AN CHÚIRT UACHTARACH

THE SUPREME COURT

Supreme Court Record No. 2023/119

[2024] IESC 59

Dunne J.
O'Malley J.
Woulfe J.
Hogan J.
Donnelly J.

Between/

IRISH BANK RESOLUTION CORPORATION LIMITED

(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 Mr. Justice Woulfe delivered on the 19th day of December, 2024

Introduction

1. The appellant appeals a decision of the Court of Appeal (Costello J., Haughton J. and Binchy J.) delivered on the 10th May, 2023, which dismissed his appeal against the judgment and order of the High Court (Hunt J.) delivered and made on the 14th May, 2021. The High Court refused the appellant's application to dismiss or permanently stay these proceedings against him 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. It might be noted at the outset that this strand of inherent jurisdiction is separate to the inherent jurisdiction of the Court to dismiss proceedings on the grounds of culpable delay on the part of a plaintiff, as per the principles set out by this Court in *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 ("*Primor*"), and this issue will be considered further below.

2. Although the proceedings are now being conducted by his lawfully appointed attorneys, Mr. Michael P. Fingleton will be referred to in this judgment as the appellant.

Background

3. The appellant played a central role in the affairs of the Irish Nationwide Building Society ("INBS" or "the Society") from 1971 until 2009, serving in roles such as Secretary (a post equivalent to Chief Executive Officer), Director, Managing Director or Chief Executive. As a result of the financial crisis in 2008, INBS became grossly insolvent and it transferred significant commercial loans, subject to extremely significant discounts from their face value, to the National Asset Management Agency

("NAMA") in 2010. This transfer crystalised losses to INBS amounting to €6,031,000,000.

4. The first named respondent, Irish Bank Resolution Corporation Limited ("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 the 1st July, 2011. Subsequently in 2013, special liquidators of IBRC were appointed.

5. This case began by plenary summons issued in March, 2012, and originally involved the respondents claiming damages equal to the entire losses of INBS in the sum of €6.031 billion from a single individual, the appellant. In the statement of claim it was pleaded that there was an extraordinary delegation of powers from the Board of INBS to the appellant on various occasions from 1981 onwards. It was 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 in relation to the terms upon which such loans might be made.

6. It was pleaded in the statement of claim that during the period from 2003 to the end of 2007, all loans in excess of €1m required a Credit Committee recommendation and formal Board approval. It was alleged that despite these internal procedures, the appellant in fact authorised the paying out of funds in excess of €1m to borrowers before the Board had even considered the matter, and it was further alleged that during his period in office he caused INBS to significantly alter the nature of the INBS loan book. The statement of claim alleged a systemic failure to adhere to INBS policies, and stated

that the appellant dominated the Credit Committee and that meetings of that Committee were frequently inquorate as loans were in fact authorised by the appellant unilaterally.

7. The respondents claimed, *inter alia*, that the appellant by his gross negligence or negligence and breach of duty caused or contributed to losses suffered by INBS in five series of loans advanced between 2006 and 2009, as pleaded in paras. 40 – 86 of the statement of claim. They also claimed the return of expenses/expenditure allegedly improperly claimed from the INBS by the appellant during the period 2002-2009.

8. The appellant delivered a full defence and counterclaim on the 21st October, 2013. It was admitted that the INBS Board had delegated wide powers to the appellant, but it was pleaded that the delegations were justified and appropriate, and were in the best interests of the Society, and that the delegated powers, if exercised, were only exercised by the appellant properly and in the best interests of the Society.

9. It was further pleaded that the appellant was at all times subject to the control and oversight of the Board, both in practice and in all other senses. It was said that if any loans of over €1m were authorised in advance of Board approval, the same occurred validly, and following an appropriate assessment of such loans and in the commercial interests of the Society.

10. The appellant counterclaimed in respect of the removal of Directors and Officers insurance cover, which previously subsisted for his benefit. By reason of the absence of this cover, he has funded his defence of these proceedings privately.

11. After the pleadings closed in 2014, the parties engaged in relation to very extensive discovery, and continued to prepare the proceedings for trial. The appellant issued a motion in December, 2020, seeking to dismiss or permanently stay the proceedings in the interests of justice. The application was grounded on the affidavit of the appellant's son, Mr. Michael Fingleton Jnr., sworn on the 10th December, 2020.

12. Mr. Fingleton Jnr stated that the fact that eight years had elapsed since the commencement of these proceedings was in his view almost entirely attributable to the incredible depth and scope of the allegations made against his father. He added that no complaint has ever been made that the respondents had not properly progressed the litigation, and he thought it fair to say that both parties had cooperated in working towards achieving any timeframes directed by the High Court.

13. Mr. Fingleton Jnr then set out details of the serious health difficulties which had been experienced by the appellant, who was almost 83 at the time, in recent years. One of the medical reports exhibited described the appellant as "a frail older gentleman with considerable neurological deficit and cognitive impairment secondary to a stroke". Mr. Fingleton Jnr referred to the claim, as pleaded at paras. 40 – 86 of the statement of claim, that the appellant was grossly negligent in permitting the Society to enter into five series of loan arrangements with various borrowers including Devondale Limited, Louis Scully, Colpy Limited/Cyril Dennis, Ice Mountain, Coast & Capital, Admiral Taverns, and Galliard Developments (Sully) Limited. He stated that this claim would require his 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.

14. It was submitted before the High Court that the medical evidence demonstrated that the appellant would not be able to participate in the trial of this action in any meaningful way, in circumstances where the nature of many of the allegations made against him were such that an effective defence would require many matters to be addressed directly

by him, on the basis of his particular position in, and knowledge of the affairs of, INBS at the time of the events pleaded in the statement of claim.

The High Court

15. In his judgment, Hunt J. was satisfied that the appellant's physical and mental capacities had been significantly compromised, and the net result was that he was in the throes of a gradual deterioration in his condition, which would not be reversed. As a result he would 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 was intended to be adduced by the respondents, 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 a stroke he had suffered in May, 2019, not least due to impairment of his short-term memory.

16. The trial judge set out the arguments of the parties for and against staying or dismissing the proceedings. He stated that most of the authorities concerning the exercise of this 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. However, the fundamental fact of importance to this application was that neither party had accused the other of culpable delay in progressing this litigation.

17. In considering whether the inherent jurisdiction should be exercised, Hunt J. felt that it was worth bearing in mind several general considerations. One such consideration was that 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 respondents' allegations in this case were correct, and he expressed no view about same at that point, there could be little doubt that they had

been victims of an injustice, and their ability to pursue this civil action was the method by which they sought to vindicate their rights in the light of the alleged injustice. A further important consideration was that "the draconian penalty" of dismissing or staying proceedings should not issue where a properly conducted trial could obviate any prejudice which might otherwise arise. Hunt J. went on to analyse the issues as pleaded, and then considered the possible relevance of the appellant's evidence to those issues. Having considered all of these matters Hunt J. was satisfied that, applying the balance of justice test to the particular facts and circumstances of this case, he had to refuse the application at that point of the proceedings, for thirteen reasons which he set out at para. 23 of his judgment.

18. Hunt J. accepted that the absence of the direct testimony of the appellant 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 this disadvantage was not determinative in and of itself as to whether the proceedings should not continue, and 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 into account the fact that ordering a stay and/or dismissal to vindicate the rights of one party has the inevitable consequence of preventing the other party exercising their right of access to the courts. It followed that such a step would be rare and would only occur when there was no alternative means of vindicating the rights of the moving party, and this was especially so where there was no issue of delay or other culpable behaviour on the part of the respondents.

19. The trial judge did not agree that the complexity and scope of the claims in this case was a significant operative consideration. In fact, he felt that the nature and complexity of the issues were such that the absence of the appellant's evidence would be less

significant, especially when resolution of the issues would depend heavily on an assessment of objective factors and standards. There was no dearth of witnesses to the matters in issue, and there was no suggestion that such witnesses were now unavailable.

