered on behalf of the third party to the third party notice dated 16th December, 2013. The third party Statement of Claim was served on 17th January, 2012.

13. In addition, KPMG, a firm of accountants were joined as another third party in a separate application.

Application to the Commercial List

14. On 5th June, 2013, the plaintiffs made an application to admit the proceedings to the Commercial List of the High Court. On 10th June, 2013, the High Court (Kelly J.) made an order transferring the proceedings to the commercial list. The application to transfer the proceedings to the commercial list was in itself unremarkable. However the grounding affidavit of Sean Barton, a solicitor with McCann Fitzgerald, solicitors for the plaintiffs in these proceedings contained a number of averments which set out the background to the litigation and the background to the application. Some of these averments have a bearing on my judgment in this case and I therefore set out these averments below.

15. At paragraph 19 of his affidavit Mr. Barton states as follows:

> *"It is a particular feature of the plaintiff's claim that an unusual management structure operated in INBS. In particular, it is alleged by the plaintiffs that until his resignation in April 2009, the INBS Board, which at all material times, included each of the defendants, delegated by resolution to the Chief Executive officer, Mr. Fingleton all its powers for the effective management and control of INBS. This included significant responsibility and autonomy in respect of the lending functions and decision making powers of INBS, meaning that there was unusual and excessive concentration of the powers of INBS in the hands of Mr. Fingleton. It is an essential element of the plaintiff's case that this excessive or improper delegation, allied with a lack of effective supervision or control of Mr. Fingleton was in breach of the duties owed by the defendants to INBS. (Emphasis added).*

16. Mr. Barton then sets out in his affidavit that up to the 1990s the INBS loan book was predominantly based on residential lending but that in the early 2000s INBS significantly increased its activity in commercial lending and, in particular, in lending for commercial property development. He also states that a considerable part of the extraordinary losses suffered by INBS arose from huge impairments in its commercial property development lending in the period up to 30th September, 2008. He also stated that these "catastrophic losses and impairments are further particularised in the Statement of Claim by reference to the recent financial statements by INBS, and the significant discounts or "haircuts" applied by NAMA in acquiring distressed loans from INBS." (see paras. 21 and 21 of the affidavit)

17. In paragraph 26 of his affidavit Mr. Barton, (having set out various investigatory work which had been carried out by the Board of INBS and accountants Ernst and Young) continued as follows:

> "Following the further INBS investigation work arising from the preliminary findings, further reports were delivered by Ernst and Young and my firm - to the 2009 - 2011 Board of INBS in the period from February 2011 to June 2011 on lending practices and legacy governances at INBS and on civil liability issues and other matters arising from the INBS investigation. These reports have been shared with the Central Bank on terms that INBS continues to assert privilege over them as against any person other than the Central Bank of Ireland and that the reports remain confidential as among the authors, INBS and the Central Bank of Ireland and they may not be disclosed by any one of those three parties to any other person without the prior written consent of the other two parties. (Emphasis added).

18. Moreover at para. 29 Mr. Barton states as follows:

> *"On 22nd December, 2011 the Central Bank of Ireland commenced an administrative sanctions procedure against INBS pursuant to Part III (c) of the Central Bank Act 1942. I understand that former officers of INBS including the defendants may also be interested in that administrative sanctions procedure which is ongoing. The plaintiffs have co-operated with the Central Bank of Ireland in progressing their procedure. I should alert this court to the fact that these proceedings may need to be managed so as to avoid any conflict (in terms of timing) between steps or events in these proceedings and steps or events scheduled in the Central Bank of Ireland procedure. Having regard to this feature of the proceedings, the Central Bank of Ireland has been put on notice of the present application for entry to the commercial list."*

19. At para. 40 of the affidavit Mr. Barton states as follows:

> *"These proceedings relate to essentially to the manner in which INBS was managed, principally by the defendants and Mr. Fingleton as its Board and also by those, principally Mr. Fingleton, to whom the Board had delegated powers, over the period of years prior to the state guarantee both generally and as reflected in specific lending transactions entered into by INBS. In order to obtain a full understanding of these matters it was necessary to review very significant quantities of documents and information referred to in more detail below, which reflected the governance arrangements in place in INBS in the period up to 2008 and to review in great detail the large number of lending transactions entered into by INBS in the same period. These proceedings, in my view, should be distinguished very clearly from the more conventional breach of contract or tort claim which usually has its focus in a specific transaction or set of events. The nature of this case is that it relates to the management generally of INBS over time and necessarily required the review of a very large number of transactions and sets of events. The scale of material that had to be reviewed was, in my view, of a different order to what would be the case in a more conventional breach of contract or tort claim. In addition to arriving at an understanding of the general corporate governance issues, it was deemed necessary to identify particular transactions in respect of which there are grounds for complaint against the defendants, having regard to the role they played or ought to have played. (Emphasis added).*

20. Again at para. 43 Mr. Barton states as follows:

> *"Additionally, arising from the State's investment in (or rescue of) each of INBS and IBRC, each of the plaintiff has been party to a relationship framework with the Minister for Finance arising from which the Minister must be informed and/or*

consulted about, or the Minister's consent may be required to authorise, certain key decisions including decisions in relation to the prosecution of the present proceedings". (Emphasis added).

The pleadings

21. The statement of claim was delivered on 17th April, 2013. It is a lengthy document running to some 65 pages. It sets out the details of the plaintiffs, the defendants, the functions, powers and duties of the defendants and, at para. 21, deals with the issue of delegation by the Board to the Chief Executive/managing director.

22. Rule 23 (1) of the rules of the INBS provided that the society shall be under the control and management of the Board of directors of the society. Paragraph 21 of the statement of claim pleads that under rule 23 (4) of the rules of the building society, the Board of directors of the building society "shall have power to delegate any of its powers or duties to such committee or committees of the Board or to such senior officials of the society as it thinks fit".

23. Paragraph 22 of the statement of claim provides as follows:

> *"Notwithstanding the provisions of rule 23 (4) it was not within the competence of the Board and the members of the Board could not reasonably have understood it to be within the Board's competence, to delegate its functions in such a manner and/or to such an extent that the society was in reality no longer under the control and management of the Board as required by rule 23 (1) (and by the provisions of the act of 1989 set out above)" (Emphasis added)*

24. It is clear therefore that a central plank of the plaintiffs' case against the defendants is that there was, in effect, a wholly unlawful delegation of powers.

25. Paragraph 23 of the Statement of Claim provides:-

> *"The Board and the defendants as members of the Board owed a duty to the society:*
>
> *a. Not to abdicate or surrender their respective functions and duties as such*
>
> *b. To ensure that the business of the society was under the control and management of the Board at all times in accordance with rule 23 (1)*
>
> *c. Not to make or to allow to continue an excessive delegation of the powers duties discretions and/or authorities of the Board relating to the business of the society to the Chief Executive".*

26. Paragraph 24 of the statement of claim pleads that, where the Board did delegate powers to the Chief Executive, the Board and members of the Board owed a duty to the society to "supervise, review and carefully monitor the exercise by the Chief Executive of same".

27. Paragraph 25 of the statement of claim pleads that the Board and members of the Board of directors remained, at all times, responsible for the acts and omissions of the Chief Executive in the exercise by the Chief Executive of all powers delegated to him by the Board.

28. Paragraph 26 of the statement of claim pleads the three effective delegations by the Board to the Chief Executive, Mr. Fingleton, and given the centrality of this plea to the issues in this application I set it out in full as follows:

> *"At all times material to these proceedings, and for the avoidance of doubt from at the latest 31st March, 1981 until his resignation in April 2009, the Board delegated to the Chief Executive Mr. Fingleton, all its powers for the effective management and control of INBS as particularised hereunder.*
>
> *(a.) By resolution of the Board passed at its meeting on 31st March, 1981 it was resolved that the Board delegate to the Chief Executive all powers necessary*
> *"for the practical, effective and efficient management, promotion and development of the society." The powers delegated included those "to set vary and alter interest rates, these terms and conditions of all loans, whether secured or unsecured, and on all investment and deposit accounts, to review and settle all documentation whether legal or otherwise, to initiate legal action in connection with arrears and in the pursuance and protection of all the societies assets and interests, to make arrangements with individual borrowers, investors and depositors in the normal course of business."*
> *(b.) By resolution of the Board passed at its meeting on 13th December, 1994, it was resolved as follows:*
> *"It was proposed by Mr. Murphy seconded by Mr. Maloney and unanimously agreed that all powers vested in the Board necessary for the effective and efficient management, promotion and development of the society be delegated to the managing director."*
> *(c.) By resolution of the Board passed at its meeting on 25th August, 1997 the resolution of 13th December, 1994 was amended by the replacement of the first paragraph with the following:*
> *"It was agreed that such powers vested in the Board necessary for the practical effective and efficient management promotion and development of the society be formally delegated to the managing director".*

29. Paragraph 27 is the foundation stone of the plaintiffs' case against the defendants. It provides as follows:-

> *"The delegation and/or the continuation and/or failure to revoke the said delegation aforesaid was in breach of the duties of the Board and of the defendants as members of the Board pleaded at para. 23 above and constituted an unlawful and improper abdication by the Board and its members of their respective functions and duties and a serious failure to comply with rule 23 (1)." (Emphasis added).*

30. Paragraph 28 also provides as follows:-

> *"Further, at all material times as aforesaid, contrary to what was appropriate for an institution of its scale and in breach of the duty of the Board and of the defendants as members of the Board pleaded at para. 23, in practice the Chief Executive enjoyed complete (or near complete) autonomy and freedom from oversight by the Board in his conduct of*

the business of the society such that there was unusual and excessive concentration of the powers of the society in the hands of the Chief Executive. The Board (including for the avoidance of doubt the defendants and each of them) failed to take any or any appropriate steps to ensure that the necessary oversight was established or maintained or the concentration of the powers of the society in the hands of the Chief Executive was diluted". (Emphasis added).

31. Paragraph 29 of the statement of claim pleads that in practice the Chief Executive exercised control over and enjoyed very significant responsibility for, the lending functions of the society, including commercial and development lending, without any or any sufficient Board oversight, such that there was unusual and excessive concentration in the hands of the Chief Executive of the decision making power of the society. Furthermore, the Chief Executive made, and was permitted by the Board to make, lending decisions which were the function of the Board and/or sought and obtained retrospective approval for these decisions already made by him.

32. There follows at para. 29 eighteen specific transactions in respect of this allegation.

33. Paragraph 30 of the statement of claim pleads that the Board is legally responsible for the decisions, and actions of the Chief Executive in the exercise of the power delegated to him by the Board.

34. Paragraph 31 of the statement pleads that, although the lending procedures of the building society required a credit committee recommendation and Board approval for all loans of €1m or more, in practice the Chief Executive was able to authorise such loans prior to reference to the credit committee and/or the Board, and did so without any adequate assessment of the loans. It also pleads that "the Board retrospectively approved such loans without any or any adequate consideration of the breach of procedures occasioned by the authorisation of loans prior to Board approval having been obtained".

35. Further paragraphs of the statement of claim pleaded that the defendants owed a duty to INBS to ensure that the building society kept proper accounting records and established and maintained proper systems of control, that the defendants had duties, including fiduciary duties, as directors to INBS, and that the defendants had a duty to exercise reasonable care, skill and diligence in the exercise of their powers and duty.

36. Paragraph 49 in the statement of claim also pleads that the failures and breaches of duty on the part of the defendants caused and contributed to the massive losses sustained by INBS from 2008 onwards.

37. In the prayer to the statement of claim the plaintiffs claim damages for breach of contract, damages for negligence, damages for breach of duty including breach of fiduciary duty and damages for breach of statutory duty and an order directing the repayment by the defendants of all amounts that may be due and owing by them to the plaintiffs. The plaintiffs' claim, although not particularised, was agreed to run to hundreds of millions of euro.

The Defence of the first named defendant

38. It is also important to note certain paragraphs of the Defence of the first named defendant. In particular para. 15 of the Defence pleads as follows:-

"It is admitted that certain powers were formally delegated to the Chief Executive through delegations passed at Board meetings which are pleaded as particulars at para. 26(a), 26(b) and 26(c) of the Statement of Claim. It is denied that there was any wrong on the part of the first named defendant in approving the said delegation. It is expressly pleaded that the power of delegation is provided for in the rules of the Society at rule 23(4) (d). It is further pleaded that the Financial Regulator was fully aware of and approved the delegation which existed to the managing director. The said delegation was considered by the Financial Regulator and amended at its request at the time of its implementation." (Emphasis added)

39. Thus the first named defendant pleads fully that this delegation was done with the full knowledge and consent of the Central Bank.

40. Paragraph 94 of the defence pleads:

"It is denied that the first named defendant failed to exercise and/or adequately monitor or supervise the activities of the Chief Executive in order to secure his compliance with duties owed by him to INBS and with the requirements of the Act."

41. Likewise there is a full denial that there was any negligence, gross negligence, breach of duty, breach of fiduciary duty or breach of contract by the first named defendant.

42. Likewise at para. 101 there is a plea that the losses sustained by INBS were caused by the acts and/or omissions of the Regulator, the Central Bank and the Society's auditors KPMG.

Replies to particulars

43. The plaintiffs raised a notice for particulars arising out of the defence of the first named defendant on 11th November, 2013. The first defendant replied to these notice for particulars. Certain of these replies to particulars are also relevant to the first named defendant's defence in these proceedings.

44. The following are of most relevance.

1. Arising out of para. 15

(b) When did the Financial Regulator allegedly approve the delegation to the Managing Director and how and by whom was this approval communicated?

This is a matter for evidence.

Without prejudice to the foregoing, the Central Bank approved of the delegation as in 1997 at the latest [sic]. The Central Bank added a rider to the 1997 amendment to the delegation.

(c) In what respect was the delegation amended in line with a request from the Financial Regulator and how and

by whom was that request communicated to INBS?
The Central Bank requested the addition of a rider in the following terms:

"It was agreed that it be formally noted that policy decisions in the following areas are reserved for the Board.

(a) Acquisition and disposal of assets of the Society or its subsidiaries that are material to it

(b) Investment, capital projects, Authority levels, Treasury and Risk Management Policies.

At No. 9:

Arising out of para. 101:

(a) Furnish particulars of all acts and omissions of the Regulator alleged to have cause loss to INBS?

