THE COURT OF APPEAL

CIVIL

[Approved]

[No redaction needed]

[2023] IECA 114

Court of Appeal Record Number: 2021/175

High Court Record Number: 2012/3280P
2013/74COM

Costello J.
Haughton J.
Binchy J.

BETWEEN

IRISH BANK RESOLUTION CORPORATION (IN SPECIAL LIQUIDATION) AND IRISH NATIONWIDE BUILDING SOCIETY

PLAINTIFFS/ RESPONDENTS

- AND –

MICHAEL P. FINGLETON (ACTING THROUGH HIS LAWFULLY APPOINTED ATTORNEYS EILEEN FINGLETON AND MICHAEL FINGLETON JNR.)

DEFENDANT/ APPELLANT

JUDGMENT of the Court delivered on the 10th day of May, 2023

Introduction

1. This is an appeal against the judgment of the High Court (Hunt J.) refusing the appellant's application to dismiss or permanently stay the proceedings pursuant to the inherent jurisdiction of the Court in the interests of justice where, by reason, of the passage of time

and the severe ill health of the appellant it is said that there is a real or substantial risk of an unfair trial or an unjust result.

Background

2. The appellant was a director of the Irish Nationwide Building Society ("INBS") from 1971 until January 2008. He served as managing director of INBS from 1981 until January 2008. In 1971 he was appointed secretary of INBS, a post equivalent to that of a chief executive officer. From 1981 to the end of April 2009 his formal title was Chief Executive of INBS. The powers of the Board of INBS were delegated to the appellant on various occasions from 1981 onwards and the appellant played a central role in the affairs of the INBS for decades, though the exact nature and extent of this influence is in dispute between the parties. From the late 1990s to the 2000s, the business of INBS changed radically from predominantly residential lending to commercial lending and development, expanding from Ireland to the UK.

3. INBS was severely impacted by the financial crisis of 2008 and became grossly insolvent. It transferred various commercial loans subject to extremely significant discounts from their face value to the National Asset Management Agency in 2010. This crystalised losses to INBS amounting to € 6,031,000,000.

4. The first named respondent ("IBRC") is a state entity created by statute. Pursuant to a Transfer Order approved by the High Court pursuant to the terms of the Credit Institutions (Stabilisation) Act 2010 all of the assets and liabilities of INBS were transferred to IBRC on or about 1 July 2011. On 7 February 2013 pursuant to the provisions of s.4 of the Irish Bank Resolution Corporation Act 2013 the Minister for Finance signed the Irish Bank Resolution Corporation (Special Liquidation) Order 2013 (S.I. No. 36 of 2013) under the terms of which Kieran Wallace and Eamonn Richardson were appointed as Special Liquidators of IBRC.

5. On 29 March 2012 the Plenary Summons in these proceedings issued. They were served in March 2013. An appearance was entered on 27 March 2013 and a Statement of Claim running to 81 pages was delivered on 17 April 2013. By Order dated the 10 day of June

2013 the proceedings were entered into the Commercial List of the High Court. The proceedings have been subject to case management in the Commercial List thereafter. The proceedings have progressed with expedition. A Request for Particulars dated 8 July 2013 was replied to on 29 July 2013. The appellant delivered a defence and counter claim on 21 October 2013. The respondent's raised a Notice for Particulars on 11 November 2013 which was replied to on 9 December 2013. A Reply and Defence to the Counter Claim was delivered on 7 January 2014. Thereafter, the parties engaged constructively in the extremely onerous task of agreeing and the producing discovery.

6. The case advanced by the respondents is extremely wide ranging. It spans from 1981 to 2009 and it claims damages equal to the entire losses of the INBS in the sum of €6.031 billion from a single individual, the appellant. In the Statement of Claim it is pleaded that there was an extraordinary delegation of powers from the board of INBS to the appellant on various occasions from 1981 onwards. It is said that the appellant enjoyed considerable autonomy and freedom from oversight; that he had very significant responsibility for the lending functions of INBS and that there was an unusual and excessive concentration of decision-making power vested in the appellant in relation to approving applications for commercial and development lending and for the terms upon which such loans might be made. During the period from 2003 to the end of 2007, all loans in excess of €1 million required a credit committee recommendation and formal board approval. It is alleged that despite these internal procedures, the appellant in fact authorised the paying out of funds in excess of €1 million to borrowers before the board had even considered the matter, and it is further alleged that during his period of office he caused INBS to significantly alter the nature of the INBS loan book. The Statement of Claim alleges systemic failure to adhere to INBS policies. It is said that the appellant dominated the credit committee and that meetings of the credit committee were frequently inquorate as loans were in fact authorised by the

appellant unilaterally. The respondents claim damages for alleged negligence and breach of his duties as a director of INBS and the return of expenses/expenditure allegedly improperly claimed from the INBS by the appellant during the period 2002 -2009.

7. The appellant counter claimed in respect of the failure to provide him with Directors and Officers insurance cover. By reasons of the absence of this cover, he has funded his defence of these proceedings privately.

8. At the same time as these proceedings were progressing, the Central Bank of Ireland initiated a Central Bank Inquiry pursuant to s.33AO of the Central Bank Act 1942 (as amended) in relation to suspected "proscribed contraventions" (as that term is defined in the Central Bank Act) by the appellant, INBS and former directors and other members of the INBS management. The inquiry commenced by Notice of Inquiry dated 9 July 2015 and the appellant represented himself as he was unable to afford legal representation in respect of the inquiry.

9. The appellant was born in January 1938 and was thus 74 years of age when the proceedings commenced. He was 77 years of age when the Central Bank Inquiry commenced and thereafter his health started to deteriorate. It is not necessary to set out the details of his unfortunate experience in this regard save to note that he suffered a major stroke on 30 May 2019 which severely impacted him including his cognitive abilities. Unfortunately, he has steadily deteriorated thereafter.

10. On 20 December 2019 the Central Bank Inquiry was permanently stayed against the appellant on the basis that the appellant could not participate in it, and it would be contrary to his right to fair procedures to continue the inquiry.

11. In the meantime, the parties continued to prepare the proceedings for trial in accordance with the directions of the Commercial Court. The Judge in charge of the Commercial List has listed the matter for hearing on a number of occasions, so it is clear that the proceedings

are either in a very advanced stage of readiness or are actually ready to proceed subject to the outcome of this appeal.[1] At no point prior to the issuing of this motion was it suggested that the appellant could not defend the proceedings or that it was unjust to require him to do so.

12. On 11 December 2020 the appellant issued a motion seeking an order pursuant to the inherent jurisdiction of the High Court declaring that in the interests of justice the proceedings against the defendant be dismissed in their entirety or permanently stayed. The application was grounded on the affidavit of the appellant's son, Mr. Michael Fingleton Jnr., sworn on 10 December 2020. It is important to note that no complaint has been made that the respondents have not properly progressed the litigation or that there has been any culpable delay on the part of the respondents in the prosecution of the proceedings. Mr. Fingleton Jnr. sets out details of the health difficulties experienced by the appellant. It is not necessary to set these out in this judgment as subsequently an enduring Power of Attorney has been registered and the proceedings have been reconstituted in the name of the appellant's attorneys. It is accepted that he has suffered cognitive impairment and he no longer has capacity to conduct these proceedings. He will be unable to give evidence on his own behalf or to instruct his lawyers either in advance of or during the hearing.

13. From para. 50 of his affidavit, Mr. Fingleton Jnr. addresses the appellant's alleged inability to defend these proceedings. He refers to the extraordinarily large claim (€6.031 billion) and the time span of the allegations concerning the appellant which relates to his "tenure as managing director and/or chief executive" of the INBS, which commenced in

[1] On 18 November 2021, a hearing date was set for the 4 October 2022. When the matter was re-listed before the Judge in charge of the Commercial List of the High Court, this hearing date was vacated, and the matter was adjourned for mention until the 3 May 2022. At a listing on the 16 May 2022, the court ordered that the proceedings be reconstituted in the names of the appellant's attorneys. On 20 June 2022, the hearing date of 17 January 2023 was once again vacated, and the 7 March 2023 was provisionally fixed for hearing. At a listing on the 2 December 2022, the March hearing date was vacated, and the matter was adjourned for mention until 20 January 2023. At the listing on 20 January 2023, the matter was once again adjourned to 19 May 2023 and a hearing date was set for 17 October 2023.

1970. The essential basis upon which he seeks to permanently stay the proceedings are set out in paras. 52 and 63 of his affidavit as follows:

"52. The allegations against my father, as set out in the Statement of Claim, are both extremely detailed and broad in nature. They encompass widespread complaints about the systemic management and credit risk systems utilised by the Society and the extent of my father's powers as chief executive. The extensive time span of the allegations does not just relate to generalised complaints about the manner in which my father established the internal governance structures of the Society. There are also very specific allegations about events that happened over 30 years ago. Particular emphasis is placed on resolutions of the board of the Society passed on 31 March 1981, 13 December 1994 and 25 August 1997, each of which related to the delegation of powers from the board of the Society to my father as Chief Executive (see paragraphs 16-22 of Statement of Claim)."…

"63. It would be an extraordinary mental task for any individual to defend these proceedings and the mental strain it would impose upon even a fully able person is evident from a very basic review of the pleadings. By way of illustration only of the vast scope and breadth of the allegations being made against my father I refer to a selection of complaints and allegations pleaded by the Plaintiff in these proceedings specified below and set out a brief comment on what would be required from my father:-

(i) That there was an unusual and excessive concentration of the powers of the Society without appropriate oversight [paragraph 18 of the Statement of Claim] – this allegation would require my father to provide a detailed explanation of the manner in which the Society

developed its internal structures and the evolution of his role as Chief Executive since 1970;

(ii) That my father exercised significant control over the lending function of the Society and made lending decisions that were the function of the Board and/or sought retrospective approvals for decisions already made by him [paragraph 19 of the Statement of Claim]- this is a generalised complaint which the Plaintiff declined to limit to a specific group of loans [paragraph 13 of the Plaintiff's replies to particulars]- in order to answer this allegation my father would need to be able to give evidence in relation to the historic approvals processes as it developed since 1970 and provide a detailed explanation of loan approvals relating to a series of specific loans all of which were advanced prior to 2009;

