THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 383

RECORD NO. 2017/437

Irvine J.
Whelan J.
Baker J.

IN THE MATTER OF BANK OF IRELAND PRIVATE BANKING LIMITED

AND IN THE MATTER OF THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

AND IN THE MATTER OF AN APPLICATION UNDER SECTION 1141 OF THE COMPANIES ACT 2014

BETWEEN

JOHN KELLY

APPELLANT

AND

BANK OF IRELAND PRIVATE BANKING LIMITED AND THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 5th day of December 2018

1. This is an appeal by Mr. John Kelly against an order of the High Court (McGovern J.) of the 21st July 2017.

2. By his order, McGovern J. confirmed the then proposed merger between Bank of Ireland Private Banking ("BOIPB") and the Governor and Company of the Bank of Ireland ("BOI") pursuant to s. 1141 of the Companies Act 2014 ("the Act"). By his order, he also directed that, pursuant to s. 1144 of the Act, the merger should take effect at 00.01 on the 1st September 2017.

Background

3. In anticipation of the application to confirm the proposed merger, on the 31st May 2017, BOIPB delivered to the Registrar of Companies a copy of the Draft Terms of Merger for registration. Thereafter, in accordance with s. 1135(1)(b) of the Act, notice of delivery of the Draft Terms of Merger was published by the Registrar of Companies in the Companies Registration Office Gazette on the 7th June 2017.

4. The application which led to the making of the order under appeal was made on foot of an originating notice of motion dated the 13th June 2017. The proceedings were admitted to the Commercial Court list on the 19th June 2017, when the court fixed the hearing date for the application for Friday the 21st July at 11 a.m. The presiding judge also directed that any interested party intending to appear at the hearing should file any affidavit upon which they intended to rely by 5 p.m. on Tuesday the 18th July 2017.

5. It is not in dispute that the proposed application became known to Mr. Kelly on the 24th June 2017 and that on the 13th July 2017 his solicitor, W.B. Gavin & Co., corresponded with Messrs. A & L Goodbody, the solicitors on record for the applicants, seeking copies of the documentation to be relied on for the purposes of the application. That request was met by letter of the 14th July 2017.

6. The application seeking the court's confirmation of the proposed merger was heard and determined on the 21st July 2017. Two affidavits were sworn by Mr. Andrew Keating, a director of BOI, on behalf of the applicants, dated respectively the 13th June and the 19th July 2017. By affidavit sworn on the 18th July 2017, Mr. Kelly set out why he considered that the application should be adjourned or refused.

7. In his first affidavit, Mr. Keating advised that BOI was the parent company of BOIPB and was the legal and beneficial owner of 100% of the issued share capital of BOIPB. Following a strategic review of the business and activities of BOIPB, it was, he stated, considered desirable that the corporate structure of the group be simplified, as would occur on a merger, and that there would be a significant cost saving in having the business of BOIPB combined with that of BOI.

8. Mr. Keating explained that historically the Central Bank of Ireland had overall responsibility for the supervision of credit institutions in Ireland but that since November 2014 a number of supervisory responsibilities and decision-making powers had moved to the European Central Bank ("ECB") through the establishment of the Single Supervisory Mechanism, with the result that the ECB is now responsible for all core supervisory responsibilities as defined in Council Regulation (EU) No.1024/2013. Mr. Keating advised that because BOI is categorised as a "significant" institution, it is supervised by a Joint Supervisory Team led by the ECB. The team consists of both ECB and Central Bank supervisors and it had been advised by the applicants of the proposed merger. By letter dated the 29th May 2017, BOI had received confirmation that the ECB Joint Supervisory Team had no objection to the proposed merger.

9. Mr. Keating also described how the proposed merger was to be "a merger by absorption" within the meaning of s. 1129(2) of the Act with the result that all of the assets and liabilities of BOIPB would be transferred to BOI. He advised the court on the draft terms of the merger and on how it was that those terms complied with the requirements of s. 1131 of the Act. He also drew the court's attention to the fact that, because the merger proposed was a merger by absorption, the Board of Directors of BOIPB and BOI were exempt from drawing up a directors' explanatory report, and to how, for the same reason, the application did not need to be

supported by an independent expert's report.

10. Mr. Keating further stated that in compliance with s.1136 of the Act the statutory financial statements of both BOIPB and BOI for the three years preceding the proposed application, and the draft terms of merger had been made available for inspection since the 31st May 2017 and that this facility would continue for at least 30 days as required by s. 1136. The records show that there had been no visitors to the registered offices of BOIPB for the purposes of inspecting these documents. Of particular significance in the context of this appeal is what was stated by Mr. Keating concerning the financial wellbeing of BOI and the consequences it would have for any creditors or customers of BOIPB. It would, he stated, be "business as usual" for all such creditors and customers who would automatically become creditors and customers of BOI. Mr. Keating emphasised the fact that BOI was an entity with a net asset value of approximately €8.1 billion as per the most recent audited accounts, a position to be contrasted with that of BOIPB which had a net asset value of approximately €35.1 million. He referred the court in this regard to the annual report for the BOI Group for the year ended the 31st December 2016 which included, *inter alia*, the audited accounts of BOI for the year end 2016 and the auditor's report of Mr. Kevin Egan of Price Waterhouse Coopers Chartered Accountants.

