

**THE HIGH COURT
COMMERCIAL**

[2021] IEHC 372

Record Nos: 2012/3280P 2013/74COM

BETWEEN:

IRISH BANK RESOLUTION CORPORATION LIMITED

PLAINTIFFS

-AND-

MICHAEL P. FINGLETON

DEFENDANT

JUDGMENT of Mr. Justice Tony Hunt delivered on 14 May 2021

1. The essential nature of this uniquely wide-scale and long-running litigation is best summarised by Costello J. in her judgment delivered in this matter on 15 April 2015. As I could not improve upon that summary, I gratefully accept it to avoid unnecessary duplication. Although nearly six years have passed since that date, the parties have not been inactive during that time. A large number of documents have been discovered by the plaintiffs to the defendant at lengthy intervals according to an agreed schedule. Prolonged periods were provided for review and consideration thereof, owing to the volume of discovered documents.
2. This is an application by the defendant for an order, pursuant to the inherent jurisdiction of the Court, declaring that in the interest of justice the proceedings against the defendant be dismissed in their entirety or permanently stayed. The application was heard remotely on 23 February 2021.
3. The defendant is now aged 83 years. Unfortunately, his health has deteriorated somewhat in recent years. In 2015, he lost the sight in his right eye. In December 2017, he was diagnosed with skin cancer and treatment was scheduled in 2018. He was admitted to St. John of God Hospital in August 2018, suffering from a severe depressive episode. Most significantly, he had a stroke in May 2019 and was immediately admitted to St. Vincent's Hospital. He was transferred to the Stroke Rehabilitation Unit at St. Columcille's Hospital, Loughlinstown in August 2019. Although he was discharged from that facility in January 2020, and currently resides at home, he now requires full-time care.
4. There is no dispute as to the fact that the defendant suffers from significant incapacities as a result of this event. His physical and mental capacities have been significantly compromised. I am satisfied that the net result of his difficulties is that he is in the throes of a gradual deterioration in his condition, which will not be reversed. As a result, he will be unable to participate meaningfully in the trial of the extensive claims brought against him in these proceedings, to follow or react to the detailed and lengthy evidence that is intended to be adduced by the plaintiffs, to issue fresh instructions to his legal and other advisers in response to the evidence as it unfolds, or to give any meaningful evidence on his own behalf by reason of the symptoms and consequences of his stroke, not least due to impairment of his short-term memory. It is not clear what effect this event has had on his long-term memory, but I do not regard that as a point of significance having regard to his overall medical situation. This is a working summary of

his current health, which is set out in greater detail in the motion papers and the transcript of the hearing.

5. Niall Clerkin (solicitor) moved the application on behalf of the defendant. In summary, his arguments in support of the application were as follows: -
 - a) While it was accepted that the jurisdiction invoked by the defendant was very rarely exercised, two exceptional circumstances existed in this case.
 - b) Firstly, the medical evidence demonstrated that the defendant would not be able to participate in the trial in any meaningful way.
 - c) Secondly, the enormous breadth and scope of the claim was a particularly weighty factor, having regard to the highly unusual (if not unique) features of the litigation, as referred to in the judgment of Costello J. referred to above.
 - d) The nature of many of the allegations made by the plaintiffs against the defendant in the proceedings were such that an effective defence would require many matters to be addressed directly by the defendant, on the basis of his particular position in, and knowledge of the affairs of, the Irish Nationwide Building Society ("INBS") at the time of the events pleaded in the Statement of Claim.

6. Mr. Clerkin referred to the following matters in support of his application:
 - a) The primary complaint against the defendant throughout the proceedings is that he enjoyed an excessive concentration of control over INBS.
 - b) It is also alleged that the defendant had sole authority to approve lending decisions, and on that basis lent out amounts in excess of €1 million without consulting the board (an allegation hotly disputed by the defendant).
 - c) 18 different loans are pleaded as examples of this practice. The books and records of INBS would not give a full picture of the defendant's contacts with the board in relation to these loans, and the defendant's evidence would be required to provide a full picture and explanation of these matters. In that regard, Mr. Clerkin conceded that it is "*fair to say that the Society was run in an old-fashioned manner at that point*". As a consequence, it will be necessary for the defendant to explain directly how INBS was set up and managed.
 - d) The test for the exercise of director's duties is comprised of both objective and subjective factors. Particular reliance was placed on paragraph 11 of the judgment of the High Court (Charleton J.) in *Bloxham -v- Irish Stock Exchange [2014] IEHC 93*, in circumstances where that the defendant's illness will prevent him from expressing his subjective beliefs concerning the actions impugned by the plaintiffs.
 - e) The unprecedented scale of the plaintiffs' allegations caused specific and exceptional unfairness in this case.