(iii) That my father authorised loans of €1 million and more without reference to the Credit Committee or Board and did so without any or any adequate assessment of the loans- this is both a generalised complaint and one made by reference to 18 specific loans advanced in the period May 2004- December 2007 .The defendant has declined to further particularise the generalised allegation by reference to specific loans or a time period [paragraph 15 replies to particulars]- in order to deal with this allegation my father would need to be in a position to provide a detailed explanation of the Society's historic lending practices and provide specific details in relation to the approval process for, at a minimum, the 18 specific loans referred to at paragraph 22 of the Statement of Claim and have a detailed

recollection of how each of these borrower relationships evolved over time;

(iv) *That in the period from 2002-2007 my father improperly substantially increased the comparative size of the Society's loan book thereby exposing the society to greater risks of loss [paragraphs 35 and 36 of the Statement of Claim]- in order to deal with this allegation my father would need to be able to provide a very detailed explanation of the market conditions which prevailed in the commercial and residential mortgage markets during that period, the development of the Society's commercial lending strategy over the entirety of his tenure as managing director and the financial imperatives which lead to this change in direction and a detailed perspective on what he considered to be medium and the long term economic outlook at that time;*

(v) *That he failed to implement proper corporate governance and risk management structures and failed to establish or operate the appropriate internal committees- this would require him to provide detailed evidence of the manner in which the Society's internal structures evolved over time to deal with risk and corporate governance and a detailed explanation of all the personnel involved in these functions and the roles they performed, also as they evolved over time;*

(vi) *That he failed to comply with the Society's lending policies which were poorly drafted causing confusion [paragraph 38 of the Statement of Claim] – this would require my father to have a detailed understanding of five specific policy documents [specified at paragraph 38(c) of the Statement of Claim] and provide evidence of how they were created, by*

whom and with whose input and oversight and then explain how they were subsequently implemented in the Society;

(vii) *That the Credit Committee function was grossly inadequate and was dominated by my father and other senior members of the Society's lending function [paragraph 38(w) of the Statement of Claim]- this would require my father to provide detailed evidence of the manner in which the credit committee operated and of the role which specific individuals played over a significant period of time together with an account of his own relationship with other Board members and an explanation of how the board operated during different time periods;*

(viii) *That he failed to heed the warnings in successive management letters issued by KPMG from 2004 onwards [paragraph 38(jj) of the Statement of Claim]- this would require my father to have a detailed recollection of successive audits of the Society, his interactions with senior members of KPMG and his subsequent discussions with the Board regarding the contents of the management letters;*

(ix) *That he caused the Society to participate in profit sharing arrangements thereby encouraging the Society to act in the manner of a venture capital financier [paragraph 38(tt) of the Statement of Claim]- this would require my father to provide detailed evidence about the evolution of the Society's business model by reference to the market conditions which prevailed at relevant time periods;*

(x) *That he was grossly negligent in permitting the Society to enter into a series of loan arrangements with various borrowers including Devondale Limited, Louis Scully, Colpy Limited/Cyril Dennis, Ice*

Mountain, Coast & Capital, Admiral Taverns, Galliard Developments [paragraphs 41-86 of the Statement of Claim]- this would require my father to recall the full details of each of these borrower relationships including the history of their borrowing with the Society and the circumstances in which, in respect of each such borrower, each financing and refinancing was approved, by reference to his assessment of each secured property at all relevant times and the prevailing market conditions at each relevant time;

(xi) That he failed to notify the Society of his ongoing breaches of duty which had he done so, it is claimed, would have resulted in his summary dismissal by no later than 1 December 2007 [paragraph 87 of the Statement of Claim]- this would require my father to provide evidence of his course of dealings with all other board members and members of senior management over a number of years, including a detailed recollection of what was discussed at board meetings over many years; and

(xii) That he unlawfully sought reimbursement of 154 specified expenses in the period 2002-2009 that were not properly incurred in connection with the business of the Society- this would require my father to have a detailed recollection of each event in respect of which the expense was incurred and of the business purpose of the Society to which the expense related on each relevant date."

Decision of the High Court

14. The trial judge set out the arguments of the parties for and against staying the procedures. He analysed the pleadings and then considered the possible relevance of the appellant's evidence to these issues. He summarised the pleaded issues as follows:-

> *"a) The defendant was a director of INBS from 1971 to 26 January 2008 and was the managing director from 1981 at the latest to 26 January 2008. He resigned as director on attaining 70 years of age and thereafter remained as chief executive of INBS until April 2009. By resolution of a Board of 31 March 1981, the Board of INBS delegated to the defendant the wide powers pleaded at paragraph 17(a) of the statement of claim. Paragraph 17(b) and (c) plead further delegations of powers from the Board to the managing director by resolutions dated 13 December 1994 and 25 August 1997.*
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> *b) Contrary to what was appropriate for an institution of the scale of INBS, in practice the defendant enjoyed very considerable autonomy and freedom from oversight by the board in his conduct of the business of INBS, such that there was unusual and excessive concentration of the powers of the society in his hands. As a consequence, the defendant exercised control and enjoyed very significant responsibility for the lending functions of INBS, including commercial and development lending. He exercised the broad decision-making power of INBS to approve applications for such lending. The defendant made lending decisions which were the function of the Board and/or sought retrospective approval for decisions already made by him. (Paragraphs 18 to 22)*
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> *c) Although the lending procedures of INBS between 2003 and 1 December 2007 required a Credit Committee recommendation and Board approval for all loans of €1 million or more, in practice the defendant in fact authorised such loans*

prior to reference to the Credit Committee and/or the Board and did so without any or any adequate assessment of the loan applications.

d) These delegations afforded the defendant an extremely broad discretion in directing the strategy, management and decision making of INBS, and he was treated as the main controller of such matters by borrowers, intermediaries and others having relevant dealings with INBS and, as a result, the defendant bore significant responsibility for the conduct of the business of INBS. In this regard, paragraph 22 pleads 18 specific advances of in excess of €1 million made to stated borrowers between 17 May 2004 and 4 December 2007.

e) INBS failed to comply with various statutory obligations as to the maintenance of proper accounting records, systems of control, to lend against security and to assess the adequacy of security for loans. (Paragraphs 23 to 31)

f) The defendant breached further (including fiduciary) duties owed by him to INBS. (Paragraph 32)

g) The defendant breached various duties to exercise reasonable care, skill and diligence owed by him to INBS. (Paragraph 33)

h) In the early 2000s the defendant caused the loan book of INBS to pivot from primarily residential lending to lending for commercial purposes, primarily commercial property development. (Paragraphs 34 and 35)

i) This decision exposed INBS to greater risks of loss associated with a decline in property values and/or the refinancing ability or appetite of other financial institutions, of which the defendant either was, or ought to have been aware. (Paragraph 36)

j) The defendant was thereby obliged to take steps to measure, manage, monitor and control the additional risks to INBS associated with the policies implemented by him. (Paragraph 37)

k) The defendant failed to put in place measures to implement, monitor and ensure compliance with lending policies, corporate governance and risk management structures that were adequate in the circumstances, or to do so at all. The particulars plead various criticisms of a range of lending policies in force in INBS from 2003 to 2008. Specific criticisms are made under separate headings of foreign lending, compliance with lending policies, Credit Committee, portfolio risk management, risk management systems, profit sharing arrangements, strategy documents and management structure. (Paragraph 38)

l) The failures and breaches of duty on the part of the defendant caused or contributed to the massive losses sustained by INBS from 2008 onwards, and also losses on particular loans from 2006 onwards.

m) Alternatively, it is alleged that had the defendant not committed the alleged breaches of duty, the losses sustained by INBS during this period would have been avoided or substantially reduced. (Paragraph 39)

n) In the further alternative, these losses were caused or contributed to by gross negligence, negligence and breach of duty alleged against the defendant in relation to specific loan transactions (paragraph 40), which are pleaded and particularised from paragraphs 41 to 86. These paragraphs set out certain loans advanced to five listed customers, with specific complaints as to the lending practices in each case. The dates of these loans were March 2007 in relation to the first customer, October 2007 in relation to the second, December 2006 and

December 2007 in relation to the third, April 2007 in relation to the fourth, and May 2004 and May 2006 in relation to the fifth.

o) The defendant, in breach of his fiduciary duty, failed to disclose his breaches of duty to INBS. As a consequence of these breaches, INBS would have summarily dismissed him for breach of duty not later than 1 December 2007, would not have awarded him performance bonuses for the financial years 2008 and/or 2009 in the sums of €1 million and €221,000 respectively, and would not have retained him as Chief Executive after he resigned as a director. (Paragraph 87)

p) The defendant received payments of expenses from INBS which were not properly due to him (paragraph 88). Extensive particulars of this claim are set out at pages 61 to 80."