11. Notwithstanding the comfort afforded by the aforementioned accounts and the approval of the proposed merger by the ECB Joint Supervisory Team, Mr. Keating explained that the directors of BOIPB and BOI had, nonetheless, considered it appropriate to carry out their own due diligence to ensure that the merger would have no or minimal impact on BOIPB's business and operations. The nature of that exercise is explained in his affidavit.

12. As already stated, Mr. Kelly filed a replying affidavit on the 18th July 2017. In his affidavit he made the following points:-

> (i) that he had not been afforded sufficient time to marshal the information he wanted to place before the court for the purposes of opposing the application and that he would seek an adjournment so that, if necessary, he might place additional material from an expert in banking before the court;
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> (ii) that he had commenced proceedings against BOIPB in 2014 (Record Number 4200P/2014) and the pleadings were closed. His claim was for damages for negligence, fraudulent misrepresentation, breach of duty and breach of contract in relation to a property in Stockholm, Sweden. If successful in that action, BOIPB would have a significant liability to him in damages and costs. While he was satisfied that all of the assets of BOIPB would be available to meet any such award, the same could not be said in respect of BOI. While Mr. Keating had exhibited BOI's accounts, he had given no explanation as to the nature and make-up of the liabilities of BOI. It could not be stated that the proposed merger would have no adverse consequences for creditors or customers of BOIPB;
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> (iii) that recent events, including the recapitalisation of Irish banks by the Irish government, the Central Bank and private equity investors, were such that Mr. Keating was under an obligation to provide more detailed information to the court concerning the liabilities of BOI. Absent "more details" the court could not be satisfied as to the financial wellbeing of BOI and its potential ability to meet any award as might be made in his favour in his proceedings.

13. Finally, in his supplemental affidavit of the 19th July 2017, Mr. Keating set forth the manner in which the court's directions of the 19th June 2017 had been complied with. He referred to the advertisements placed in the 'Irish Times' and the 'Irish Examiner' on the 21st June 2017 and to the advertisement placed in 'Iris Oifigiúil' on the 23rd June 2017. Mr. Keating also addressed the affidavit filed the previous day by Mr. Kelly and noted that in a letter of the 26th June 2017 to Mr. Richie Boucher, the then CEO of BOI, concerning an unrelated matter, Mr. Kelly had advised that he had instructed his legal representatives to attend court on the 21st July to object to confirmation of the proposed merger. In light of this letter, Mr. Keating criticised Mr. Kelly for his delay in engaging with the proposed application. He referred to the fact that it was not until the 13th July 2017 that W.B. Gavin & Co. had requested sight of the papers supporting the confirmation application and had advised that Mr. Kelly intended to object to the confirmation of the merger on the grounds that the same would prejudice him in relation to his proceedings against BOIPB.

14. Mr. Keating stated that Messrs. A & L Goodbody had replied the following day. In their letter of the 14th July 2017, they had enclosed the requested documentation and informed W.B. Gavin & Co. that BOI was an entity which had a net asset value of approximately €8.1bn. as of the 31st December 2016, as compared with BOIPB which had a net asset value of approximately €35.1m. as of the same date. In those circumstances Mr Keating asserted that it was clear that BOI would be in a position to satisfy any order for costs or damages as might be made in favour of Mr. Kelly in his proceedings.

15. For the sake of completeness, I would here observe that a Mr. John Doherty, whom I will describe as a second objector, also unsuccessfully contested the application for confirmation of the merger by the High Court judge, but he has not appealed the decision of McGovern J. to this Court.

The High Court Hearing

16. In the High Court, senior counsel on behalf of Mr. Kelly submitted (*inter alia*) that:-

> (i) the application was not urgent and ought to be adjourned so that the court might further scrutinise the materials that had been put before it;
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> (ii) the application was flawed as the grounding documentation was insufficient to allow the court carry out its statutory role. The BOI Group Annual Report for the year ending December 2016 was insufficient for the purposes of enabling the court reach any meaningful conclusion as to the financial wellbeing of BOI. In light of Mr. Kelly's concerns and the lack of urgency an adjournment was warranted in order that the *applicants* might address the alleged *lacunae* in the information;
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> (iii) the court should not confirm the merger unless the financial statements filed in court were brought up to date;
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> (iv) the information put before the court was insufficient to allow Mr. Kelly test the proposition that his position as a creditor would not be affected by the proposed merger;
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> (v) that in pointing to the *lacunae* in the information placed before the court, Mr. Kelly had credibly demonstrated that the proposed merger would likely put the satisfaction of his claim at risk.

17. On behalf of the applicants it was submitted that:-

> (i) there was no valid basis for the adjournment application. The applicants had moved with relative expedition to bring on the application. They had issued their motion within weeks of receiving the approval of the ECB to the proposed merger.