The first named defendant will particularise the relevant acts and omissions on the part of the Regulator and the Central Bank after he has been furnished with discovery. Without prejudice to the foregoing the Central Bank of Ireland has been joined as third party to these proceedings and the particulars pleaded against the Central Bank of Ireland at present are:

1. The Central Bank of Ireland considered and approved the specific wording of the delegation passed at a meeting of the Board of INBS on the 25th August 1997.

2. The Central Bank of Ireland (including the former office of the Financial Regulator) continued their approval of the delegation, and never revoked same.

3. The Central Bank of Ireland (including the former office of the Financial Regulator) its servants or agents acted with reckless disregard as to the consequences of their continuation of the said delegation and their failure to revoke same.

45. In the Reply to the defence of the first defendant, the plaintiffs plead at para. 5 inter alia:

"It is not admitted that the Financial Regulator was fully aware of or approved the delegation to the Chief Executive nor is it admitted that the delegation was considered by the Financial Regulator and amended at its request at the time of its implementation. Further, the plaintiffs deny that the Regulator was fully aware of the manner in which the delegation operated in practice. Further and in any event the plaintiffs plead that, even if the matter as pleaded in para. 15 as regards the Financial Regulator are correct (which is not admitted) the same would not constitute a defence to the plaintiffs claim or mitigate or dilute the first named defendant's liability to the plaintiffs".

Third party statement of claim
46. In the third party's statement of claim, the first defendant pleads as follows at para. 10:

"10. A central plank of the plaintiffs' claim pleaded in the statement of claim (and in particular paras. 21 – 32 thereof) is that the delegation of certain powers, duties, discretions and/or authorities of the Board of the Irish Nationwide Building Society to the Chief Executive of the Society and/or continuation and/or failure to revoke the delegation aforesaid was in breach of the duties of the Board and of the defendants (including the first named defendant) as members of the Board. Further it is pleaded that the delegation constituted an unlawful and improper abdication by the Board and its members of their respective functions and duties and a serious failure to comply with rule 23(1) of the rules of the Building Society."

47. Paragraph 11 pleads that the initial delegation of powers to the Chief Executive of the Society occurred in 1981 when the Board passed a resolution to delegate significant powers to the Chief Executive.

48. Paragraph 12 pleads that there was a further resolution of the Board on 13th December, 1994, delegating all powers vested in the Board necessary for the effective and efficient management, promotion and development of the Society to the managing director.

49. Paragraph 13 pleads that this 1994 resolution was amended on 13th December, 1997, and was reworded.

50. Paragraph 14 pleads that a rider or amendment to the said delegation was approved by the Board on 25th August, 1997.

51. Paragraph 19 pleads that INBS was at all material times regulated by the Central Bank who had a duty to maintain proper and effective regulation of the Society and that the specific powers and duties of the Central Bank were set out at para. 37 of the Building Societies Act 1989.

52. In paragraph 21, the first defendant pleads that the Central Bank owed a duty of care to the first named defendant, so that any approval and/or assent communicated by the Central Bank to INBS in respect of any act or decision of the Board of the Society was at all material times appropriate and that the relevant act and/or decision of the Board was neither unlawful and/or improper.

53. Paragraph 22 of the third party statement of claim pleads that:

(a) That if the plaintiffs succeed in their claim against the first named defendant in respect of the delegation of powers by the Board to the Chief Executive, the Central Bank is in turn liable to indemnify and/or contribute with respect to all costs, losses, damages and expenses payable to the plaintiffs by the first named defendant….

(b) The Third Party is liable for the losses and damage on the basis that it is a concurrent wrongdoer in the alleged losses suffered by the plaintiffs and on the basis that such loss, damage, inconvenience and expense were caused by the negligence, breach of duty and misfeasance in public office on the part of the third party.

54. The third party's statement of claim then sets out the particulars of negligence, breach of duty and misfeasance in public office of the Central Bank. These particulars include:

1. At para. 23 - that the nature and scope of the wording of the delegation were approved by the Central Bank.

2. At para. 24 - that the Central Bank wanted a rider to the delegation and furnished the wording of this rider which was approved by the Board and included in the minutes of the meeting dated the 25th August, 1997.

3. That at all material times from 1997 onwards, the Central Bank were aware of, and approved, the delegation of powers to the Chief Executive.

4. That the delegation of powers by the Board was the subject of correspondence between the Chief Executive and the Financial Regulator in 2006 and 2007 wherein the Financial Regulator accepted the wide-ranging scope of the delegation.

5. That the delegation was authorised and approved by the Central Bank of Ireland and the continuation of the delegation was approved by the Central Bank and subsequently by the Financial Regulator. It is also pleaded that the approval for the delegation was never revoked by the Central Bank or the Financial Regulator.

6. That the Central Bank was at all material times aware that, in certain circumstances, approval of loans by the Board were given retrospectively by the Board.

7. That the Central Bank acted with reckless disregard as to the consequences of its continuation of the said delegation and their failure to revoke same.

8. That the Central Bank were aware that the continuation of the delegation of powers to the Chief Executive including the approval of loans was likely to cause loss to the society.

In the prayer of the first defendant's claims against the third party, he pleads:-

1. A declaration that the third party must indemnify and/or provide a contribution in relation to any liability and/or damages which the first defendant must discharge to the plaintiffs.

2. Damages for negligence, breach of duty including breach of statutory duty and misfeasance in public office.

(An issue arose as to whether such damages for negligence would arise as a breach of a duty to the first defendant separately).

Affidavit of John Purcell grounding the application to serve a third party notice.
55. Mr. Purcell swore an affidavit on 13th November, 2013, grounding his application to issue and serve the third party notice. He refers to the fact, (in para. 16 of his affidavit) that the delegation of powers by the Board to the Chief Executive constitutes a central plank of the plaintiffs' claim. His evidence is:

(a) The first delegation of powers to the Chief Executive by the Board occurred in 1981.

(b) The second delegation of powers by the Board to the Chief Executive occurred on 13th December, 1994.

(c) That the Central Bank wanted an amendment to the Board resolution delegating powers to the Chief Executive and that the Central Bank considered and approved a rider or amendment to the Board resolution delegating these powers;

(d) That the Central Bank rider was approved by the Board and included in the minutes of the Board meeting dated 25th August, 1997.

(e) The 1994 delegation was amended by resolution of the Board dated 13th December, 1997.

(f) Thus he says that the Central Bank had full knowledge and consent of this delegation of powers to the Chief Executive and indeed were intimately involved in the wording of the delegation and approving the wording of same.

56. He states at para. 22 of his affidavit that neither the Central Bank nor the Financial Regulator ever sought a revocation of the delegation.

57. At paragraph 23 he also states as follows:

"The delegation was the subject of correspondence between the Chief Executive of INBS and the Financial Regulator in the period between 20th November, 2006 to 14th March, 2007.

58. At paragraph 24 he states "*Whilst the Regulator expressed his wish that the delegation be monitored and that risk tolerance controls be in place, there was no attempt whatsoever by the regulator to revoke the delegation. The delegation continued in being until Mr. Fingleton's resignation from the Society in April, 2009*.

59. At para. 25 he stated:-

"I say and believe and am advised that the Central Bank had a duty to INBS to maintain proper and effective supervision and regulation of the society. If the plaintiffs succeed in their plea that the delegation was an unlawful and improper abdication of powers and/or in breach of duty then, through their continued approval of the delegation, the Central Bank failed in their duty to maintain proper and effective supervision of INBS. I am entitled to indemnity and contribution for the Central Bank for any loss or damage arising from such finding.

26. Further and/or in the alternative, if the plaintiffs' case against me succeeds I am entitled to indemnity and contribution from the Central Bank because had the Central Bank not approved the delegation or had they revoked the delegation, loss or damage to INBS would have been avoided or substantially reduced.

27. I say and believe and I am advised further that if the plaintiffs are proven correct in their case about the delegation, the Central Bank of Ireland, its servants or agents acted with reckless disregard as to the consequences of their failure to maintain proper and effective supervision of INBS insofar as their approval for the delegation continued unrevoked over a period of 12 years.

28. I say and believe and am advised that my claim for indemnity and contribution from the Central Bank arises from the same facts as the facts giving rise to the Plaintiffs' claim against me in respect of the delegation pleaded at para. 22 – 31 of the Statement of Claim and damages claimed elsewhere in the body of the Statement of Claim."

Correspondence between the Financial Regulator and the INBS.

60. Mr. Purcell in his affidavit also referred to certain correspondence which took place between the Central Bank/Financial Regulator and the INBS. It appears from this correspondence that the Central Bank/Financial Regulator conducted an inspection of INBS in June, 2006. As is stated in the letter from the Financial Regulator dated 20th November, 2006, to Michael Fingleton, Managing Director of INBS:-

"the purpose of the inspection was to conduct a review of the internal audit function, corporate governance procedures and, to a limited extent, the credit review function. A number of issues identified by the inspectors are outlined in the attached schedule together with recommendations in relation to these issues."

61. In the schedule to the letter at page seven under the heading "Corporate Governance" it is stated as follows:

"Board

- M9 – Delegation of powers by the Board

The inspectors noted the Board extract dated 4th January, 2006 which details Board resolutions dated 13th December, 1994 and 25th August, 1997 dealing with the delegation of powers by the Board to the managing director.

. . . . . .

Because the powers delegated only include certain specified powers, it is not clear to the inspectors as to the extent of the powers delegated. In addition it is not clear from a review of the Board minutes as to the monitoring by the Board of the exercise of such powers.

Recommendations.

The society shall confirm the following:

(1) Whether there is a list of delegated powers other than those set out in the Board extract dated 4th January, 2006. If applicable provide the Financial Regulator with this list.

(2) Whether the Board monitors the exercise by the managing director of powers delegated by the Board and if so how this is achieved.

(3) Whether the Board has set a risk tolerance in relation to the powers delegated to it by the managing director."

62. On 31st January, 2007, Michael Fingleton on behalf of the INBS replied to the Financial Regulator. On the issue of corporate governance and delegation of powers by the Board Mr. Fingleton stated as follows:

"Corporate Governance.

Delegation of Powers by the Board.

The resolution dated 25th August, 1997 delegated "powers vested in the Board necessary for the practical effective and efficient management promotion and development of the society." The powers delegated are not limited to the powers set out in the second sentence of the resolution.

The memorandum and rules and the mortgage deed require that many decisions, authorisations and variations in agreements be determined by the Board. In order to ensure that the Society, in the event of it being challenged legally, is in compliance with these requirements, the Board decided to delegate such powers, duties, discretions and authorisations relating to the management of the society to the managing director. This delegation relates to the practical day to day administration of the society.

Other than what is set out in the Resolution, the Memorandum and Rules and the mortgage deed, there is no listing of delegated powers. As the delegation relates to practical day to day matters there is no separate monitoring or setting of risk tolerance".

63. On 14th March, 2007, the Central Bank/Financial Regulator replied to Mr. Fingleton and at page 4 of the letter dealing with the issue of delegation of powers by the Board stated as follows:

"Delegation of powers by the Board.

The Financial Regulator would expect the Board of the society:

• To monitor the powers delegated to the managing director on a periodic basis.

• To set risk tolerance levels. In particular the Financial Regulator would expect the Board to set risk tolerance levels for the risk to which it is exposed.

Affidavit of John Purcell dated 13th March, 2014

64. Mr. John Purcell, the first defendant, swore a replying affidavit in this application, dated 13th March, 2014.

65. At para. 24 of his affidavit, having set out his role within the Building Society, he stated that during his 24 years with INBS *"I was*

in almost weekly contact with the Central Bank and subsequently, the Financial Regulator's Office from 1989".

66. At para. 31 he states that he is currently the subject of an ongoing administrative sanction procedure under the auspices of the Central Bank as prescribed by s. 33 of the Central Bank Act. He says that "*there is a very significant degree of overlap between the issues being determined in these proceedings and the subject matter of the administrative sanction procedure*".

67. At para. 33, Mr. Purcell states as follows

> "*The Central Bank/Financial Regulator's role in overseeing the activities of the Board of INBS can be described as paternalistic in nature. I was required to correspond with and contact the Central Bank and subsequently the Financial Services Regulatory Authority to ensure compliance with the wide variety of issues that arose on a regular basis. If there was uncertainty regarding any aspect of the Society's functions, we sought and followed guidance from the Central Bank/Financial Regulator. Furthermore, the Central Bank did not hesitate to give directions. For example, in 2006, I recollect the Financial Regulator requiring the Board to have a contest for the election of a non-executive director, despite the fact that this was not required by the rules of the Society or the 1989 Act.*

68. At para. 34 of his affidavit, he refers to the fact that "*a central plank of the plaintiffs' lengthy statement of claim is that the delegation of certain powers and functions of the Board of INBS to the Chief Executive, Michael Fingleton, constituted "unlawful and improper abdication of powers by the Board*".

69. At para. 35, he says "*I describe the pleas regarding the delegation of power to the Chief Executive as being 'a central plank' to the plaintiff's claim because many of the allegations in the statement of claim (particularly relating to lending) flow from the alleged wrongful delegation of power to the Chief Executive*.

70. At para. 36 he notes that in his defence he has denied that this delegation constituted an unlawful and improper abdication of powers and he denies any breach of duty.

