Neutral Citation: [2014] IEHC 93

THE HIGH COURT

COMMERCIAL

2013 No.2682P

Between:

BLOXHAM (IN LIQUIDATION)

Plaintiff

-and-

THE IRISH STOCK EXCHANGE LIMITED

Defendant

Judgment of Mr Justice Peter Charleton delivered on the 13th day of February, 2014.

1. 'Chrysalis' bears this dictionary definition: the state of "a quiescent insect pupa, especially of a butterfly or moth" (Oxford Dictionary online). It can reference a state of waiting whereby a particular form of being is primed to turn into another. Originally, one reads, the word comes from *χρυσός,* meaning gold, apparently because often pupae in Greece are of that color. Historically, gold is closely allied to money. This case is about 'project chrysalis'; which was a plan to take about €26.25 million in reserves built up in the Irish Stock Exchange (hereinafter "the ISE") and to distribute it to the 7 guarantor members of that company, limited by guarantee, by the device of liquidating it and passing its responsibilities to a new entity that thereby would take over the running of and become the national stock exchange. Originally, the plaintiff stockbroking firm Bloxham was one of those seven members of the defendant Irish Stock Exchange and it is pleaded that it could expect a return of about one seventh of that sum; dependant on other factors not now important. Unfortunately, Bloxham is in liquidation and has been expelled from the ISE. Bloxham has not gotten any return and project chrysalis has not yet come to pass: wrongly, the plaintiff claims, because on being precipitated into liquidation the ISE, firstly, wrongfully suspended it then, secondly, schemed to delay the anticipated date for the fulfillment of project chrysalis from the third quarter of 2012 to beyond today's date and, finally, terminated its membership on the 19th December, 2012, thus illegally cutting it out from its anticipated share. These decisions were made, Bloxham pleads, illegally and in breach of the duties of the directors of the ISE. Hence, in this action the reversal of the decision to expel Bloxham from the ISE is sought by its liquidator; whereupon, it is hoped, project chrysalis will complete this year with an appropriate yield to all seven members of the ISE. The current members of the ISE are the stockbrokers J&E Davy, Goodbody, Investec (formerly NCB), Cantor FitzGerald (formerly Dolmen), Campbell O'Connor, Royal Bank of Scotland and, to make up for the absence of Bloxham, Davy Corporate Finance. At the time of the relevant decisions the last was absent and some others were in a different iteration as guarantor members of the ISE.

2. As to the board of the ISE, the body which made the impugned decision: each guarantor member had a right to nominate a director; in addition the chairman of the board Pádraig O'Connor sat with the chief executive Deirdre Somers as organisational directors; and there were four experienced external directors. That makes 13. The actual decision was not made by the board but was delegated to the head of regulation Daryl Byrne and this delegation was made in the absence of the guarantor directors because conflict of interest issues led them to be advised to absent themselves so that the disinterested directors would act alone.

Directors' duties

3. Many cases on the scope and nature of directors' duties have been referenced. One turns for an unimpeachable statement of principle back as far as Ussher – Company Law in Ireland (Dublin, 1986), where at pp. 200-203 the following is set out:

> An individual director stands in a relationship to his company. A fiduciary has power to deal with the property of another, and is assumed therefore to occupy a position of trust and confidence in relation to that other, whom we might loosely call the beneficiary. In our case, the beneficiary is the company. To protect the relationship from abuse, the courts will prevent the fiduciary from making any personal profit from it without the informed consent of the beneficiary. They will curb acts of the fiduciary beyond the powers delegated to him, but they will be reluctant to interfere with decisions honestly made by him within his powers, since the discretion is his, and not the court's. They will impose personal responsibility on him to compensate the beneficiary for loss caused through his dereliction of the duties which he undertook. … It is [also] well-established law that the director owes the duties arising out of his office to the company itself, the separate person, and to no one else.