Mr. Kelly had been afforded adequate time to enable him to engage with the application. He had known about the proposed application since the 24th June 2017 but had only sought copies of the papers on the 13th July some three weeks later;

(ii) there were no *lacunae* in the information provided to the court. The BOI Group Annual Report for the year ended the 31st December 2016 contained fifty pages of notes concerning the liabilities and assets of BOI (see pages 307-357). This was much more detailed information than that which was available in respect of BOIPB and with the financial standing of which Mr. Kelly had expressed himself satisfied. Mr. Kelly had made no attempt to engage with the documentation exhibited, from which the nature and extent of the liabilities of BOI were readily ascertainable;

(iii) Mr. Kelly had identified nothing that was missing from the information before the court that could have precluded the High Court judge from making an informed assessment of the financial wellbeing of BOI;

(iv) there was no basis on the evidence to suggest that there was any likelihood that Mr. Kelly's claim would be put at risk as a consequence of the merger particularly in light of BOI's surplus of assets over liabilities of €8bn. Mr. Keating's assertion in this regard was not a bald averment or headline assertion. The supporting documentation had been provided to allow any creditor to test the validity of that statement.

The High Court Decision

18. In the course of his *ex tempore* judgment, the High Court judge first referred to the provisions of s. 1142(1)(b) of the Act for the purpose of identifying that the burden was on any objector to demonstrate credibly that the proposed merger would be likely to put the satisfaction of any claim they might have against BOIPB at risk and that no adequate safeguards in respect of that risk had been obtained from the acquiring company.

19. In the course of his ruling, the High Court judge expressed himself satisfied that there would be no impediment to Mr. Kelly continuing his proceedings against BOI if the merger was confirmed. He rejected Mr. Kelly's contention that there had been insufficient detail furnished about the financial state of BOI and observed that the information that had been provided was the most up to date available and it showed that BOI had a surplus of assets over liabilities in excess of €8bn.

20. The High Court judge also concluded that Mr. Kelly had not credibly demonstrated that the proposed merger would be likely to put the satisfaction of any award of damages or costs he might recover in his High Court proceedings at risk as required by s. 1142(1)(b). Further, the bank had provided more than adequate information from which any creditor could ascertain the nature of the scheme proposed and the safeguards therein provided. The High Court judge, in making the order which he did, also relied upon the fact that the Regulatory Authorities had not expressed objection to the merger and that BOI and BOIPB had carried out their own due diligence in relation thereto and as a result of which they were convinced that the merger would not result in any additional risk to creditors.

21. At the very end of his *ex tempore* judgment, the High Court judge confirmed that, consistent with the rulings that he had given earlier in the course of the hearing, he had refused the applications of both proposed objectors to the adjournment of the application.

The Submissions on the Appeal

Appellant's Submissions

22. Mr. O'Floinn SC on behalf of Mr. Kelly submits that:-

(i) the decision of the High Court judge not to adjourn the application was unreasonable having regard to all of the relevant factors. Mr. Kelly had not been afforded adequate time to engage with "voluminous materials". What was stated by Mr. Keating in his affidavit concerning the chronology leading up to the application did not establish any urgency, particularly in circumstances where the decision to merge the two banks had been taken as far back as 2016. There would have been no prejudice to the applicants if the application had been adjourned for a short period or even until October 2017. By refusing the adjournment Mr. Kelly had been unreasonably deprived of the opportunity to engage with the statutory process as the legislation had intended;

(ii) there had been a paucity of information before the court. The court had accepted at face value that after the merger there would be a surplus of assets over liabilities and there was inadequate material to justify this conclusion.

(iii) the materials before the High Court judge were out of date. A more careful assessment of the financial position of the respondent bank was required before he agreed to confirm the merger. The High Court judge should not have accepted the most recent audited accounts of the respondent bank as sufficient for such purpose particularly in light of the recent history concerning the banking industry in this country;

(iv) the court had failed to comply with its statutory role insofar as all that had been dealt with by the trial judge in his ex tempore judgment was whether or not Mr. Kelly and another objector were entitled to object to the merger. He did not satisfy himself that the requirements for approval of a merger, listed in Chapter 16 of the Act, had been complied with and he did not carry out any meaningful analysis or scrutiny of the paperwork supporting the application which included a four hundred page report. He did not discharge his public function insofar as he did not expressly identify in his ruling how proper provision had been made for the creditors of BOIPB.

Submissions of the respondent

23. Mr. Declan Murphy BL on behalf of the respondents submits that:-

(i) the High Court judge acted within his discretion when he refused to adjourn the application. Mr. Kelly had not identified any factors relevant to the adjournment application which the High Court judge had ignored. The High Court judge was entitled to balance the rights of the applicants who wished to proceed with the application against those of Mr. Kelly who wished to adjourn it. The refusal of the adjournment could not be considered unreasonable having regard to the prevailing circumstances;

(ii) The High Court judge was entitled to have regard to the averment of Mr. Keating, made in the context of his affidavit

to have the application admitted to the Commercial Court, that it was important that the proposed transaction be brought to a conclusion expeditiously in the interest of commercial certainty for the applicants, their employees and customers. Mr. Kelly had not acted in a timely manner and the court was entitled to have regard to the fact that he had come into court at the last moment claiming he had had insufficient time to engage with the application. Yet, he had been unable to identify specifically what he was going to do if he obtained the adjournment. Neither was he in a position to state why the documentation submitted by Mr. Keating was incomplete.