71. At paras. 38 - 40 of his affidavit, he says the delegation of powers to the Chief Executive was envisaged by Rule 23(4)(d) of the INBS Rules which stated that:-

> *"The Board shall have power from time to time to delegate any of its powers, duties, discretions and authorities relating to the business of the society to such committees, committees consisting of such member or members of the Board and/or such senior officials of the society as it thinks fit."*
>
> *39. As set out above, it was the function of the Central Bank to approve the rules of the society, to approve amendments to the rules, to prescribe changes and to prohibit restrictions on a society in respect of how it operates. (sic)*
>
> *"40. In that context and in the context of the overall relationship between the Board and the Central Bank, the Board was involved in approving and amending the delegation of powers to the Chief Executive."*

72. He also refers at para. 44 to the Financial Regulator's final letter of 14th March, 2007, but he goes on to state at paras. 45 - 50 of his affidavit as follows:-

> *"45. The Financial Regulator's Office had expressed some concerns historically regarding the 'overdependence' of the society on the Chief Executive. Notwithstanding this, there was never any suggestion by the Central Bank or the Regulator that the delegation of powers to the Chief Executive was either unlawful or improper or that it ought to be reviewed, amended or revoked.*
>
> *46. As far as I was concerned, the delegation was for the effective day to day management of the society and the Central Bank.[sic] Any concerns I might have had regarding the delegation were satisfied by the approval given to it by the Central Bank. I relied on their guidance with regard to the implementation of the rules of the society. (Emphasis added).*
>
> *47. As is pleaded at para. 28 of the third party statement of claim, the Central Bank/Financial Regulator were aware that in certain prescribed circumstances, the Board of INBS retrospectively approved loans. This was made clear in various reports furnished to the Central Bank.*
>
> *48. Furthermore, the Central Bank was fully aware of the manner in which the society shifted focus from home mortgage lending to commercial lending over time. There is no suggestion of the Central Bank not being kept up to date. In fact, the Central Bank/Financial Regulator was more fully informed as to the nature and extent of lending at INBS than it might have been with regard to other institutions. This was because of the proposed demutualization of the society which required extremely detailed due diligence in 2006/2007.*
>
> *49. Insofar as the Central Bank had concerns about any 'overdependence' the society might have had on the Chief Executive, it was open to the Central Bank to request a revocation to the delegation or an amendment to the delegation. They never did.*
>
> *50. If the plaintiff's case in respect of the delegation is ultimately proven, and there is any finding of liability against me in respect of the delegation, I am advised that the third party has a liability to the plaintiffs [as] a concurrent wrongdoer and they have a liability to me in negligence."(Emphasis added).*

73. At para. 52, Mr. Purcell states that it is most certainly arguable at the trial of the action that the Central Bank owed a duty of care to INBS.

74. At para. 53, Mr. Purcell refers to the comprehensive defence which has been entered on his behalf to the plaintiffs' claim and states that, without prejudice to that defence, in the event that he is found liable for any loss to the society arising out of or in connection with the delegation, that the Central Bank bears responsibility to the plaintiffs. He states at para. 54 that the third party is a concurrent wrongdoer within the meaning of s. 12 of the Civil Liability Act 1961.

75. Mr. Paschal Finn, who swore an affidavit on behalf of the Central Bank, sought to rely on the fact that the plaintiffs had not

joined the Central Bank as a co-defendant. The Central Bank sought to argue from that that this was because the plaintiffs did not believe that Central Bank owed any duty to the Building Society directly. However, Mr. Purcell in reply submits that no significance whatsoever ought to attach to the decision of the plaintiffs not to join the Central Bank as a co-defendant because IBRC, INBS and the Central Bank are now all State bodies of one sort or another and therefore it would be most unusual for one State body to issue proceedings against another. Mr. Purcell also states that these proceedings appear to arise directly from reports commissioned both by the Central Bank and the INBS together. At para. 59, he states:-

> *"To some extent at least the Central Bank of Ireland and the plaintiffs have been acting in unison in bringing about these proceedings. I am not privy to the full extent of communication and co-operation between the Central Bank and the plaintiffs (including the terms of any formal agreement between them)."*

76. At para. 58 of his affidavit, he sets out the various points at which the plaintiffs and the Central Bank have apparently co-operated in relation to the investigation into INBS and the taking of these proceedings.

77. Mr. Purcell also deals with his allegation that the Central Bank owes a duty of care to him and states that at para. 75:-

> *"75. Specifically I was entitled to rely on the fact that the Central Bank approved, amended and never revoked the delegation as being a representation to the effect that the delegation was neither unlawful nor improper. Given the nature of my relationship with the Central Bank I had an entitlement to rely on the imprimatur of the Central Bank for the delegation and they owed [a duty] of care as regulator not to approve an act of mine which might be subsequently be found to be unlawful. The fact that the Central Bank involved itself in the wording of the delegation cannot be ignored.*
>
> *76. In the premises I say, believe and am advised that the Central Bank owed me a duty of care in the particular circumstances described above and insofar as any finding is made against me personally arising from or in connection with the delegation in these proceedings, I am entitled to an indemnity and/or contribution from the Central Bank in respect of any award of damages relating to same."*

78. At para. 81, he states:-

> *"The plain fact is that one state body is seeking to hold me wholly liable for the act for which another state body bears responsibility. This constitutes in effect double or enhanced claim on the part of the state against me. I am advised that as a matter of law it is neither proportionate nor fair and this will be fully addressed in legal submissions".*
>
> *82 "The purported reliance by the third party on the immunity must be further tarnished by the collusion and co-operation between the Central Bank and INBS by acting in unison in preparing the ground work to bring these proceedings and the Central Bank's own administrative sanction procedure against me".*
>
> *83. "I am advised that the purpose of the immunity is to afford protection to the State and the Central Bank in respect of losses sustained by third parties. It cannot be permitted to be used to enable one state body to claim damages against an individual or person arising from a claim for which the body relying on the immunity also bears responsibility. In this case the IBRC being an arm of the state is suing me for alleged losses which prima facie can be said to have been caused by the approval of the delegation of the Central Bank (another arm of the state)."*

The Nyberg Report.

79. Various sections of the Nyberg report were also opened to the Court. At para. 2.4.6 Nyberg states:

> *2.4.6. "INBS business model during the period was unique. Earlier INBS had grown modestly over a number of years as a provider of residential mortgages. The Building Societies Act 1989 however empowered building societies to make loans for, inter alia, residential housing development. Subsequently INBS entered the development finance market where interest margins and fees were greater and consequently the business was deemed to be more profitable……"*
>
> *2.4.7. "There is no evidence of the Board having approved a formal business model or strategy during this period…..Notwithstanding this, it was commercial property lending rather than residential mortgages that showed significant growth over the period. By the end of the period no less than 85% of its loan book comprised commercial property lending".*
>
> *2.4.9. "This business model was in principle and in practice risky because of the planning permission risks involved and because of the reliance on the refinancing of borrowers by other banks."*
>
> *2.5.9. "INBS operated with a very flat organisational structure and had a relatively small number of staff responsible for the large commercial loan book. The managing director had been given extraordinary powers by the Board and many staff reported directly to him. In August 1997 the Board had formally delegated its powers for the practical effective and efficient management promotion and development of the bank to the MD. This delegation of powers was most unusual given its vague and general formulation. Indeed it is not immediately apparent what the limits to this empowerment were."*
>
> *2.5.10. "Though INBS had an asset and liability committee and an audit committee it operated without a number of other standard Boards of committees (risk or nominations committees.)Moreover there were functional inconsistencies in the operation of the committees that were in place. Often basic procedural requirements for the operation of these committees such as terms of reference were only put in place following protracted representations from the Financial Regulator".*
>
> *2.5.11. "INBS essentially appears to have attempted to manage risk through its choice of trusted borrowers and correctly identifying profitable property development projects. Therefore its risk of credit functions do not appear to have been effective in any traditional sense. For instance the credit committee was populated at times primarily by the lenders who should normally be challenged by such a committee. INBS also operated without a head of commercial lending and a CRO for most of the period. The functions that did exist lacked independence as they all reported directly to the MD"*

2.5.12. The Board had only three non executive directors for most of the period. Rotation was modest and Board members had little practical banking experience. Despite this they were responsible for assessing virtually all large commercial loan proposals; though documentation was limited few proposals were apparently ever refused. The INBS NEDs nevertheless seemed to have accepted the unique method used to assess manage and monitor risks. The frequent requests from the FR to improve governance were noted but did not for various reasons, lead to much improvement. Great comfort appears to have been taken by the NEDs from the past profitable activity of INBS. Past performance seems to have been taken as a sign that governance (and risk) on the whole was appropriate".

80. At para. 5.3.3 under the heading the "The Financial Regulator" and under "Findings" the Nyberg Report found as follows:-

"Provided the appropriate structures and processes were in place, the FR's approach was to trust bank leadership to make proper and prudent decisions. However even when problems were identified and remarked upon, the FR did not subsequently ensure that sufficient corrective action was taken. Thus even insightful and critical investigation reports tended to have little impact on banking practices. Furthermore, readily available information on, for instance, sector or borrower concentrations was not sufficiently critically analyzed by the FR. Even if it were accepted that the FR was significantly under resourced throughout the period, this would not explain why available information was not acted upon. (Emphasis added).

5.3.4. It seems remarkable that the FR in practice accepted the severe governance problems in INBS. Allowing this bank to continue operations without major reforms or sanctions must, on the part of the FR, have reflected either a reluctance to pursue legal action or a profound trust in bank management and the Board.

5.3.5. The Commission is aware of the view that the FR did not have sufficient powers to intervene. This view is not persuasive given that the FR could have acted in concert with the Central Bank and ideally though perhaps unrealistically with government support. The real problem was not lack of powers but lack of scepticism and the appetite to prosecute challenges" (Emphasis added).

Central Bank
"The CB chose to rely on the FR appropriately handling individual banks stability issues much as the FR in turn chose to trust bank leadership. By implication, unless there were problems in the individual banks, there could not be major stability issues in the system as a whole. The Financial Stability Report (FSR) was constrained to present benign conclusions with a number of almost routine warnings voiced in the text itself. Simultaneously macro economic data as signalling the emergence of the two key risks – growing dependence on foreign funding and the concentration of bank lending in the property sector – did not appear to have caused acute concern."

5.3.7 "At least at policy level, the CB seems not to have sufficiently appreciated the possibility that, while each bank was following a strategy that made sense, in the aggregate, when followed by all banks, this strategy could have serious consequences for overall financial stability. This was a classic macro economic fallacy that must have been recognised in the CB and it remains unclear why it was not appreciated at senior levels there. However there are signs that a hierarchical culture, with elements of self censorship at various levels, developed in the CB. Of course this eventually made it even harder to address the increasing instabilities in the financial market."

81. Mr. Finn for the Central Bank swore a replying affidavit in which he took issue with many of the points made by Mr. Purcell in his affidavit. In particular he stated at para.12 of his affidavit that - for the purposes of this application only - he did not propose to contest the factual account which Mr. Purcell had given of the issue about the Central Bank involvement in the delegation of powers by the Board to the Chief Executive, but that it was the Central Bank's case that the factual background as explained by Mr. Purcell was not accurate and represented only a part of the story.

82. It is in the light of these pleadings and this affidavit evidence that I must consider the application to strike out the proceedings against the Central Bank.

The principles relevant to a strike out application
83. The principles which are relevant to a strike out application are agreed between the parties. The relevant principles can be summarised as follows:

1. The Court has jurisdiction pursuant to Order 19 Rule 28 and also pursuant to its inherent jurisdiction to strike out proceedings if they are bound to fail.

2. In considering an application to strike out proceedings pursuant to its inherent jurisdiction the Court is not limited to considering the pleadings of the parties but is free to consider evidence on affidavit relating to the issues in the case (per Costello J. in *Barry v. Buckley* [1981] IR 306).

3. This jurisdiction to strike out proceedings is one to be "exercised sparingly and only in clear cases". (See Costello J. in *Barry v. Buckley* [1981] IR 306).

4. Moreover as McCarthy J. stated in Sun Fat Chan v. Osseous Ltd [1992] 1 IR 425 "Generally the High Court should be slow to entertain an application of this kind".

5. In addition as was stated by Keane J. in *Lac Minerals v. Chevron Corporation* [1995] 1 I.L.R.M. 161 (High Court, 6th August, 1990) (and quoted with approval by the Supreme Court) in *Supermacs Ireland Ltd v. Katesan (Naas) Ltd* [2000] 4 I.R. 273 "*a judge in considering an application to strike out or dismiss a claim must be confident that the plaintiff's claim cannot succeed no matter what might arise on discovery or at the trial of the action*."

6. If the pleadings can be amended in such a manner as to save the action then the proceedings should not be dismissed (see McCarthy J. in *Sun Fat Chan v. Osseous Ltd*).

7. The Court can only exercise a jurisdiction to strike out a claim on the basis that "on admitted facts it cannot succeed" (per McCarthy J. in *Sun Fat Chan v. Osseous Ltd*).

8. The Court in considering whether to strike out a claim "*must treat the plaintiff's claim at its high water mark*" (per Clarke J. in *McCourt v. Tiernan* [2005] IEHC 268.

9. The burden of proof lies on the defendant to establish that the plaintiff's claim is bound to fail. (See *Salthill Properties Ltd v. Royal Bank of Scotland* [2009] IEHC 207)

10. The Court should not require a plaintiff to be in a position to show a *prima facie* case, merely a stateable case, in an application to strike out. (See Clarke J. in *Salthill Properties Ltd v. Royal Bank of Scotland*.)

84. Mr. Barniville S.C. for the Central Bank submitted that the legal principles which the court has to consider in an application to strike out a third party statement of claim were similar to the principles which the court has to consider in an application to strike out a statement of claim on the part of a plaintiff. Whilst I think that proposition is broadly speaking true, there is however an important point of distinction between the two applications which is of relevance in this case. This is that in a more usual application to strike out a claim, the plaintiff maintains that it has suffered a wrong by virtue of the actions of the defendant. By contrast, in a third party claim for indemnity and/or contribution the defendant is not claiming that he has suffered a wrong but rather that the third party owes a duty to the plaintiff and that the defendant and third party are concurrent wrongdoers in respect of the plaintiff.

Statutory interpretation in a strike out application
85. Another issue which arose in this case is that if the question at issue is one of statutory interpretation, and if there are two possible interpretations of the statute, the question arises as to which interpretation the court should consider in an application to strike out a claim.

86. In my view the answer to that question is that if the statute admits of more than one interpretation then it should be interpreted in a manner which assists the plaintiffs' case. This is because if there is an interpretation of the statute under which the plaintiffs have a case, then the plaintiffs' case is clearly stateable and is not bound to fail. It is then a matter for the trial judge, having heard all the evidence and all the legal submissions on the case, to consider whether the plaintiffs' interpretation of the statute is correct.

Review of authorities
87. The essential issues in this application are whether the Central Bank owes a statutory duty to building societies (such as INBS) and/or directors of building societies and whether a building society such as INBS (anad its directors) have a cause of action for negligent breach of statutory duty against the Central Bank.

88. Before considering these issues, I turn to a review of the authorities and the principles which apply to a consideration of these issues.

89. Counsel for the Central Bank sought to lay considerable reliance on *Pine Valley Developments Ltd & Ors v. The Minister for the Environment & Ors.* [1987] IR 23. In that case the Minister for the Environment granted outline planning permission to a Mr. Patrick Thornton on certain lands. The plaintiff then purchased these lands from Mr. Thornton together with the benefit of the outline planning permission. In 1980 the County Council refused to grant approval for the development in the terms of the outline planning permission. The plaintiff sought an order of mandamus in the High Court directing the County Council to consider and adjudicate upon the application for approval within the parameters of the outline planning permission already obtained in respect of the lands. The High Court made a conditional order of *mandamus* and subsequently made an absolute order of *mandamus* on 27th May, 1981. The County Council appealed that decision to the Supreme Court. The Supreme Court reversed the decision of the High Court and set aside the order of *mandamus* on the grounds that the grant of outline planning permission was *ultra vires* and a nullity.