20. For Hunt J. a significant feature of this case was that it concerned the processes of a sophisticated financial institution of systemic importance, and not the informal operation of a small business. He felt there was a reasonable expectation that overall strategy in 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 he or she formally occupied.

21. The trial judge noted that in this case, the nature and extent of the respondents' claims had been known to the appellant since delivery of the statement of claim in 2014. There had been no change in substance since that date. Consequently, there was a period of several years over which the appellant 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 had delivered a lengthy and comprehensive defence, presumably composed on the basis of his instructions. It was only in comparatively recent times that he had unfortunately deteriorated to the extent whereby meaningful further participation by him was not possible. Accordingly, his lawyers should be able to challenge the respondents' evidence by effective cross-examination on the basis of instructions and preparations that arose before illness and infirmity overtook the appellant.

22. Hunt J. held that 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, he

found it impossible to come to an advance conclusion that it was fundamentally unfair to permit the proceedings to continue, particularly in the absence of delay or other culpable conduct. It might be that such a conclusion might be reached at another stage of the proceedings, with the benefit of the focus of trial.

23. 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 might arise by reason of the absence of testimony or other input from the appellant to wide-ranging and complex litigation, which largely depended on objective factors for resolution, Hunt J. was satisfied that the balance of justice lay firmly on the side of permitting the proceedings to continue. He felt that there may be rare cases where disability could in itself found a successful application to stay or dismiss, but he was not convinced that this was one of those cases. Nor was he convinced at this juncture in the proceedings that the trial judge would be unable to secure a fair trial.

24. In reaching his conclusion, Hunt J. attached importance to the consideration that the balance of justice and fairness would remain live issues in the continuing proceedings. Monitoring these issues would be a continuing obligation on the trial judge, who would ensure fairness with the benefit of the clarity that comes with a trial in progress. The appellant would have a continuing ability to raise issues of concern in that context, particularly at the close of the respondents' case.

The Court of Appeal

25. The appellant appealed, and on the day the appeal was listed for hearing the Court of Appeal 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

therefore adjourned to allow the appellant's attorneys to register the enduring Power of Attorney he had previously executed, and to reconstitute the proceedings. This occurred and the appeal recommenced in December, 2022, and proceeded on the basis that the appellant lacked capacity to manage his affairs, and the proceedings were now to be conducted by his attorneys.

26. On the second day of the hearing what the Court below described as a "most profound change" in the proceedings and the application to stay the proceedings occurred, during the submissions of counsel for the respondents. The case as originally pleaded was exceptionally broad, covering the period from at least 1981 to 2009, and 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 €6.031 billion. Counsel for the respondents confirmed on day two of the appeal hearing that the respondents were now limiting their claim to damages arising from the five series of loans, as pleaded in paras. 40 – 86 of the statement of claim. He also stated that evidence as to events or matters proceeding these identified large loans "may set the context for what happened".

27. Counsel for the respondents confirmed that the approximate value of the claim was now €65m (arising from loans advanced in the State) plus £220m (in respect of loans advanced in England). Thus, it was in the region of €290m. As the Court below stated, it was of course still a very large claim, but it was now approximately 5% of the previously advanced claim. The Court below felt that, for the purposes of this application, what was even more significant was that whole swathes of issues would no longer feature in the case.

28. The Court of Appeal held that, by any matrix, this limiting of the claim amounted to a very significant change in the case. The proceedings no longer could be said to be truly

exceptional. They now comprised 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 was a claim, details of which had been pleaded clearly in the statement of claim and by way of further particulars. Furthermore, extensive discovery had been made in respect of these loans. Notices of business records evidence had been served pursuant to the relevant legislation in respect of documents relating to the transactions, and relating to and evidencing the loans. This, the Court felt, was highly relevant to the ability of the appellant to defend the case as it was now constituted.

29. The Court of Appeal considered the scope of the continuing claim and the evidence of prejudice in respect of the reduced claim. It noted that no further affidavit was filed between the date of the High Court judgment and the hearing of the appeal, other than affidavits of means which did not address any issue of prejudice to the appellant if the case were to proceed to trial. The facts upon which the relief was sought by the appellant were those set out in the affidavit of Mr. Fingleton Jnr. The specific prejudice identified in his affidavit which applied to the case now being advanced was that set out in para. 53(x), which relates to the series of five loans to which the respondents had now confined their case.

30. The Court below felt it was important to emphasise that there was no evidence before the Court of any steps taken to prepare the defence, to identify possible witnesses for the defence, or whether they were available to give evidence. The Court had 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, the Court felt that 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 was all the more significant as Mr. Fingleton Jnr stated that he had 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 – 86 in the statement of claim were advanced. There was no evidence that he or the appellant sought to identify or contact his former colleagues about these loans. The Court had no evidence of any efforts made to identify who was on the Credit Committee at the relevant period, and the affidavit of Mr. Fingleton Jnr was silent about the possible evidence from the members of the Board.

31. The Court of Appeal noted that vast discovery had been made in these proceedings, and that there was no averment in respect of any of these loans that the files were incomplete, or that it was not possible to defend the claim due to the inadequacy of the records available. It observed that, somewhat unusually, the application to dismiss the proceedings was therefore not based upon the absence of witnesses or documents. It was based on the inability of the appellant, a central witness, to give any evidence or to instruct his lawyers in relation to the case he has to face.

32. The Court of Appeal reviewed the jurisprudence as to the 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. The Court set out the principles which emerged from those cases which were relevant to the application before it as follows (at para. 59):

> "(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 assess the nature of the evidence to be led and the issues to be decided. It must weigh the role of documents in this context…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."

33. The Court below reviewed the issues to be determined at trial, concerning the remaining live allegations against the appellant of gross negligence or negligence or breach of duty in respect of the five series of loans advanced by INBS between 2006 and 2009. It then considered the appellant's potential evidence in the context of these remaining issues. The Court stated that much of the evidence to be adduced in the defence of these proceedings would not depend on the appellant's personal evidence, even if he were well and in a position to give evidence. This was 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 could be independently established without the need for evidence from the appellant. In addition, many of the documents could be admitted pursuant to the procedure provided under the recent legislation in relation to business records evidence. In light of the above, the Court concluded that the evidence of the appellant would not be as critical as was urged on the Court in submissions.

34. The Court below considered whether there was a real and serious risk of an unfair trial or an unjust result. It noted that the nature of the appellant's ill-health and his lack of capacity gave rise to a significant litigation disadvantage, as was accepted by the respondents and acknowledged by the trial judge, but held that this in and of itself was not determinative. It stated that the jurisprudence in this jurisdiction was more nuanced, and the prejudice arising 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 would then be able to assess the magnitude of the litigation disadvantage flowing from the disability of the appellant.

35. The Court held that the appellant had not made out a case that his inability to give instructions about or to give evidence in relation to these five series of loans gives rise to the degree of prejudice which is required to dismiss the proceedings. In the light of

the pleaded defence, it felt there must be relevant witnesses other than the appellant who could give evidence in relation to the factual matters at issue. There was no evidence that the appellant had sought to identify any of these witnesses, still less to try to locate them and ascertain whether they would be in position to give evidence.

36. The Court held that the same dearth of information applied in relation to the availability of documents, in circumstances where the case had become more rather than less document dependent, with the change in the focus and extent of the claim. The applications for the loans, the assessment of the loans and the fixing of the terms upon which the loans were advanced would all to a greater or lesser degree be recorded in documents. The same applied to the difficulties which subsequently emerged in relation to the borrowing. The Court concluded that while the documents relating to the five series of loans might not be as complete as one might expect from a financial institution of the nature of INBS, despite the fact that discovery had been made some considerable time ago, there was 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.