(iii) Mr. Kelly was entitled to object to the application only if he could credibly demonstrate that the merger, if confirmed, would be likely to put the satisfaction of any award of damages or costs he might recover in his High Court proceedings at risk and that no safeguards had been obtained from the company or acquiring company. The High Court judge correctly decided that Mr. Kelly had put nothing before the court from which the court might have drawn such a conclusion;

(iv) it could not be stated that the order of the High Court judge should be set aside because he did not ask for additional information or documentation beyond that which was before him. The documentation lodged included the most up to date audited accounts. These were unqualified and the margin of solvency was as large as €8 billion. No updated financial statements were required in order to comply with Chapter 16;

(v) the fact that the High Court judge in his *ex tempore* judgment did not specifically state that he was satisfied from the evidence before him that all of the requirements of Chapter 16 had been met provided no basis upon which the High Court order might be challenged and the application to confirm the merger sent back to the High Court for a re-hearing. It was to be inferred from the fact that the High Court judge confirmed the merger that he was satisfied that the formal requirements of the Chapter had been complied with;

(vi) there was no evidential basis to support the contention made by Mr. Kelly that the High Court judge had not fully complied with his statutory role. He had read the papers in advance and it was clear from his ruling that he was fully familiar with all of the material that had been lodged for his consideration;

(vii) insofar as it was contended that the High Court judge had not properly considered the issue of "proper provision" as provided for in s. 1144(2)(b)(ii), that obligation only arose if Mr. Kelly had been in a position to credibly demonstrate two things. First, that the proposed merger would likely put the satisfaction of any order for damages or costs he might obtain in his proceedings at risk, and second, that no adequate safeguards had been obtained from the acquiring company in respect of that risk. Mr. Kelly had not met the first of these requirements and accordingly the issue of "proper provision" did not fall for consideration. There was, in any event, no reason to doubt Mr. Keating's evidence that the creditors of both merging companies would not be adversely affected by the merger.

The Appeal
24. For the purposes of determining the within appeal this court has had the benefit of all of the evidence that was before the High Court judge as well as the transcript of the hearing and the court's ruling. The court has also received written submissions from both parties.

Discussion and Decision
25. It is not contested that a merger, whether it be by way of acquisition, absorption or by formation of a new company, must be effected in accordance with the requirements of Chapter 16 of the Act.

26. Of particular importance in the present case is the fact that the High Court judge was dealing with an application to confirm a merger by absorption within the meaning of s. 1129 (1) (2) of the Act by which, on being dissolved and without going into liquidation, a company transfers all of its assets and liabilities to a company that is the holder of all of the shares representing the capital of the transferor company. That is a very significant factor insofar as the application does not need to be supported by a directors' explanatory report prepared by each of the proposed merging companies, as would be the case if the merger was by acquisition or by formation of a new company. Relevant also is the fact that an application to confirm such a merger does not need to be supported by a report from an independent expert.

27. It is, perhaps, not surprising that these requirements are dispensed with in the case of a proposed merger by way of absorption in that reports of the type which I have just mentioned are inevitably required for the protection of shareholders. In particular, the function of the expert report, where required, is inter alia to examine and explain to the shareholders of the merging companies the terms of the merger and give an independent opinion as to whether the proposed share exchange ratio is fair and reasonable. No such considerations arise here as BOI, as transferee, was already the owner of all of the shares of BOIPB.

28. Perhaps it is also worth observing that after a merger by absorption all of the assets and liabilities of the transferor company are transferred to the transferee company, the transferor company is dissolved, and the transferee company is substituted for the transferor company in relation to all contracts, agreements or instruments to which the transferor company was a party with the result that all rights, obligations and liabilities of the transferor company then vest in the transferee company. Hence the importance of the financial wellbeing of the transferee company.

Relevant Statutory Provisions
29. It is here convenient to set out the sections of the Act which are of significance in the context of this appeal, those being ss. 1142 and 1144. Section 1142 defines who is to be treated as a "creditor" of the merging companies for the purposes of Chapter 16, and s. 1144 is concerned with the circumstances in which the court may confirm a merger.

Section 1142(1):

"(1) A creditor of any of the merging companies who-

(a) at the date of publication of the notice under section 1135(1)(b) is entitled to any debt or claim against the company, and

(b) can credibly demonstrate that the proposed merger would be likely to put the satisfaction of that debt or claim at risk, and that no adequate safe-guards have been obtained from the company or the acquiring company,

shall be entitled to object to the confirmation by the court of the merger.

Section 1144(1)

(1) Where an application is made under section 1141 to the court for an order confirming a merger this section applies.

(2) The court, on being satisfied that-

(a) the requirements of this Chapter have been complied with;

(b) proper provision has been made for-

(i) any shareholder in any of the merging companies who has made a request under section 1140; and

(ii) any creditor of any of the merging companies who objects to the merger in accordance with section 1142;

(c) …

(d) …

may make an order confirming the merger with effect from such date as the court appoints (the "effective date").

Refusal of the Adjournment Application

30. Whilst an appellate court clearly enjoys the jurisdiction to reverse an order made by a High Court judge in the exercise of his or her discretion, it should, in my view, act with significant restraint when asked to reverse the decision to refuse an adjournment as in the present case. The appellate court should, I believe, attach significant weight to any decision made by a High Court judge in the exercise of his or her discretion, particularly where the order under appeal is one which might be described as procedural in nature or is one which concerns the manner in which the litigation is to be managed (see decisions such as those of Budd J. in *Vella v. Morelli* [1968] I.R. 11 and Keane C.J. in *RB v. AS* [2001] 2 I.R. 428).