In paragraph 13 he considered the issues raised in the defence. He referred to a number of general objections that the claims were statute barred, that the respondents had been guilty of laches and delay and then he summarises the specific pleas as follows:-

"a) Paragraph 21 pleads that the delegations referred to in paragraph 17 of the Statement of Claim were justified and appropriate, were in the best interests of INBS, and that these powers, along with all of the powers and functions of the defendant, were exercised by the defendant properly and in the best interests of INBS.

b) The Central Bank (and later the Financial Regulator) were aware of these delegations and expressly and/or tacitly approved of the same. The defendant was, in fact, subject to the control and oversight of the Board and that he took appropriate steps to ensure that his powers were diluted or diffused throughout the organisation.

c) *If any loans of over €1 million were authorised in advance of Board approval, this occurred validly and following an appropriate assessment of such loans, and in the commercial interest of INBS.*

d) *Particular loan applications were, in fact, subjected to the internal loan approval procedure of INBS.*

e) *The defendant did not direct INBS in any sense other than the execution of the functions of the position of the Chief Executive. The loans of over €1 million pleaded in paragraph 22 of the Statement of Claim were dealt with in accordance with appropriate procedures or, alternatively, were expedited to take advantage of a good commercial opportunity in the best interests of INBS. If there were deficiencies, in that such loans were authorised by the defendant in advance of Board approval, it is denied that this was causative of any loss to INBS, or if it did, INBS failed to mitigate its loss.*

f) *The defendant believed on reasonable grounds that competent and reliable persons were charged with the duty of ensuring compliance with the duty set out in section 76 of the Building Societies Act, 1989.*

g) *There was no deficiency in the keeping of proper accounting records or systems of control, of inspection and of report or, if there was, the defendant did not bear any blame in respect thereof. He reserved the right to rely upon certifications given by KPMG as the auditors of INBS between 1975 and 2008 as a contemporaneous account of the financial condition of INBS, and on the fact that these audit reports were all issued without qualification.*

h) *If the defendant owed fiduciary duties to INBS or a duty to exercise reasonable care, skill and diligence, such duties were not breached by him.*

i) As to the pleas in paragraph 35 of the Statement of Claim, although certain admissions are made as to the activities of INBS, it is pleaded that any increases in lending and commercial lending were based on then-prevailing objective factors, including business and economic factors, and were correctly deemed to be in the best interests and to the commercial advantage of INBS. The growth in the loan book is said to have been well within the capacity of INBS and all regulatory and financial requirements and ratios including, but not limited to, the capital adequacy ratio required by the Central Bank and/or Financial Regulator. The defendant relies on similar decisions made in financial institutions in Ireland and elsewhere at that time, and on the fact that in December 2007 the Board formally adopted a policy of reducing the balance sheet exposure of INBS to lending, particularly commercial lending, and to focus on further building of balance sheet liquidity as a priority. The defendant relies again on an alleged awareness of the matters particularised in paragraph 35 of the Statement of Claim on the part of the Central Bank and the Financial Regulator, and on the lack of any material objection or adverse action by those institutions in that regard.

j) The actual subsequent decline in property values was not reasonably foreseeable by the defendant, and INBS had adequate reserves to deal with a foreseeable fall in property values at all material times.

k) The duties pleaded at paragraph 37 of the Statement of Claim were not breached because structures were put in place which were commensurate with the scope, size and complexity of the activities being conducted by INBS, and such duties were validly and/or properly delegated to others, including, without limitation,

to the Credit Risk department, the Audit Committee and the relevant heads of department.

l) In respect of paragraph 38 of the Statement of Claim, whereas certain admissions are made in respect of the five lending policies pleaded therein, it is denied that this lending was imprudent or otherwise improper, having regard to the prevailing business, economic and competitive environment, and was not the subject of adverse attention from the regulatory authorities, either in Ireland or elsewhere. If there were inadequacies in, or failure to follow lending policies, the responsibility lay elsewhere. Alternatively, departures from lending policies were justified where this was appropriate and commercially advantageous to INBS.

m) The defendant did not dominate the Credit Committee, and he did not exercise his right to sit on the Credit Committee until December 2007, when certain functions were transferred from the Board to that Committee. Furthermore, the members of the Credit Committee were appointed by the Board.

n) Insofar as the alleged losses are concerned, it is contended that these losses would have occurred in any event as a result of the global economic crisis, the credit crunch and the resulting property market crash, none of which events were reasonably foreseeable at any material time.

o) The subsequent transfer of INBS loans to the National Asset Management Agency was not reflective of their proper long term economic value or fair market value.

p) The five specific loan facilities pleaded in the Statement of Claim are approached in line with the preceding general pleas."

15. The trial judge observed that the appellant emphasised the subjective element of the claims, with particular reference to the decision of Charleton J. in *Bloxham -v- Irish Stock Exchange* [2014] IEHC 93, whilst the respondents emphasised the strictly objective nature of a claim in negligence and the irrelevance of subjective belief to the defence of such a claim.

16. At para. 19 he held:

> *"... I do not think that the test expressed by Charleton J in Bloxham imports a broad notion of subjectivity to the analysis of whether a director is in breach of his or her duties. The principal area of subjectivity permitted to a director is in relation to honesty of belief and propriety of purpose. I do not read the pleadings in this case as alleging that Mr Fingleton did not hold his opinions honestly or that he exercised his powers for improper purposes. Therefore, I do not share Mr Clerkin's view that the subjective testimony of the defendant on these issues is essential to the formation of a fair judgment on the actions or omissions of Mr Fingleton."*

17. He continued in para. 21 and 22:

> *"21. The essence of the claims made by the plaintiffs, as I understand them, is not that the defendant's decisions were dishonest or made for an improper purpose, but rather that they were negligent, and that there was no objective support for what Mr Fingleton asserts to be an honest and genuine belief that they were in the best interests of INBS. I do not see how the loss of the defendant's direct testimony on this aspect of the matter is crucial, as the subjective opinion or views of the defendant as to these matters is neither decisive nor relevant…*
>
> *22. Consequently, if the Bloxham test is applicable, the objective nature of that analysis does not differ greatly from that which applies by virtue of the conventional*

principles of the general law of negligence… The objective nature of the considerations that arise in relation to all of these matters considerably lessens the importance or necessity for evidence of the defendant's subjective views on such issues."

18. The trial judge determined that the balance of justice did not require that the pleadings be stayed for 12 reasons which he set out in para. 23 of his judgment. He expressly accepted that the absence of the direct testimony of the defendant and his input into pre-trial preparations and the running of the trial itself *"represent a significant litigation disadvantage for his side of the case."* He said the existence of this disadvantage was not determinative in and of itself as to whether the proceedings should not continue. He pointed to the fact that even the death of a party does not in itself prevent litigation proceeding. He said there must be a balancing process which must take account of the fact that in ordering a stay and/or dismissal to vindicate the rights of one party, it has as its inevitable consequences the preventing of the other party of exercising their right of access to the court. He concluded that *"that such a step will be rare and will only occur where there is no alternative means of vindicating the rights of the moving party. This is especially so where there is no issue of delay or other culpable behaviour on the part of the plaintiffs."*

19. He said the nature and complexity of the issues of the case are such that the absence of the appellant's evidence will be less significant than in a simpler case where the sole witness of significance is unavailable. He noted that there is *"There is no dearth of witnesses to the matters in issue, and there is no suggestion that such witnesses are now unavailable."* He placed reliance on the fact that the case concerned *"the processes of a sophisticated financial institution"* and that *"A true and fair view of these processes within such an institution should [be] ascertainable from the books and records required to be kept by statute"* rather than the evidence of one individual. *"The suggestion that a complete picture might depend*

on the naturally fallible recollections of a director many years later is a matter of concern in itself".

20. He rejected the argument that the proceedings were punitive in nature. He did not regard the decision of the Central Bank Inquiry to stay its proceedings to be a guide as to whether civil proceedings should be stayed or dismissed on the balance of justice. The consequences of adverse findings by the inquiry were *"more punitive in nature than an award of compensatory damages in a civil claim"*.

21. He held that the public interest was not a significant factor as, if a stay or dismissal was required to vindicate the appellant's position in the interests of justice, the respondents' interests would not carry any greater weight than the private rights of any other plaintiff. He pointed out that the appellant had known the nature of the claim since the Statement of Claim was delivered in 2013 and therefore has had several years to give instructions to his legal team. So, therefore, his lawyers should be able to challenge the evidence of the respondents on the basis of instructions and preparations which took place before the appellant's illness precluded the giving of any further instruction. Hunt J. also noted that vast quantities of documents had been provided on discovery and he characterised the prejudice flowing from the unavailability of any further input from the appellant to the defence of these proceedings as *"relatively limited"*. He therefore held that the appellant had not met the high threshold required to dismiss or stay the claim of a blameless plaintiff.

Developments post the judgment of the High Court

22. The appellant appealed the decision of the High Court. The scope of the application widened through the Notice of Appeal, the written submissions and then the oral submissions before this court. These will be discussed more fully below.

23. In addition, on the day the appeal was listed for hearing on 22 February 2022 the Court was firmly of the view that the evidence before it disclosed a serious question over the ability

of the appellant to give instructions to his legal team. The appeal was adjourned to allow the appellant's attorneys to register the enduring Power of Authority he had previously executed and to reconstitute the proceedings. This occurred and the appeal recommenced on 12 December 2022. It proceeded on the basis that the appellant lacked capacity to manage his affairs and the proceedings were now to be conducted by his attorneys.

24. On the second day of the hearing a most profound change in the proceedings and the application to stay the proceedings occurred during the submissions of counsel for the respondents. To put this in perspective, it is first necessary to recall the breadth of the case as pleaded as summarised by the trial judge in para. 12 of the judgment quoted above. It could truly be described as unprecedented in both its temporal scope and the breadth of the allegations.

25. In the appellant's written submissions before the High Court, he summarised the scope of the case as follows:

> *"4. The plaintiffs have elected to frame their case in the broadest possible terms. The total amount claimed against the defendant in these proceedings is €6.031 billion. It is understood that this is the largest financial claim made in the history of the State. The allegations date as far back as the commencement of the defendant's tenure as an officer of Irish Nationwide Building Society (the "Society") in 1971. The allegation at the heart of the proceedings, which is that the defendant exercised excessive unilateral powers to override the internal risk management structures of the Society, is grounded on a decision of the board of a society to delegate certain powers to the Defendant as Chief Executive which was made on 31 March 1981. Accordingly, the conduct and evolution of the Society's business over these expanded time periods is a central issue in the proceedings. Most of the voluminous specific allegations made in the proceedings relate to the period 2002 – 2007.*

5. The claims against the Defendant seek to call into question every aspect of the Society's business including its governance and risk management structures, its commercial lending strategy, its lending policies, its loan approval processes and its human resources capacity. Numerous claims also seek to call into question the manner in which various internal committees of the Society were constituted and how they interacted with each other. The Plaintiff contends that the internal risk management structure of the Society as they evolved over time were grossly inadequate and incapable of addressing the risks associated with the Society's business at relevant time periods.

6. All of the above are critical factual issues which demonstrate the enormous breadth and scope of these proceedings. In order for factual determinations to be made in relation to these issues, it would require a detailed examination of the Society's internal processes as they evolved over the entire period during which the Defendant held office dating back as far as 1971 and the role which the Defendant played in that evolution.