37. Furthermore, the Court held that many crucial matters were objectively provable without the need for the appellant's testimony. Much of the relevant evidence was not evidence which one would expect the appellant personally to give from his memory alone. He would also, like doctors in medical negligence litigation, rely on the contemporaneous records and documents to assist him in giving evidence. Given the provisions of recent legislation, it was now possible to introduce the documents into evidence without the need for the appellant to prove same. It had not been established that there were no other witnesses able to give evidence in relation to any of the facts

which might be in dispute regarding the loans, once the documents were admitted in evidence.

38. For these reasons the Court below was of the view that the inability of the appellant to give instructions to his lawyers or to give evidence in court in relation to the remaining claims in respect of the five series of loans fell 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. The Court stated that the starting point must be that the respondents are entitled to a trial on the merits unless, exceptionally, the appellant can show that the interests of justice, as set out by McKechnie J. in *Comcast International Holdings v. Minister for Public Enterprise* [2012] IESC 50 ("*Comcast*"), require that the proceedings be dismissed. The appellant bears the burden of establishing this, and there is no obligation on a plaintiff to establish that it is just that the case proceeds to trial. All of the authorities say that a plaintiff should not rightly be deprived of a trial on the merits.

39. For all of the reasons set out in the judgment, the Court of Appeal was of the view that the appellant had not discharged the very high burden which he bore in an application of this kind. He had not established that there was either a real or serious risk of an unfair trial or an unjust result, or that there was 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 those reasons the Court dismissed the appeal.

Determination

40. This Court granted the appellant leave to appeal in a determination dated the 3rd November, 2023: see [2023] IESCDET 136. The Court stated that it appeared from the Court of Appeal judgment that there is no decision in this jurisdiction on when, if at all,

it is appropriate to order the dismissal *in limine* of proceedings where a defendant is unable, due to ill-health, to defend a civil claim brought against him or her. This raised a matter of general public importance and the Court was satisfied that it was appropriate to grant leave accordingly in respect of the following grounds…:

(1) Is a person who is no longer able to defend a civil claim – in the sense of being unable to instruct lawyers or give evidence on his or her own behalf – because of ill-health, entitled, on that basis, to have that case dismissed *in limine*?

(2) If so, what are the factors to which a court must have regard when considering whether to dismiss a particular claim where the defendant is no longer in a position to defend?

    (a) In particular, is the nature of the claim being made against the defendant, for example, a claim that would have significant reputational damage for the defendant, relevant to the entitlement to a dismissal *in limine?*

    (b) What relevance, if any, does the fact that there is no culpable delay on the part of the plaintiff have to a consideration of whether the case ought to be dismissed?

    (c) To what extent is the nature and extent of the evidence available to those now defending on behalf of an incapable defendant relevant to the issue of whether the proceedings ought to be dismissed *in limine*?

Submissions in the Appeal

The Appellant's Submissions

Existing Jurisprudence

41. The appellant submits that, even on the respondents' re-amended claim, the risk of an unfair trial is so overwhelming that the Court's duty under Article 34 of the Constitution to administer justice requires the proceedings to be brought to an end. As regards the existing jurisprudence on dismissal of proceedings, his principal contention is that the jurisdiction invoked is a natural extension of (or already accommodated by) the well-recognised jurisdiction of the courts to bring proceedings to an end where (1) there is a real 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) they place an inexcusable and unfair burden on the defendant to defend.

42. The origin of this jurisdiction to dismiss, separate from the jurisdiction to dismiss in cases of culpable delay, is said to be the decision of this Court in *O'Domhnaill v Merrick* [1984] IR 151 ("*O'Domhnaill*"), in which the test as outlined by Henchy J. (at 157) involved a balancing of the parties' interests. The appellant submits that the dominant consideration, upon an application of this kind, is to ask whether the fundamental obligation to do ultimate *justice between the parties* can be achieved by the Court. The appellant highlights a series of cases which he contends clarifies the Court's jurisdiction to dismiss proceedings in the interest of justice, in cases not encompassed by the decision of this Court in *Primor*, including *Manning v Benson & Hedges Limited* [2004] 3 I.R. 556 ("*Manning*") and *Comcast*. He submits that this line of authority was carefully explained by McKechnie J. in *Comcast*, who stated that it cannot be doubted that the courts have such inherent jurisdiction, and set out a number of features to this jurisdiction which he felt were worthy of note.

43. The appellant contends that this jurisdiction is inherently flexible, and that the kind of circumstances which might lead a Court to find a real and substantial risk of an unfair trial are not closed. He does not make the case that mental incapacity will *ipso facto* lead a Court to conclude that there is a real and substantial risk of an unfair trial or a patent unfairness to the appellant, but submits that there is a potentially wide range of circumstances in which a fair trial may be possible, even after a defendant has become incapable of giving instructions.

Type of evidence likely to be adduced and issues to be determined

44. The appellant contends that the subject matter covered by the numerous witness statements, *précis* of evidence and expert witness reports delivered by the respondents extends far beyond the five series of loans to which the claim for damages is now limited, and in most instances provides little or no evidence relevant to them. He contends that the overall factual panorama remains vast, and that by any normal litigation standard the requirement of meeting the range of issues advanced by the respondents will impose an enormous (and ultimately unfair) burden on the appellant in his incapacitated state. The appellant submits that it is important that fundamental factual issues will undoubtedly require to be determined based upon oral evidence, rather than upon the interpretation or analysis of documents.

45. The appellant notes the point made by O'Flaherty J. in *Primor* that there are simple 'documents' cases and there are complicated 'documents' cases, with an example of a simple 'documents' case being where the documents would be regarded as tantamount to speaking for themselves. He argues that this case fits within a category that requires oral evidence, as in these proceedings the existence of documentary records will not permit the trial Court to determine whether or not the appellant acted negligently in the

operation of INBS or in the advancement of particular loans. He contends that the respondents have confirmed that they will principally rely on oral evidence.

46. The appellant suggests that the fact that the documentary records of INBS across the relevant period are poor has been recognised in the minutes of a meeting of the INBS Board held on the 26th of May, 2011. He also refers to a deposition from the former internal auditor of INBS, Killian McMahon, taken on the 25th September, 2023, which stated that " there was a lot of information in people's heads, and documentation wasn't centralised." The appellant submits that these matters are wholly incompatible with the High Court and Court of Appeal conclusions that a fair trial is possible in this case. To achieve the basic mutuality of process inherent in a fair trial the appellant must, it is submitted, be in a position to respond and give instructions in relation to both witness statements and oral evidence at the trial.

Nature of a Director's Duties

47. The appellant submits that the test for assessing whether he breached his duties as a director of INBS is outlined, *inter alia*, in the case of *Bloxham v Irish Stock Exchange* [2014] IEHC 93. He argues that the trial judge will be required to have regard to the appellant's subjective state of mind at the time of the relevant decisions, and contends that the absence of the appellant's direct evidence of his subjective state of mind and whether he honestly believed that he was at all times acting honestly, responsibly, in good faith and in what he believed to be the best interests of INBS puts a fair trial of those allegations to the hazard. It is submitted that the appellant's subjective state of mind is directly relevant in another way to the defence of the claim. Section 115 of the Building Societies Act, 1989 provides that where a Court considers that an officer of a building society is or may be liable in respect of negligence, default, breach of duty, or

breach of trust, but that the officer acted honestly and reasonably, the Court may, having regard to all the circumstances of the case, relieve the officer from liability, either wholly or in part.

Historic Instructions provided by the Appellant

48. The appellant's submissions highlight the fact that the instructions received from the appellant were historic instructions, provided many years before the respondents' claim had been fully particularised and before witness statements were delivered. It is said to be unclear how the appellant's lawyers could effectively cross-examine on the basis of these historic instructions, provided in respect of an entirely different claim. The appellant refers to the case of *Sun Fat Chan v. Osseous* [1992] IR 425, where McCarthy J. observed that often times at earlier stages in the proceedings it may appear that the facts are clear and established but the trial itself will disclose a different picture. The appellant submits that this undeniable reality further militates against these proceedings being permitted to go any further.