4. To this some points of nuance may be added. Directors are bound to act in good faith in the interests of the company as a whole; *G&S Doherty* (Unreported, High Court, Henchy J., 19th June, 1969). Directors may not exercise their powers to further their own personal interests; *Re Ashclad Ltd: Forest v. Harrington* (Unreported, High Court, Geoghegan J., 5th April, 2000). As a nominee of a shareholder, a director must be free of any obligation to any other entity than the company and no duties may be imposed by the nominee on a director; *Re Neath Rugby Ltd* [2010] B.C.C. 597 at 605. As the matter was put by Street J. in *Bennetts v. Board of Fire Commissioners of New South Wales* (1967) 87 WN (NSW) 307 at 311:

> It is entirely foreign to the purpose for which this or any other board exists to contemplate a member of the board being representative of a particular group or a particular body. Once a group has elected a member he assumes office as a member of the board and become subject to the overriding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict might arise, to serving the interests of the group which appointed him. With this basic position there can be no room for compromise.

5. The triple obligations of directors, being required to act in good faith and within the scope of their powers and in the interests of the company as a whole, are to a large extent overlapping. If a decision of a board of directors is to be challenged, the problem will generally be one of proof. In *Re Dublin North City Milling Company Limited* [1909] 1 I.R. 179 at 184, Meredith M.R. stated that he was:

> … of [the] opinion that the law allows the directors to hold their tongues. It allows them to say that everything was done honestly and *bona fide* in the interests of the company; … and according to my view I have no power to make them say more.

6. That may be fine in the context in which that decision is made. In court, each side has the opportunity to make a case. Failure to answer a plaintiff's allegations may mean that such allegations are all that are in the case. Of course, the absence of a defence case as a decision in litigation is a risky one to take. What the Court is concerned with here, having heard both sides fully, is the issue about taint of self-interest in the decisions in question and, as with every case, whether the evidence exists to establish that a plaintiff has met the probable burden of proof. Most usefully, Ussher states, leaving out footnotes, at p.224:

> The proof of bad faith usually involves clutching at straws. Attempts to prove infringements of the latter part of the definition, namely that the directors' powers should be exercised for the proper purpose, are altogether more productive. Here the courts have attempted a systematic approach. "The first general proposition is that you must ascertain the powers of the directors from the very words of the articles," said Meredith MR in *Re Dublin North City Milling Company Limited*. And Lord Wilberforce said much the same in giving the opinion of the Board of the Privy Council case of *Smith (Howard) Ltd v Ampol Petroleum Ltd*: "it is necessary to start with a consideration of the power whose exercises in question. …" and to define "as best can be done in the light of modern conditions the, or some, limits within which it may be exercised." This initial consideration of the ambit of the power will generally be imprecise, and can only properly be phrased in generalities, since, as Lord Wilberforce admitted earlier in the opinion:
>
> > "To define in advance exact limits beyond which directors must not pass is, in the Lordships' view, impossible. This clearly cannot be done by enumeration, since the variety of situations facing directors of different types of company in different situations cannot be anticipated."

7. A director is not bound to bring special qualifications to that office. In fact, he or she may have nothing to offer at all. As Neville J. memorably stated in *Re Brazilian Rubber Plantations and Estates Ltd* [1911] Ch. 425 at 437, a person may enter the business of a rubber company "in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance". But such abilities as a director must be applied to the company and the transaction of its business.

8. By what standard is the discharge by any director of the triple responsibility, of acting in good faith and within the scope of the relevant power and in the interests of the company as a whole, to be judged? In this case extremes have been argued. For the ISE, *Howard Smith Ltd v. Ampol Petroleum Ltd [*1974] A.C. 821 at 835 is cited for the proposition that having analysed the relevant power that is in issue in a case, the court must "give credit to the *bona fide* opinion of the directors" and where this is present must "respect their judgment as to matters of management", ultimately concluding "as to the side of a fairly broad line in which case falls." The test is said to be entirely subjective. This approach would appear at odds with other branches of the law concerned with commerce. A commercial contract has to be construed against the background into which it was entered in accordance with the meaning of its words interpreted so as to give to that contract the business efficacy that the parties intended. This seems to rule out subjectivity. In many branches of the law of contract, what a reasonable person would have concluded from a term or condition or from a particular representation or situation is the touchstone from which the law proceeds. Yet, the case of *Regentcrest plc v. Cohen & Another* [2001] B.C.L.C. 80 is cited in favour of an entirely subjective approach to scrutinising the discharge of directors' responsibilities as follows:

> The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task in persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.