31. It is true to say that whilst a High Court judge is not required to set out "chapter and verse" as to why they reached the decision which they did concerning an adjournment application, it is certainly preferable that they give a brief summary as to the reasons why they acceded to or refused that application. The party who was refused an adjournment is entitled to know why it was refused. However, the fact that a judge may omit to give reasons does not provide any basis upon which an appellate court might reverse that decision. The onus is on the party who seeks to appeal such an order to demonstrate in no uncertain terms that, having regard to the evidence and the submissions made, the order made was unreasonable and was one which was not in accordance with the proper administration of justice.

32. Even if it is the case that another judge or even the majority of judges faced with the same application might have acceded to Mr. Kelly's application for a short adjournment, circumstances which I consider highly unlikely, it does not follow that the High Court judge's decision to refuse the adjournment was necessarily unreasonable or unjust such that an appellate court would interfere with it. A High Court judge, charged with the management of the court's scarce resources and who is responsible for the proper and efficient administration of justice, is entitled to a wide margin of appreciation in relation to any decision which he or she makes regarding procedural aspects of the proceedings before them.

33. In circumstances where the trial judge did not specifically address the factors which influenced his refusal of Mr. Kelly's adjournment application, it is necessary for this court to consider the evidence that was before him and the submissions made to him in order to evaluate whether or not he exercised his discretion in a manner which was reasonable, fair and in accordance with the proper administration of justice.

34. Relevant to this aspect of the appeal is the fact that the order refusing the adjournment was made in the context of an application which was listed for hearing in the Commercial Court on the date the application was made. As all who may read this judgement will know, the Commercial Court was established in 2004 in order to facilitate the speedy disposal of disputes which are commercially important and urgent. Because of the significance of its work, the judges who sit on that court have extensive experience of commercial litigation. Each judge assigned to the court is involved in the management of its case load and in the giving of directions to ensure that proceedings are brought to a conclusion with particular expedition.

35. I dare say there are few legal practitioners in this country who do not appreciate that the establishment of the Commercial Court changed the litigation landscape for all proceedings admitted to that court. It is true that the pace of litigation in the Commercial Court makes significant demands on litigants but there are good reasons for that approach and solicitors and counsel alike well know that the Court's directions are rigorously enforced and that parties will not be readily relieved of their obligations to comply with the timetable set for the hearing of any proceedings or application. Once a date is fixed for a hearing, as was the position here, the court will rarely accede to an application made for an adjournment, particularly if it is opposed and made on the day set aside for the hearing.

36. It is against this backdrop that Mr. Kelly's appeal against the refusal of his adjournment application must be assessed.

37. Returning to the facts in the present case, in favour of refusing the adjournment was the averment of Mr. Keating that the application should be dealt with speedily in order to create commercial certainty, as he explained more fully in his affidavit seeking to have the application admitted to the Commercial Court. Further, the hearing date had been set as far back as the 19th June 2017, a fact known to Mr. Kelly as early as the 24th June, and yet the application was made on the hearing date itself rather than in advance.

38. Mr. Kelly, in his affidavit of the 18th July 2017, stated that he "immediately" sought to enquire about the nature of the application through his solicitors once notified of the proposed application. However, this statement is not supported by the evidence. According to his affidavit, Mr. Kelly first became aware of the proposed application on the 24th June 2017, yet it was not until the 13th July 2017, a date somewhat conveniently omitted from his affidavit, that his solicitors made any enquiry concerning the proposed

application. Further, that three-week delay must be considered in light of the fact that, by letter dated the 26th June 2017, Mr. Kelly had advised Mr. Richie Boucher of BOI, when corresponding regarding an unrelated matter, that he had at that point already instructed his legal representative to attend court on the 21st July 2017 to object to the merger.

39. Relevant also is the fact that, whilst Mr. Kelly had apparently instructed solicitors as early as 26th June 2017 to oppose the application, neither he nor his solicitors requested sight of the documentation grounding the application until the 13th July 2017. No reason was furnished as to why they had not sought that documentation as of the 26th June given Mr. Kelly's stated intention to challenge the application and the fact that he had at that stage already retained solicitors for the purpose of opposing the application.

40. Whilst Mr. Kelly, in his affidavit, maintained that he was not afforded sufficient time to marshal the information he wanted to place before the court to oppose the proposed merger, it is clear that even when he swore his affidavit on the 18th July 2017 he had not approached any banking expert to advise either as to whether it could be said from the documentation presented to the court that his position as a potential creditor would likely be prejudiced by the merger or what additional documentation would be required to enable that assessment be made.

41. Relevant also to the court's consideration of the adjournment application was the fact that the reason relied upon by counsel for the adjournment was the failure on the part of the *applicants*, in light of Mr. Kelly's objection, to put more meaningful documentation concerning the financial wellbeing of BOI before the court. The application was not premised upon the need or desire of Mr. Kelly to himself produce additional documentation. When requested by the trial judge to state precisely what additional documentation or information Mr. Kelly maintained that the applicants should have produced in light of his objection, the only additional information referred to by counsel was "up to date figures". I assume, in light of the submissions before this court, these were those figures that might be provided if s. 1134 of the Act applied. However, that section does not apply on the facts of this case as will be later observed.