- f) In all of the circumstances outlined above, there was a real and serious risk of an unfair trial and/or unjust result, a clear and patent injustice in asking the defendant to defend, and an inexcusable or unfair burden on the defendant in so defending, by reference to the test set out by McKechnie J in *Comcast International Holdings Inc. & Ors. -v- The Minister for Public Enterprise & Ors [2012] IESC 50*.
 - g) In addition, much the same matters are the subject of a statutory Central Bank Inquiry. This Inquiry decided that the defendant's cognitive capacity was such that he was unable to effectively or meaningfully participate therein, and that the public interest in that Inquiry was not so exceptional as to override the defendant's right to fair procedures. Accordingly, the members of the Inquiry decided that it would be permanently stayed as against the defendant, as a person concerned in that process. Mr Clerkin submitted that as the defendant's condition had deteriorated since that decision, the grounds for not proceeding with this litigation were stronger, particularly in the light of the financial liability and general loss of reputation entailed in an adverse judgment in this case.
7. In summary, Lyndon McCann SC (of the Inner Bar) responded as follows:
- a) The plaintiffs did not dispute the medical evidence, accepting that a gradual deterioration is evident and no reversal is anticipated. As a consequence, it was also accepted that the defendant will not be in a position to give any significant evidence in his defence, and the plaintiffs did not gainsay the difficulties that will be experienced by his legal team in obtaining instructions, and in the ongoing conduct of the defence.
 - b) Notwithstanding that, the defendant's medical condition did not provide a basis for a dismissal or permanent stay of the plaintiff's claims. There was no authority for the proposition that the diminished health, mental or physical, of a defendant could be relied on to that end.
 - c) These proceedings could be distinguished from the Central Bank Inquiry on the basis that the latter was punitive in nature, and therefore more akin to a criminal prosecution than ordinary civil proceedings, which justified a different approach. In this case, the plaintiffs claim an award of damages on a compensatory rather than a punitive basis.
 - d) By statute, civil proceedings against a deceased person were permissible, even though death could have similar or greater consequences than extreme ill-health on the ability to defend such proceedings. Therefore, something more than death or serious impairment was required before a civil claim could be stayed or dismissed.
 - e) The test expressed by Charleton J. in *Bloxham* did not apply to the circumstances of this case. That case involved a challenge by a firm of stockbrokers to the decision of the Stock Exchange to exclude a firm in financial difficulties from the Exchange. The issue in that case was whether the directors had exercised their

powers *bona fide* in the interest of the company as a whole. By contrast, the claim in these proceedings is based on negligence principles, which apply an objective standard to the conduct of the defendant. In that circumstance, the belief of the defendant as to whether he was negligent or not is irrelevant to that issue.