9. For Bloxham, the argument goes the other way; in favour of an objective analysis of every decision made by a board of directors. Here the problem would be that in objectively analyzing decisions, the courts might be in danger of stepping into the shoes of directors. This is not appropriate. A court might be inclined to wear its legal brogues in circumstances where directors are entitled to, and where the experience exists, bound to wear the practical shoes of business people and that is a concept which extends to the muddy boots of the farming community, where incorporated. The court cannot displace a decision simply because it does not like it; and this is what a completely objective principle would tend towards, instead of appropriate deference to the exigencies and pressures of business. Even the case cited, taken at its height, does not support such a proposition. In *Australian Growth Resources Corporation Pty Ltd v. van Reesema* (1988) 6 A.C.L.C. 529 the Supreme Court of South Australia held:

> It is not to the point that a director genuinely considers his purpose to be honest if those purposes are not in the interests of the company. The director must act in a way which he concedes to be for the benefit of the company as a whole, as that concept is understood by the law.

10. In other branches of the law, entirely subjective principles rarely hold sway. The most absurd and self-serving things have been thought by those who have usurped power over nations and those who have supported them through the course of human history. In public law, broad latitude is given to administrative and quasi-judicial decisions to the extent that these are not interfered with unless these are unreasonable. Originally, this was a question of jurisdiction; since it was thought that no limited power could be exercised within jurisdiction if a decision was unreasonable. Now, it is clear a public law decision can be overturned by the courts if it flies in the face of fundamental reason and common sense and that, as a matter of law, this ground stands alone. In the sphere of criminal law, subjective approaches are common since a major crime cannot be committed without intention or recklessness, or in the case of manslaughter, criminal negligence. Even there, a defendant does not inevitably get away with preposterous tales since it has been a principle of the criminal law for centuries that whereas a subjective belief may operate as a defence, as to whether that belief actually existed is be judged according to the presence or absence of reasonable grounds for it.

11. Thus, it seems that the test for the exercise of directors' duties must involve a scrutiny of the relevant power in the context of the broad limits within which it can be exercised; the interests that from a business point of view that are involved in a particular decision; and whether the presence or absence of reasonable grounds enables what is said subjectively to be an honest decision to stand as being in the best interests of the company as a whole.

12. With that in mind, the Court, turns to the relevant rules, to a general chronology, to project chrysalis and then to the circumstances surrounding the suspension and termination of Bloxham's membership of the ISE.

The articles and rules

13. The memorandum of association of the ISE is dated the 22nd May, 1995, but was subsequently amended. Article 4 forbids the distribution of any surplus and is in the following terms:

> The income and property of the company wheresoever derived, shall be applied solely towards the promotion of the objects of the company as set forth in this memorandum of association; and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit to the members of the company provided that nothing herein contained shall be taken to preclude any payment or other disposition made to any persons who are members of the company, otherwise than in their capacity as members.

14. Hence, one sees the need for project chrysalis. Article 7, however, allows such a distribution:

> If upon the winding up or dissolution of the company the remains after the satisfaction of all its debts and liabilities any property whatsoever, the same shall be paid to or distributed equally among the members of the company at the time of such winding up or dissolution.

15. Thus the seven guarantor members of the company could only access the funds built up over many years since the Irish stock exchange ceased to be a member of the London stock exchange by dissolving the ISE.

16. The articles of association were adapted later by special resolution in 2007 and 2009. Trading member of the exchanges defined as "any person who has been admitted to any class of membership" of the exchange and "such membership has not been terminated." Article 2 (a) provides:

> Any person who is a trading member of the exchange may apply to be admitted as a member of the company, in accordance with the provisions of these articles…

17. Thus, it might be argued that where a company was admitted as a trading member of the exchange, it might continue in such a status even where it had ceased to trade. But, even so, it is hard to see such a situation continuing indefinitely. Article 8 (b) gives a power to the board to refuse to accept a notice of resignation prior to investigation and article 8 (a) provides for a cessation of membership:

> Subject to paragraph (b) below, a member of the company shall cease to be a member:
>
> (i) if it resigns by giving not less than three months' notice in writing or such shorter period as the board may agree of its resignation to the board and such resignation is accepted by the board;
>
> (ii) if it ceases pursuant to the rules to be a trading member of the exchange; or
>
> (iii) in such other circumstances as may from time to time be prescribed in any proceedings adopted the board pursuant to article 7 above…