…

9. The extent to which the case pleaded by the Plaintiff will require detailed oral evidence is illustrated by the following examples of the more expansive pleas from the pleadings, none of which could possibly be resolved by reference to documentation alone:-

> *"(i) That there was an unusual and excessive concentration of the powers of the Society in the hands of the defendant without appropriate oversight [para. 18 of the Statement of Claim];*

(ii) That the defendant made unilateral lending decisions and advanced loans in excess of €1million without consulting the Board [para. 19 of the Statement of Claim];

(iii) That the defendant unilaterally authorised loans of €1million and more without reference to the Credit Committee or Board and did so without any or any adequate assessment of the loans [para. 19 of the Statement of Claim];

(iv) That in the period from 2002-2007 the Defendant improperly substantially increased the comparative size of the Society's commercial loan book thereby exposing the Society to greater risks of loss [paras. 35 and 36 of the Statement of Claim];

(v) That the Defendant was responsible for the introduction and implementation of inadequate or defective loan policy documents and then failed to comply with them [paragraph 38 of the Statement of Claim];

(vi) That due to the actions of the defendant the Credit Committee function was grossly inadequate [paragraph 38(w) of the Statement of Claim];

(vii) That the Defendant failed to heed the warnings in successive management letters issued by KPMG from 2004 onwards [paragraph 38(jj) of the Statement of Claim];

(viii) That the Defendant caused the Society to participate in profit sharing arrangements thereby encouraging the Society to act in the manner of a venture capital financier [paragraph 38(tt) of the Statement of Claim];

(ix) That none of the 12 individuals who reported to the Defendant were in a position to challenge decisions made by the Defendant [paragraph 38(xx) of the Statement of Claim];

10. Similarly, it is clear that the pleas entered by the Defendant also require detailed oral evidence and in this regard reference is made, by way of illustration, to the following pleas:-

(i) From March 2006 the Defendant was engaged in efforts to sell the Society, and this informed his decision making at that time [paragraph 11 of the Defence];

(ii) The formal delegations of powers to the Defendant, which it is alleged resulted in an excessive concentration of powers in the hands of the Defendant, were in the best interests of the Society [paragraph 21 of the Defence];

(iii) The Defendant denies that he approved any loans unilaterally [paragraph 22 of the Defence];

(iv) That the Defendant did take steps to limit the concentration of power in his hands by appropriately delegating powers to other members of the Society's management including heads of department [paragraph 29 of the Defence];

(v) The Defendant contends that any increase in commercial lending was based on the prevailing business and economic factors at that time and were to the commercial advantage of the Society [paragraph 58 of the Defence]; and

(vi) The Defendant contends that any internal policies implemented by him were commensurate with the scope, size and complexity of the Society's business [paragraph 65 of the defence]."

26. The judgment of Hunt J. and the judgment of Costello J. in the application for discovery ([2015] IEHC 296) proceeded on the basis that the claim covered the period of at least 1981

to 2009, was concerned with *"the entire architecture and infrastructure of the business of the Society"*, i.e., its entire business model, and was a claim for damages amounting to €6.031billion.

27. On Day 2 of the hearing of the appeal counsel confirmed that the respondents were limiting their claim to damages arising from five series of loans pleaded in paras. 40-86 of the Statement of Claim. He expressly confirmed that evidence as to events/matters preceding these identified large loans *"may set the context for what happened"*.[2] The claims starting at paragraph 40 are claims for damages for gross negligence and negligence and breach of duty.

28. It is not clear whether counsel was also indicating that the respondents were no longer pursuing the claim for damages for failure to inform the INBS of his breaches of duty with the result that the INBS wrongfully retained him as Chief Executive and paid the appellant's salary and bonuses from 2006 onwards (para 87) or the claim for restitution in respect of the expenses paid between 2002 and 2009 (para 88), but this appears to be the case and certainly no mention was made of these claims in submissions to the Court, so this judgment proceeds on the basis that these claims have been withdrawn and no longer remain in the proceedings.

29. He confirmed that the appropriate value of the claim was now €65 million (arising from loans advanced in the State) plus £220 million (in respect of loans advanced in England). Thus, it was in the region of €290m. It is of course still a very large claim, but it is now approximately 5% of the previously advanced claim.

30. For the purposes of this application, what is even more significant is that whole swathes of issues will no longer feature in the case. In terms of the Statement of Claim, paras. 18-39 are no longer being pursued as standalone issues grounding a claim for damages. This means that issues (a), (b), part of (c) and (d),(e)-(k), part of (l), (m) and (o) and (p) identified

[2] Page 48 of the transcript Day 2.

by Hunt J. are no longer issues in the case, save insofar as they may specifically arise in relation to the five series of loans which remain in the case.

31. Counsel also confirmed that there was no challenge to the honesty of the appellant and that the plea in the Reply based on s.71 of the Statute of Limitations (the defence of equitable fraud) was also withdrawn. In any event, as the five series of loans were all advanced after 30 March 2006 and are thus within the six-year limitation period for claims in negligence, it follows that no issue in relation to the Statute arises in respect of these claims.

32. By any matrix, this amounts to a very significant change in the case. The proceedings no longer can be said to be truly exceptional. They now comprise a case of negligence and/or breach of a director's duty to exercise due skill, care and diligence in or about the authorising and advancing of a series of five specified loans between 2006 and 2009. It is a claim, the details of which were pleaded clearly in the Statement of Claim in 2013 and particulars of which were furnished on 29 July 2013. Furthermore, extensive discovery has been made in respect of these loans. Notices of Business Records evidence have been served pursuant to ss. 13, 14 and 15 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 in respect of documents relating to the transactions and relating to and evidencing the loans. This is highly relevant to the ability of the appellant to defend the case as it now constituted.

The scope of the claim and the evidence of prejudice in respect of the reduced claim

33. The case advanced on behalf of the appellant to justify the dismissal or staying of the proceedings has been quoted previously. It is said that it flows from the appellant's ill health and the nature of the case facing him. No further affidavit was filed between the date of the judgment of the High Court and the hearing of the appeal. At the request of the Court, Affidavits of Means were filed and replied to, but these affidavits did not address any issue of prejudice to the appellant if the case were to proceed to trial. The facts upon which the

relief is sought are those set out in Mr. Fingleton Jnr's affidavit. As a matter of principle, the appellant is confined to the evidence he has adduced in support of his application, and he may not advance any alleged prejudice which is not substantiated by evidence.

34. This is no longer a claim for €6.031billion. It is no longer a claim spanning the appellant's tenure as Managing Director and/or Chief Executive of INBS. It is no longer concerned with allegations about the systemic management and credit risk systems of the society or the extent of the delegation of powers to the appellant or the internal governance structure of the society or its lending policies or any generic issues of this sort. This means that the matters identified as (i), (ii), (iv)-(ix), (xi) and (xii) in Mr. Fingleton Jnr.'s affidavit relate to claims which are now no longer being pursued. It follows, therefore, that no prejudice can arise in this regard from the appellant's inability to address these issues or to instruct his lawyers in relation to these matters.

35. This leaves two matters identified by Mr. Fingleton Jnr. as giving rise to prejudice to the appellant of such gravity that the case ought not to be permitted to proceed to trial: (iii) and (x). Category (iii) is not being pursued separately to category (x). Therefore, the specific prejudice identified in Mr. Fingleton's Jnr.'s affidavit which applies to the case now being advanced is that set out in (x) which is the series of five loans to which the respondents have now confined their case per counsel.

36. It is important to emphasise that there is no evidence before the Court of any steps taken to prepare the defence, to identify possible witnesses for the defence, or whether they are available to give evidence. The Court has no evidence of the loss of potential witnesses by reason of their whereabouts no longer being known or the death or other reason for their not being available. Given the nature of the defence – which will be considered in more detail – one would expect the appellant to call witnesses from the Credit Committee, the Commercial Loan department and the Board of the Society. The absence of this evidence is

all the more significant as Mr. Fingleton Jnr. says that he has been assisting his father with this case since 2013. He personally worked in the Commercial Lending Division of the INBS in London between 2006-2010, the very period when the five series of loans pleaded in paras. 40-89 of the Statement of Claim were advanced. There is no evidence that he or the appellant sought to identify or contact his former colleagues about these loans. The Court has no evidence of any efforts made to identify who was on the Credit Committee at the relevant period and Mr. Fingleton Jnr's affidavit is silent about the possible evidence from members of the Board. The appellant cannot and does not make the case that witnesses with relevant testimony are not available to give evidence as to factual matters which will arise at trial.

37. Vast discovery has been made in these proceedings. There is no averment in respect of any of these loans that the files in respect of these loans are incomplete or that it is not possible to defend the claim due to the inadequacy of the records available. Simply put, this case has not been made on behalf of the appellant.

38. Somewhat unusually, the application to dismiss the proceedings is not based upon the absence of witnesses or documents – it is based on the inability of the appellant, a central witness, to give any evidence or instruct his lawyers, relevant to the case he has to face.

Jurisprudence

39. There is an inherent jurisdiction to dismiss proceedings where, by reason of lapse of time or delay:

(1) There is a real and serious risk of an unfair trial or an unjust result;

(2) There is a clear and patent injustice in asking the defendant to defend; or

(3) It places an inexcusable and unfair burden on the defendant to defend. (*Comcast International Holdings Inc. and Ors. v. Minister for Public Enterprise and Ors.* [2012] IESC 50 (McKechnie J. at para. 40)).

In the same case Clarke J. (as he then was) stated at para. 4.2 that proceedings should be tried on the merits in all cases where no blame can lie on the plaintiff *"save where there is a high degree of assurance that the relevant defendant will not be able to get a fair trial or will suffer serious unfairness."*

40. The jurisdiction to dismiss proceedings by reason of the lapse of time on the grounds that it is not possible for the defendant to defend his or herself even where the plaintiff has not been guilty of a culpable delay has been recognised since *O'Domhnaill v. Merrick* [1984] IR 151. The facts were that an accident occurred when the plaintiff was an infant in 1961. The plenary summons did not issue until 1977 and the defendant was first notified of the claim sixteen years after the event. The trial was likely to be twenty-four years after the event. The Supreme Court held that it would be contrary to natural justice and an abuse of process for a defendant to face a trial in those circumstances.