The Questions Posed in the Determination

49. The appellant's central submission is that the Court does possess a jurisdiction to terminate proceedings *in limine* where the appellant has become unable to defend owing to ill-health. No strict entitlement to dismiss arises, however, and the party applying for dismissal on that ground is required to satisfy the *O'Domhnaill* test as elaborated upon by McKechnie J. in *Comcast*. In considering the factors which are relevant, the appellant tentatively accepts as potentially relevant the factors identified in para. 59 of the Court of Appeal judgment, but states that the range of potentially relevant factors is not closed.

50. The appellant advances an argument under Article 40.3.2 of the Constitution, drawing a parallel with the case of *O'Callaghan v Mahon* [2008] 2 IR 514. It is submitted that the appellant could suffer reputational damage as a result of the allegations made against him in these proceedings, and that the broad reputational import of the proceedings engages a constitutional protection which weighs against permitting the case to proceed in circumstances where the appellant is simply unable to tell his side of the story in accordance with the demands of procedural and constitutional justice.

51. As regards how the test for dismissal falls to be applied here, the appellant summarises the significant factors which he submits weigh against permitting the respondents' case to proceed to trial:

(i) The issues raised by the respondents' case can only be resolved through oral evidence;

(ii) The scope and likely duration of the respondents' case is, by any normal litigation standard, very large;

(iii) The forensic documentary record relating to the five series of loans under consideration is demonstrably lacking;

(iv) The lapse of time since the events under consideration took place is significant and inherently prejudicial;

(v) The content of the respondents' evidence was not known to the appellant before his supervening incapacity;

(vi) The precise particulars of the respondents' case have yet to be furnished;

(vii) The case advanced by the respondents is peculiarly and specifically focused upon the appellant personally and on his actions and decisions;

(viii) The appellant will be required to defend the proceedings without the prior benefit of the insurance policy for which he counterclaims in the proceedings; and

(ix) The proceedings will have a significant adverse effect on the appellant's reputation and dignity.

The Respondents' Submissions

Summary

52. The respondents note that there does not appear to be any dispute between the parties that the jurisdiction to stay or dismiss civil proceedings, where there has been no culpable delay on the part of a plaintiff, is properly explained in *Comcast*. Specifically, a defendant must establish a real and serious risk of an unfair trial. The respondents submit that this appeal concerns the relatively narrow issue of how *Comcast* should be applied in the context of an incapacitated defendant.

53. The respondents note the appellant's contention that, because the appellant's ill-health prevents him from giving evidence which would have been central to the defence, this has the effect of making any trial unfair. They dispute this contention as misconceived in both law and fact, and say that the appellant cannot cite any authority in this or any other jurisdiction which supports an argument that proceedings should be dismissed by reason of his incapacity. The respondents contend that the applicable legal principles are clear in emphasising the exceptional nature of the jurisdiction, and how any such application must be grounded in the evidence in the case. They submit that seen in this light, the concerns of the appellant amount to no more than bald assertions of unfairness which wholly fail to engage with the evidence in the case, and accordingly this

application falls far short of the high bar the appellant must meet to dismiss the respondents' claim.

Issue 1 identified in the Determination

54. The respondents accept that the courts have developed a separate jurisdiction to dismiss proceedings on the grounds of unfairness to a defendant, even in the absence of culpable delay. They cite the passage in *Comcast*, where McKechnie J. stated that the proposition that the courts have such an inherent jurisdiction cannot be doubted and he noted that the test to be applied has been described in various ways.

55. In considering the requirements of a fair trial and of a defendant's ability to defend himself or herself, the respondents highlight the case of *Nash v Director of Public Prosecutions* [2015] IESC 32 ("*Nash*") in which the appellant sought to prohibit his criminal trial on grounds of delay. In *Nash*, Clarke J. (as he then was) stated that there is a significant constitutional weight to be placed on the side of credible cases, whether criminal or civil, going to trial and being determined on the merits in accordance with the law and the evidence. The respondents highlight Clarke J.'s observation, with regard to the requirements of a fair trial, that there will very rarely be a perfect trial where all desired evidence was available, and accordingly the availability of supporting material such as documentary evidence was an important factor, as also was the nature of the documents and whether they might be considered self-explanatory or would need to be put in context. They note that Clarke J. further held that it was preferable, except in clear cases, that the assessment of unfairness was made by the trial judge hearing the case.

56. The respondents conclude on the first issue that it is clear that, unlike in criminal cases, a defendant in civil proceedings has no automatic entitlement to have a case dismissed

in limine on grounds of ill-health or incapacity. Rather, such a defendant must invoke a wider jurisdiction to dismiss the claim for unfairness based, at the very least, on the absence of evidence, rather than purely on their own personal incapacity. In other words, if, by reason of this incapacity, a defendant is unable to give evidence and the case is one which would largely rely on that oral evidence, dismissal might conceivably follow, but only after a rigorous analysis of the missing evidence and within the context of the case as a whole. They contend that, even then, the Court would have to be very slow to adopt such an approach, particularly when one bears in mind the fact that in Part II of the Civil Liability Act 1961, the Oireachtas has seen fit to permit the survival of a cause of action against a deceased person.

Issue 2 identified in the Determination

57. The respondents submit that the factors governing an application to dismiss are as set out in *Comcast,* and as summarised at para. 59 of the judgment of the Court of Appeal. They further contend that the case law makes clear that a defendant seeking to dismiss a claim on grounds of missing evidence cannot simply rely on simple assertions of unfairness to support their application, but must engage with the evidence in the case and demonstrate how its absence creates a sufficient unfairness to satisfy the high bar for dismissal. They submit that, given the different rights of both parties at issue, any order for dismissal must be proportionate and strike a balance between the rights of all parties, rather than solely focus on the rights of the defendant as the appellant envisages.

58. The respondents address whether the nature of the claim being made, for example a claim that would have significant reputational damage for the defendant, is relevant to the entitlement to a dismissal *in limine*. They contend that the extent to which a defendant may suffer significant reputational damage has no bearing on whether, on the

particular facts of a case, there is a real and serious risk that the defendant's right to a trial in accordance with fair procedures is at real and serious risk. They suggest that if proceedings can be fairly maintained against a deceased defendant who cannot give evidence, then it would be inconsistent to arrive at a different conclusion merely because the defendant was alive and, therefore, had a reputation capable of constitutional protection.

59. While the respondents accept that whether a plaintiff has been guilty of culpable delay is not determinative, in and of itself, of whether a fair trial can be conducted, it is submitted that the lack of culpable delay on the part of the respondents is a factor which the Court may take into account in considering the fairness of the trial to which they may be entitled. They support this contention with reference to Clarke J.'s judgment in *Comcast* where he stated (at para. 4.3) that the threshold which must be surmounted to justify the dismissal of proceedings where there is no culpable delay on the part of the plaintiff must necessarily be more onerous than that which applies in the case of culpable delay.

60. The respondents submit that, where there has been no culpable delay on the part of the plaintiff (as they submit has been accepted by the appellant in this case), the Court should be extremely slow to dismiss proceedings, whether on grounds of a defendant's cognitive impairment or otherwise, and should only be prepared to even consider doing so where there has been meaningful engagement with the evidence, resulting in a clear and cogent demonstration of material impairment of the right to a fair hearing. The respondents further submit that, as per *Nash*, these are arguments that ought to be advanced before the trial judge rather than in advance of trial.

61. The respondents submit that the relevance and nature of the evidence available to the appellant is of fundamental importance in applying the test for dismissal. They highlight

the appellant's repetition that the appellant himself is the only one capable of providing the appropriate evidence, but submit that at no point is any indication given of what that evidence might be, how it might support his defence, or more importantly, how it is distinct from the available documentary evidence and therefore irreplaceable. The respondents state that the case law makes it clear that such bare assertions are no substitute for a proper engagement with the facts and the evidence.