18. Article 7 provides for the making of rules. The relevant rule here, and the one invoked by Daryl Byrne, is 2.6.1 and this provides:

> If at any time, the member firm is subject to an order revoking its authorisation, or is the subject of an order having equivalent effect served by its relevant competent authority, which impacts on the services and activities conducted by a member firm of the [ISE], the [ISE] may:
>
> (a) restrict the scope of [ISE] business conducted by the member firm, or
>
> (b) suspend the membership of the member firm, or
>
> (c) terminate the membership of the member firm.
>
> Action may be taken under this rule without prior notice being given to the member firm concerned.

19. Rule 2.15 provides as follows:

> If a member firm has ceased to carry on business on the [ISE] for a period of six months or more, its membership may be revoked by the [ISE], by notice in writing to such member firm.

20. In any case such as the present, it is important for a court to have regard to the general scope of the rules and the context within which any particular rule occurs before reaching a decision as to whether a provision has been correctly invoked and the power therein exercised. Here, there have been wide-ranging submissions on the rules and, subject to the general context, these are the rules applicable. The rules are to be construed in a commonsense way in order to give business efficacy to the provisions, addressed as they are to people of business. As to natural justice, sometimes this can be implied into private contracts and is not just a principle of public law. The indication can arise through the operation of the bystander principle; had it seemed likely that a sensible person standing by were to be asked would it be right as to whether membership of the ISE might be terminated without notice to the member facing termination and without giving that member the chance to make general submissions on the issue? The question does not need to be answered here; notice was given and an opportunity to make a general submission on termination was afforded to Bloxham.

General chronology

21. The person driving project chrysalis was Pramit Ghose, the former managing partner of Bloxham. While holding this position, he was not in fact nominated by his company as a director of the ISE. His evidence was satisfactory and admirably clear on this aspect of the case and, overall, highly reliable. His fundamental point was that since he had worked on this project on behalf of Bloxham within the ISE in order to yield a return for the company, that it was fundamentally unfair that Bloxham should be excluded, notwithstanding its troubles. The Court is not, of course, bound by this opinion. By the 19th September, 2011, heads of terms had been agreed between the then seven members of the ISE: J&E Davy, Goodbody, NCB, Bloxham, Dolmen, Campbell O'Connor and RBS. A board paper was presented on the 18th January, 2012. The timeline noted was the completion of the project by the third quarter of 2012. This, however, was dependent on the consent of the Maltese Financial Services Authority, a subsidiary of the ISE operating in Malta, on authorisation from the Central Bank of Ireland, the authority for designating the operator of the Irish stock exchange, on a

change of subsidiary legislation from the Department of Jobs, Enterprise and Innovation, and also on the tax implications of the project falling out in the way anticipated through a preliminary ruling from the Revenue Commissioners. On reading the board minutes, any sensible person would realise that the pursuit of this project might hit snags and, particularly so, if legislation was required. Furthermore, on the ISE contacting the Central Bank of Ireland, that regulatory authority decided after a series of meetings and communications that it could not apply what was called the 'grandfather principle', which seamlessly allows one body to take the place of another. Instead what was required was for it to consider the application by any new company operating the stock exchange on its own and individual merits. The briefing document to the guarantors of the ISE was placed in a high state of readiness. That degree of preparation is evident from the document dated the 27th March, 2012. One particular factor has been highlighted and this occurs in para. 44 of the new draft articles of association. This provides that where a shareholder "enters into liquidation or receivership or suffers the appointment of an examiner or suffers any analogous proceeding…" it may, in effect, be forced out through its share being bought by the other members at a fair value. This has been argued both ways. On the one hand, the plaintiff says that if liquidation had occurred under the new rules, supposing they were then operative, it would have been entitled to a buyout at market value. On the other hand, the defendant replies that the project as evidenced by these draft articles never contemplated having the new company with members under a serious financial disability. The briefing document was refined by the 2nd April, 2012.