41. As in p.157 of the report Henchy J. stated:

"Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a case…In all cases the problem of the court would seem to be to strike a balance between a plaintiff's need to carry on his or her delayed claim against the defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend."

42. In balancing the competing rights of the plaintiff and the defendant, he continued at p. 158 of the report:

"While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons, a trial in 1985 of a claim for damages for personal injuries sustained in a road accident in 1961 would be apt to give an unjust or wrong result,

in terms of the issue of liability or the issue of damages, or both. Consequently, in my opinion, the defendant, who has not in any material or substantial way contributed to the delay, should be freed from the palpable unfairness of such a trial."

43. The next decision was *Toal v. Duignan (No. 1)* [1991] ILRM 135. The plaintiff was born on 28 June 1961 with an undescended right testicle which was not detected at the time. Consequently, he was afforded no remedial treatment nor were his parents warned of the necessity for such treatment. The plaintiff issued a plenary summons in 1984 against the hospital, the then Master of the hospital, the gynaecologist who attended his mother (who died after the issue of the summons) and the personal representative of the consultant paediatrician who examined the plaintiff after his birth. He also sued a general practitioner who had been consulted by the plaintiff's parents in 1971 when the plaintiff was suffering from mumps. The claim against the hospital, the gynaecologist and the paediatrician was that they had failed to diagnose an undescended testicle in the baby or having diagnosed, failed appropriately to advise the plaintiff's mother as to the steps to be taken if the testicle did not descend within a few years. At the hearing of motions to dismiss the proceedings against the hospital, the gynaecologist and the paediatrician, it was established that the records were incomplete (they were subsequently described as wholly incomplete and wholly inadequate in *Toal v. Duignan (No. 2)*); that a particular search had *"failed to yield any more than the incomplete records"* and there was evidence that the whereabouts of the nurses who were employed in the hospital were unknown. Given the nature of the claim against them *"it would be impossible for either the hospital authorities or the consultants engaged in the absence of the most detailed clinical notes, to defend themselves twenty-six years on from attendance at the birth in 1961."* On this basis, the Supreme Court dismissed the proceedings against the hospital and the two consultants. It is important to note that extensive steps had been taken to ascertain the availability of witnesses and documents to

defend the claim. Based on the evidence of the absence of both witnesses and clinical notes, not merely the death of the two consultants, the proceedings were dismissed against the HSE and the two consultants.

44. In *Toal v. Duignan (No. 2)* [1991] ILRM 140, the issue was whether the case by the plaintiff against a locum GP who attended him as a boy with what turned out to be mumps and meningitis should likewise be dismissed for delay. The High Court rejected the GP's application to dismiss the claim, largely due to the absence of evidence to support her contention that she could not defend the claim due to the lapse of time. Between the rejection of her motion and the hearing of her appeal she carried out what the Supreme Court described as *"extremely exhaustive enquiries"* which demonstrated that there were no medical notes held by other practices which could assist her in defending the claim. The Supreme Court was satisfied on the evidence she adduced that there were no records available and, in those circumstances, given the lapse of time, she could not be required to defend the proceedings and it dismissed the case against her.

45. In *Kelly v. O'Leary* [2001] 2 IR 526, the plaintiff sought damages in negligence in respect of physical and mental injuries arising from events said to have occurred between 1934 and 1947 when she was placed in the Goldenbridge orphanage which was run by the Sisters of Mercy. The defendant was sued in a representative capacity, and she brought a motion to dismiss the proceedings based upon extensive evidence of searches for possible witnesses and of prejudice suffered in defending the claim by reason of the established unavailability of witnesses and the absence of medical notes in respect of the plaintiff's three admissions to hospital. Evidence established that all but one of eighteen potential witnesses for the defendant were dead and the surviving witness was eighty-two years old and could not remember specific incidents after so many years. The consultant psychiatrist engaged by the defendant to provide an expert medical report in respect of the plaintiff said in his

affidavit that in the absence of any medical records *"any attempt to make an assessment of the plaintiff would be "meaningless.""* There was thus actual evidence of substantial prejudice. Kelly J. held that there was a clear and patent unfairness in asking the defendant to defend the action after the lapse of time involved where actual prejudice had occurred to the defendant by reason of that delay. It had not contributed to the delay. There was a real and serious risk of an unfair trial:-

> *"As a matter of probability the trial may amount to an assertion countered by a bare denial. Indeed even the ability of this defendant to make a denial is doubtful in respect of a number of allegations. Such an exercise would be far removed from the form of forensic enquiry which is envisaged in the notion of a fair trial in accordance with the law of this State.*
>
> *...*
>
> *Constitutional principles of fairness of procedure require that the action not proceed. To allow the action to go on would put justice to the hazard."*

46. The next case in time to which the parties referred was *Manning v. Benson & Hedges Limited* [2004] 3 IR 556. Finlay Geoghegan J. in the High Court considered whether, by reason of inordinate and inexcusable delay, applying the principles in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 or, in the alternative, the principles deriving from *O'Domhnaill v. Merrick* (lapse of time without culpability by the plaintiff), the proceedings should be dismissed. At paras. 32 and 33 of the judgment she held:-

> *"32. The constitutional requirement that the courts administer justice requires that the courts be capable of conducting a fair trial. This, as was submitted, is required by Article 34 of the Constitution. Accordingly, if a defendant can on the facts establish that having regard to a lapse of time for which he is not to blame there is a real and serious risk of an unfair trial then he may be entitled to an order to dismiss.*

33. Also, if a defendant can establish that a lapse of time for which he is not to blame is such that there is a clear and patent unfairness in asking him now to defend the claim then he may also be entitled to an order to dismiss. This entitlement derives principally from the constitutional guarantee to fair procedures in Article 40.3 of the Constitution."

47. She identified factors which may be considered by the court in relation to these questions as follows:-

"1. has the defendant contributed to the lapse of time;

2. the nature of the claims;

3. the probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues;

4. the nature of the principal evidence; in particular whether there will be oral evidence;

5. the availability of relevant witnesses;

6. the length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and the probable trial date."

Further, on the second question it would be relevant to consider any actual prejudice to the defendant in attempting to defend the claim by reason of the lapse of time."

48. Other than factor no. 1, it would appear that these factors are relevant to the assessment to be made in this case.

49. She analysed the cases made by the plaintiffs and in paras. 67 and 68 held:-

"67. ...Hence it appears in respect of each of the defendants that as a matter of probability the claims would require the court to decide issues of fact pertaining to the

state of scientific knowledge which they either were aware of or ought to have been aware of and the precise decision taken by the defendants not only in relation to the manufacturing but including detailed decisions effecting such matters as the level of nicotine over much of the twentieth century. Many of these issues would have to be determined on oral evidence and it is improbable that the relevant witnesses would be available to the defendants relating to the earlier part of the twentieth century.

68. For a court to be asked in the years 2006 or 2008 or later to determine issues of fact of the nature which would be required by these claims as to what was or was not done and why in the early part[of the twentieth century] or even 40 years ago and in the probable absence of many of the persons actually involved, in the words of Henchy J. in O'Domhnaill v. Merrick [1984] I.R. 151 "puts justice to the hazard.""

50. She concluded that there was both a real and serious risk of an unfair trial if the claims were to be permitted to continue and that there would be a patent unfairness in asking the defendants to defend each of these actions now brought against them. Accordingly, she dismissed the plaintiff's claim on the three motions before her.

51. *McBrearty (APUM) v. The North Western Health Board & Ors.* [2010] IESC 27 was a medical negligence claim relating to the birth of the plaintiff on 1 January 1981. Unlike the situation in *Toal v. Duignan*, full medical records were available in 2010. There was no evidence that witnesses were unavailable, even though the events in question had occurred 31 years prior to the date of the judgment of the Supreme Court. Geoghegan J. emphasised that medical witnesses refresh their memories by reference to their notes and that they could not otherwise recall events from their busy professional lives. Thus, the existence of the full medical records was critical. The plaintiffs' experts had been able to give expert reports based upon the complete notes and accordingly he refused to dismiss the proceedings against

the HSE as the successor in title to the Health Board. He distinguished the position between the Health Board on the one hand and the two individual doctors who were defendants on the other hand. At the time of the proceedings there had been an ongoing dispute as to whether the Medical Defence Union would indemnify the two defendant consultants. Geoghegan J. described this as an *"exceptional factor"* which differentiated them from the Health Board. He observed that in reality there were all kinds of possibilities as to how the indemnity issue might be resolved:

> *"Litigation to compel the Medical Defence Union to meet these claims might prove successful. Alternatively, there might be an overall settlement that did not prejudice these particular defendants. In the further alternative if all else failed, the State might provide indemnity to doctors caught in the situation that these doctors were in. But all of that is speculation. It seems to me that there is a dimension which the learned High Court judge overlooked in regarding the concern as merely contingent. Quite simply, these two doctors, a long number of years after the events in question, are now faced potentially at least with huge expense both in relation to paying their own lawyers and, of course, in the event of the plaintiff being successful in relation to an award of very large damages indeed and the plaintiff's costs. In theory, at least, the two doctors themselves might between them or indeed one only be faced with the entire award of damages on the basis that the health board was merely vicariously liable and might be held entitled to claim one hundred per cent indemnity. The aspect which I am suggesting the learned High Court judge overlooked is the enormity of the worry and upset this would cause and must already be causing these two defendants no matter what the ultimate outcome might turn out to be. Therefore, in my view, it is fundamentally unfair that they should have to face a trial and, it is a circumstance in*

which the court can exercise its inherent jurisdiction irrespective of the fact that there is not a finding of inordinate and inexcusable delay by the plaintiff.