90. Thus the plaintiff having purchased a site with planning permission found that they could not in fact realise the benefit of developing the site with that planning permission. They therefore instituted proceedings against the defendants for damages.

91. It was agreed between the parties in the High Court in the second action that there were certain preliminary questions of law which arose. The matter was heard before McMahon J. in the High Court on the basis of the pleadings and the oral evidence of a senior legal assistant in the department of the environment as no other evidence was given.

92. Finlay C.J. stated, at page 34 of his decision:

> *"The learned trial judge dealing with the evidence given before him by the principal legal advisor to the first defendant stated as follows:*
>
> *"The evidence, which I accept, was that all planning appeals to the Minister were scrutinised by the legal section of the department before a submission to the minister and that when the Local Government (Planning and Development) Act 1963 became law the legal section of the department had advised the planning section that the Minister had power on appeal to allow a development which materially contravened the plan. The legal advisors had not appreciated that s.26 subsection 3 of the Act imposed any conditions precedent to a grant of permission by the Minister in those cases and over the years permission had been granted for many developments of that kind".*

93. Finlay C.J. continued

> *"I am satisfied that these inferences or findings of fact made by the learned trial judge are supported by the evidence given and therefore cannot be disturbed or interfered with by this court".*
>
> *"Having regard to that finding, I am quite satisfied that the learned trial judge was right in reaching the conclusion which he did that the first defendant could not be said to have been negligent or to have been guilty of negligent misrepresentation. If a Minister of State, granted as a persona designata a specific duty and function to make decisions under a statutory code (as occurs in this case), exercises his discretion bona fide, having obtained and followed the legal advice of the permanent legal advisers attached to his department, I cannot see how he could be said to have been negligent if the law eventually proves to be otherwise than they have advised him and if by reason of that he makes an order which is invalid or ultra vires…..I am therefore satisfied that insofar as the plaintiffs have appealed against the learned trial judge's findings, that an action for damages for negligence or for negligent misrepresentation does not and cannot lie, the appeal must fail."(Emphasis added).*

94. Thus the decision in *Pine Valley* must be understood on the facts of that case and in the context of those facts. Although the hearing in the High Court was by way of a trial of a preliminary issue, certain evidence was heard. Having heard that evidence the High Court held - as a fact - that there was no negligence on the part of the Minister. The Supreme Court held that these inferences or findings of fact were supported by the evidence and therefore could not be disturbed or interfered with by the Supreme Court. Having regard to that, the Supreme Court therefore concluded that the High Court judge was correct in reaching the conclusion that

the first defendant could not be said to have been negligent or to have been guilty of negligent misrepresentations.

95. The decision in Pine Valley, therefore, is based on the premise that the minister was not negligent in the exercise of his duties, and that he made a *bona fide* error of law as a result of his which his actions were *ultra vires* and unlawful.

96. The Central Bank also seeks to rely on other passages of Finlay C.J.'s decision at page 35 and 36. Finlay C.J. stated at page 35:-

> *"I am satisfied that this submission also fails. The Minister in making his purported decision to grant an outline planning permission was exercising a decision making power invested in him for the discharge of a public purpose or duty. The statutory duty thus arising must, however in law, be clearly distinguished from the duties imposed by statute on persons or bodies for the specific protection of the rights of individuals which are deemed to be absolute and breach of which may lead to an action for damages." (Emphasis added).*
>
> *"The decision making power or duty purporting to have been exercised on this occasion, in my view, falls, with regard to the question of damages arising from its performance into a quite different category.*
>
> *I would adopt with approval the clear summary contained in the 5th edition of H.W. R. Wade, Administrative Law at page 673 where the learned author states as follows:*
>
> > *"The present position seems to be that administrative action which is ultra vires but not actionable merely as a breach of duty will found an action for damages in any of the following situations:*
> > *(1) If it involves the commission of a recognised tort, such as trespass, false imprisonment or negligence.*
> >
> > *(2) If it is actuated by malice e.g. personal spite or a desire to injure for improper reasons.*
> >
> > *(3) If the authority knows that it does not possess the power which it purports to exercise."*
>
> *I am satisfied that there would not be liability for damages arising under any other heading.*
>
> *It is, of course, conceivable that proof of what was being submitted in this appeal as a gross abuse of the exercise of a statutory power of decision, or proof of a wholly unreasonable exercise of that power, would be taken by a court to be evidence that the authority knew or must have known that it did not possess the power which it purported to exercise."*
>
> *"I am quite satisfied however that the exercise by the defendant of this power in 1977, in the manner in which he did, and having regard to the legal advice which he sought and obtained prior to doing so, could not possibly constitute such a gross abuse of power or wholly unreasonable exercise of power so as to lead to an inference that he was aware that he was exercising a power which he did not possess. The only evidence led in this case quite clearly indicates the contrary and that the Minister was of the belief that he was exercising a power which he possessed."*

97. Thus the decision of the Supreme Court in *Pine Valley* must be distinguished from the present case. Firstly, there was no evidence at all in that case of negligence. In the present case however the first defendant has made an allegation of negligence and breach of duty against the Central Bank and for the purposes of this application those allegations must be regarded as being true.

98. Secondly, I would note, even applying the principles set out in Wade on Administrative Law, approved by Finlay C.J., that the present position is that administrative action will found an action in damages if it involves the commission of a tort of negligence. That is the allegation made by the first defendant here and therefore it follows that the *Pine Valley* case must be distinguished.

99. Thirdly, Counsel for the Central Bank submitted that the legislative scheme in the *Pine Valley* case was similar to the legislative scheme under the Building Societies Act in that both were for the benefit of the public rather than for the benefit - in this case - of building societies. I do not agree with that submission and I will deal with the legislative scheme under the Building Societies Act 1989 later in my judgment.

100. Counsel for the Central Bank also placed considerable reliance on *Glencar Explorations plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84. In *Glencar,* the applicants who were public companies had obtained a number of prospecting licences from the State in respect of certain lands in Co. Mayo. Licences which had been held from the Minister since 1986 had been continuously renewed. Based on these licences, the applicants carried out extensive prospecting. However, Mayo County Council proceeded to ratify a Development Plan which incorporated a ban on mining in respect of extensive tracts of land. This ban affected the applicants. The applicants brought an application to set aside the decision of the County Council. The High Court (Blaney J.). held that the inclusion of the mining ban in the Development Plan was *ultra vires* the respondent's powers and was null and void.

101. Having succeeded in having the mining ban set aside, the applicants then claimed damages from the respondent for *inter alia*, breach of statutory duty, negligence and breach of legitimate expectations. The applicants claimed recovery of all the monies they had expended prior to the imposition of the bans. The High Court dismissed their claim for damages. The applicants appealed to the Supreme Court. The Supreme Court dismissed the appeal. In the course of the judgment in the High Court, (Kelly J.) and in the course of the judgments in the Supreme Court – in particular the judgment of Keane C.J. and Fennelly J.- the court considered the issues of statutory duty.

102. Keane C.J. in the Supreme Court in considering the issue of breach of statutory duty stated at p. 127 of the judgment:

> *"However, apart from that consideration, it seems to me that, in any event, a claim for damages for breach of the statutory duty imposed by s. 19 could not arise in the circumstances of the present case. The applicants, in abandoning their claim based on the tort of misfeasance in public office, have in effect conceded that the respondents, in adopting the mining ban, were not deliberately and dishonestly abusing the powers conferred on them under the 1963 Act. The decision by the respondents to include the mining ban constituted the purported exercise by them of a power vested in them by law for the benefit of the public in general. It was not the fulfilment by them of a duty imposed by statute for the specific protection of particular categories of persons, the breach of which may lead to an action for damages. It follows that the ultra vires exercise of the power in the present case could not of itself provide the basis for an action in damages. This view of the law is authoritatively confirmed by the judgment of Finlay C.J. in Pine Valley Developments .v. Minister for the Environment where he cited with approval the following statement of the law in the Fifth Edition of Wade*

on Administrative Law. [Keane C.J. then set out the relevant quotation and continued]

In the present case, paras. 2 and 3 in the passage cited are clearly not applicable. It will be necessary to consider at a later point in this judgment whether the ultra vires act in the present case involved the commission of the tort of negligence." (Emphasis added)

103. Keane C.J. also considered the issue of whether Mayo County Council owed Glencar a duty of care. After a detailed review of the authorities, he set out the principles which apply in considering whether a duty of care exists and stated at p. 139:

"There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J. at first instance in Ward v. McMaster [1985] 1 I.R. 29, by Brennan J. in Sutherland Shire Council .v. Heyman [1985] 157 CLR 424 and by the House of Lords in Caparo Industries Plc. .v. Dickman [1990] 2 A.C. 605. As Brennan J. pointed out, there is a significant risk that any other approach will result in what he called a 'massive extension of a prima facie duty of care restrained only by undefinable considerations.'"

104. There is one further matter which is of significance in this case and which was adverted to by Keane C.J. in his judgment at p. 141, where he stated as follows:

"In considering whether such a relationship of 'proximity' existed and whether it would be just and reasonable to impose a duty of care on the respondents, I think one also has to bear in mind that this was not a case in which it could reasonably be said that the applicants, in incurring the expense of their prospecting activities, could be said to have been relying on the non-negligent exercise by the respondents of their statutory powers. Their position is in contrast to that of the plaintiffs in both Siney v. Corporation of Dublin [1980] I.R. 400 and Ward .v. McMaster [1985] I.R. 29, where, in each case, they belonged to a category of persons for whose benefit a particular statutory framework had been created and who might reasonably be said to have relied on the local authority in each case taking reasonable care in the exercise of the statutory powers vested in them. The applicants in the present case could rely on no more than a general expectation that the respondents would act in accordance with the law which is not, in my view, sufficient to give rise to the existence of a duty of care." (Emphasis added)

105. The second judgment of the Supreme Court in Glencar was given by Fenelly J. At p. 150 in considering the issue of a breach of statutory duty, Fennelly J. stated:

"A duty imposed by statute on a public body will not be held to create a right to damages for its breach unless it can be shown to have within the scope of its intendment a reasonably identifiable protective purpose and identifiable class intended to benefit." (Emphasis added)

106. As stated by Fennelly J. at p. 151:

"The statutory duty, in the sense of obligation, which is imposed by the Local Government (Planning and Development) Act 1963 on planning authorities is, as the Chief Justice has made clear and as seems to be accepted by the appellants, is to adopt a 'plan indicating development objectives for their area'. However, that is a duty imposed for the benefit of the public and not for the protection of any particular class of the public. Moreover, it is not the duty whose breach is invoked by the applicants. It was, in fact, observed when the Plan was adopted. Their complaint is that the respondent acted ultra vires when it decided to include the mining ban in the Development Plan. The decision to include any particular objective in such a Plan is more appropriately characterised as the exercise of a discretion. Whether the decision fell properly within the range of the statutory powers of the body in question is nihil ad rem. No breach of statutory duty is involved."

107. Fennelly J. also when considering the tort of negligence stated at p. 154:

"The elements of the tort of negligence are the existence of a duty of care, lack of proper care in performing that duty and consequential damage. The lack of care which we commonly call negligence consists in commission or omission of acts. In order to be actionable, the acts or omissions must be such as will reasonably foreseeably cause damage to any person to whom the duty is owed. Mere causation is not enough. As a matter of principle, it seems to me that the failure to exercise due care can only be established by reference to a recognised duty. Then one can know what sorts of act are liable to cause damage for which one is liable."

108. I have also considered the recent decision of the Supreme Court in *Whelan v. AIB* [2014] IESC 3. At para. 64 of his judgment O'Donnell J. stated as follows:

64 In the landmark case of Glencar this court, through the medium of two comprehensive judgments by Keane C.J. and Fennelly J., with which the other members of the court agreed, reviewed and provided clear guidance in relation to some of the most troublesome areas of the modern law of torts. Thus, the judgments considered the law on the existence of a duty of care, the negligence liability of local authorities for failure to use discretionary powers, the tort of misfeasance of public office, the limits of the tort of breach of statutory duty, and the doctrine of legitimate expectations. In his judgment, Keane C.J. reviewed the development of the law on the existence of a duty of care starting with the famous speech of Lord Atkin in Donoghue v. Stevenson [1932] A.C. 562 and that judgment's treatment of the earlier decision of Lord Esher in Le Lievre v. Gould [1893] 1 Q.B. 491. The judgment then traces the development of the law of negligence in England and Ireland and concludes that the oft cited portion of the judgment of McCarthy J. in Ward v. McMaster, which appeared to endorse the approach taken by Lord Wilberforce in Anns v. Merton London Borough Council [1977] 2 All E.R. 118, could not be taken to be part of the ratio of the decision in Glencar and accordingly, could not be considered to foreclose further consideration of the underlying jurisprudence. Thereafter, in what has become the foundation stone of modern jurisprudence on the tort of negligence, Keane C.J. stated:

"There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the

notoriously difficult and elusive test of "proximity" or "neighbourhood" can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J. at first instance in Ward v. McMaster [1985] IR 29, by Brennan J. in Sutherland Shire Council v. Heyman (1985) 157 C.L.R. 424 and by the House of Lords in Caparo plc. V. Dickman [1990] 2 A.C. 605. As Brennan J. pointed out, there is a significant risk that any other approach will result in what he called a 'massive extension of a prima facie duty of care restrained only by undefinable considerations …'" (p. 139)

65 To the casual observer it might appear that there is little difference between an approach which imposes liability where there is prima facie a duty of care unless considerations of policy negative the existence of such a duty, and one which imposes a duty of care only when there is sufficient proximity and considerations of policy make it just and reasonable that such a duty should exist. One approach might seem to be merely the negative image of another and to the mathematically minded, five minus two is exactly the same as one plus two. However, there is and has been in practice a very significant difference between the two which might be illustrated by this case. The formulation in Anns v. Merton London Borough Council and Ward v. McMaster of prima facie liability only negatived by considerations of policy loads the balance heavily in favour of finding liability. Furthermore, it tends to ensure that the general issue as to the existence of a duty of care in such circumstances will be addressed in the particular circumstances of the case and the question becomes, almost imperceptibly, whether a plaintiff who has now been found to have been injured by the carelessness of a person whose acts could foreseeably cause damage to the plaintiff, should nevertheless be deprived of damages."