22. As of April 2012, in addition, the Bloxham accounts to the 31st December, 2011 had been signed off. These show financial assets available for sale in a sum of €6.25 million. That, in fact is the figure that Bloxham thought to be their surplus accumulated within the ISE. In fact, the sum available on distribution would be about half of that. The difference arises from the necessity to properly capitalise the new company. That is not important. In addition, however, trawling through the accounts, one may see payments to directors and profits; pretty ordinary financial positions, one would have thought. As it turns out, these were not. In fact some important figures had been misstated by the then financial controller of Bloxham. Unfortunately nobody within that company noticed, and nor did the auditors. In May, 2012, fiscal disaster struck in such a serious way as to become existential. On Wednesday the 23rd May, Pramit Ghose told the Court, Bloxham's finance partner Tadhgh Gunnell revealed that there were certain financial irregularities that had been hidden over a stretch of some years. Apparently, to take an example, in the accounts just referred to, payment out to partners had been put in the positive side of the balance sheet and liabilities incurred had been incorrectly credited as opposed to debited. The matter was not gone into in detail during the hearing, but it would seem that positive assets of about €3 million were in fact negative liabilities in that sum; a difference of about €6 million. Crisis meetings took place immediately. It seems fair to overlook as an oversight the fact that Bloxham did not contact the ISE until the following Monday, the 28th May. An investigation was necessary within the company, accounts needed to be checked, verification needed to be sought, the Central Bank had to be contacted. Throughout the weekend the assets of Bloxham, previously sought by Davy, were effectively sold; thus leaving it with no client business. In the negotiations before this crisis, perhaps up to twice the value of what was negotiated in that sale might have come in over time due to a profit sharing arrangement that had previously been proposed by the eventual buyer; but this is uncertain. Blame has been flying around the court as to who should have been contacted in this crisis first and when they should have contacted and that the ISE should have been told as a priority. Since, however, no one has relied on this as a ground for terminating Bloxham's membership of the ISE, this has actually been pointless. On the Monday, pursuant to rule 2.6.3, the ISE suspended the membership of Bloxham. One hour earlier the Central Bank had imposed a direction to cease all regulated activities. A provisional liquidator was then appointed. He later became the official liquidator and he is the effective plaintiff in this action. A few days later, Daryl Byrne, as head of regulation of the ISE, drafted a letter which was not sent to Bloxham but which noted the appointment of a liquidator and advised that the membership of Bloxham of the ISE "has been terminated… with immediate effect." Then, within the ISE, consideration was given as to what should happen next. It was thought that "a robust process" was needed and that "clarity of process" was also required. It was thought that there was no "other avenue available within the rules" than, it might be supposed as words are missing, termination and that consideration should be given to "any other knock-on effect of this process." This has been argued as sinister but it is not. There is, in fact, no evidence of a closed mind. People are entitled to think through their position and this is not necessarily any evidence that their mind has been made up. People are entitled to jot down where they think they might stand or think they actually stand. That, for honest people, is always subject to a rethink or to further information coming along. On the 1st June, the ISE wrote to the liquidator of Bloxham and pointed out that membership of the ISE could not be considered as an asset. On the 13th June, the board considered options in relation to Bloxham, and these included terminating the trading membership, seeking expulsion under a disciplinary process but did not include the continuation of the suspended member until the end of Project chrysalis. The process to consider termination was to be delegated by the board to the head of regulation and this was said to be the process "that most closely reflects what is in rule 2.6.1…"

23. The matter then was made ready for consideration by the board of the ISE. An unfortunate exercise of sanitisation then occurred. Daryl Byrne had drafted a memorandum suggesting that the termination of membership of Bloxham seemed inevitable. The chief executive redrafted the memo and some of the old parts were struck out and in this quote the new parts are underlined:

> Following the appointment of a provisional liquidator to Bloxham on 31 May 2012, ~~the termination of~~ Bloxham's trading membership under the Rules ~~seems inevitable~~ may be considered for termination under the Rules. ~~The executive of the ISE is preparing for this eventuality and t~~The purpose of this paper is to seek a ~~decision of the Board clarifying~~ Board approval of the processes that would underpin any the termination of Bloxham's trading membership under Rule 2.6.1.
>
> It should be noted that this paper only deals with the regulatory aspects of terminating the trading membership of Bloxham in accordance with the Rules. ~~and~~ It does not address ~~the issues that arise as a result of the~~ any consequential ~~automatic~~ termination of Bloxham as a Member/Quarantor of the ISE.
>
> …
>
> ~~At this juncture, terminating Bloxham's trading membership pursuant to~~ Rule 2.6.1 or 2.15 ~~is the most feasible option available to the ISE~~ would appear to be the more relevant provisions. <Whereas these rules are clear on the powers that the ISE has to terminate trading membership, they are unclear as to exactly where that decision making power resides for Rule 2.6.1 and 2.15 and the processes that are to be adhered to in applying Rule 2.6.1. > [Ms Somers's amendments, if any to the passage between <> are unknown, the text is as in Mr Byrne's original draft]
>
> …
>
> The developed process ~~constitutes~~ requires ~~a~~ Board ~~decision~~ approval ~~and as part of it, the~~ Subsequent to this decision, the Board's future functions for terminating trading membership would be delegated to the Head of Regulation, and any steps that have already been taken in this regard (i.e. Bloxham's suspension) would also be ratified by the Board.
>
> …
>
> ~~So as to ensure that a legally robust process is in place when the time comes to terminate the trading membership of~~

~~Bloxham under the Rules, we~~ We seek the adoption by the Board of the decision, as set out in Appendix 2.

24. This is all very unfortunate. The Court could be moved to quash the decision in the event that there were evidence that this mish mash was inspired by the board of directors, or any individual member of it, in order to cover up their true agenda and were that true agenda not in accordance with their directors' duties to the ISE. The reality of the matter, however, is that there is no evidence of that; nor evidence of any distortion of function by the person delegated by the board to make the decision. Further, there is no evidence that anything other than the sanitised version of the memorandum went to the board. Given that it was the board that was considering this matter on the basis of this, what might be called cleaned up, version, any mistake by the chief executive has to be overlooked. There is also a reality to the situation. With the prospect of judicial review pending, though not yet threatened, and with much talk about fairness of procedure and absolute independence by decision-makers going around in the community generally, it is clear that the inspiration for this paper exercise was a genuine desire to be seen to comply with the law and to also comply with the law. So, on the 27th June, the board of the ISE met and the executive and appointed members of the board advised the guarantor nominees to leave and when they had left, they delegated the decision to Daryl Byrne "in relation to any steps to be taken by the ISE under the rules in relation to Bloxham, including the consideration of the termination of Bloxham as a trading member of the ISE…"

25. On the 1st August, the official liquidator wrote to the ISE with an assurance that he would do everything that would reasonably be required "to facilitate the restructuring of the company." By this he meant to advance project chrysalis and to obtain for the benefit of the liquidation whatever was due as a result to Bloxham. This was completely correct of him. On the 16th August, the ISE wrote back and said that the completion of the project depended on certain external approvals. In the board minutes of the 5th September it is noted that project chrysalis "remains subject to uncertainty." In the board minutes of the 18th October, the chairman of the board noted that Bloxham and the ISE were to meet on a "without prejudice" basis. By December, since no decision had yet been taken, the redelegation to the head of regulation was sought from the board. In the balance sheet of the ISE setting out the budget for 2013 the available distribution to guarantors is noted as of the end of 2012 as being €26.25 million.

26. On the 7th December, Pramit Ghose wrote to the chief executive of the ISE and to the directors remaining of the other guarantor companies pleading that since Bloxham had been a member of the ISE for over 100 years and that since he had been the driving force behind project chrysalis, the "agreed restructuring deal should proceed with due expediency." On the 12th December, the ISE board met and, in the same way as previously noted, delegated any decision on termination to Daryl Byrne as head of regulation. Only Ronan Reid of Cantor Fitzgerald replied to the letter of Pramit Ghose. He said that the delay in restructuring was not "in any sense a grand plan to gain from" the demise of Bloxham. Referring to the complexity of the "multiple regulatory steps" he noted that the "Bloxham issue of itself may well have slowed processes external to the ISE." This letter, one displaying appropriate courtesy unfortunately absent elsewhere among the director guarantors written to, is part of the background and has not been relied on by the Court. It is, of course, hearsay.