62. The respondents address the appellant's contention that the narrowing of the case will require new instructions which the appellant is not capable of providing. They state that this point is misconceived as the appellant has given no indication as to what issue is new in the case, or as to what matters of evidence he will now have to meet that he had not been faced with previously. The respondents also allege failure on the appellant's part to engage with the evidence in order to demonstrate how the circumstances complained of amount to a real risk of an unfair trial. They contend that no attempt has been made to identify other witnesses who could be called to give evidence, but who cannot now be located or who are otherwise unavailable, or to address issues concerning those loans in respect of which it might be said that only the appellant could give exculpatory evidence.

Decision

The Legal Principles

63. As stated at the outset of this judgment, the appellant in this case does not seek to invoke the inherent jurisdiction of the Court to dismiss proceedings on grounds of any culpable delay on the part of the respondents, as per the principles set out by this Court in *Primor*. He seeks instead to invoke a separate strand of inherent jurisdiction to dismiss proceedings, *i.e.* a jurisdiction in the interests of justice to dismiss a claim where,

generally due to lapse of time, there is a real and serious risk of an unfair trial or of serious unfairness to the defendant. I will at times throughout the rest of this judgment use the shorthand of "unfairness" to describe this strand of inherent jurisdiction.

64. McKechnie J. suggested in *Comcast* that this separate strand of inherent jurisdiction surfaced in *Ó'Domhnaill*, which concerned a personal injuries claim instituted by a plaintiff more than sixteen years after she had suffered injuries as a three year old child. While the *ratio* of this Court's decision in *Ó'Domhnaill* was that the plaintiff's action should be dismissed on the grounds of inordinate and inexcusable delay, Henchy J. expressed the following view as to unfairness (at 158):

> "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."

65. This theme of possible unfairness resulting from lapse of time was developed in subsequent cases. In *Toal v. Dignan (No. 1)* [1991] ILRM 135 ("*Toal (No. 1)*") a claim for medical negligence issued in 1984, arising out of the birth of the plaintiff in 1961. The Supreme Court upheld a High Court order striking out the proceedings against certain defendants, on the grounds that the (by then) 26 year lapse of time, and the absence of detailed clinical notes and records, made it impossible for the hospital and

the consultants to defend themselves. In his judgment Finlay C.J. stated as follows (at 139):

> "In the High Court it was held by Keane J. that the case was governed by the decision of this Court in the case of *O'Domhnaill*…I am in agreement with that view of the law. It is unnecessary for me to repeat here the principles laid down by this Court in that case, but they may be summarised in their application to the present appeal as being that where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the Court may as a matter of justice have to dismiss the action."

66. In the sequel case of *Toal v. Dignan (No. 2)* [1991] ILRM 140 ("*Toal (No. 2)*"), Finlay C.J. noted that his judgment in the previous appeal was based on the principles in *O'Domhnaill*. He then continued as follows (at 142):

> "I have carefully reconsidered the principles laid down in that judgment on the question as to the jurisdiction of this Court in the interests of justice to dismiss a claim where the length of time which has elapsed between the events out of which it arises and the time when it comes for hearing is in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself or herself against the claim made. I have also reconsidered the dissent from that view expressed by McCarthy J. in …*O'Domhnaill*…
>
> I adhere to the view expressed by me in the previous appeal in this case that the Court has got such an inherent jurisdiction. It seems to me that to conclude otherwise is to give the Oireachtas a supremacy over the Courts which is inconsistent with the Constitution.

If the Courts were to be deprived of the right to secure to a party in litigation before them justice by dismissing against him or her a claim which by reason of the delay in bringing it, whether culpable or not, would probably lead to an unjust trial and an unjust result merely by reason of the fact that the Oireachtas has provided a time limit which in the particular case has not been breached would be to accept a legislative intervention in what is one of the most fundamental rights and obligations of a Court to do ultimate justice between the parties before it.

That view does not, however, of course mean that this is a jurisdiction which could be frequently or lightly assumed and there can be no doubt that the issue before the Court always remains that which was identified by Henchy J. in *O'Domhnaill*…where, at p. 157, in the course of his judgment he stated:

> '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 a 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.'

I also accept, as I indicated in my judgment on the previous appeal in this case, that the existence of culpable negligence on the part of a plaintiff whose claim has been delayed is of considerable relevance but that it is not an essential ingredient for the exercise by the Court of its jurisdiction."

67. The principles set out in the above cases were considered in detail by Finlay Geoghegan J. in *Manning v. Benson and Hedges Limited* [2004] 3 IR 556, who then observed as follows (at 568):

> "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.

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.

Whilst in some of the cases the judgments have referred to matters under both these headings, they appear to be potentially separate grounds upon which the inherent jurisdiction to dismiss may be exercised.

The factors to be considered by the Court in relation to each question may overlap. It appears to me that these may include:

(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; and 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 will be relevant to consider any actual prejudice to the defendant in attempting to defend the claim by reason of the lapse of time."

68. This "unfairness" strand of inherent jurisdiction was considered by both McKechnie J. and Clarke J. in their judgments in *Comcast*, although that decision of this Court was ultimately based upon the *Primor* principles. In his judgment McKechnie J. stated as follows:

"40. As the motions which issued in these proceedings disclosed, the dismissal relief is sought not only for failing to prosecute but also on the basis of the interests of justice. That the courts have such an inherent jurisdiction 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 a 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.

41. Some of the factors to be considered by the Court on this type of application were identified in *Manning*…by Finlay Geoghegan J. at p. 196 of the report. I would respectfully agree with the learned judge and add only, as she intended, that such were merely indicative of what might overall be relevant for appraisal in any given case.

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 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 the 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*…[2011] IEHC 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, "of course, such cases would have be to exceptional".

43. From my experience it seems that ever since this jurisdiction has become well established, it has routinely been included as an alternative relief by defendants in seeking to have actions dismissed for want of prosecution. I decry such a move. Given the capacity of *Primor* to deliver a just result, I cannot see any justification for its use as a matter of course. While I entirely acknowledge the importance of this jurisdiction and access to it, nonetheless its recourse in my view should be had only in the most exceptional circumstances."

69. In his judgment in *Comcast*, Clarke J. stated that it cannot be doubted that there is a separate line of authority suggesting that there are circumstances in which proceedings can be dismissed for delay, even though there is no culpability on the part of the plaintiff concerned. He agreed with the trial judge's conclusion that there remains a separate jurisdiction in the Court to dismiss if there is a real prospect that the defendant will not be able to have a fair trial, or that it would be unfair to require the defendant to meet the case after such a long delay. He continued as follows (at para. 4.2):

"For the reasons which I addressed in my judgment in *Kennedy v. DPP* [2012] IESC 34 (although that case was concerned with prohibition in the criminal context), I am concerned to ensure that proceedings should be tried on the merits in all cases where no blame can lie on the party bringing the proceedings (plaintiff or prosecutor) 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. Nevertheless, for reasons which will become apparent, it does not

seem to me that the facts of this case demonstrate the sort of prejudice or impairment to the Minister in the conduct of his defence which would meet the test in any of the ways in which it has been characterised in the jurisprudence. This case is not, therefore and as should become clear in the course of this judgment, one in which it is necessary to address with some precision the precise test which is to be applied in dismissing a case where there is no blameworthy delay on the part of the plaintiff.

4.3 However, I should make one general observation. It seems to me that the threshold which must be surmounted to justify the dismissal of proceedings where there is no culpable delay on the part of the plaintiff must necessarily be more onerous than that which applies in the case of culpable delay. If the thresholds were the same then the jurisprudence on delay in such cases would be meaningless for the level of impairment in the ability to present a defence which would have to be shown would be the same whether there was or was not culpable delay. Furthermore, a test which made it easier to dismiss proceedings where there was no culpable delay would be illogical. It follows, in my view, that whatever approach is adopted to the dismissal of cases where no culpable delay is established, it must, necessarily, require that a higher threshold be met. The rationale behind the existence of two separate bases for dismissal is that there will be some cases where the degree of unfairness to a defendant (whether because of severe impairment in the ability to mount a defence or other factors) may be so great that even a blameless plaintiff may have to suffer their proceedings being dismissed."