- f) Consequently, the proper defence of these claims did not necessarily require the defendant's evidence, and there was much other evidence that could be relied upon to answer the plaintiff's claim, in respect of which they bear the burden of proof.
 - g) The essence of much of the plaintiff's claim is apparent from the tranches of discovery delivered long before the defendant became ill. Accordingly, the defendant had ample opportunity prior to the onset of illness to identify the witnesses and the information that might be capable of addressing those claims. Ultimately the question of whether the defendant's conduct of the affairs of INBS was negligent will rest wholly or substantially on expert evidence analysing his conduct by reference to contemporaneous standards.
 - h) The plaintiffs' claim is focused on the specific loans rather than more generalised allegations as to the conduct of the INBS. In addition, potential defences based on the Statute of Limitations remained available to the defendant, which did not depend on his evidence to succeed. Similarly, the establishment of a causal link between any proven negligence and any losses sustained was also a substantial issue of proof for the plaintiffs which did not depend on evidence from the defendant.
 - i) The scale of the case had not expanded over time, and the breadth of the claims was not, in itself, a reason why the case should be stayed or dismissed.
 - j) Mr McCann relied upon *O'Domhnaill -v- Merrick [1984] IR 151*, *Toal -v- Duignan (no. 1) [1991] ILRM 135*, *Toal -v- Duignan (no. 2) [1991] ILRM 140*, *McBrearty -v- North Western Health Board [2010] IESC 27*, *Donnellan -v- Westport Textiles Ltd. & Ors. [2011] IEHC 11*, *Comcast and The Serious Organised Crime Agency -v- Mullan [2011] NIQB 55* in support of these arguments.
8. In reply, Mr. Clerkin accepted that whilst there was no rule that disability or infirmity would or should result in a stay or dismissal of proceedings, the court nonetheless has a role in such circumstances, by applying the balance of justice test. He also accepted that the plaintiffs had legitimate rights in this situation, but when the defendant's circumstances were considered in the specific context and circumstances of this case, the balance of justice lay in favour of the defendant. Mr. Clerkin also differed with Mr. McCann on the distinction that he drew between these proceedings and the Central Bank Inquiry, based on that Inquiry being punitive in nature. Mr. Clerkin suggested that this case "*bore many of the characteristics of punitive proceedings*". Mr. Clerkin also returned to the theme of the fiduciary nature of director's duties and submitted that all of the authorities showed that an honest belief that the duties and powers were exercised in the best interests of the company afforded a defence to a director, unless he was shown to

have acted for an improper purpose, which was not alleged in this case. In essence, the defendant's case is that his inability to give evidence in relation to the various loans pleaded in the Statement of Claim would necessarily produce an unjust outcome. He repeated that the defendant was a private citizen being sued for a very large sum of money by a State entity, and that there was a significant imbalance in resources between each of the parties.

Discussion

9. In this case, the defendant invokes the inherent jurisdiction of the court to order either a stay or a dismissal of the plaintiffs' claims. Most of the authorities concerning the exercise of inherent jurisdiction arise out of cases where delay and/or other conduct of the parties to the litigation was a significant feature of the case. The fundamental fact of importance to this application is that neither party has accused the other of culpable delay in progressing this litigation. As a result, delay and or other culpable conduct does not arise for consideration in this case. The invocation of inherent jurisdiction in this case arises solely by reason of the unfortunate advent of significant adverse medical and cognitive difficulties for one of the parties, for which no blame can be attributed to any person concerned in the litigation. Therefore, the exercise of inherent jurisdiction in this case is dependent solely on the possible effect of these unwanted developments on the future conduct of the litigation by the defendant.
10. Therefore, the grant of a dismissal or a stay pursuant to inherent jurisdiction which does not depend on delay or other deficiencies in the conduct of the litigation will be comparatively rare, and this jurisdiction will be exercised very sparingly. In a case where the cause of potential difficulties with the future conduct of the litigation is not within the control of the parties, the issue becomes clearly focused on the interests of justice, as opposed to the conduct of the parties, analysed by reference to the specific circumstances of the individual case.
11. In considering whether the inherent jurisdiction invoked in this case should be exercised, it is worth bearing in mind several general considerations. Firstly, proceedings based on the law of tort or on the broader corpus of civil law are an important mechanism for the vindication of constitutional rights, including property rights, where appropriate. If the plaintiffs' allegations in this case are correct, and I express no view about that at this point, there can be little doubt that they have been victims of an injustice, and their ability to pursue this civil action is the method by which they seek to vindicate their rights in the light of the alleged injustice. Secondly, the draconian penalty of dismissing or staying proceedings as against a particular defendant in circumstances which wholly defeat the claims of the plaintiffs should be made only when it is patently necessary to protect the legitimate interests of the party sued and, in particular, his constitutional right to a trial in accordance with fair procedures. Thirdly, such an order should not issue where a properly conducted trial can obviate any prejudice which might otherwise arise. Fourthly, factors that are relevant in one case will have no relevance in another. Everything depends on the specific circumstances and the position of both parties must be appraised and evaluated in order to achieve a just result. Circumspection is required in

relying on previous authorities where the stay or dismissal was sought on the basis of delay, where this is not a feature of the instant case.