27. On the 13th December, Daryl Byrne wrote to the official liquidator of Bloxham stating:

> As Bloxham has ceased to carry on business on the ISE for a period of more than six months, I am now considering revoking Bloxham's membership of the ISE pursuant to rule 2.15. If there is any matter you wish to draw to my attention any representation you wish to make to me as to why this decision was not to be taken, are required to submit these to me in writing by no later than 5 PM on Tuesday, 18 December 2012.

28. The solicitors on behalf of Bloxham replied on the 17th December. The rules could not be so operated, they argued, and this argument has not been maintained at this hearing, and the continuation, it was said "of the suspension of Bloxham does not in any way interfere with the operations of the ISE or the reorganisation." As a result, it was contended that "the motives for considering the revocation of our membership at a time when the reorganisation has been reactivated must be questionable." This letter also pointed out that as members of the board of the ISE stood to gain financially by expelling Bloxham, that they would be regarded in law as biased due to having, it was contended, "a pecuniary interest" in the decision. On the 19th December, Daryl Byrne, on behalf of the ISE, replied to the solicitors for Bloxham pointing out that the rules did give him delegated authority to act in stating that he did not accept that his powers were being improperly exercised. Earlier that day, he had made a decision to terminate Bloxham's membership. Then there is another point of controversy. A media question and answer document was drawn up in consultation with him. This is entirely about expelling Bloxham. This is said to be sinister. His rationale was that since a decision by him not to terminate would raise no new media queries, a decision to terminate had to be prepared for. That makes sense.

Project chrysalis and its troubles

29. It is clear that the insolvency of Bloxham was very serious in the context of the day to day work of the ISE. This emerges most clearly from the evidence of Deirdre Sumers and her evidence on this is convincing:

> Question: So that in fact the Stock Exchange was suffering and had suffered no damage whatsoever as a result of Bloxham's continued membership of project chrysalis as it continued to progress?
>
> Answer: That is a very broad observation that I can't affirm. The insolvency of a member firm always has an impact on the perception of the market that that member firm used to transact on. And their trading capability or lack thereof is something that will always have a reputational impact, that is my experience. Whether that transferred into specific criticism is neither here nor there in my mind.
>
> Question: The fact is nobody has been criticising you at all and nobody was suggesting to you if you don't act promptly against Bloxham this is going to have adverse consequences for the Stock Exchange in relation to its operations, in relation to its credibility or otherwise?
>
> Answer: Having a firm continue on the role of trading members that has no capacity to trade, will never again have a capacity to trade, has been put into liquidation due to financial irregularities, that is being investigated by the Central Bank and that has already been terminated by the London Stock Exchange was a matter of very significant concern reputation only for the Stock Exchange and therefore I wouldn't agree with you actually.
>
> Question: Well, nobody was criticising you, nobody was saying anything adverse about you and I have to suggest there was no material impact for you as between having Bloxham suspended and having Bloxham terminated?
>
> Answer: My job is not to respond to criticism. My job is to manage the Stock Exchange in the manner, in a highly professional manner, and in a manner that ensures that these criticisms are never leveled.

30. The delay in project chrysalis is argued by the liquidator of Bloxham to be evidence that Daryl Byrne, in the exercise of his

delegated directors' duties in relation to the termination or non-termination of Bloxham was not acting in the best interests of the ISE as a whole but was influenced by some general desire to get rid of Bloxham. This does not stack up. Another person in the executive of the ISE, namely Brian Healy, was in charge of project chrysalis. His evidence came across as straightforward and honest. It was also backed up by sensible reference to the kind of troubles which any such project might be expected to encounter. He said that earlier they had been too optimistic about permissions from the Central Bank of Ireland despite sending over five volumes of materials like plans and draft articles. In fact, the actions of the ISE came across as enthusiastic engagement. But, still, permission was not forthcoming. This was understandable, Brian Healy thought, in the context of the financial scandals that have beset the country since 2000 and which increasingly came to light after 2008 and some of these have been portrayed, whether rightly or wrongly the Court cannot know, as issues of slack regulation. No doubt, the Central Bank has to act very carefully. That is all that came across from his evidence. Nor was it possible for him to write any kind of angry letters to his regulator: that does not get anybody anywhere. The Revenue Commissioners had looked at the tax scheme and given a preliminary nod; that was the only external dependency that had been fulfilled. Brian Healy came across as enthusiastically engaging with the project, with the relevant Department of Government and with the Maltese interest. He said frankly that, yes, the project would have been concluded by January 2014 but for Bloxham going into liquidation and that it would probably have been completed by perhaps the third quarter of 2013. What came across was that, understandably, the Central Bank had real issues with Bloxham as part of the process and that this concern was shared by the Department of Jobs, Enterprise and Innovation. That evidence is probable and provides appropriate clarification.