66. "Second, the just and reasonable test in Glencar is also essentially a policy consideration and it has been determined long ago that it is just and reasonable that a solicitor, or indeed any other professional advisor, should owe a duty of care in such circumstances. It is also important that the question must be approached at that level of abstraction. As Lord Browne-Wilkinson observed in Barrett v. Enfield London Borough Council [2001] 2 A.C. 550 (pp. 559-560);

"… the decision as to whether it is fair, just and reasonable to impose liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered. … Questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company … that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case."

The test does not mandate or permit a consideration of each individual case and whether the imposition of a duty of care, and therefore liability, meets some undefined concept of fairness in the particular case. If that were so, then the law would be no more than the application of individual discretion in different facts or circumstances which might well be decided differently from court to court. In such circumstances, the law of negligence would be little more than the wilderness of single instances criticised by Tennyson."

67. If indeed it is necessary to consider afresh the question of policy then at the appropriate level of abstraction at which that issue must be addressed, it seems clear that the law has consistently and correctly held that an advisor such as a solicitor will owe a duty of care when giving advice to a client on an area within his or her expertise and where the request for the advice, and provision of it, is neither in casual circumstances nor entirely separate from the business then being transacted."

109. A helpful analysis of private law claims for damages against public authorities is set out in the decision of Lord Brown Wilkinson in the House of Lords in *X (minors) v. Bedfordshire County Council* [1995] 2 AC 633. At page 730 Lord Brown stated as follows:

"General Approach

Introductory - Public Law and Private Law.

[…]

Private law claims for damages can be classified into four different categories. viz:

(A) Actions for breach of statutory duty simpliciter (i.e. irrespective of carelessness);

(B) Actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action;

(C) Actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it;

(D) Misfeasance in public office, i.e. the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful;

Category (D) is not in issue in this case. I will consider each of the other categories but I must make it clear that I am not attempting any general statement of the applicable law: rather I am seeking to set out a logical approach to the wide ranging arguments advanced in these appeals.

(A) Breach of statutory duty simpliciter.

This category comprises those cases where the statement of claim alleges simply (a) the statutory duty, (b) a breach of that duty, causing (c) damage to the plaintiff. The cause of action depends neither on proof of any breach of the

plaintiffs' common law rights nor on any allegation of carelessness by the defendant.

The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult.

The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398; Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No.2) [1982] A.C. 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see Groves v. Lord Wimborne [1898] 2 Q.B. 402.

Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, i.e. bookmakers and prisoners: see Cutler's case [1949] A.C. 398; Reg v. Deputy Governor of Parkhurst Prison, Ex Parte Hague [1992] 1 A.C. 58. The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions.

(B) The careless performance of a statutory duty - no common law duty of care.

This category comprises those cases in which the plaintiff alleges (a) the statutory duty and (b) the "negligent" breach of that duty but does not allege that the defendant was under a common law duty of care to the plaintiff. It is the use of the word "negligent" in this context which gives rise to confusion: it is sometimes used to connote mere carelessness (there being no common law duty of care) and sometimes to import the concept of a common law duty of care. In my judgment it is important in considering the authorities to distinguish between the two concepts: as will appear, in my view the careless performance of a statutory duty does not in itself give rise to any cause of action in the absence of either a statutory right of action (Category (A) above) or a common law duty of care (Category (C) Below).

110. Then further at page 734 Lord Browne Wilkinson continued:

"In my judgment the correct view is that in order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient. (Emphasis added).

(C) The common law duty of care

In this category, the claim alleges either that a statutory duty gives rise to a common law duty of care owed to the plaintiff by the defendant to do or refrain from doing a particular act or (more often) that in the course of carrying out a statutory duty the defendant has brought about such a relationship between himself and the plaintiff as to give rise to a duty of care at common law. A further variant is a claim by the plaintiff that, whether or not the authority is itself under a duty of care to the plaintiff, its servant in the course of performing the statutory function was under a common law duty of care for breach of which the authority is vicariously liable.

Mr. Munby, in his reply in the Newham case, invited your Lordships to lay down the general principles applicable in determining the circumstances in which the law would impose a common law duty of care arising from the exercise of statutory powers or duties. I have no doubt that, if possible, this would be most desirable. But I have found it quite impossible either to detect such principle in the wide range of authorities and academic writings to which we were referred or to devise any such principle de novo. The truth of the matter is that statutory duties now exist over such a wide range of diverse activities and take so many different forms that no one principle is capable of being formulated applicable to all cases.

111. Further at page 739 of his decision Lord Browne-Wilkinson continued as follows:

"If the plaintiff's complaint alleges carelessness, not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed (e.g. the running of a school) the question whether or not there is a common law duty of care falls to be decided by applying the usual principles, i.e. those laid down in Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605. 617-618. Was the damage to the plaintiff reasonably foreseeable? Was the relationship between the plaintiff and the defendant sufficiently proximate? Is it just and reasonable to impose a duty of care?

"However the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done. (Emphasis added).

112. The Central Bank also sought to rely on *McMahon & Ors v. Ireland, the Attorney General and the Registrar of Friendly Societies*

[1988] I.L.R.M. 610. The issue Blayney J. had to consider in that case *inter alia* was whether the Registrar of Friendly Societies owed a duty of care to the plaintiff. But as Blayney J. stated at page 613 of the report:-

> *"It seems to me that the first issue that has to be considered is whether the Registrar owed any duty of care to the plaintiffs as, in the absence of such a duty, he could not have any liability in negligence. And this involved considering whether there was a sufficient relationship of proximity or neighbourhood between the Registrar and the prospective depositors as to place the Registrar under a duty of care towards persons who came within that class, as did the plaintiff. It is clear that there was nothing the Registrar could have done to save the plaintiff from loss after she had deposited the money. So the enquiry is limited to the question of whether the Registrar owed her a duty when she was still a prospective or would-be depositor."*

113. Thus it is clear and understandable that the court in that case should have come to the conclusion that the registrar owed no duty of care towards prospective depositors. However that is quite different from the issue here which is whether the Central Bank owed a duty of care to individual building societies.

114. The Central Bank also sought to rely on the similar case of *Yuen Kun Yeu v. Attorney General of Hong Kong* [1987] 3 W.L.R. 776 which was also considered in *McMahon v. Ireland*. The issue which arose in that case was whether the Commissioner of Deposit Taking Companies owed to members of the public who might be minded to deposit their money with deposit taking companies in Hong Kong a duty, in the discharge of its supervisory powers, to exercise reasonable care to see that members of the public did not suffer loss through the affairs of such companies being carried on by their managers in a fraudulent or improvident fashion. The Privy Council held that the court was unable to discern any intention on the part of the Legislature that in considering whether to register or deregister a company the Commissioner should owe any statutory duty to potential depositors.

115. However in my view that case also should be distinguished from the present case. Firstly each regulatory and statutory scheme must be considered separately as they are all different. Secondly the issue of law in that case was whether the Commissioner owed a duty of care toward the depositors not whether he owed a duty of care to each deposit taking institution.

116. Counsel for the Central Bank also sought to rely on *Beatty v. The Rent Tribunal* [2006] 2 I.R. 191. The decision of Fennelly J. in Beatty is of particular interest. At page 206 of his judgment Fennelly J. noted that the underlying principles are:

> 1. that there is a relationship of such proximity between the parties such as to call for the exercise of care by one party towards the other;
>
> 2. that it is reasonably foreseeable that breach of the duty of care will occasion loss to the party to whom the duty is owed; and
>
> 3. that it is just and reasonable that the duty should be imposed.

117. In *Beatty* Fennelly J. held:-

> 1. There was a relationship of proximity between the parties;
>
> 2. It was reasonably foreseeable that breach of the duty of care would occasion loss to the party to whom the duty was owed and;
>
> 3. However it was not just and reasonable that the duty should be imposed.

118. He also noted at page 212:-

> *" The alternative formulation, namely whether it is just and reasonable that liability be imposed, on the other hand, asks whether the duty exists. It is a threshold question. It is also a more flexible formulation. It is more adaptable to the many circumstances presented in litigation and preferable for cases such as the present…..I would emphasise that it is necessary to consider all the relevant circumstances of the case."*

119. In holding that it was not fair and reasonable to impose a duty of care on the Rent Tribunal, Fennelly J. noted that the duty of the Rent Tribunal to determine a fair rent was owed as a matter of public interest to both landlord and tenant and this issue, whilst not determinative, was an important element.

120. Fennelly J. also noted on page 216:

> *" Whether it would be just and reasonable to impose a duty of care sounding in damages for negligence on the respondent should be considered having regard to all the circumstances of the particular relationship."*

121. Fennelly J. concluded at page 216:

> *" Against this background, I believe that two considerations work against the imposition of liability. Firstly, this does not appear to be the sort of case of reliance on the behaviour of the other party which would justify departure from the normal reserve in respect of damages for pure economic loss. In both Siney v. Corporation of Dublin [1980] I.R. 400 and Ward v. McMaster [1988] I.R. 337, the court found that the plaintiff had relied on the local authority to perform a particular function. Secondly, I believe the respondent performs a role akin to that of an arbitrator; the existence of a remedy in damages might tend to compromise the independence of the respondent by inhibiting its judgement in performing its essentially adjudicative role."(Emphasis added)*

122. In my view however neither of these considerations apply in the present case. Indeed the central fact in this case as pleaded by the plaintiffs against the defendants and as pleaded by the first defendant against the third party is that the Central Bank was centrally involved in the delegation of powers to Mr. Fingleton, that it approved the delegation of powers to Mr. Fingleton and that the defendants relied on the Central Bank's guidance and approval.

Summary of principles applicable to alleged breach of statutory duty

123. It appears therefore from this review of the authorities that the following principles can be derived from the case law on breach of statutory duty:

1. The general principle is that there is no private law action for damages for breaches of statutory duty simpliciter (i.e. without negligence) where the statutory duty is being exercised in the discharge of a public purpose or duty (*Pine Valley/Glencar*)

2. However, there is a private law action for damages for breach of a statutory duty simpliciter (i.e. without negligence) if the statutory duty exists for the specific protection of an identifiable class of persons (*Pine Valley /Glencar*)

3. There is a private law action for damages for negligent breach of statutory duty – provided that the statutory body owes a duty of care to the person affected (*Pine Valley/Glencar*).

4. Such a duty of care on the part of the statutory body could arise in two ways:

(1) Under the statutory scheme itself.

(2) Under the common law principles for the establishment of a duty of care.

5. In deciding whether the statutory body owes a duty of care under the statutory scheme the court must consider the statutory scheme as a whole.

6. In deciding whether a duty of care exists under the statutory scheme the court must consider:

(1) Whether it is reasonably foreseeable that the actions or omissions of the statutory body would be likely to cause damage to the plaintiff (i.e. whether the plaintiff is a person who is so closely and directly affected by the statutory body that the defendant ought reasonably to have them in contemplation) (the concepts of reasonable foreseeability and proximity).

(2) Whether it is just and reasonable to impose a duty of care (Keane C.J. in *Glencar*)

7. In considering whether there is a common law duty of care the courts must also consider the same criteria as set out at 6 (1) and (2) above.

124. I turn now to consider the issues in this case in the light of these principles.

The issues in this application.
125. Having considered the authorities above and the submissions of the parties I am of the view that the issues which require to be considered in this application are as follows:

1. Does the Central Bank owe a statutory duty to INBS or to put it another way, does INBS have a stateable cause of action against the Central Bank for breach of a statutory duty simpliciter (i.e. without negligence).

2. Whether the INBS has a stateable cause of action against the Central Bank for negligent breach of a statutory duty.

3. Whether the INBS has a stateable cause of action against the Central Bank for the common law tort of negligence.

4. Whether the Central Bank owes a statutory duty to the directors of Irish Nationwide Building Society or to put it another way: do the directors of INBS have a stateable cause of action against the Central Bank for breach of a statutory duty simpliciter.

5. Whether the first defendant as a director of INBS has a stateable cause of action for negligent breach of statutory duty against the Central Bank.

6. Whether the first defendant has a stateable cause of action against the Central Bank for the common law tort of negligence.

7. Whether the first named defendant's claim for misfeasance is unstateable.

8. Whether the Central Bank's statutory immunity from damages means that there is no stateable cause of action against it.

9. Whether, given the pleadings in the third party statement of claim, the first defendant could plead a separate and free standing cause of action for negligent breach of duty and breach of statutory duty and damages against the Central Bank in an application for a third party indemnity and/or contributions.

126. I turn now to consider each of these issues in turn.

The First Issue: Does the Central Bank owe a statutory duty to the Irish Nationwide Building Society?/ Does INBS have a stateable cause of action against the Central Bank for breach of statutory duty simpliciter (i.e. without negligence).
127. The first issue to be considered in this application is whether the Central Bank owes a statutory duty to the Irish Nationwide Building Society.

128. This issue is in fact whether the INBS has a stateable cause of action against the Central Bank for breach of a statutory duty.

129. The Central Bank submits that it is not liable in a private law action to INBS – on the authority of *Pine Valley* and *Glencar*. The first defendant for its part submits that the INBS does indeed have such a stateable cause of action against the Central Bank.

130. Thus the question which arises in the present case is whether the statutory duty imposed by the Building Societies Act on the Central Bank is a duty which has "within the scope of its intendment a reasonably identifiable protective purpose and an identifiable class intended to benefit" to use the later formulation of Fennelly J. in *Glencar*.

131. In other words, if the statutory duty imposed on the Central Bank was enacted for the benefit of a particular class of persons rather than for the benefit of the general public, the members of that class have a cause of action for breach of that statutory duty.

132. In order to answer the question (of whether the statutory duty imposed on the Central Bank was enacted for the benefit of a particular class of persons i.e. building societies) it is necessary to have regard to the detailed provisions of the Building Societies Act 1989

The Statutory Scheme of the Building Societies Act 1989

133. Part 2 of the Act is headed: "Formation and Authorisation of Building Societies. Section 9(1) of the Act provides:

> *"(1) A building society may have as its objects the undertaking of any of the activities permitted by or under this Act and shall have as one of its objects the raising of funds for making housing loans.*
>
> *(2) A society shall have the powers conferred by or under this Act and any incidental powers that are necessary for the achievement of its objects subject to –*
>
> > *(a) compliance with any requirement that, for a power to be exercisable by a society, it must be adopted by the society; and*
> >
> > *(b) the exercise by the Central Bank of its functions under this Act, the Currency and Central Bank Acts, 1927 to 1971, or regulations made under any such Act."(Emphasis added).*

134. Thus although each building society has the powers conferred under that Act, the exercise of these powers is subject to the exercise by the Central Bank of its functions under the Acts. Thus it is clear that all building societies are placed under the supervision of the Central Bank.