For this reason, I do not have to consider "the balance of justice" issue in relation to the two doctors if I am correct in the view which I have just expressed. Even if I did have to consider that "the balance of justice" issue in relation to the action against them, I would, having regard to the consequences of the indemnity concerned already referred to have taken the view contrary to the learned High Court judge that the balance of justice in that instance favoured striking out the action as against those two defendants rather than permitting the plaintiff to continue the proceedings against them. It would seem to me that the damage to the plaintiff in striking out the proceedings as against the two doctors would be less than the damage caused to those two doctors by compelling them to defend. In expressing this view, I am particularly having regard to the fact that there would be vicarious liability on the part of the health board at any rate and, therefore, the plaintiff would not be precluded from pursuing his action against the board." (pp. 46 and47)

52. The appellant relied heavily upon the judgment in *McBrearty* and referred to the fact that he has no Directors and Officers indemnity policy – it in fact forms part of his counter claim. He says that there is an analogy between his situation and that of the two consultant doctors in *McBrearty*.

53. The appellant placed greatest reliance on the decision of the Supreme Court in *Comcast* and in particular the judgment of McKechnie J. The heart of his judgment dealing with this jurisdiction is to be found in paras. 40 and 42 :

"40. ...That the courts have such an inherent jurisdiction [to dismiss claims on the basis of the interest of justice] cannot be doubted. It surfaced in O'Domhnaill, was

further established in Toal (No. 1) and Toal (No. 2), and since then, in several cases, has been accepted without question. It has a somewhat distinct basis and separate existence from Primor, but many of the matters relevant for its application are common to both. The test to be applied has been described variously such as, by reason of lapse of time or delay:

(i) is there a real and serious risk of an unfair trial, and/or of an unjust result;

(ii) is there a clear and patent injustice in asking the defendant to defend; or

(iii) does it place an inexcusable and unfair burden on such defendant to so defend?

The justification for the existence of this jurisdiction was described by Finlay C.J. in Toal (No. 2), a case in which the plaintiff was blameless for the delay involved and where the proceedings were issued within the permitted statutory period, as stemming from the supremacy of the court's constitutional obligation which transcends any legislative provision to achieve justice inter partes. No specific article of the Constitution was quoted in this regard, but the administration of justice and the personal rights provisions, must have been intended.

…

42. There are a number of features to this jurisdiction which are worthy of note: firstly that it applies even if the proceedings are instituted within the statutory period prescribed for by the Oireachtas; secondly, that a defendant can succeed in avoiding a merit hearing even where a plaintiff is entirely blameless for the delay, in either in a personal or a vicarious sense; and thirdly, that the time period looked at, commences from the date of the alleged wrongful acts and continues to the anticipated date of trial. In addition however, it also has the distinct feature of its focus being on the defendant: as appears from the descriptive nature of the test as given, the criterion essentially is defendant directed. This is in stark contrast to the Primor principles

where the positions of both are equally considered. It is therefore clear that this is a wider jurisdiction than Primor with a lower threshold to surmount before its successful invocation. That distinction, coupled with others as identified, makes this jurisdiction one which should be sparsely used and little availed of. I fully agree with the words of Hogan J in Donnellan v Westport Textiles Limited (in Voluntary Liquidation) and the Minister for Defence, Ireland and the Attorney General [2011] I.E.H.C. 11 where in this context, the learned judge, having stated that such jurisdiction permits the court in an appropriate case to "strike out proceedings, even though the third limb of the Primor test might not have been established" went on to caution that "[o]f course, such cases would have to be exceptional."

54. In para. 41 he indicated that the factors identified by Finlay Geoghegan J. in *Manning* were amongst the factors to be considered by a court hearing such an application.

55. McKechnie J. emphasised that it is only in the most exceptional circumstances that a plaintiff's claim should be dismissed under this jurisdiction. This is accepted by the appellant. It is also worth noting that at para. 44 McKechnie J. concluded that a consideration of the pleadings and the affidavits in *Comcast* and *"in particular noting the relevant time period and events"* [March 1995 – May 2006] that in October 2012 when the judgment was delivered, *"exceptionality, of the scope demanded, cannot in my view be said to exist"* and he rejected the claim to dismiss the proceedings on the basis of this jurisdiction.

56. It is of some relevance to record that, notwithstanding the somewhat ambiguous reference to a lower threshold in para. 42 of McKechnie J.'s judgment, the appellant accepts that Clarke J. correctly described the applicable threshold at para. 4.3 of his judgment which must be surmounted to justify the dismissal of proceedings where there is no culpable delay on the part of the plaintiff as being necessarily more onerous than that which applies in the case of culpable delay.

57. The final judgment opened to the court on the question of the inherent jurisdiction to strike out proceedings by reason of lapse of time was *Cassidy v. The Provincialate* [2015] IECA 74. The proceedings concerned an allegation that between 1977 and 1980 when the plaintiff was a girl, she visited a friend who lived in a house on the grounds owned by the defendant. She alleged she was raped and falsely imprisoned by PD, a groundsman employed by the defendant. The defendant investigated the claim and tried to identify potential witnesses. There was no record that PD was ever employed by the defendant. Eighteen potential witnesses in addition to PD, the alleged abuser, had died. An application to dismiss the proceedings pursuant to the inherent jurisdiction of the Court on the grounds of inordinate and inexcusable delay as well as non-culpable delay was brought in 2014. Irvine J. (as she then was) said at para 32:-

> *"The question most commonly considered by the court when exercising [the non-culpable delay jurisdiction to dismiss]is whether, by reason of the passage of time, there is a real and substantial risk of an unfair trial or an unjust result.*

She then went on to say at para 38:-

> *"38. ...[A] court should exercise significant caution before granting an application which has the effect of revoking that plaintiff's constitutional right of access to the court. It should only grant such relief after a fulsome investigation of all of the relevant circumstances and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be placed at risk of an unfair trial or an unjust result."*

58. As Irvine J. pointed out, the burden is on the defendant to prove that it would be placed at risk of an unfair trial or an unjust result if the action were to proceed. Given the nature of the allegations in the case before her, the death of PD, the alleged perpetrator, resulted in the

"grossest imaginable prejudice" to the defendant and for this reason she allowed the appeal and dismissed the proceedings.

59. From these cases the following principles emerge which are relevant to the application before this court:

(1) The burden is on the moving party to establish that there is a real and serious risk of an unfair trial or an unjust result or that there is a clear and patent injustice in asking the defendant to defend or that it places an inexcusable and unfair burden on such defendant to so defend.

(2) It is an exceptional jurisdiction which must be used rarely.

(3) The court must look at the circumstances pertaining at the date of the application and consider the date of the alleged acts and omissions and the likely date of trial when considering the lapse of time in the case.

(4) The court must look at the nature of the claims and the defences raised. It must access the nature of the evidence to be led and the issues to be decided. It must weigh the role of documents in this context. In medical negligence claims the presence or absence of medical records is highly relevant. The court must consider whether it is a case where documents will play a very significant role or not; whether such documents exist and the extent to which oral evidence is likely to be required and/or contested and/or critical to resolving the issues to be decided by the court.

(5) In the context of all of the above the court must assess the prejudice the defendant asserts and the evidence he or she adduces to support the assertion.

(6) The fact of the existence of litigation disadvantage does not preclude the conduct of a fair trial or lead to the conclusion that the result will be unfair. The Oireachtas has legislated to allow cases to be brought by or against deceased

> persons, and persons who lack capacity may both sue and be sued. In each case of necessity, the litigant suffers a degree of disadvantage in comparison to a litigant who is not so situated. Therefore, the fact that a defendant lacks the capacity to conduct the proceedings and to give evidence on his own behalf, while undoubtedly prejudicial, does not lead to the conclusion that proceedings involving such a litigant must be dismissed or permanently stayed.

60. Neither party cited an Irish case where the issue of dismissing proceedings on the grounds of the ill health of a defendant had been considered. The respondents referred to the decision of the High Court of Northern Ireland in *The Serious Organised Crime Agency v. Mullan* [2011] NIQB 55. The plaintiff agency brought proceedings pursuant to s.243 of the Proceeds of Crime Act 2002 against the defendant in respect of certain properties which it claimed were recoverable property within the meaning of the Act. The defendant sought to stay the proceedings as he had suffered a stroke and he was unable to participate effectively in the trial as a result. Related criminal proceedings had been stayed on the basis that he was unfit to plead.

61. Tracey J. held that it is *"unsound in principle"* to stay civil proceedings as an abuse of process on the basis solely of the moving party's inability to give instructions due to that person's medical condition/disability. He held at paras. 9 and 10:-

> *"9.It is unsound in principle because it would necessarily involve depriving other parties of <u>their</u> rights to a fair or any hearing to determine their civil rights and obligations. If the contention was correct individuals in a similar or worse position to the defendant could neither sue nor be sued - that consequence would appear to inexorably flow from acceding to the defendant's application to stay the present proceedings on the basis asserted. It would be surprising if SOCA were thereby to be deprived of their rights, in the public interest, to pursue the proceeds of crime no*

matter how vast where the defendant has for whatever reason become unable to give instructions. And what of people who have died in the meantime? Logically if the defendant's contention is meritorious a similar argument could be made in those circumstances.

10. Unsurprisingly the defendant's submission is unsupported by authority. There is powerful jurisprudence to the contrary. In The Queen v M, K and H [2002] 1 WLR 824 the Court of Appeal in England rejected the contention that it infringed Article 6 to proceed to determine whether the defendant did the acts charged following a jury finding of unfitness to plead. The court also acknowledged that an application to stay proceedings as an abuse of process could be made before the jury's determination of fitness to plead or following that determination but before proceeding to determine whether the defendant did the acts charged. However, and very importantly in the present context, such an application the court held had to be founded on matters independent of the defendant's disability. Accordingly, the defendant's disability or matters related to it could not ***in themselves*** *found a successful application to stay on grounds of abuse. If that be so in the criminal context it would be surprising if a more favourable approach was mandated in the civil context."* (emphasis in the original)

62. It is important to note that the sole basis upon which the application was brought in the *Mullan* case was his lack of capacity to give instructions and to participate in the trial; the events had occurred in the relatively recent past and were neither vast nor unduly complex.