31. In addition, the board of the ISE was receiving reports about the progress of project chrysalis and it is fair to say that in the light of all that was going on, the news was generally not good. A briefing was received on the 5th July, 2012, and one paragraph quoted is enough to set the tone of the document:

> There is currently uncertainty surrounding the project due to the fact that one of the guarantors is now in liquidation. This impacts key regulatory, legal and implementation aspects of the project. This situation has hampered our progress with external authorities such as the [Central Bank of Ireland, the Revenue Commissioners and the Department of Jobs, Enterprise and Innovation] in the last month including a dissipation of the urgency with which they view the project and in their willingness to dedicate resources to it. We have engaged extensively with all these parties and have sought to (a) give them an understanding of the implications of the changed circumstances and (b) to keep the focus on maintaining momentum where possible in key work-streams.

32. That document in its totality brings across the frustrations involved in the advancement of the project in the aftermath of the Bloxham liquidation. There is nothing about the briefing that shows up as dissimulating or evasive.

The decision to terminate

33. There is no reliable evidence that the decision to terminate the membership of Bloxham of the ISE arose from a conspiracy, was engineered so as to financially benefit one section of the ISE as opposed to being made for the benefit of the ISE as a whole, or was not made in good faith, or was made in excess of the powers that are clearly ample in terms of the text of the relevant rule, or was made for an improper purpose. The situation of Bloxham was unfortunate and the benefit that might have gone to the credit of the liquidation has been lost. But it has been lost in consequence of the liquidation. Furthermore, in terms of realism, how long could this situation be expected to go on? The Central Bank was entitled to have concerns that they were expected to put up with a restructuring project to organise the national stock exchange in circumstances where a member of the existing company promoting the project had gone into liquidation in the deeply unfortunate circumstances that afflicted Bloxham. Failing to see this is ignoring the obvious. Daryl Byrne gave evidence. He came across as honest, straightforward and seriously meticulous. Pádraig O'Connor said that he expected Daryl Byrne to exercise his delegated powers with good faith and in the interests of the company as a whole and that he would be amazed if he were to do anything other than that. This, again, is honest evidence. Daryl Byrne did not come across as the kind of man that could be pushed around. He was conscious of his duty. There is no probable evidence that the decision maker was being pushed around or manipulated. Furthermore, Bloxham had ceased trading on the stock exchange for more than six months; it had close down its clearing arrangements with the relevant agency; it transferred all of its business relevant on the stock exchange to Davy; it was insolvent; in October 2012 it had been expelled from the London Stock Exchange; there were financial irregularities that were being investigated by the Central Bank of Ireland; and there was literally no prospect of Bloxham ever returning to active membership of the ISE.

34. In the circumstances, it is very hard to see any other decision being made. Furthermore, the law is clear that the Court has no entitlement to review this decision on the basis of substituting its own view. Even if the Court were to declare the decision unlawful, the decision would simply have to be reviewed by the board of the ISE. That could be done through another delegation but, more probably, the way to go about matters afresh would be for the non-guarantor board to consider all the relevant material afresh, because they had never made any decision to terminate before, and to assess realistically where they might stand. At this stage, there might be room for negotiation between the ISE and Bloxham but it is very hard to see any appreciable measure of strength in Bloxham because of its unfortunate position.

Result

35. In the result, there is no tenable evidence that the decision to terminate the membership by Bloxham of the ISE on the 19th December, 2012, was made for anything other than the good reason that has been subjectively justified. The decision has been supported by sufficient underlying fact. On the evidence, the decision of the ISE to terminate the membership of Bloxham was made in good faith and was taken for the benefit of the company as a whole. The case has been most ably argued. Other points have also been ventilated on the side, or were simply raised in the pleadings, such as estoppel. Insofar as some evidence may have been directed towards these points, any such evidence was insufficient to establish any probable basis whereby the Court would be entitled to interfere with this decision.