135. Section 10 deals with the formation, registration and incorporation of building societies. Section 10(1) provides that:-

> *"(1) A building society is formed under this Act on compliance by the persons forming it with the requirements of this Act in relation to the formation of a society and is incorporated under this Act on the issue of a certificate of incorporation."*

136. Section 10(3) provides that it is the Central Bank who registers the memorandum and rules of the society and issues the society with the certificate of incorporation. However, the Central Bank will only issue the society with a certificate of incorporation under s. 10(3):

> *(a) If it is satisfied that the memorandum and rules are in conformity with this Act and any regulations made hereunder and that the name of the proposed society is not undesirable.*
>
> *(b) It has no reason to believe that the society will not be authorised under section 17 , and*
>
> *(c) It is satisfied that registration would not be prejudicial to the orderly and proper regulation of building societies generally."*

137. Therefore the Central Bank has a role even in allowing a building society come into existence. The Central Bank must be satisfied that the memorandum and rules of the society are in conformity with the Act and that the registration would not be prejudicial to the orderly and proper regulation of building societies generally.

138. Section 11(2) provides that:-

> *"(2) The Central Bank may, in the interests of the orderly and proper regulation of building societies, by regulation –*
>
> > *(a) make further provision as respects the form and content of the memorandum . . .*
> >
> > *(b) prescribe rules in respect of any of the matters in Part II of the Second Schedule . . . or any of the following matters as respects housing loans or loans of the type referred to in section 6(2)(a) – (i) the prohibiting or restricting of the charging of redemption fees [and various other matters]."*

139. Thus the Central Bank has a statutory power to make further regulations in respect of specific aspects of building societies in the interest of the orderly and proper regulation of building societies. Again this is stated to be "in the interests of the orderly and proper regulation of building societies".

140. Section 13(6) provides that where in the opinion of the Central Bank the society is registered by a name which, in the opinion of the Bank, is undesirable, the Bank may require the society to change its name by giving it notice to that effect.

141. Section 14(1) provides that a building society may alter its memorandum or its rules by special resolution. However, such amendments have to be approved by the Central Bank. Thus under s. 14(3), the Central Bank must be satisfied that the memorandum and rules are in conformity with the Act and any regulations made under the Act, and that the registration would not be prejudicial to the orderly and proper regulation of building societies generally. Again such a provision shows the element of control and supervision by the Central Bank over individual building societies.

142. Section 17(1) deals with the authorisation of a building society to raise funds. It provides that a building society shall not raise funds unless there is in force an authorisation granted by the Central Bank in respect of this matter. Section 17(4) provides that the Central Bank may grant such an authorisation if is it satisfied that:-

> *"(i) the society has qualifying capital of an amount that is not less than the prescribed minimum.*
>
> *(ii) the chairman and members of the board of directors, the chief executive and secretary are each fit and proper persons to hold their respective offices in the society, and*

(iii) the board of directors, with the chief executive and secretary, have the capacity and intention to direct and manage the affairs of the society with prudence, integrity and adequate professional skills."

143. Again this provision shows the degree of regulatory control and supervision exercised by the Central Bank over each individual building society.

144. Section 17(5) provides that the conditions of an authorisation may be revoked, amended or added to where the Bank thinks proper. Section 17(6) provides that the types of conditions which may be imposed by the Central Bank in relation to such an authorisation may require the society to take specified steps with regard to the conduct of the business of any subsidiary or any other associated body and may require the removal of any director or any other officer or may require the society to take certain steps or refrain from adopting or pursuing a particular course of action or to restrict the scope of its business in a particular way.

145. Section 17(8) provides that if a society raises funds without such an authorisation, the Central Bank may apply to the Court for the winding up of the society.

146. Part III sets out the powers of a building society. Section 18 of the Act provides that a building society may raise funds including - with the approval of the Central Bank - funds in a currency other than the currency of the State.

147. Section 18(8) also provides that a building society shall notify the Central Bank of all loans received by it from other societies in such a manner as may be specified by the Bank. Thus the power of a building society to raise funds and borrow money is also, in many respects, subject to the regulatory control of the Central Bank.

148. The ability of a building society to make housing loans is also subject to the approval of the Central Bank in certain circumstances. (See s. 22).

149. Likewise, under s. 23, the ability of a building society to make certain loans is also, subject - in certain circumstances - to the approval of, or limits which may be specified by, the Central Bank. Likewise at s. 28 the ability of a building society to invest in shares in other corporate bodies is also, in certain circumstances subject to the approval or restrictions of the Central Bank. (See s. 28(3)).

150. Section 36 of the Act deals with the exercise of a building society of any of its powers under certain sections of the Act. Section 36(4) provides that, having adopted a power, a society shall not exercise that power except with the approval of the Central Bank and in accordance with the terms and conditions of such an approval.

151. Section 36(5) provides that the Central Bank may specify, in relation to any such power, the circumstances in, and conditions under which, a power may be exercised by a society (without the specific approval under subs. (4).)

152. Section 36(7) provides that the Central Bank may specify such requirements as it considers necessary for societies exercising any power to which this section applies and it may specify different requirements for different powers.

153. Section 36(9) provides that an application for approval by the Central Bank, of a society exercising a specific power must be made in such a manner as the Central Bank may specify and shall be accompanied by such information as the Central Bank may require either generally or in any particular case.

154. Section 36(10) provides that, having considered an application, the Central Bank may grant an approval, refuse to grant an approval or grant an approval, subject to whatever conditions, restrictions or exclusions the Central Bank considers appropriate in respect of the approval of the exercise of specific powers by specific building societies.

155. Section 36(11) provides that the Central Bank may in particular include provisions as to:

"(a) the class or classes of persons for whom a service may be provided;

(b) whether the activity may be undertaken by the society itself or by a subsidiary or other associated body;

(c) the amount of funds that may be applied by the society or its subsidiary or other associated body to the activity;

(d) whether the society may act as principal or agent in undertaking the activity;

(f) limits on any guarantees, bonds, contracts of suretyship or indemnities given or entered into by the society;

(h) conditions which must be fulfilled as regards any subsidiary or other associated body of a society undertaking the activity;

(i) the qualifications required to be held by employees of the society or its subsidiary or other associated body undertaking the activity;

(j) the avoidance of conflicts of interest;

(k) charges to be made in relation to the provision of any service;

(l) the maintenance by the society of separate accounting records and the preparation of accounts in respect of the service being provided."

156. It is clear therefore, that the Central Bank maintains a pivotal and central role in all aspects of each and every building society's activities – from the name of the building society to the activities in which it is engaged. The Act itself gives a detailed control and regulation function to the Central Bank over each individual building society separately.

157. Part IV of the Act is headed "Control and Supervision of Building Societies by the Central Bank. It is in this context that s. 37 of the Building Societies Act 1989 must be considered. Section 37 does not appear in isolation. The preceding sections of the Act have set out in considerable detail the provisions of the formation and authorisation of building societies and the powers of a building society. It is also clear from the above review of the statutory scheme that the Central Bank is centrally involved in each and every activity of a building society.

158. It is necessary to set out this statutory scheme in some detail because the argument of the Central Bank rests to a large extent on s. 37 of the Building Societies Act. The Central Bank's argument is that under s. 37, the Central Bank owes no duty of care to an individual building society.

159. Section 37(1) of the Building Societies Act provides as follows:

> *"(1) Subject to the general function and duty of the Central Bank under s. 6 of the Central Bank Act, 1942 , the Bank shall administer the system of regulation and supervision of building societies provided for by or under this Act with a view to –*
>
> *(a) the protection by each society of the funds of its shareholders and depositors, and*
>
> *(b) the maintenance of the financial stability and well being of societies generally." (Emphasis added.)*

160. Section 39 of the Act sets out the provisions applicable to the asset and liability ratios and structures of a building society. Section 39(4) provides that the Central Bank may from time to time require a building society to maintain a specified ratio between its assets and liabilities.

161. Section 39(5) provides that such a requirement may be in relation to all societies or to societies of a specified category, it may be in relation to total assets or total liabilities or to specified assets or specified liabilities or in relation to a specified period of time.

162. Section 39(7) provides that the Central Bank may, from time to time, specify requirements as to the composition of its assets and requirements as to the composition of its liabilities.

163. Again it is clear that the statutory scheme envisages specific actions which the Central Bank may take in respect of an individual building society.

164. Section 40 of the Act provides for the revocation of authorisations and the giving of directions by the Central Bank to individual building societies. Section 40(1) provides that the Central Bank shall revoke a building society's authorisation if it is satisfied that the building society has done, or not done, certain matters. Thus under s. 40(2) an authorisation may be revoked by the Central Bank if it is satisfied that the society has failed to comply with the requirement of the Act or a requirement or condition of notices from the Bank, if a society no longer possesses adequate capital resources, if it is expedient to do so in the public interest or in order to protect the funds of shareholders or depositors.

Observations on the Act.

165. Thus when one considers the detailed provisions of the statutory scheme, it is clear that the Central Bank has extensive powers over all building societies. It supervises them from the cradle to the grave i.e. from inception to winding up. There are numerous activities building societies cannot carry out without Central Bank approval and there are numerous duties imposed on the Central Bank in respect of building societies.

166. Moreover the heading at part 4 of the Act is entitled "Control and supervision of building societies by Central Bank". Thus the duty of the Central Bank is the "control" and "supervision" of building societies. The concepts of "control" and "supervision" must mean, as a matter of statutory interpretation, that the Central Bank has a statutory duty to building societies in general and to the INBS in particular.

167. In addition the side note to s.37 provides "Duty of Central Bank as respects building societies". This, in my view, means as a matter of statutory interpretation that the Legislature intended to impose a statutory duty on the Central Bank in respect of building societies. It is difficult if not impossible to construe the words in any other way.

168. Moreover s.37 (1) of the Act provides that the bank shall administer the system of regulation and supervision "with a view to" the maintenance of the financial stability and well-being of societies generally. This clearly means, as a matter of statutory interpretation, that the Central Bank has a duty to control and supervise building societies and to administer the system of regulation and supervision of building societies with the objective of maintaining the financial stability and well-being of building societies generally. Again this, together with the side note to s.37 is consistent with the imposition of a statutory duty towards the building societies for the benefit of building societies as an identifiable class within the statute.

169. Mr. Barniville S.C. for the Central Bank submitted that these duties were imposed on the Central Bank for the benefit of the public not for the benefit of the building societies. However in my view, as a matter of statutory interpretation, the Act confers duties on the Central Bank for "the specific protection of particular categories of persons" (namely building societies) to use the formulation of Keane C.J. in *Glencar*. It may well be that in protecting building societies, the Central Bank is also acting for the benefit of the public. But that is a different matter.

170. Thus, having considered the provisions of the 1989 Act, I am of the view that there is certainly a stateable cause of action that the Central Bank owes a statutory duty to building societies in general and thus to the INBS in particular. Indeed in my view it is not only a stateable cause of action, it is, on the basis of my analysis of the Act, a *prima facie* case. However I would emphasis that in an application to strike out all the plaintiffs have to do (or in this case the first named defendant) is to establish that there is a stateable case and that it is not bound to fail. In my view there is certainly such a stateable case and on this ground alone the first defendant's third party statement of claim against the Central Bank should not be struck out on the grounds that it is bound to fail.

The Second Issue: Does INBS have a stateable cause of action against the Central Bank for negligent breach of statutory duty?

171. Having considered whether there is a stateable case against the Central Bank for breach of statutory duty simpliciter, I now turn to consider the issue of whether the INBS has a stateable case against the Central Bank for negligent breach of statutory duty.

172. Having already found that the Central Bank has a statutory duty to individual building societies, I must now consider the "negligent" aspect of the claim i.e. the negligent breach of statutory duty. To do that I must consider whether the Central Bank has a statutory duty of care towards INBS, or towards building societies generally.

173. In assessing that issue I must apply the principles set out by Keane C.J. in *Glencar* in considering whether a duty of care arises. This means that I must consider:

1. Is it reasonably foreseeable that the actions/omissions of the Central Bank would be likely to injure or cause damage to its neighbour (i.e. a person who is so closely and directly affected by the Central Bank that the Central Bank ought reasonably to have them in contemplation as being so affected.)

2. Is it just and reasonable that the law should impose a duty of care on the Central Bank for the benefit of the plaintiffs.

174. In considering the issue of whether it is reasonably foreseeable that the actions of the defendant would be likely to cause damage to the plaintiff, and the issue of whether the plaintiff is so closely and directly affected by the actions of the defendant that the defendant ought reasonably to have them in contemplation as being so affected, it is necessary to have regard to the statutory framework in which the parties are operating.

175. In my view the first limb of the twofold test is fulfilled and the Central Bank does indeed owe a duty of care to the INBS for the following reasons:

1. I have set out in detail the provisions of the statutory framework governing the relationship between the Central Bank and building societies. It is clear from this analysis that the Central Bank is involved in the control and supervision of building societies from inception to winding up. It is therefore reasonably foreseeable that if the Central Bank were to exercise its powers and duties in a careless and negligent fashion that an individual building society in question might suffer some harm. Moreover it is clear from the statutory framework that the relationship between the Central Bank and building societies is sufficiently proximate.

2. It is also clear from the heading of part 4 that the duty of the Central Bank is the "control" and "supervision" of building societies. These concepts of "control" and "supervision" – especially "supervision" - must mean as a matter of statutory construction that the Central Bank is in a relationship of proximity to the building societies and that it is reasonably foreseeable that any of its acts or omissions could cause them damage.

3. In normal cases a "supervisor" would owe a duty of care to those whom he supervises because they are sufficiently proximate as a matter of law. So it is here. Indeed as a matter of construction all the indicators point to the existence of a duty of care and there is nothing in the Act in my view which excludes a statutory duty of care being imposed upon the Central Bank in relation to building societies.

4. The side note to s.37 refers to a "Duty on Central Bank". The exact terms of this duty are set out in s.37 and it is a duty on the Central Bank to maintain the financial stability and well-being of building societies generally. This is consistent with the imposition of a duty of care.