Summary of pleaded issues

12. The first specific matter to be considered is the nature of and extent of the claim and defence as set out in the proceedings, and the state of the pre-trial process as of the date of the application for a stay or dismissal. The Statement of Claim in this case runs to some 80 pages and was delivered on 17 April 2013. In summary, it contains the following allegations:

- 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 a director on attaining 70 years of age and thereafter remained as Chief Executive of INBS until April 2009. By a Board resolution 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) pleads further delegations of powers from the Board to the Managing Director by resolutions dated 13 December 1994 and 25 August 1997.
- 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)
- 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

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.

Possible relevance of Mr Fingleton's evidence to these issues

14. Although factually and legally complex, when reduced to essentials, the pleadings allege civil wrongdoing based on breaches of duties imposed on the defendant by virtue of his directorship of INBS, and on the general law of negligence as applied to his activities in the same context. Some emphasis was placed by each of the parties on the ingredients of these respective causes of action and how these ingredients might be addressed at the trial of the action. Mr Clerkin laid particular emphasis on the subjective element applicable to such claims, with particular reference to the judgment of the High Court (Charleton J) in *Bloxham*. On the other hand, Mr. McCann relied heavily on the strictly objective nature of a claim in negligence, and the irrelevance of subjective belief to the defence of such a claim.
15. Having considered the submissions, I do not consider that there is a great deal of distance between them for the practical purposes of the trial of this action. In *Bloxham*, Charleton J noted that any company director has the triple responsibility of acting in good faith, within the scope of the relevant power, and in the interests of the company as a whole. He noted that extremes have been argued as to the standard by which the discharge of these duties was to be judged.
16. The case of *Howard Smith Ltd -v- Ampol Petroleum Ltd [1974] AC 821* was cited to Charleton J for the proposition that having analysed the relevant power that is in issue in

a case, the court must “give credit to the bona fide opinion of the directors” and where this is present must “respect their judgment as to matters of management”, ultimately concluding “as to the side of a fairly broad line in which case falls.” He noted that the entirely subjective test suggested in that case would appear to be at odds with other branches of the law concerned with commerce, such as the construction of contracts, where the approach ruled out subjectivity. A similar approach was apparent from the case of *Regentcrest Plc -v- Cohen & Anor [2001] BCLC 80*, which characterised the question as being “whether the director honestly believed that his act or omission was in the interests of the company”.

17. On the other side of the *Bloxham* case, an argument was made in favour of an entirely objective analysis of every decision made by a board of directors. In that regard, Charleton J noted that the problem would be that in objectively analysing such decisions, the courts might be in danger of stepping into the shoes of directors, which was not appropriate. He noted that a court cannot displace a decision simply because it does not like it, which is what a completely objective principle would tend towards, instead of an appropriate deference to the exigencies and pressures of business.
18. Ultimately, and sensibly, Charleton J noted that in other branches of the law, such as public law and criminal law, entirely subjective principles rarely hold sway. A public law decision can be overturned by the courts if it flies in the face of fundamental reason and common sense. A subjective assertion or belief may operate as a defence to a criminal charge, but the actual existence of that belief is to be judged according to the presence or absence of reasonable grounds for it. Therefore, Charleton J concluded as follows:

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

19. Therefore, 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. It seems to me that the battleground in this case will be the three questions identified by Charleton J in paragraph 11 of his judgment in *Bloxham*.
20. Firstly, the exercise of each relevant power will have to be scrutinised within the context of the broad limits within which it could be exercised. This context is primarily set by the Articles and rules of INBS. Secondly, the interests from a business point of view that

were involved in each decision will have to be individually scrutinised. I imagine that, generally speaking, it will be accepted that the decisions were taken based on a subjective view that they advanced the business interest of maximising the profits of INBS, in the interests of its members. Thirdly, it will be considered whether the presence or absence of reasonable grounds enable what is said subjectively to be an honest decision to stand as being in the best interests of the company as a whole. In my view, the third limb of this analysis is the crux of the extensive claims made by the plaintiffs in this case, and the test constructed by Charleton J requires objective scrutiny of any subjective component that might arise in the context of the first two limbs of the test.