The issues to be determined at trial

63. The case now concerns the allegation of gross negligence or negligence, or breach of duty alleged against the appellant in respect of five series of loans approved and advanced

by INBS between 2006 and 2009 while the appellant was Chief Executive and the losses flowing from the loans for which the respondents say the appellant is responsible. A number of issues are common to some or all of the loans for which the respondents say the appellant is liable. It is alleged that had the appellant "not intervened" to authorise the loans that they would not have been made and INBS would not have suffered the losses associated with the loans. These include whether:-

- the loans complied with the lending policy of the INBS for commercial lending
- the proposals were properly evaluated and risk assessed
- there were proper up to date valuations of the properties
- the security was adequately assessed
- the loans were offered and agreement reached and drawdown permitted in advance of credit committee and/ or board approval
- the agreements were profit share transactions
- there were adequate assessments of the creditworthiness of each borrower, their repayment capacity or other associated risks
- there was adequate monitoring of the developments/ loans after drawdown

64. There are also allegations which are specific to individual transactions.

- In respect of the first loan to Devondale Limited, it is alleged that there was insufficient due diligence in respect of the site, including possible difficulties with access to the site and the requirement to build three homes for members of the travelling community, and there were no arrangements in place for the assessment of the adequacy of security,
- In respect of the second loan to Louis Scully it is alleged that the site was not zoned for development and had no planning history and that there were no specific plan to develop the site

- In respect of the third series of loans to Colpy Ltd./Cyril Dennis Connection, INBS made approximately 50 loans to companies connected with the company and/or Mr. Dennis and the respondents sued in respect of four such loans. As regards the loans to Laurent Properties, it is pleaded that the borrower sought an additional loan of €2.75m. to buy an adjoining site on the basis that the first site (which it acquired with the benefit of a loan of €7 million) could not be developed until the second site was bought and no such indication had been given before the first loan was advanced. There were impediments to be overcome before the project could be developed. Part of the site was occupied by a public thoroughfare. There were political difficulties in obtaining the required permission for the intended development.

- The fourth of these series of loans were loans to Admiral Taverns Limited and its related companies. They were engaged *inter alia* in the business of buying and selling public houses in England and Wales. INBS entered into various loan agreements and restructuring and refinancing of borrowings. Part of the lending was secured by second charges only over the borrower's property. Halifax Bank of Scotland was the owner of the first charge and INBS had no control and/or awareness of the scale of lending by HBOS to Admiral Taverns. By 2009, INBS was owed approximately £107 million while HBOS was owed approximately £1 billion. The value of the property had fallen to £400 million, thereby eliminating all value in INBS's second charges. It is pleaded that there was no adequate consideration given to the increased risk assumed by INBS by lending against security subordinated to that of HBOS and that this was

exacerbated by a lack of knowledge of and/or control over the knowledge of indebtedness of the borrower to HBOS.

- The fifth series of loans was to Galliard Developments (Sully) Limited ("Sully"). INBS entered into two commercial mortgage offers with Sully. As the development proceeded and units were completed and sold, Gary McCollum of INBS Belfast branch consented to the sales proceeds from individual units being paid directly to Sully rather than being used to pay down the INBS loans *"in clear contravention of the loan agreement"*. The respondents say these decisions were authorised or approved by the appellant.

65. The defence to these allegations also includes pleas common to all of the loans and some which are specific to the particular transaction. The grounds of defence common to some or all of the five series of loans include whether

- he bore any responsibility for the alleged deficiencies in any of the loans or monitoring the loans after drawdown or whether that responsibility lay with the employees of the INBS, including the members of the commercial lending department
- The property market crash was unforeseeable
- The passing by the appellant of proposals to the commercial lending department for consideration amount to approval by him of the loan
- The loans would have been approved on the same terms even if he had not been involved
- The advance of loans prior to approval by the credit committee or the board constituted negligence or a breach of the rules of the INBS.

66. The respondents are put on proof that the second named respondent used its best endeavours to maximise the value received from NAMA for the loans and that such value as was received represented the long term economic value and a fair value for the loans. If the respondents have suffered loss as alleged, he pleads that the INBS has been guilty of contributory negligence and/or contributed to such loss and that third parties, including the other members of the Board and/or Credit Committee, valuers and others engaged by INBS in relation to security caused or contributed to the losses.

67. He makes the following pleas specific in relation to the individual loans. In relation to the Devondale facility, the appellant alleges that difficulties with planning permission and/or a dispute with neighbours in relation to access were unforeseeable (and the latter was a supervening event) and that the opinion of counsel was procured on the issue of a right of way/ access to the site.

68. As regards Mr Scully and Mr Dennis, he will rely upon their respective track records with the INBS as successful developers.

69. In addition, the appellant argues that INBS's strategy in respect of the loan to Mr Scully was to sell the lands on rezoning and that rezoning was foreseeable and expected within the stated term of the loan, and that the advancing of the loan was commercially advantageous to INBS by virtue of a need to exploit a time sensitive and advantageous commercial opportunity in respect of lands with a strategic value in an extremely competitive environment.

70. In relation to the loans to Admiral Taverns, the appellant says that a second ranking charge could be *"fully secured"* within the meaning of s.23 of the Building Societies Act and that even if acceptance of second charges was effectively a breach of any applicable lending policy, it was justified in respect of these loans in all the circumstances, including the valuations which had been received.

The appellant's evidence in context of the remaining issues to be determined

71. Much of the evidence to be adduced in defence of these proceedings will not depend on the appellant's personal evidence, even if he were well and in a position to give evidence on his own behalf. This is apparent from the nature of the defence pleaded as well as the now limited nature of the claim advanced by the respondents. Many of the facts can be independently established without the need for evidence from the appellant. For example, the issue of the zoning of lands, whether or not there were legal disputes with neighbours in relation to development land, whether planning permission had been obtained or the prospects of obtaining planning permission at the time the loan was advanced and whether it was possible for the INBS to hold the first legal charge in respect of the lands in question. In addition, many of the documents can be admitted pursuant to the procedure provided under the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 in relation to business records evidence.

72. In light of the above, the evidence of the appellant will not be as critical as was urged on the Court in submissions. It is for the court to determine whether in all the circumstances there is a real and substantial risk of an unfair trial or an unjust result, or there is a clear, patent injustice in asking the appellant to defend the proceedings or whether to do so would place upon him an inexcusable and unfair burden. If the answer to each of these questions is negative, then the appeal should be refused, and the case allowed to proceed to trial.

Is there a real and serious risk of an unfair trial or an unjust result?

73. Given the nature of the appellant's ill health and his lack of capacity, it is accepted by the respondents that he can no longer give instructions, assist in the preparation of his defence nor participate in the trial either as a witness or by way of giving instructions or assistance as the trial progresses (although it is accepted that he was in a position to give

what his solicitor described as detailed instructions prior to his ill health, though whether this was so up to and until the stroke suffered by the appellant in May 2019, or some time earlier, is unclear). This is a significant litigation disadvantage as was accepted by the respondents and acknowledged by the trial judge. This in and of itself is not determinative. If it were, a person under a legal disability could neither sue nor be sued, which is not the law. Further, the Oireachtas has provided for the continuance of actions against a deceased defendant. The situation of the attorneys of the appellant cannot be more prejudicial to that of the personal representatives of a deceased defendant. It was held in *SOCA v. Mullan* that it is unsound in principle to stay civil proceedings as an abuse of process on the basis *solely* of the moving party's inability to give instructions due to that person's medical condition or disability. The jurisprudence in this jurisdiction is more nuanced. The prejudice must be assessed in the context of the nature of the claim, the matters which either side will be required to prove and the nature and availability of the evidence. The Court will then be able to assess the magnitude of the litigation disadvantage flowing from the disability of the defendant. The lens through which the Court makes this assessment is the three-fold test identified by McKechnie J. in *Comcast*. Thus, it is possible, as in *Cassidy*, that the unavailability of one, absolutely critical, witness to the defence – whether by reason of death (as in *Cassidy*) or illness (as is here) – may mean that there is a real and serious risk of an unfair trial or an unjust result or a clear and patent injustice in asking the defendant to defend the proceedings. That will only be so in the most exceptional of circumstances. It is worth observing that McKechnie J. was of the opinion that this threshold was not met in *Comcast*.

74. Counsel for the appellant identified core features of the case which, he said, bore on the question of whether the court should grant a permanent stay. Point 1 was the extent of the defendant's injuries and his incapacity and is no longer an issue in view of the registration of the Enduring Power of Attorney and the reconstitution of these proceedings.

75. Points 2 and 3 were taken together and were *"the unusual nature of the proceedings, their unprecedented scale and the gravity and breadth of the allegations"* and *"the historic nature and age of the allegations, with the associated risk of injustice due to elapse of time."* These two core features have effectively fallen away as a result of the limitation of the respondents' case against the appellant as confirmed by counsel. The case is now limited to the five series of loans issued between 2006 and 2009. In the judgment of the Court the appellant has not made out a case that the inability of the appellant to give instructions about or to give evidence in relation to these loans gives rise to the degree of prejudice which is required to dismiss the proceedings. In light of the pleaded defence, there must be relevant witnesses other than the appellant who could give evidence in relation to the factual matters at issue. There is no evidence that the appellant has sought to identify any of these witnesses, still less to try to locate them and ascertain whether they would be in a position to give evidence. The same dearth of information in relation to the availability of documents applies. While originally this may not have been strictly a documents case in the sense that that phrase is used in the jurisprudence, with the change in the focus and extent of the claim, it has become more rather than less document dependent. The application for the loans, the assessment of the loans and the fixing of the terms upon which the loans were advanced will all to a greater or lesser degree be recorded in documents. The same applies to the difficulties which subsequently emerged in relation to the borrowings. While the documents relating to the five series of loans may not be as complete as one might expect from a financial institution of the nature of INBS, despite the fact that discovery has been made some considerable time ago, there is no evidence of any prejudice, let alone the degree of any such possible prejudice, to the defence of these proceedings by reason of the availability or non-availability of relevant documents. There is no evidence upon which this court can conclude that the documentary evidence in relation to these loans is so incomplete that the

continuation of these proceedings in the circumstances would amount to a clear, patent unfairness to the appellant such as justified the dismissal of the proceedings in *Toal (1)* and *(2).*

76. Furthermore, many crucial matters are objectively provable without the need for the appellant's testimony. These include the question of the zoning of certain lands, whether or not planning permission existed at the date of the issuing of the loan, whether there were boundary disputes with neighbours, whether the borrower was in a position to offer INBS a first legal charge, whether the terms of the agreement involved a profit-sharing structure and the LTV ratio stipulated in the Letter of Loan offer. Much of the relevant evidence is not something which one would expect the appellant personally to give from his memory alone. He would also, like the doctors in medical negligence litigation, rely on the contemporaneous records and documents to assist him in giving evidence. Given the provisions of the Act of 2020, it is now possible to introduce the documents into evidence without the need for the appellant to prove the documents. It has not been established that there are no other witnesses able to give evidence in relation to any of the facts which may be in dispute in relation to the loans once the documents are admitted in evidence.