176. It is clear therefore in my view, as a matter of statutory construction, that there is certainly a stateable cause of action that the Central Bank owes each individual building society a duty of care.

Just and reasonable

177. I turn now to consider the second limb of the test set out by Keane C.J. in *Glencar*: is it just and reasonable that the law should impose a duty of care on the Central Bank for the benefit of building societies?

178. As McCracken J. stated in *Beatty v. Rent Tribunal*:

> *"What is to be considered as just and reasonable is not merely what would be just and reasonable as between the parties, but also what would be just and reasonable in the public interest. Where a public body, such as the respondent, performs a function which is in the public interest, then in many cases and I believe this to be one of them, that body ought not to owe a duty of care to the individuals with whom it is dealing. It is in the public interest that it should perform its functions without the fear or threat of action by individuals. The fact that it is performing a function which is in the public interest may outweigh any duty of care to private individuals. Whether it does or not, of course, is a matter for decision based on consideration of the position of any particular public body."*

179. In my view it is just and reasonable that a duty of care should be imposed on the Central Bank for the benefit of building societies for the following reasons:

1. The statutory framework in this case clearly means that the Central Bank is closely involved with building societies in every part of its activities. If it fails to exercise this power properly or if it exercises this power negligently then individual building societies suffer damage and it would be unjust and unreasonable that an individual building society should not have redress against the Central Bank for such a breach of its statutory duties.

2. Both Keane C.J. in *Glencar* and Fennelly J. in *Beatty* adverted to the concept of "reliance" as a factor in considering whether a duty of care arises. In the present case the central issue in these proceedings is that the plaintiffs allege an unlawful delegation or abdication of powers by the board to the Chief Executive. The first defendant's defence however is that this was all done with the full knowledge and consent of the Central Bank and that the directors relied on the authorisation of the Central Bank to engage in this delegation. In those circumstances the Central Bank has a central role in these proceedings and it would be unjust and unreasonable if a duty of care were not imposed on the Central Bank in such matters.

3. Where a person relies on the Central Bank and the Central Bank is fully aware of such reliance for approval of certain actions then it would be unjust and unreasonable not to hold that the Central Bank has a duty of care towards building societies in such circumstances.

4. There was some concern expressed by Finlay C.J. in *Glencar* that a private law action for damages for breach of statutory duty simpliciter might lead to a "freezing effect" on the actions of public officials. However in my view that consideration does not apply in a case of allegations of negligent breach of statutory duties. Indeed it is just and reasonable as between the parties that a duty of care should be imposed precisely to avoid negligent acts by public officials.

5. As McCracken J. pointed out in *Beatty v. The Rent Tribunal* what is to be considered as just and reasonable is not merely what is just and reasonable as between the parties but what is just and reasonable in the public interest. I am of the view that it is overwhelmingly just and reasonable in the public interest that a duty of care should be imposed on the

Central Bank on the facts of this case. The Central Bank was charged with a vital public duty. That duty was the regulation and supervision of building societies. It was given immense regulatory powers and supervision powers under the Building Societies Act 1989. It is alleged that it exercised those powers in an extraordinary way. It is alleged that it permitted the abdication of powers by an entire Board of directors to a single individual - Michael Fingleton - for a protracted period of time without proper monitoring and supervision. It had full knowledge of the exact circumstances of the delegation. Indeed it got involved in the drafting of company resolutions authorising such delegations. It is alleged that it allowed the situation continue year after year after year without interruption. The court cannot ignore, and should not ignore, the fact that this building society lost billions of euros and that these crushing losses were imposed upon the tax payer. The public is entitled to ask how could this have happened? To impose a duty of care on the Central Bank in its supervision of building societies is simply to require that the Central Bank should carry out its functions of supervising this sector of the financial sector in a careful manner. The question could be asked rhetorically: how could it not be in the public interest that a duty of care be imposed on the Central Bank towards individual building societies given the statutory scheme and given the particular facts of this case?

180. In the light of all of the above I am firmly of the view that there is a stateable cause of action that there is a duty of care imposed on the Central Bank towards individual building societies under the statute. Indeed I am of the view that the first defendant has made out a prima facie case on this issue.

The Third Issue: does the Central Bank owe a common law duty of care to the INBS?
181. I have set out above the formulation of Keane C.J. in *Glencar* as to when a duty of care arises.

182. I have also concluded based on the statutory relationship between the parties that the Central Bank does owe a statutory duty of care to building societies generally and the INBS in particular.

183. Similar principles apply in relation to the consideration of the common law tort of negligence.

184. Thus I am of the view that the Central Bank does indeed owe a common law duty of care to the INBS. Both limbs of the *Glencar* test are fulfilled in this case.

185. In my view when one applies that principle to the facts of this case, the answer is clear. Building societies are clearly persons so closely and directly affected by the acts of the Central Bank that they are, as a matter of law, directly affected by acts of the Central Bank. Moreover when one considers the proximity test in this context, one asks the question: would the Central Bank know that a building society would be directly affected by a careless act of the Central Bank? Again, in my view, the answer to this question is yes and the application of this proximity principle on the facts of this present case would mean that there is a duty of care owed by the Central Bank to building societies within the specific statutory scheme of the Building Societies Act 1989.

186. Applying those principles to the facts of this case, I am of the view that in this case there does exist between the Central Bank and individual building societies a relationship characterised by the law as one of proximity and that it is reasonably foreseeable that acts of the Central Bank could cause damage to the plaintiffs. Moreover I am also of the view that it is fair, just and reasonable that the law should impose a duty upon the Central Bank for the benefit of individual building societies.

187. Thus again, I am of the view that the first defendant has made a stateable cause of action. Indeed I am of the view that he has made out a prima facie case.

The Fourth Issue: Does the Central Bank owe a statutory duty under the Building Societies Act towards individual directors?/Does the first named defendant have a stateable cause of action against the Central Bank for breach of statutory duty simpliciter (i.e. without negligence)?
188. In answering this question it is necessary to consider the statutory scheme in the Building Societies Act of the role of the Central Bank in the regulation and supervision of directors of building societies.

189. Section 48(1) of the Act provides that a building society should have at least three directors. Section 48(4) provides that the chairman of the Board of directors shall not also be the Chief Executive of the society except with the consent of the Central Bank.

190. Section 49(1)(a) provides a building society shall have:-

> *"(a) a Chief Executive who, either alone or jointly with one or more other officers of the society, shall be responsible, under the immediate authority of the Board of directors, for the conduct of the business of the society; and*
>
> *(b) a secretary." (Emphasis added).*

191. Section 49(3) provides that:-

> *"(3) The Chief Executive and the secretary of a society shall be appointed by the Board of directors of the society who shall take all reasonable steps to ensure that the persons appointed are persons who have the knowledge and experience to discharge the functions of those offices.*
>
> *(4) The Board of directors of a society shall give to the Central Bank prior notice of a proposal to appoint a person as Chief Executive stating the person's full name and address, the date on which he is to take office and such other information as the Bank may require and the Bank shall record the person's name and the date on which he begins to hold office in the public file of the society."*

192. Section 50 (15) provides that a building society shall notify the Central Bank of all valid nominations of persons for election as directors as soon as possible after the closing date for nominations, giving in each case information that the bank may require.

193. Moreover s.51 has supplementary provisions about the election of directors and provides *inter alia* that the person appointed under the rules of a society to supervise the conduct of an election of directors shall prepare and submit to the Central Bank a report on the conduct of the election.

194. Section 51 (7) also provides that the Central Bank may, following consideration of the report if it thinks proper, apply to the court for an order setting aside the result of an election of directors and directing the society to hold another election.

195. Section 59 provides that the building society shall maintain a register containing all transactions and loans made between the building society and a director for the current financial year and any of the preceding ten financial years. Section 59 (4) provides that two copies of the statement shall be sent by the society to the Central Bank.

196. Section 60 provides that a building society must keep a record of, and disclosure of, certain businesses in which a director of the building society was involved.

197. In effect this section seeks to keep a record of disclosures by directors of the building society of business interests they have in other areas which may carry on business with the building society. Section 60 (9) provides that two copies of such a statement shall be sent by the building society to the Central Bank.

198. However, having considered the provisions of this part of the Act, I do not find any words comparable to those in s.37 (1) that the Central Bank must carry out these supervisory tasks "with a view to" the protection of directors specifically.

199. Moreover although s.37 (1) does refer to the system of regulation and supervision of building societies as being "with a view" to "the maintenance of the well-being of building societies generally", I am of the view that this includes the statutory duties in respect of the management of building societies, including directors. This means, in my view, that the statutory duties imposed by the Act on the Central Bank in respect of directors are imposed for the benefit of building societies not for the benefit of directors individually.

200. Therefore I would conclude that the statutory duties imposed on the Central Bank in respect of directors are not for the benefit of directors. The directors are not an identifiable class intended to benefit within the statute and therefore the first defendant has no stateable case against the Central Bank for breach of statutory duty simpliciter (i.e. without negligence).

The Fifth Issue: Does the first defendant as a director have a stateable cause of action against the Central Bank for negligent breach of statutory duty?

201. However different considerations apply in respect of the issue as to whether individual directors such as the first named defendant have a stateable cause of action for negligent breach of statutory duty against the Central Bank. In my view directors such as the first named defendant do have a stateable cause of action for negligent breach of statutory duty against the Central Bank for the following reasons:

1. There is a specific statutory provision – s.49 (1) (a) which provides that it is the Chief Executive who shall be responsible for the conduct of the business of the society under the immediate authority of the Board of Directors. Thus there are crucial statutory provisions which deal with corporate governance of building societies under the statute.

2. It is the plaintiffs' case against the defendants that the defendants unlawfully abdicated their powers to Mr. Fingleton in breach of the Act and in breach of the rules of the building society.

3. It is the director's case that this was done only with the full knowledge and consent of the Central Bank and that the director relied on the Central Bank in respect of this matter.

4. Therefore it appears that if, what the plaintiffs say is true (and there was an interference with the corporate governance provisions set out in the Act) and this was done with the full knowledge and consent of the Central Bank, not as a breach of statutory duty simpliciter but negligently, then that constitutes a different cause of action on the part of the director against the Central Bank.

5. In deciding that, I must consider whether having regard to the statutory scheme set out above

(1) It was reasonably foreseeable that the acts/omissions of the Central Bank would be likely to injure or cause damage to its neighbour i.e. a person who is so closely and directly affected by the Central Bank that the Central Bank ought reasonably to have been in contemplation as being so effected and

(2) Whether it is just and reasonable that the law should impose a duty of care on the Central Bank for the benefit of directors.

202. In my view on the facts of this case the directors were persons who were so closely and directly affected by the Central Bank that the Central Bank ought reasonably to have been in contemplation as being so affected. Therefore there was sufficient proximity between the Central Bank and the directors based on the statutory scheme and also on the facts of this case. Moreover it was reasonably foreseeable that any actions or omissions on the part of the Central Bank would be likely to injure or cause damage to the directors. Thus the reasonable foreseeability part of the test is also fulfulled.

203. I am also of the view for the reasons set out above that it is just and reasonable both as between the parties but also in the public interest that the law should impose a duty of care on the Central Bank in respect of any of its alleged careless acts towards directors.

204. Therefore I would conclude that the first defendant has a stateable cause of action against the Central Bank for negligent breach of statutory duty. Indeed I am of the view that he has made out a prima facie case.

The Sixth Issue: Does the first defendant have a stateable cause of action against the Central Bank for the common law tort of negligence?

205. Having regard to tests set out above and also to the conclusion set out above in relation to a negligent breach of statutory duty, I am of the view that the Central Bank does owe a duty of care under the common tort of negligence to directors for any alleged negligent acts or omissions on its part because:

1. The parties are sufficiently proximate as a matter of law and it is reasonably foreseeable that the Central Banks acts or omissions could cause damage to such directors and

2. It is just and reasonable to impose a duty of care on the Central Bank in respect of any of its acts or ommissions.

206. I would therefore conclude that the first named defendant does have a stateable cause of action against the Central Bank for the common law tort of negligence.

207. I am conscious that it might appear paradoxical that the Court could conclude that the Central Bank has no statutory duty to directors and yet has a duty of care to directors. However this paradox is more apparent than real. It arises out of the fact that different tests are to be applied in relation to each matter. Thus, given the jurisprudence which has developed in relation to whether the directors have a cause of action for breach of duty simpliciter (i.e. without negligence), I conclude that they have no such private law action for damages for breach of statutory duty simpliciter. But they do have a stateable action against the Central Bank for negligent breach of statutory duties. There is no inconsistency in holding that (i) a director has no claim for a breach of statutory duty simpliciter (ii) but has a claim for negligent breach of statutory duty. In my view when considered in those terms the paradox dissolves.

(5) The Seventh Issue: Should the claim for misfeasance be struck out?
208. The first named defendant has pleaded misfeasance of public office against the Central Bank.