70. Clarke J. subsequently addressed what he described as the lapse of time jurisprudence in some detail in *Nash*, which was a judicial review application seeking to prohibit a

criminal trial on grounds of delay. He felt it useful to attempt to take a step back and identify the fundamental principles which lay behind the case law. He stated that, in the civil context, persons who claim disputed rights or obligations or who allege wrongdoing in respect of which the law allows redress are, in principle, entitled to have their day in Court. That means that there is a strong constitutional value in a Court ultimately determining the rights and wrongs of the competing positions of the parties on the basis of a proper analysis of all relevant and admissible evidence, and the application of the law to the facts thereby emerging. All those factors suggest that there is a significant constitutional weight to be placed on the side of credible cases, whether it is criminal or civil, going to trial and being determined on the merits in accordance with the law and the evidence. However, it seemed to him that, at least at the level of broad and high principle, there were certain competing considerations.

71. First, Clarke J. felt that it must be acknowledged that persons who may be the subject of adverse findings as a result of a Court process (including adverse orders in civil claims) have a general constitutional entitlement to have those rights, obligations or liabilities determined in a timely fashion. This was an entitlement which was, in his view, independent of the entitlement to a fair trial. He stated that, in the criminal delay context, there may well, at least in many cases, be a significant interaction between lapse of time *per se* and prejudice to a fair trial for it was the universal experience that the more time which elapses, the greater the risk there would be to the possibility of there being a fair trial. Nonetheless, he was satisfied that there was a constitutional value involved in this area of jurisprudence which required weight to be placed on the entitlement of parties not to have potential litigation hanging over them for a period which, in all the circumstances, amounted to a significant breach of their rights. Importantly, he added, it also had to be acknowledged that the remedy for a breach of

the right to an early or expeditious trial would not necessarily be that the trial must be prohibited.

72. Clarke J. went on to note how similar principles had been identified, as a stand-alone element of the jurisprudence, in the civil context. He cited *Toal (No. 2)* as authority for the proposition that the Court had an inherent jurisdiction, in the interests of justice, to dismiss a claim where the length of time which had elapsed between the events out of which it arises and the time when it comes on for hearing is, in all the circumstances, so great that it would be unjust to call on the defendant to defend himself against the claim made. It seemed clear to him that this inherent jurisdiction to dismiss a claim existed even in the absence of culpable delay on the part of a plaintiff, citing *Manning*. He then continued as follows (at para. 2.10):

> "It follows that, in both the criminal and civil jurisprudence, there is a strand which recognises that there is a constitutional entitlement to a timely trial of proceedings and that, in extreme cases, it may be that a particularly serious breach of that entitlement will, of itself, override the constitutional imperative that there should be a trial on the merits and, thus, require that the case not progress to trial. It should, however, be emphasised that the fact of a breach of the constitutional right to a timely trial does not, in and of itself, necessarily mean that there should be no trial on the merits. There will be many cases where the breach will not be sufficiently serious to warrant interfering with the presumption in favour of a trial on the merits. There may also well be many cases where some form of remedy, other than preventing a trial on the merits, will be sufficient."

73. Clarke J. then turned to the second competing consideration, and suggested that in many (probably most) cases the key consideration which will require to be balanced against

the undoubted desirability of there being a trial on the merits is the risk that that very trial will, by virtue of lapse of time, in itself be unfair. He then posed the question as to what, in that context, is meant by an unfair trial, and he then continued as follows:

> "2.12 The starting point has to be to acknowledge that there will very rarely be a perfect trial where all evidence which either side might theoretically wish to have available is before the Court. As has often being pointed out, even where a case comes on for trial with commendable expedition, evidence may just no longer be available because of the untimely death of witnesses or, indeed, their unavailability. Documentary or forensic evidence may not have been preserved or even gathered in the first place in circumstances which may be wholly understandable and where no blame may attach to anyone…A witness to a car crash which is the subject of a civil claim may not have left their name with anyone who remained at the scene of the accident and may just not be capable of being found. Literally hundreds of other examples could be given. So the starting point has to be to acknowledge that very few trials will be close to perfect in the sense of the judge having available all materials which either side might, in an ideal world, have wished to have been in a position to present. But such lack of perfection does not mean that the trial will be unfair for to require such perfection as a necessary ingredient of a fair trial would automatically lead to the vast majority of cases being incapable of being tried and, thus, to the whole scale denial of the rights and obligations of those parties who had an interest in a proper trial and a proper determination of whatever rights, obligations or liabilities the evidence on the law required. In that context it is apposite to note the telling comment of Henchy J. in *O'Domhnaill*…to the effect that justice delayed does not always mean justice denied but can often mean

justice diminished. Henchy J. went on to say that, in some cases, delay can 'put 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'.

2.13 What then leads to a trial, whether criminal or civil, being regarded as constitutionally unfair given that trials will almost inevitably fall somewhat short of perfection? When does justice become so diminished or "put to the hazard" to lead to a degree of unfairness sufficient to hold that justice is denied and thus to warrant departing from the imperative of a trial on the merits? In my view, a proper analysis of the jurisprudence in both the criminal and civil contexts leads to the conclusion that there are two ways in which such unfairness may be established. First, the lapse of time may be so great and the divergence from any semblance of a real trial on the merits so substantial, that it can be appropriate to come to the view that the conduct of a trial would be nothing more than that in name. Obviously the extent to which such situation can properly be said to exist may be very dependent on the type of case under consideration. Some types of cases, of their nature, will, no matter how perfect the trial may be, involve the Court in only having available limited materials to assess the facts. Also certain types of materials are likely to be less cogent or effective as evidence over time. For example, while the context in which a contract was drawn up will always be of some relevance to the proper interpretation of its terms, legal rights and obligations which are more or less completely determined by a document are likely to be just as capable of being properly assessed even after a lengthy period of time. However, even in cases where all of the witnesses who might have been available, had there been a very early trial, are still in a position to give evidence, lapse of time can make it a lot

more difficult for a Court to carry out any proper assessment of where the truth may lie particularly where the facts are contested. At a certain point the absence of evidence which might otherwise have been available coupled with the effect of lapse of time on the ability of the Court to assess other evidence, may lead to a stage being reached where, in the words used in some of the civil jurisprudence…the case has gone beyond the reach of fair litigation.

2.14 In such cases, whether criminal or civil, the finding of the Court is simply that, not necessarily through anyone's fault, time and events have passed to such an extent that the establishment of facts, determined by an analysis of evidence which can properly be tested, which process is at the heart of a court system, is just no longer possible. In such circumstances it will not be possible to have a fair trial.

2.15 There are, however, other cases where the consequence of lapse of time and events is not so severe so that it is possible to say that a meaningful trial could not be conducted at all. As noted earlier, few trials will be perfect. But the effect of lapse of time may well, again to a greater or lesser degree depending on the type of case involved, mean that the extent to which any trial might fall short of perfection has increased. To adopt the phrase of Henchy J. in *O'Domhnaill*, lapse of time will diminish but not deny justice. Should that, necessarily and of itself, lead to a conclusion that any trial would be unfair? I do not think so."