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. The basic issues are whether the decisions that were taken as to the overall business strategy of INBS, the structures devised for the pursuit of that strategy, and the individual lending decisions relied on by the plaintiffs in support of their claims were taken in the presence or absence of reasonable grounds supporting the contention that these decisions were in the best interests of INBS as a whole. Considered in this way, if the test to be applied to the resolution of the plaintiff's claims is that identified by Charleton J in *Bloxham*, I believe that resolution of the significant area of dispute in this case lies within an objective realm.
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. These appear in the judgment of Keane CJ in *Glencar Exploration PLC -v- Mayo County Council (No. 2) [2002] I I.R. 84*. The existence of a duty of care requires the plaintiff to establish that injury or damage was reasonably foreseeable, that there was the necessary proximity of relationship, that no policy considerations require the court not to impose a duty of care and, finally, that it is just and reasonable that a duty of care be imposed. The establishment of these matters seems to me to be based on objective criteria. Similarly, establishing a breach of any such duty requires proof that the defendant departed from the existing average standards of the community, (in this case the contemporaneous standards the banking community), expressed in terms of the reasonable person in the position of the defendant. The plaintiffs will be obliged to prove these matters before any question of the defendant giving or calling evidence will arise. If successful on these issues, they will then be faced with addressing issues of causation and remoteness in the context of the damages claim, as well as addressing the pleas relating to the Statute of Limitations, and the defence of laches. 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.

Balance of justice

23. Having considered the nature and extent of the issues framed by the pleadings, and how these issues might be addressed at the trial of the action, I am satisfied that, applying the balance of justice test to the particular facts and circumstances of this case, I must refuse the application for a stay and/or dismissal of the plaintiff's claims at this point in the proceedings. I summarise the reasons for refusal as follows:

- a) I accept 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. However, the existence of such a disadvantage is not determinative in itself as to whether the proceedings should now continue.
- b) This is illustrated by the fact that even the death of a party does not, in itself, prevent litigation proceeding. The legislature has provided to some extent for that circumstance and has not decided that death should confer a statutory immunity from suit in civil proceedings. In the absence of legislative provision, such questions must necessarily be dealt with by reference to existing rules and, if necessary, to inherent jurisdiction. However, it is to be borne in mind that death does not automatically terminate civil litigation when considering whether illness or infirmity should have that effect.
- c) The balancing process must take account of the fact that ordering a stay and/or dismissal to vindicate the rights of one party has the inevitable consequence of preventing the exercise of the right of access to the courts of the other party. It follows 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.
- d) Much is made by the defendant of the complexity and scope of the claims in this case as a significant factor in the balancing process. I do not agree that this is a significant operative consideration. The absence of testimony from one witness may assume a much wider import in a simpler case where the witness concerned is the sole witness of significance. In fact, the nature and complexity of the issues summarised above are such that the absence of Mr Fingleton's evidence will be less significant, especially when resolution of the issues in the litigation depends heavily on an assessment of objective factors and standards. There is no dearth of witnesses to the matters in issue, and there is no suggestion that such witnesses are now unavailable. Indeed, one element of the defence to these proceedings depends on an assertion that defendant did not enjoy the primacy alleged by the plaintiffs, and that he was simply one component of the strategy-making and quotidian operations of INBS.
- e) A significant feature of this case is that it concerns the processes of a sophisticated financial institution of systemic importance, and not the informal operation of a small business. There is a reasonable expectation that overall strategy and

individual lending decisions would be reached and recorded with a degree of formality in such a case. 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. The actions of a properly-run financial institution of this size should not, in fact, require extensive explanations derived from the memory of one individual, no matter how prominent the position that they formerly occupied. Corporations and similar entities have a vitality and lifespan that is necessarily separate and distinct from the individual managers and directors, and which may last long after individuals have come and gone, whether by reason of resignation, dismissal, infirmity or death. 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. A building society is necessarily independent of and broader than one individual, no matter how important that individual is at any given time, and ought to be operated on the basis of that simple principle.