42. There were, of course, factors which would have favoured granting the adjournment. One such was that the applicants could not point to any specific prejudice which would have resulted if the matter had been adjourned. Also in favour of the adjournment was the fact that it would have left open the possibility that Mr. Kelly might have retained an independent expert to advise as to whether he could credibly demonstrate that the merger would likely put the satisfaction of any award of damages or costs that he might recover in his proceedings against BOI at risk.

43. Having considered the evidence which was before the High Court judge at the time of the adjournment application and the submissions made by the parties, I have not the slightest hesitation in concluding that the High Court judge, in refusing the adjournment application, exercised his discretion in a just and fair manner and in accordance with the proper administration of justice. In reviewing the exercise of the High Court's discretion, the following factors weigh heavily in favour of the approach adopted by McGovern J.:

> (i) Mr. Kelly knew of the proposed application as of the 24th June 2017 but did not apply at any stage prior to the hearing date (the 21st July) to postpone the hearing;
>
> (ii) Mr. Kelly had decided to challenge the application and had retained solicitors for that purpose as early as the 26th June 2017 but took no steps to advance his ability to do so until the 13th July when his solicitors sought copies of the documentation supporting the application;
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> (iii) Mr. Kelly had sought no expert financial advice in the four weeks preceding the date fixed for the hearing, as he might have done, and made no commitment to retaining any such expert if he was granted the adjournment;
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> (iv) Mr. Kelly had not demonstrated any realistic prospect of opposing the application having regard to the threshold set by s. 1142(1)(b) and to the documentation exhibited in Mr. Keating's affidavits concerning the financial wellbeing of BOI post-merger including its surplus of assets over liabilities as of the 31st December 2016;
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> (v) the date had been fixed by the Commercial Court on the 19th June 2017 and there was urgency to the application for reasons of commercial certainty; and
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> (vi) when counsel was queried as to the purpose of the adjournment proposed the court was advised that it was in order that the court could analyse the documentation further.

Substantive Issue

44. The role of the High Court judge in respect of company mergers is, as already stated, to be found in Chapter 16 of the Act and different proofs are required by an applicant seeking the court's approval depending upon the nature of the proposed merger.

45. The matters to which the court must have regard when an application is made under s. 1141 to confirm a merger are set out in s. 1144 of the Act. First, the court must be satisfied that all of the formal requirements of the chapter have been complied with. In the case of a merger by absorption, as was the case here, the court had to be satisfied that the applicants had met their obligations, inter alia, in terms of the registration and publication of documents and that they had made available for inspection the requisite reports, accounts and financial statements of both entities. As is apparent from Chapter 16, the legislative scheme provides for significantly lesser proofs to be placed before the court when confirmation is sought in respect of a merger by way of absorption, compared to other types of merger. Directors' reports and expert reports are not required. That being so, there was no basis for the appellant's submission that the trial judge was somehow in breach of his statutory obligations in failing to require the applicants to meet the statutory requirements which would be required on an application to confirm a different type of merger or which might have applied had there been a greater interval between the audited accounts for year end 2016 and the Draft Terms of Merger (see s. 1134). Moreover, given that the proofs required in respect of a merger by absorption had been placed on a statutory footing, it was simply not open to the High Court judge to substitute these statutory proofs for his own more demanding proofs, and this position could not be changed, as seemed to be suggested by Mr. Kelly, by apprehensions relating to the recapitalisation of the Irish banks generally.

46. Second, the court has a role in providing protection for shareholders and creditors in the context of a proposed merger, and its role is provided for by statute. There are specific protections built into the legislation to protect shareholders in the case of mergers other than mergers by way of absorption, to which I have earlier referred, such as the need for the applicant to produce directors'

reports and a report from an independent expert.

47. Likewise, the provisions of the Act identify how creditors of proposed mergers are to be protected. It provides a mechanism whereby a creditor of either company, who considers that they will be prejudiced by the proposed merger, may object to it. There is, however, a threshold which they have to cross before their objection will be entertained by the court. Such a restriction is quite understandable having regard to the potential numbers of those who might otherwise object for no good or valid reason. Any creditor wishing to object must be in a position, as required by s. 1142(1)(b), to credibly demonstrate that the proposed merger would be likely to put the satisfaction of their debt or any claim they may have against either merging company at risk, and that no adequate safeguards had been obtained from the acquiring company to obviate that risk. Only if the creditor meets that threshold does their individual position need to be addressed by the court when considering the merger under s. 1144.

48. The statutory role of the court, when asked to confirm a merger under s. 1144, is not to engage with the financial material provided so as to satisfy itself that "proper provision" has been made for *all creditors* of the merging companies. Its obligation is to satisfy itself that "proper provision" has been made for "any creditor of the merging companies who objects to the merger in accordance with section 1142". It is the identification of a specific risk to a specific creditor which is credible that triggers the obligation on the court to consider whether or not "proper provision" has been made to protect that creditor against that risk. It follows that the court need only be satisfied that any creditor captured by the provisions of s. 1144(2)(b)(ii) will be properly provided for in the course of the merger.