74. Clarke J. later made an important point regarding the primacy of the role of the trial judge in the exercise of this inherent jurisdiction:

"2.21 …[T]here has been a growing tendency for the Courts, when asked to prohibit or otherwise prevent a trial from going ahead (by means of prohibition

in the criminal context of by stay or dismissal for inordinate and inexcusable delay in the civil context) to consider whether it might be more appropriate to leave the final decision to the trial judge. Where it is clear that no true trial on the merits is capable of being conducted then such a course of action may well not be appropriate. Likewise, there may be circumstances where delay *per se* leads to it becoming constitutionally unfair to allow a trial to proceed in circumstances where nothing which would be likely to emerge at the trial would alter the proper assessment of where the balance of justice lies in the case in question. However, in many cases, and most particularly those cases where it is suggested that the fundamental constitutional unfairness stems from an accused or defendant being required to be subjected to a trial which has been rendered significantly more distant from the ideal of a perfect trial by reason of culpable delay, it may well be that an assessment of the extent of any such difficulties will much more easily be made by a trial judge. Such a judge will be able to assess, in the light of the evidence which is actually tendered and in the light of having a much better ability to assess the kind of evidence which might have been tendered were it not for the delay (and the relevance and importance of such evidence in practice), whether the extent of departure from the ideal of a perfect trial is sufficiently significant to warrant interfering with the constitutional imperative that proceedings should be tried on their merits. Likewise, a trial judge will almost invariably be in a better position to determine whether the ability to assess the credibility or cogency of evidence has been impaired by lapse of time.

2.22 In those circumstances, I am of the view that it is preferable, except in clear cases, that the issue be left to the trial judge whether in civil or criminal

proceedings. That position should only be departed from where, in advance of trial, the result of the outcome of any analysis of the competing interests is sufficiently clear to warrant the case not even going to trial. It must again be emphasised that, even where the case goes to trial, it remains one of the most important duties of the trial judge to assess, if the issue is raised, whether any of the lapse of time issues which emerge render it appropriate to reach a determination other than on the merits in all the circumstances of the case."

75. In the light of the above summary of the relevant principles, I might highlight the following matters which appear to me to be of key importance. Firstly, where a person brings civil proceedings, there is a strong presumption in favour of a trial on the merits. That presumption is rooted in the significant constitutional value or weight to be placed on the side of *prima facie* credible cases going to trial, and being determined in accordance with the admissible evidence and the applicable law.

76. Secondly, in order to displace that strong presumption, a defendant must clearly establish a sufficiently weighty countervailing factor, such as establishing that it will not be possible to have a fair trial because of the lapse of time, irrespective of whether blame can be attached to any person. I agree with the Court below that the burden is on the moving party, and that it is an exceptional jurisdiction which must be used rarely.

77. Thirdly, in considering this inherent jurisdiction, it is necessary to distinguish between an imperfect trial/litigation disadvantage and an unfair trial, as per Clarke J. in *Nash*. There may be many trials which are imperfect or which involve litigation disadvantage in the sense of potential evidence being unavailable, but such lack of perfection or litigation disadvantage does not necessarily mean that the trial will be unfair. This distinction may be easier to state than to apply in certain cases, and much depends on the specific circumstances of an individual case, but at some point the absence of

evidence, coupled with the effect of lapse of time on the ability of the Court to assess other evidence, *may* lead to a stage being reached where the case has gone beyond the reach of fair litigation.

78. Fourthly, a Court called upon to exercise this inherent jurisdiction should consider the factors identified by Finlay Geoghegan J. in *Manning*, as set out at para. 67 above, as amplified at para. 59 of the judgment of the Court below, as set out at para. 32 above. These include (but are not limited to) the nature of the claims and the defences raised; the nature of the evidence to be adduced in the context of the issues to be determined; the role of documents and whether such documents exist; the extent to which oral evidence from a particular witness is likely to be required; the prejudice which the defendant asserts, and the evidence he or she adduces to support that assertion.

79. Fifthly, it will normally be preferable, except in very clear cases, that any exercise of this exceptional jurisdiction be left to the trial judge. While the comments of Clarke J. in *Nash* were expressly made in the context of an application for stay or dismissal for inordinate and inexcusable delay, it seems to me that the underlying reasoning applies equally to this separate strand of inherent jurisdiction. A motion judge is often, if not invariably, faced with somewhat generic claims of prejudice arising from a lapse of time, involving some degree of speculation. An assessment of the true extent of any such prejudice will more easily be made by a trial judge. As per Clarke J. in *Nash*, such a judge will be better able to assess, in the light of the evidence which is actually tendered and in the light of having a much better ability to assess the kind of evidence which might have been tendered were it not for the lapse of time (and the relevance and importance of such evidence in practice), and whether the extent of departure from the ideal of a perfect trial is sufficiently significant to warrant interfering with the constitutional imperative that proceedings should be tried on their merits.

80. Sixthly, the precise scope of this inherent jurisdiction to dismiss a claim in the interests of justice may be subject to consideration in future cases. However, it must be stressed that this is an exceptional jurisdiction which will only arise in rare cases, and the exact parameters of this jurisdiction are best left over to a case in which it may be necessary to consider those parameters for the resolution of that particular case.

81. In the light of the above, I propose next to consider the two questions expressly set out in the Court's determination granting leave to appeal, and then to consider the application of the relevant principles by the Courts below.

The First Question: Is a person who is no longer able to defend a civil claim – in the sense of being unable to instruct lawyers or give evidence on his or her behalf – because of ill-health, entitled, on that basis, to have that case dismissed in limine?

82. In my opinion inability to defend a civil claim, in the sense used above, because of ill-health does not, in itself, ground an entitlement to have that case dismissed *in limine*. A defendant has to satisfy the more demanding test as required by this strand of inherent jurisdiction, *i.e.* that a fair trial of the action, or the avoidance of serious unfairness to the defendant, is not possible having regard to all of the circumstances, as per the line of authority summarised above.

83. As a matter of first principles, if ill-health, in itself, grounded an entitlement for a defendant to have case dismissed *in limine*, then it would appear logical that death would have to ground a similar entitlement. However, the general rule laid down by the Oireachtas (in the Civil Liability Act, 1961, as amended) is that all causes of action (other than "excepted causes of action") subsisting against a deceased person survive against the deceased person's estate.

84. It was stated in the judgment of the Court below that neither party had cited an Irish case where the issue of dismissing proceedings on the grounds of the ill-health of a defendant had been considered, and again no such case was cited in this Court. The respondents did, however, rely upon the decision of the High Court of Northern Ireland in *The Serious Organised Crime Agency v Mullan* [2011] NIQB 55 ("*SOCA*"). In that case criminal proceedings against the defendant had been stayed, on the basis that he had established that he was unfit to plead due to an underlying medical condition. In subsequent civil proceedings under proceeds of crime legislation to confiscate his assets, he sought a stay of the proceedings as an abuse of process on the basis solely of his inability to give instructions due to his medical condition.

85. In dismissing the application to stay, Treacy J. stated as follows (at para. 9):

> "I do not accept that the defendant's medical condition is a basis for staying the proceedings…Persons appearing before a Court under a perceived disadvantage or disability may require a Court to consider taking reasonable mitigating measures to enhance an individual's participation in the trial process. But the novel contention that the inability to give instructions due to an underlying medical condition must, in present circumstances, lead to a stay is unsupported by authority and is unsound in principle. It is unsound in principle because it would necessarily involve depriving other parties of *their* 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."

86. Treacy J. subsequently (at para. 13) stated that while it is plain that a party's disability, involving an inability to give instructions, will inevitably impact on that party's effective participation in the trial process, it does not follow that a "fair" hearing is not possible. He added that the taking of special measures to minimise disadvantage to ensure a fair hearing will be context specific but, as he felt the authorities make clear, a trial in civil proceedings where the relevant disadvantage has been minimised can still be "fair" even if it is impossible to totally remove the disadvantage.

87. I agree with the approach adopted by Treacy J. in *SOCA*, and in particular with his finding that the defendant's contention was unsound in principle. Age-related illnesses or decline in cognitive abilities cannot *per se* be expected to justify an order to stay or dismiss proceedings.

The Second Question: If so, what are the factors to which a Court must have regard when considering whether to dismiss a particular claim where the defendant is no longer in a position to defend?