- f) I do not accept the characterisation of these proceedings as punitive in nature. The claims will be determined by reference to the civil standard of proof and, if successful, will result in a compensatory award of such damages as may be found to be recoverable in the event that the plaintiffs establish any of the breach of duties alleged by them. I have no doubt that a finding of negligence or breach of fiduciary duty would result in damage to the plaintiff's reputation, but this is a usual consequence of any such finding against any party to civil litigation. I also note from the motion papers that the defendant received considerable financial compensation for his services to INBS, and he must therefore accept the burden of litigation arising from the provision of those services, unless he can show that the interests of justice dictate that he is entitled to a stay or dismissal of the claims against him.
- g) I also do not regard the decision of the Central Bank Inquiry into Mr Fingleton's management of INBS not to proceed further in the light of his medical condition to be a guide as to whether civil proceedings should be stayed or dismissed on the balance of justice. That Inquiry was considering whether INBS committed certain suspected prescribed contraventions and whether Mr Fingleton participated in those contraventions. An adverse finding would have involved consequent sanctions and financial penalties. These features are more punitive in nature than an award of compensatory damages in a civil claim. No doubt the decision of the Inquiry not to proceed was influenced by the provisions of the relevant Central Bank legislation, and the possibility of effective participation in that context, which are not applicable here.
- h) I do not believe that the public interest is a significant factor in this case one way or the other. Of course, given the collective national experience over the last decade, there is a proper public interest in the widest sense of that term in the issues raised by these proceedings. However, if a stay or dismissal is ultimately required to vindicate the defendant's position in the interests of justice, any public interest

would not carry any greater weight than the private rights of the opposing party to have access to the courts to seek a remedy for loss and injury caused by alleged civil wrongdoing.

- i) In this case, the nature and extent of the plaintiff's claims has been known to the defendant since delivery of the Statement of Claim in 2014. There has been no change in substance since that date. Consequently, there was a period of several years over which the defendant had time to consider and react to the allegations made against him, and to instruct his legal and other advisers as to his approach to these matters. He delivered a lengthy and comprehensive Defence, presumably composed on the basis of his instructions. It is only in comparatively recent times that the defendant has unfortunately deteriorated to the extent whereby meaningful further participation by him is not possible. Accordingly, his lawyers should be able to challenge the plaintiffs' evidence by effective cross-examination on the basis of instructions and preparations that arose before illness and infirmity overtook the defendant.
- j) This is not a situation where proceedings have been commenced or continued after the onset of the defendant's difficulties. Prior to that time, the defendant had a significant opportunity to engage with the detailed matters pleaded in the Statement of Claim and the subsequent exchange of particulars, as well as the intermittent tranches of discovery. These are issues with which the defendant would have had a degree of familiarity at the time when he was able to consider them. Any propositions concerning the matters pleaded in the Statement of Claim over and above that which is apparent from the books, records and minutes of INBS would have been apparent to him during that time.
- k) These proceedings are also arranged around the 18 listed loan transactions, which provide a specific frame of reference for assessment of the defendant's stewardship of INBS. These transactions will provide a focus to the case and enable concentration on the contemporaneous exigencies and pressures of the business of INBS, with the exclusion of hindsight as a factor.
- l) In addition, the defence has access to a vast quantity of relevant documents in meeting the claims of the plaintiffs, as well as to the many other witnesses mentioned above.
- m) The threshold required to dismiss or stay a blameless plaintiff must be high, and a great degree of unfairness is required to succeed. In those circumstances, I find it impossible to come to an advance conclusion that it is fundamentally unfair to permit the proceedings to continue, particularly in the absence of delay or other culpable conduct. It may be that such a conclusion might be reached at another stage of the proceedings, with the benefit of the focus of trial.

Conclusion

24. Having considered these matters in assessing the balance of justice and the fairness to both parties of either permitting the proceedings to continue or staying or dismissing them, and having regard to the relatively limited extent of the prejudice that arises by reason of the absence of testimony or other input from the defendant to wide-ranging and complex litigation, which largely depends on objective factors for resolution, I am satisfied that the balance of justice lies firmly on the side of permitting the proceedings to continue. There may be rare cases where disability could in itself found a successful application to stay or dismiss. I am not convinced that this is one of those cases. Nor am I convinced at this juncture in the proceedings that the trial judge will be unable to secure a fair trial. Therefore, I must dismiss this application.
25. In reaching that conclusion, I attach importance to the consideration that the balance of justice and fairness will remain live issues in the continuing proceedings. Monitoring this issue will be a continuing obligation on the trial judge, who will ensure fairness with the benefit of the clarity that comes with a trial in progress. The defendant will have a continuing ability to raise issues of concern in that context, particularly at the close of the plaintiffs' case.

Order

26. I therefore refuse the relief sought in the defendant's notice of motion. As the plaintiffs have been entirely successful on the event in this application, I also propose that they be awarded their costs of and incidental to the motion, to be adjudicated in default of agreement, but with a stay on that order pending final disposal of the proceedings. I will hear the parties further if required.

Approved Judgment

No Redaction Required