49. What is clear from the transcript and the evidence that was before the High Court judge is that Mr. Kelly put no evidence before the court from which it might credibly have concluded that he was a creditor entitled to object to the merger. He was unable to point to any aspect of the financial information provided to the court by Mr. Keating from which it could credibly be argued that any award of damages or costs he might recover in his proceedings would be put at risk if the merger was confirmed. Further, he was unable to identify any gap or *lacuna* in the information provided by Mr. Keating which, had it been made available, could possibly have qualified him to object to the merger. Nor could Mr. Kelly, in circumstances where he had failed to allege any specific deficiency in Mr. Keating's evidence, seek to in effect evade his own evidential burden by asserting that events surrounding the recapitalisation of the banking system were such that a duty to produce more detailed information regarding the liabilities of BOI than would usually be necessary could be imposed on Mr. Keating.

50. In my view, it would have been irrational and in the teeth of the available evidence had McGovern J. concluded that Mr. Kelly was a creditor who had credibly demonstrated that the proposed merger would likely put any award of damages or costs he might obtain in his proceedings at risk. All of the evidence pointed the other way.

51. It was, in my view, wholly inaccurate for Mr. Kelly and his legal advisors to describe the evidence of Mr. Keating concerning BOI's excess of assets over liabilities in the sum of €8.1bn. as a bald averment or headline assertion which could not speak to the financial wellbeing of BOI or as a statement which could not be tested in any meaningful way.

52. The fact of the matter is that the surplus figure of €8.1bn. was taken by Mr. Keating from the audited accounts of BOI which are to be found at p. 307 of the annual report of the BOI Group for the year ended the 31st December 2016. There follows, commencing at p. 312, detailed notes to the financial statements, which provide a more detailed breakdown and explanation for each of the figures that appear in the balance sheet in respect of both assets and liabilities. For some reason, Mr. Kelly chose not to engage with these. Neither was he in a position to identify any additional documentation which he maintained the court would have to consider before taking a view as to the financial wellbeing of BOI post-merger. He relied solely upon a contention that an up to date financial statement was required, but as noted earlier in this judgment, the provisions of s. 1134 did not apply on the facts of the present case. Accordingly, I would reject the submission that there was any paucity of information in the financial information put before the court, and in my view, it had more than sufficient information to allow it gauge the wellbeing of both proposed merging entities and whether or not it could be credibly asserted that Mr. Kelly was at risk that BOI would not be in a positon to discharge any order for damages or costs he might recover in his High Court proceedings if the merger was confirmed.

53. Yet another reason as to why, in my view, it was inappropriate, particularly in the absence of any evidence to the contrary, for Mr. Kelly and his advisors to seek to undermine Mr. Keating's evidence concerning the wellbeing of the BOI based on its surplus of assets over liabilities in the sum of €8.1bn is the fact that Messrs. Price Waterhouse Coopers, the company's auditors, had reported that the group's financial statements for the year end 2016, which include the balance sheet for BOI, gave a true and fair view of the financial position of the company.

54. In circumstances where there was no shareholder or shareholders entitled to any particular consideration or protection from the court and there were no creditors entitled to object to the merger having regard to the provisions of s. 1142(1)(b), the court was fully entitled to rely upon the evidence provided by Mr. Keating to the effect that the merger would have no adverse consequences for any creditors or customers of BOIPB. It is to be remembered that that statement was not only supported by the most up to date audited accounts but also by the due diligence carried out by both companies. Further, insofar as the letter of the 29th May 2017 from the ECB refers to correspondence dating back to the 4th November 2016 and subsequent interactions concerning the proposed merger, it would not be unreasonable to infer that the Joint Supervisory Team had given detailed consideration to the consequences of the merger for all interested parties including the creditors of both companies.

55. In my view, once the High Court judge was satisfied, as he clearly was, that Mr. Kelly had not credibly demonstrated that the proposed merger would be likely to put the satisfaction of *his* claim against BOIPB at risk, there was no need for him to consider further whether "proper provision" had been made for any other creditor. That is not to say that if it was clear from the documentation submitted by the applicants, such as the latest audited accounts of BOI, that the rights of creditors of either company would clearly be compromised by the proposed merger, that the court would not be entitled to refuse the application in the exercise of its discretion. However, in the instant case, the surplus of assets over liabilities at year end in December 2016 clearly spoke to the financial wellbeing of BOI and to the absence of risk to creditors of either merging company; as did, in my view, the fact that of all of the creditors who might have appeared to seek to contest confirmation of the merger, only two attended and had put nothing before the court to seek to undermine the evidence of Mr. Keating.

56. As to the appellant's submission that the High Court judge failed to scrutinise or analyse the application, and that what he did was no more than rubberstamp the application, that is a submission which, having regard to the transcript of the hearing and the court's ruling, I reject.

57. While counsel stated in the course of his submission to this court that he made no criticism of the High Court judge, that is far from what occurred. He stated that the obligation on the High Court judge under the legislation was not "to simply read the affidavit, take what it says at face value without analysing [it] of its own motion…. It has to carry out an analysis. And that didn't happen

here."

58. Further, the manner in which counsel sought to dilute that submission by stating that "any High Court judge dealing with any list by 21st of July would be forgiven…for wanting to bring matters to completion before the vacation and also is faced with a huge list" made his attack on the role and conduct of the High Court judge even more serious than it would otherwise have been insofar as it is to be inferred from that submission that McGovern J. had departed from his statutory obligations for reasons of expediency. The criticism was all the more unwarranted in circumstances where counsel made no effort to identify what information he maintained was not considered or scrutinised by the High Court judge and how its inclusion and consideration might have materially affected the outcome of the application.