77. Much of the alleged prejudice related to the appellant's inability to give evidence as to the commercial justification for the loans. In fact, very little of the case will turn on the rationale for the loans in the context of the remaining claims maintained by the respondents against the appellant, which are essentially a claim in negligence and a claim of a breach of a director's fiduciary duty to the society. The question of whether the authorising of these loans on the terms set out amounted to negligence on the part of the appellant will largely turn on expert testimony, once the terms of the loans and the agreement of the appellant to issue the loans on these terms are established. These will be matters for the respondents, as the plaintiffs, to prove.

78. For these reasons, the court is of the view that the inability of the appellant to give instructions to his lawyers or evidence in court in relation to the claim that the five series of loans were authorised by the appellant in breach of the duty of care which he owed to the INBS falls short, and considerably so, of the threshold required to be met by a defendant who invokes this exceptional jurisdiction to dismiss proceedings in advance of a trial on the merits.

79. In submissions to the Court, counsel for the appellant sought to rely on factual matters which were not evidenced in the affidavit of Mr. Fingleton Jnr. However, the appellant cannot rely on a generic claim of poor standard of records and diminished corporate memory in respect of transactions as a basis for seeking the dismissal of the proceedings. No factual basis for the asserted prejudice has been laid and no attempt is made to link the generic claim of prejudice based on the bare assertion of the inadequacy of the documentary record to the five series of loans which are now the focus of the case.

80. In submissions to the court, it was argued that the appellant would be prejudiced because he could no longer give evidence as to his honest belief in relation to his impugned decisions and actions. It was made clear during the hearing that the respondents make no allegation that he did not act honestly, and the question of equitable fraud no longer arises as it was only raised as a defence to the plea that much of the claim was statute barred and the loans upon which the respondents sue are all within the limitation period. Insofar as the appellant might wish to rely upon s.115 of the Building Society Act[3] the respondents have expressly

[3] "(1) Where in any proceedings for negligence, default, breach of duty or breach of trust against an officer or auditor of a building society it appears to the court hearing the case that that officer or auditor is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he acted honestly and reasonably and that, having regard to all the circumstances of the case (including those connected with his appointment), he ought fairly to be excused for the negligence, default, breach of duty or breach of trust that court may relieve him (either wholly or partly) from his liability on such terms as the court may think fit."

confirmed that they make no allegation in relation to his honest belief and therefore this is not an issue which could arise in the proceedings.

81. The appellant referred to the cost of defending the proceedings and the disparity of resources between the parties as a feature of the case to which the Court should have regard. This has been a feature of the proceedings since their inception, but it was not suggested prior to his ill health that the appellant could not therefore have a fair trial with a just result. This is not a basis for staying the proceedings. It would be unsound in principle to so hold. If it were the case, neither the State nor any wealthy corporation could ever sue an individual. This would effectively deprive well-resourced litigants from a right to pursue claims against parties who were not similarly resourced. Further, the asserted unfairness in allowing a case to proceed where there may be a disparity of resources cannot refer to the potential exposure of a defendant to two sets of costs and an award of damages if the defendant loses the case, as that risk is common to all cases. While in this case the appellant is exposed to a claim in the region of €290 million plus two sets of costs, that arises by reason of the claim and not from any unfairness in pursuing a legitimate claim. Without deciding whether it could ever be the case, the scale of the proceedings is not of such an exceptional nature that the scale alone could justify a conclusion that it would simply be patently unjust to require an individual defendant to defend him or herself against such a claim.

82. It is also relevant to consider that the abandonment by the respondents of large parts of the case will significantly reduce the duration of the trial to a fraction of the estimated six months. This will necessarily reduce the cost to the appellant of defending the claim. It is notable that Mr. Clerkin, the appellant's solicitor who argued the motion in the High Court, never suggested to the High Court that his firm would or could cease to act on behalf of the appellant due to his inability to fund his defence, notwithstanding Mr Clerkin's knowledge

of the lack of an indemnity for the appellant's costs. The Court simply cannot infer that the appellant will be unable to secure representation for the trial.

83. Furthermore, even if it had been established that the appellant would not be able to secure legal representation, unfortunately many cases are defended by litigants in person. There is no suggestion that this is constitutionally impermissible or requires the courts in the interests of justice to dismiss claims brought against such defendants. As the proceedings have been reconstituted, the case would not fail by reason of the absence of a defendant with capacity to act.

84. At the end of the hearing of the appeal, the Court asked the appellant to provide an Affidavit of Means in the context of exploring the likelihood of the respondents, if successful, recovering even the costs of mounting a six-month trial let alone some part of the damages claimed. Affidavits were provided to the Court as referred to above. The affidavits do not establish that the appellant cannot continue to privately fund his defence of the proceedings through his attorneys. It is important to note that the Affidavits of Means were not provided for the purpose of establishing that the appellant could not pay for legal representation for the duration of the trial and therefore there was a risk that at some stage he may no longer have representation, a point which had not been made in either written or oral submissions in the High Court. It follows that this Court must reject any argument which counsel for the appellant belatedly sought to introduce and advance in order to dismiss these proceedings premised on an allegation (the inability of the appellant to secure representation for the duration of the trial) which is unsupported by any evidence and which has never been advanced by his solicitor.

85. Counsel for the appellant referred to the absence of Director & Officers insurance. It is the case that the appellant has no D & O insurance to fund the litigation. He has counter claimed in relation to this issue in his defence and counter claim delivered on 21 October

2013. He did not seek a trial of a preliminary issue in relation to this point. It is possible that he might have succeeded, and he would then have had the benefit of either an indemnity for his fees or an award of damages. He chose not to adopt this course, and so the issue remains a live issue in the proceedings. It is difficult to understand how, in the interests of justice, a defendant could rely upon an issue raised by way of counter claim which has yet to be determined at trial to found a claim that the proceedings should be dismissed in advance of a trial to determine that very issue. It is also striking that the appellant never asserted that there could not be a fair trial on the merits, notwithstanding the disparity of resources, by reason of the unavailability of D & O insurance to cover his legal expenses until he became unwell and issued this motion. There is no link between the appellant's capacity and his ability to fund legal representation.

86. The appellant's position is distinguishable from that of the two doctors in *McBrearty*. In that case, the plaintiff's case was not dismissed in its entirety; it continued against the HSE and the doctors remained parties to the proceedings on foot of the Notices of Indemnity and Contribution served by the HSE. It has repeatedly been stated that each case must be determined on its own facts. In this instance the appellant's ill health has impacted his short-term memory severely. This necessarily means that the worry and concern to which Geoghegan J. gave significant weight in *McBrearty* cannot weigh as a significant factor in this case. Likewise, the completely understandable concern for the appellant's personal dignity, were he required to attend court, has been overtaken by events and he will no longer be exposed to the indignities apprehended by his family.

87. The decision of the Central Bank Inquiry to permanently stay its inquiry into the conduct of the appellant is not of assistance to this Court on this application. At the time the appellant was representing himself. He became unwell and incapable of conducting his defence. Quite apart from the difference between the Central Bank Inquiry and these proceedings addressed

by the trial judge, facts have moved on, and in the judgment of the Court, critically so. The Enduring Power of Attorney has been registered and the proceedings have been reconstituted. Thus, the defendants in the proceedings are now the appellant's attorneys. They will conduct the defence on his behalf, and they do not lack capacity. They will be able to carry on the defence of these proceedings, unlike the appellant before The Central Bank Inquiry. The fact that he will not be able personally to participate, give evidence and instructions, is a matter already addressed in this judgment. The prejudice in relation to the appellant's role in these proceedings is not comparable to that in The Central Bank Inquiry: there, there was no competent party to conduct the defence, here there is.

88. During the course of the hearing, a question arose as to whether the liquidators of the respondents ought to continue to pursue this litigation having regard to the prospects of recovery if they succeed in the litigation. It was in relation to this issue that the Court invited the appellant's attorneys to file affidavits of means. It is the view of the Court that the conduct of the liquidation by the liquidators is not a matter for this Court and it is not a matter to be weighed in the balance against the case proceeding where (a) it was not raised by the appellant, (b) it did not feature in the High Court and (c) the respondents had no opportunity to address any factual matters by way of affidavit relevant to the issue in advance of the hearing. The starting point must be that the respondents are entitled to a trial on the merits unless, exceptionally, the appellant can show that the interest of justice, as set out by McKechnie J. in *Comcast*, requires that the proceedings be dismissed. The appellant bears the burden of establishing this. There is no obligation on a plaintiff to establish that it is just that the case proceeds to trial. All the authorities say that a plaintiff should not lightly be deprived of a trial on the merits. The State has pursued the litigation at taxpayer's expense, with possibly little chance of recovering the costs or damages even if successful. It is not for this Court to intervene and say it is unjust to pursue the proceedings because of the costs

to the public purse. The wisdom or otherwise of pursuing litigation must always be a matter for the litigant: as a matter of principle, it is not a matter for the Court trying the litigation.

89. For all of these reasons, the Court is of the view that the appellant has not discharged the very high burden which he bears in an application of this kind. He has not established that there is either a real or serious risk of an unfair trial or an unjust result or that there is a clear, patent injustice in asking him to defend the proceedings or that to do so would place upon him an inexcusable and unfair burden. For these reasons the Court dismisses the appeal.