209. At paras. 63 - 69 and following in his affidavit, Mr. Purcell deals with the claim of misfeasance in public office.

210. Paragraph 63 states as follows:

> *"63. If the plaintiffs are successful in demonstrating at the trial of this action that the delegation of power to the Chief Executive was unlawful and proper, I say and am advised that such a finding could form the basis of a finding in misfeasance in public office on the part of the third party.*
>
> *64. The basis of my claim against the Central Bank in this regard rests on the purported unlawfulness of the delegation of powers to the Chief Executive, Mr. Fingleton. If the plaintiff establishes that the delegation was unlawful, then prima facie the Central Bank approved and involved itself in an unlawful act.*
>
> *65. In the third party statement of claim it is pleaded…*
>
> > *"The Central Bank (including the former office of the Financial Regulator) its servants or agents acted with reckless disregard as to the consequences of their continuation of the said delegation and their failure to revoke same."*
>
> *66. I am advised that this can be particularised more fully (strictly without prejudice to my defence to the plaintiffs' claim) as follows:-*
>
> > *(i) It was not within the powers of the Central Bank, its respective servants or agents to approve and/or amend the delegation.*
> >
> > *(ii) The Central Bank approved the delegation notwithstanding the fact that this was beyond its power.*
> >
> > *(iii) The Central Bank, its respective servants or agents were aware that the approval of the delegation was beyond its power and knowingly acted with reckless indifference as to the consequences of its own unlawful act.*
> >
> > *(iv) That the Central Bank acted with reckless disregard as to the consequences of their continuation of the said delegation and their failure to revoke same.*
>
> *67. The claim in misfeasance can be more properly understood in the context of the overall behaviour of the Central Bank/Financial Regulator in monitoring and supervising Irish banks and building societies under the regulatory cloak up to 2009.*
>
> *68. All of the significant Irish banks and building societies failed and had to be bailed out by the State.*
>
> *69. [Mr. Purcell refers to Prof. Honohan's report on the Irish banking crisis dated 31st May, 2010, in which it is stated:-]*
>
> > *'The key protection in any national system against the emergence of a banking crisis should be the Central Bank and regulatory function. It is clear that a major failure in terms of bank regulation and maintenance of capital stability occurred.'"*

211. At para. 70 of the affidavit, Mr. Purcell also refers to the Nyberg report entitled *Misjudging Risk: Causes of the systemic banking crisis* in Ireland and at para. 71, Mr. Purcell states as follows:

> *"71. With regard to the delegation which is the subject matter of this application, Prof. Nyberg states:-*
> > *'The Managing Director (MD) had been given extraordinary powers by the Board and many staff reported directly to him. In August 1997, the Board had formally delegated its powers for the practical and efficient management, promotion and development of the Bank to the MD. This delegation of powers was most unusual given its vague and general formulation. It is not immediately apparent what the limits of this empowerment were. (Emphasis added).*
>
> *72. In light of the foregoing, I say and am advised that there is a clear basis on which I can seek to maintain that there was misfeasance on the part of the Central Bank in the approval, amendment to and continuation of the delegation."*

212. Counsel for the Central Bank submits that this is not sufficient and that these pleadings fall far short of what is required to sustain a claim of misfeasance in public office.

213. Both parties agree that the relevant test for misfeasance is that set out by the Supreme Court in *Kennedy v. The Law Society (No. 4)* [2005] IESC 23 i.e. that a public official can be guilty of the tort of misfeasance of public office in circumstances where that official is subjectively reckless as to whether his actions are lawful. That is to be distinguished from objective recklessness and indeed deliberate misconduct (see *Omega Leisure Ltd v. Barry* [2012] IEHC 23; *Kennedy v. The Law Society No. 4* 2005 IESC 23 and *Beatty v. The Rent Tribunal* [2006] 2 I.R. 191.

214. The pleadings alleging misfeasance are set out above. To a large extent they overlap with the particulars of negligence. The main particulars of misfeasance/negligence are:

> 1. That the Central Bank knew of and consented to and were involved in and actively approved the allegedly wrongful delegation of powers.
>
> 2. That the Central Bank knew that there was no monitoring of the Chief Executive Officer and nevertheless did nothing to intervene.
>
> 3. That the Central Bank knew of the fact that approval of certain loans was given retrospectively and yet never intervened.
>
> 4. That the Central Bank was aware that this continuation of the delegation of powers and the retrospective approval of loans was likely to cause loss and damage to the society.
>
> 5. That despite all of the above the Central Bank failed to intervene and in so doing acted with reckless disregard as to the consequences of their actions in permitting this delegation to continue.

215. Mr. Barniville S.C. for the Central Bank submits that these particulars are not sufficient to ground a case of misfeasance. However I do not agree. The necessary facts to ground a stateable plea of misfeasance are pleaded. The first defendant also pleads "reckless disregard". The only word missing is "subjective". In addition it is a stateable cause of action i.e. a cause of action known to the law. Moreover many more facts may well emerge from the discovery or witness statements. In any event the issue of proof of "subjective recklessness" is a matter which might only be proved at trial either in direct examination or more particularly in cross examination. Indeed the question of the "subjective" mindset of a public official is a matter which might only be established in cross examination.

216. Mr. Barniville also submitted that a plea of misfeasance of public office is similar to a plea of fraud and therefore must be stated with specific particularity. However I do not agree with that comparison. Fraud occurs when a person seeks to personally benefit from a wrongful act. Moreover it is an objective assessment. Neither of these elements are present in the tort of misfeasance.

217. Misfeasance in public office is a stateable claim. It is a claim known to the law. It is also the case that the first defendant has pleaded this matter here. I must also have regard to the fact that in the light of the nature of the tort it is a matter which, by its nature, might only come out during the trial of the action. In my view the observations of Keane J. in *Lac Minerals v. Chevron Corporation* [1995] 1 I.L.R.M. 161 (High Court, 6th August, 1993) are apposite in this context: a judge in considering an application to dismiss must be confident that no matter what may arise on discovery or at the trial of the action of the plaintiffs' claim cannot succeed. I am not confident that the plaintiffs' claim in misfeasance "cannot" succeed. This application has been brought at a very early stage in the proceedings. Matters may arise in discovery or in the witness statements or indeed in direct evidence or cross examination at the trial of the action which might well establish misfeasance in public office. I am of the view therefore that it is not appropriate to strike out this part of the first defendants claim on such an application.

The Eighth Issue: Central Bank immunity from damages

218. Mr. Barniville S.C. for the Central Bank also submitted that the third party Statement of Claim against the Central Bank was either unstateable or was bound to fail because the Central Bank has a statutory immunity in damages. The legal foundation for this argument is as follows: the Central Bank was established on 1st February, 1943, under the provisions of the Central Bank Act 1942; under the Central Bank and Financial Services Authority of Ireland Act 2003 on 1st May, 2003, the Central Bank was reconstituted as the Central Bank and Financial Services Authority of Ireland; in 2003 to 2010 the regulation and supervision of building societies under the 1989 Act was carried out by the Financial Regulator. In accordance with s.33 C (12) of the 1942 Act, the Financial Regulator performed the functions of the Central Bank and Financial Services Authority of Ireland. The 2003 Act, by way of amendment to the 1942 Act, introduced certain statutory protections for the bank, its servants and agents. In particular s.33 AJ provides as follows:

> *"Section 33 AJ*
>
> *(1). This section applies to the following persons:*
>
> *(a) The Bank.*
>
> *(b) The members of the Board and of the Regulatory Authority.*
>
> *(e) Employees of the Bank.*
>
> *(f) Agents of the Bank or any of its constituent parts.*
>
> *(2) A person to whom this section applies is not liable for damages for anything done or omitted in the performance or purported performance or exercise of any of its functions or powers unless it is proved that the act or omission was in bad faith.*
>
> *(3) The fact that the Bank has authorised or revoked the authorisation, or regulates the activities, of a person, under any of its functions is not a warranty by the Bank as to the person's solvency or performance.*
>
> *(5) Neither the State nor the Bank is liable for losses incurred because of the insolvency, default or performance of a person or body referred to in subsection (3) or (4).*
>
> *(6) Nothing in subsections (3) to (5) limits the effect of subsection (2)".*

219. Mr. Barniville submits that these provisions mean that the Central Bank has an immunity in damages.

220. Mr. Rogers S.C. for the first defendant submits that the statutory immunity is not relevant to a consideration of this application for the following reasons:

(1.) The Central Bank has no immunity from suit; it only has an immunity – if at all – in damages.

(2.) Statutory immunity is for damages only; it is not an immunity for a third party claim for indemnity and/or contribution.

(3.) Under the provisions of the Civil Liability Act as set out above the definition of "liable" under the Civil Liability Act 1961 refers to "legal liability whether or not enforceable by action". Thus the Central Bank could be joined as a third party because they have a legal liability. This legal liability may result in a declaration that the Central Bank was a concurrent wrongdoer and/or a declaration that the Central Bank is liable for an indemnity and/or contribution. However the fact that the Central Bank has a statutory immunity in damages does not operate as a matter of law to prevent them being joined as a third party.

(4.) The issue of bad faith could remain a live issue in these proceedings.

(5.) If the Central Bank seeks to rely on statutory immunity then there would be a constitutional challenge to that provision.

221. In relation to the third argument above, it is necessary to consider some of the provisions of the Civil Liability Act.

222. In Section 2 (1) of the Act the following words are defined:-

"Liable" refers to legal liability whether or not enforceable by action"

"Negligence" includes breach of statutory duty".

"Wrongdoer" means a person who commits or is otherwise responsible for a wrong."(Emphasis added)

223. Section 11 (2) provides as follows:

"Without prejudice to the generality of subsection (1) of this section

(a) persons may become concurrent wrongdoers as a result of vicarious liability of one for another, breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage;

(b) The wrong on the part of one or both may be a tort, breach of contract or breach of trust, or any combination of them;

(c) It is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive.

224. As is stated in Kerr on The Civil Liability Acts (Fourth Edition) at page 25:

"But a claim against a third party for a contribution or indemnity will only succeed if it can be shown that the third party committed a "wrong" in respect of which the injured plaintiff could have sued the third party" (see Staunton v. Toyota (Irl) Ltd (Unreported, High Court, Costello J., April 15th , 1988.)" This proposition is well illustrated by the decision of the Supreme Court in Conole v. Redbank Oyster Co. Ltd [1976] IR 191."

225. The learned author then continues at page 26:

"Payment on foot of a judgment for damages is not necessary to establish the right to contribution. Subsection 1 provides that a concurrent wrongdoer may recover contribution from any wrongdoer "who is, or would if sued at the time of the wrong have been liable in respect of the same damage". The ordinary meaning of the word "liable" is that a person is under an obligation enforceable by legal process: see George Whimpey & Company Ltd v. British Overseas Airway Corporation 1955 AC 169. For the purposes of the 1961 Act however "liable" is defined as referring to legal liability whether enforceable by action or not. In typical cases of injury caused by two wrongdoers, both will be "liable" to the victim in the ordinary sense of the word. In certain cases, however one wrongdoer will not be liable because of some immunity or other defence. An example given in the explanatory memorandum accompanying the bill was the liability as a concurrent wrongdoer of a person who damages the property of a deceased person before the executor obtains probate. Another example would be the immunity provided in s.12 of the Industrial Relations Act 1990 to a member or official of an authorised trade union i.e. trade union with a negotiation licence who in contemplation of furtherance of a trade dispute has induced the breach of contract of employment.

"Glanville Williams argued that persons under an unenforceable liability should still be considered liable for the purposes of tortfeasor statutes. Such an unenforceable liability would exist when there was a "defence which is a complete defence to the action …..and yet…..is not sufficient to take away all wrongful quality from the act." It is essential therefore to distinguish between cases where there is an unenforceable liability, such as where injuries caused by the carelessness of someone who owes the victim a duty of care but at the same time enjoys diplomatic immunity and cases where there is no liability at all, such as where injury is caused by the carelessness of someone who does not owe the victim a duty of care. In the latter situation, it was not the case of a special defence preventing victim from obtaining judgement but of one of the essential elements of liability being absent." (Emphasis added).

226. Mr. Rogers S.C. for the first defendant relies on the above passage in Kerr to say that even if the Central Bank seeks to rely on a statutory immunity – as it does – that does not prevent the Central Bank being joined as a concurrent wrongdoer because under the 1961 Act "liable" is defined as referring to legal liability whether enforceable by action or not.

227. In my view Mr. Rogers S.C. is correct in his submission. I am of the view that the Central Bank can be correctly joined as a third party even though at a later stage in the proceedings they may wish to rely on a statutory immunity in damages.

228. Having regard to all of the above I do not believe that the third party's Statement of Claim could be struck out on the basis of the statutory immunity points

The Ninth Issue: Can a defendant claim Damages against the third party in respect of a wrong done to him?

229. The final issue which arose is that the third party statement of claim against the Central Bank also contains a claim that the

Central Bank owed a separate and stand-alone duty of care to the first defendant as a director of a building society. This claim is set out in the body of the statement of claim and also in the prayer where there is a claim for damages for negligence and breach of statutory duties. The Central Bank submitted that it was wrong, as a matter of law, to plead in a third party statement of claim a separate claim for damages owed by the third party to one of the defendants.

230. Mr. Rogers S.C. for the first named defendant sought to clarify the issue by saying that although the first defendant was claiming a separate cause of action for negligence and breach of statutory duty and negligence owed to him, he was not seeking any damages in respect of same but simply an indemnity or contribution. Mr. Barniville S.C. countered that that was simply not procedurally nor substantively possible within the four corners of a third party statement of claim.

231. In my view Mr. Barniville is correct in this submission.

232. Section 11 (1) of the Civil Liability Act 1961 provides as follows:

> *"For the purpose of this part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third party (in this part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them".*

233. It is clear from the provisions of this section, that a third party claim for indemnity and/or contribution is founded on the principle that the third party is a concurrent wrongdoer with the defendant. The governing principle is that:

(a) Both the defendant and the third party are allegedly wrongdoers and

(b) The defendant is responsible to the plaintiff

(c) The third party is also responsible to the plaintiff.

234. Thus it cannot be the case in third party proceedings that the defendant can claim a separate and stand-alone cause of action owed by the third party to the defendant seperately. That is a matter for separate proceedings.

Conclusions

235. I would therefore conclude as follows:

1. There is a stateable case that the Central Bank owes a statutory duty to the INBS. Thus there is a stateable case that INBS could sue for breach of a statutory duty simpliciter (i.e. without negligence). Thus there is a stateable case that the first named defendant can join the Central Bank as a third party in respect of this matter.

2. There is a stateable case that the Central Bank is liable to INBS for negligent breach of statutory duties. Thus the first defendant can join the Central Bank as a third party in respect of this matter also.

3. There is a stateable case that the Central Bank owes a common law duty of care to the INBS. Thus the third party can join the Central Bank in respect of this matter.

4. There is no stateable case that the Central Bank owes a statutory duty simpliciter (i.e.without negligence) to directors of a building society. Thus directors of individual building societies such as the first named defendant have no stateable case against the Central Bank in respect of this matter.

5. There is however a stateable case that the Central Bank owe directors of building societies a duty of care. As such therefore there is a stateable case that the first named defendant as a director has a cause of action against the Central Bank for negligent breach of statutory duty.

6. There is also a stateable case that directors of a building society have a common law case of negligence against the Central Bank for negligence.

7. However these claims by directors of a building society – in this case the first named defendant against the Central Bank - cannot form part of a third party claim for an indemnity of contributions. They can only form part of separate proceedings.

8. There is a stateable claim for misfeasance of public office on the part of INBS against the Central Bank. Therefore the third party is entitled to include this in its third party Statement of Claim against the Central Bank.

9. The Central Bank's statutory immunity in damages does not prevent it from being joined as a third party.

236. In the circumstances therefore I would dismiss the application of the Central Bank to strike out the third party Statement of Claim.