59. In my view, a criticism of the nature last described, which was advanced for the purpose of seeking to unwind a merger of two companies confirmed by the court over a year ago, should not have been made in the absence of clear evidence to support it, and there was none such available.

60. McGovern J., who heard the application, was, at the time he made his order confirming the merger, a highly experienced judge of the Commercial Court well known and respected for his knowledgeable and thorough approach to his judicial obligations. Counsel for Mr. Kelly well knows that it is the practice of the Commercial Court that the judge assigned to hearing any application or proceedings is required, before they sit, to have read and considered the relevant papers in detail, and it is to be expected that as a result of such preparation the hearings will be significantly truncated and the judge well-positioned to deliver *ex tempore* judgements in cases where there is any degree of urgency.

61. The fact that counsel for Mr. Kelly made the submission he did, particularly in circumstances where at the very outset of the application the High Court judge had indicated that he had read the papers in advance of the hearing, is regrettable. Quite frankly, I cannot understand how it was counsel found himself able on the one hand to say he was making no criticism of the High Court judge and in the same breath contend that the judge had so conducted himself in his failure to scrutinise the in excess of 400 pages of papers filed for the court's consideration, that this court should set aside the order confirming the merger of these two companies over a year ago, with all of the attendant legal and commercial consequences.

62. It simply cannot be inferred from the fact that the High Court judge did not specifically state in the course of his ex tempore ruling that he was satisfied that the requirements of Chapter 16 had been complied with that he failed to comply with his statutory role. Mr. Keating, in his affidavits and in the exhibits he put before the court, dealt fully and comprehensively with all of the requirements of Chapter 16 and it was never contended how the information provided by him failed to comply with the statutory proofs required to obtain the court's consent to the proposed merger.

63. In circumstances where the High Court judge made clear that he had read the papers lodged by the applicants in advance of the hearing, it cannot be inferred from the fact that the High Court judge did not specifically state in the course of ex tempore ruling that he was satisfied that the requirements of Chapter 16 had been complied with that he had somehow failed to comply with his statutory obligations. To so conclude would be perverse in all of the circumstances.

64. Finally, for what reason does Mr. Kelly state that such a rehearing is warranted? It is not that he claims that, if the application were to be reheard, he would be in a position to establish that it was likely that he was at risk that BOI would be unable to meet any award of damages or costs that he might recover in his High Court proceedings and that the merger should only be confirmed in the event of "proper provision" being made by BOI to obviate that risk. Neither has Mr. Kelly at any point in the within proceedings, either in the High Court or on the hearing of this appeal, identified any requirement provided for in Chapter 16 of the Act that was not addressed by Mr. Keating in his affidavits and exhibits. Each of the said requirements are fully and comprehensively dealt with in those affidavits, including a supplemental affidavit of the 19th July 2017 in which he set out in detail how he had complied with each of the court's directions.

Conclusion

65. To conclude, for the reasons which I have summarised at para. 43 (i)–(v) of this judgment, I am satisfied that the High Court judge acted in a fair and just manner and in accordance with the proper administration of justice when he refused Mr. Kelly's application for an adjournment on the 21st July 2017. This ground of appeal accordingly fails.

66. For the reasons earlier set forth, I am satisfied that the High Court judge's conclusion that Mr. Kelly had not credibly demonstrated that the proposed merger would put at risk any award of damages or costs he might recover in his High Court proceedings was well supported by the evidence.

67. Given that the High Court judge had determined that Mr. Kelly was not entitled to object to confirmation of the merger because he could not satisfy the requirements of s. 1142(1)(b), he was under no statutory obligation to consider whether "proper provision" had been made for Mr. Kelly under s. 1144(2)(b), or indeed, any other creditor, in order that he could confirm the merger. Neither was the High Court judge under any statutory obligation to require the applicants provide any additional documentation or other evidence beyond that which had been provided by Mr. Keating in his affidavits and accompanying exhibits.

68. Neither was there any obligation on the part of the High Court judge, by reason of Mr. Kelly's objections or for any other reason, to seek of his own motion to undermine or cast in doubt Mr. Keating's statement that, in circumstances where the proposed transferee company had a surplus of €8.1bn. assets over liabilities, the company's creditors would not be at any risk as a result of the merger. In the absence of any expert evidence from a creditor entitled to object to the court's confirmation of the merger challenging Mr. Keating's evidence, it would, in my view, have been inappropriate for the High Court judge to have taken such an approach.

69. Finally, in circumstances where (i) all of the requirements of Chapter 16 were dealt with by Mr. Keating in his affidavits and supporting exhibits; (ii) all such documentation had been considered by the trial judge in advance of the hearing; and (iii) Mr. Kelly has been unable to point to any aspect of that Chapter left unattended to by the documentation supporting the application, it is untenable to suggest that merely because the High Court judge did not specifically state in the course of an ex parte ruling that he was satisfied that all of the requirements of Chapter 16 had been complied with, that his order should be set aside with all of the attendant consequences.

70. For these reasons, and those earlier dealt with in the course of this judgment, I would dismiss all aspects of this appeal.