(a) In particular, is the nature of the claim being made against the defendant, for example, a claim that would have significant reputational damage for the defendant, relevant to the entitlement to dismissal in limine?

(b) What relevance, if any, does the fact that there is no culpable delay on the part of the plaintiff have to a consideration of whether the case ought to be dismissed?

(c) To what extent is the nature and extent of the evidence available to those now defending on behalf of an incapable defendant relevant to the issue of whether the proceedings ought to be dismissed in limine?

88. The second question will be considered in the context of the more general strand of inherent jurisdiction to dismiss proceedings, as discussed above, in circumstances

where I have found that an inability to defend because of ill-health does not, in itself, ground an entitlement to a dismissal. The factors to which a Court must have regard when considering whether to exercise this inherent jurisdiction are those set out at paras. 77 and 78 above.

89. As regards para. (a) of the second question, the nature of the claim is clearly one of the relevant factors to which a Court must have regard. This factor links in with other factors such as the role of documents in proving the claim, and how critical the oral evidence of the defendant might be in defending the claim. The fact that a claim would have reputational damage for a defendant is normally of only slight consequence, in my opinion. I accept the respondent's submission that it would not normally seem to amount to a fair balancing of the rights of the parties if more serious allegations of more serious wrongdoing (involving potentially more significant reputational damage) could be more readily dismissed than proceedings involving less serious allegations. It is very difficult to see how the issue of potential reputational damage could be a basis for the exercise of this exceptional jurisdiction, but I leave open the possibility that there might be special cases where such damage might have to be a relevant consideration.

90. As regards para (b) of the second question, it is clear from the authorities discussed above that the fact that there is no culpable delay on the part of the plaintiff is not a bar to the exercise of this inherent jurisdiction, but rather a feature of same. In *Toal (No. 1)* Finlay C.J. stated that the Court may as a matter of justice have to dismiss the action "irrespective of whether the plaintiff has contributed to [the delay]." Again, in *Toal (No. 2)* Finlay C.J. referred to the courts dismissing a claim which by reason of the delay in bringing it, "whether culpable or not", would probably lead to an unjust trial and an unjust result.

91. This feature of this inherent jurisdiction was confirmed more recently by McKechnie J. and Clarke J. in *Comcast*. Notwithstanding same, Clarke J. felt that the absence of culpable delay on the part of the plaintiff did have some relevance to the exercise of this jurisdiction, as it seemed to him that the threshold to justify dismissal in such cases must necessarily be more onerous than that which applies in the case of culpable delay, as a test which made it easier to dismiss proceedings where there was no culpable delay would be illogical. This approach was different to that of McKechnie J. in that case, who stated (at para. 42) that this is a wider jurisdiction than *Primor*, "with a lower threshold to surmount before its successful invocation". I prefer the approach of Clarke J. in this regard, as it does seem more logical to me.

92. As regards para. (c) of the second question, it is clear from the authorities discussed above that the nature and extent of the evidence available to those now defending on behalf of an incapable defendant is highly relevant to the exercise of this inherent jurisdiction. This is because these factors go to the issue of whether those defending can establish that a fair trial is no longer possible. It is therefore important to assess whether documentary evidence is available to those defending, whether the oral evidence of other witnesses is available, and how critical the absence of the oral evidence of the defendant might be in the light of same. Obviously, the starkest case would be one where *no* other evidence is available to those defending. The difficulty in many cases may be that there is *some* other evidence available, and it may then be a difficult matter of degree in drawing the line between an imperfect trial and an unfair trial, as per Clarke J. in *Nash*.

Application of the Principles in the Present Case

93. In my opinion the Court below applied the relevant principles correctly in concluding that the appellant had not discharged the very high burden which he bears in an application of this kind. My principal reasons for coming to this view are as follows.

94. I am satisfied that the Court below was correct in assessing the potential prejudice to the defence of these proceedings in the context of the nature of the remaining claims, the matters which either side will be required to prove, and the nature and availability of the potential evidence.

95. The Court of Appeal highlighted how the case is now confined to allegations against the appellant in respect of the five series of loans advanced by INBS between 2006 and 2009. A fundamental aspect of the reasoning in the Court below was that the change in the focus and extent of the claim means that the case has become more rather than less document dependent, and I agree with this view. One would confidently expect the advancing of loans by a major financial institution, as of 2006 and 2009, to be recorded in documents, and that there would also be some documentary record of some detail of the difficulties which subsequently emerged in relation to the borrowing. The Court below noted that there was no averment in the grounding affidavit of Mr. Fingleton Jnr 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.

96. In submissions to this Court the appellant sought to bridge this gap with two matters. Firstly, he cited the minutes of a 2011 Board meeting of INBS which stated that "INBS records…of transactions during the legacy period are poor". Secondly, he referred to evidence taken on deposition from a former internal auditor of INBS in September, 2023, which postdates the Court of Appeal judgment. In his evidence, Mr. McMahon agreed that there may not have been documentary evidence regarding certain loans

issued by the Society, and he stated that there was a lot of information in people's heads, and documentation was not centralised.

97. My reaction to these submissions is that poor record keeping in the past should not count for much in the appellant's favour when he was the person very much in charge of the Society. Furthermore, I do not think that the appellant can rely on a somewhat generic claim of poor standard of records as a basis for seeking the dismissal of these proceedings, and certainly not at this juncture. No real attempt is made to link this somewhat generic claim to the five series of loans which are now the focus of the case. The assessment of any such possible linkage would be better carried out by the trial judge, who will have sight of the evidence which is actually tendered, an advantage not enjoyed by this Court or the Courts below.

98. The Court below also held that much of the evidence to be adduced in defence of these proceedings will not depend on the appellant's personal evidence, and that, in the 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. It noted that Mr. Fingleton Jnr personally worked in the commercial lending division of the INBS in London between 2006 and 2010, the very period when the five series of loans were advanced, but there was no evidence that he or the appellant (before the appellant's incapacity) sought to identify or contact his former colleagues about these loans. It held that 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. It also held that the question of whether the authorising of these loans, on the terms as may be proven, amounted to negligence on the part of the appellant will largely turn on expert testimony.

99. In submissions to this Court the appellant's counsel did not really challenge the findings as to other relevant witnesses. He sought instead to emphasise the central importance of the absence of any oral evidence of the appellant, including evidence as to his subjective state of mind in dealing with the five series of loans, and evidence which would explain and supplement what was said to be poor documentary records.

100. In my opinion, however, much of these submissions were again of a somewhat generic nature, and did not engage in a sufficiently specific way with the actual evidence in the case. This reflected a tendency by the appellant to advance very generalised arguments, when challenged during the course of the hearing to identify specific prejudice which might demonstrate that the appellant could not deal adequately with the five series of loans. For example, during the hearing the appellant's counsel submitted that there may be a minute or a note or a document or a record of a particular incident, but the actual finer detail of what it meant, what was said, what were the consequences, that will usually be a matter for oral evidence, but the appellant will not be available at the trial to give the evidence. During exchanges with the Court, however, he accepted that the appellant had not exhibited any specific minute, and he was therefore unable to demonstrate any actual prejudice arising from that hypothetical minute. In the circumstances all of this submission appears to have remained entirely speculative. This example reinforces my view that the trial judge would be in a better position to assess the extent of any possible prejudice arising from the inability of a defendant to give oral evidence himself or herself, which would explain and supplement the documentary evidence actually adduced at the trial.

101. For these reasons, I am satisfied that the Court below came to the correct conclusion that the inability of the appellant to give instructions to his lawyers or to give 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. In reaching my conclusion, like the trial judge I attach importance to the consideration that the balance of justice and fairness will remain a live issue in the continuing proceedings. As Hunt J. correctly pointed out, monitoring this issue will be a continuing obligation of the trial judge, who will have a duty to ensure fairness with the benefit of the clarity that comes with a trial in progress.

Conclusion

102. In conclusion, I would therefore dismiss the appeal.