THE HIGH COURT

[2021] IEHC 83

[2010/4996 S]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LTD.
(IN SPECIAL LIQUIDATION)

PLAINTIFF

AND

THOMAS BROWNE

DEFENDANT

RULING of Mr. Justice Brian O'Moore delivered on the 8th day of February, 2021.

A. The History of the Proceedings

1. This action was commenced by Summary Summons issued on the 15th of October 2010. The sums claimed by the Plaintiff ('I.B.R.C.') are significant. According to the Legal Submissions delivered on behalf of I.B.R.C. in preparation for the trial due to commence in January 2021, the Defendant (Mr. Browne) as of September 2020 owed I.B.R.C. £11,964,478 under one facility and €13,539,286, £2,093,311 and $990,992 under a second facility. Mr. Browne claims that he was induced to enter into these loan arrangements by the fraud of I.B.R.C., and accordingly he is entitled to have these transactions rescinded and set aside; he further claims that he is entitled to damages against I.B.R.C.

2. The action was admitted to the Commercial List on the 1st of November 2010. On the 16th of December 2010 Kelly J. refused I.B.R.C.'s application for summary judgment, and made directions for the exchange of pleadings and correspondence concerning discovery. On the 26th of July 2011 the action was provisionally listed for trial on the 7th of February 2012.

3. Because of ongoing disputes about discovery and interrogatories, the trial could not proceed in February 2012. However, on the 16th of April 2012 Kelly J. fixed the trial of the action for the 16th of October 2012; this time, the trial date does not appear to have been a provisional one. The date of the 16th of October 2012 was confirmed by the Court on the 2nd of July 2012, with the length of the hearing being extended from four weeks to six weeks. The estimated length of the trial remains, some eight years later, at about six weeks.

4. On the 24th of September 2012, Kelly J. gave what he must have hoped were final precise directions in preparation for the hearing on the 16th of October. He also directed that Mr. Browne would go first at the trial, 'in order to prove his counterclaim', given the lack of dispute about the advancing of loans to Mr. Browne under the two facilities as asserted by I.B.R.C. and the non-repayment of these loans.

5. However, immediately before the trial was due to take place these proceedings were seriously disrupted by the prosecution of Mr. Patrick Whelan and Mr. Sean Fitzpatrick. Both of these gentlemen were former officers of Anglo Irish Bank Plc., the entity which had made the loans in question to Mr. Browne; as it happens, Mr. Browne himself had been a senior official in the same institution. On the 10th of October 2012, having heard

counsel for Mr. Browne, counsel for I.B.R.C., counsel for Mr. Whelan, counsel for the DPP, and counsel for Mr. Fitzpatrick, McGovern J. adjourned the trial of this action 'to the determination of the criminal proceedings".

6. This was not a trivial delay. It was not until the 24th of June 2019 that Haughton J. re-entered the proceedings in the Commercial List, and fixed the 21st of April 2020 as the trial date. As had been the case in respect of the February 2012 hearing date, the listing for April 2020 was a provisional one, at least initially. However, in his Order of the 18th of November 2019 Barniville J. confirmed this trial date and gave directions for the delivery of witness statements and submissions in order to have the hearing proceed on that date.

7. The misfortune of the parties in attempting to have this action tried persisted. The fallout from the banking crisis had already lead to a delay of over nine years in getting to trial. Now, the Covid-19 pandemic intervened. The April 2020 trial could not proceed because of the national health crisis created by the novel coronavirus, and it was not until September 2020 that the question of yet another trial date could safely be raised; or so it must have seemed.

8. On the 15th of September 2020, Barniville J. fixed the 15thof January 2021 for the trial of this action. The parties agreed to a hybrid hearing, which would involve some of the evidence being taken in person and some being taken remotely. While there remained certain outstanding issues, including the inspection of a document over which I.B.R.C. maintained a claim of privilege and the late indication by Mr. Browne's counsel that two further witnesses were to be called by him, these have been resolved without any great difficulty.

9. Because of the rapidly deteriorating public health position, on the 5th of January 2021 Irvine P. issued a Covid-19 Notice in connection with High Court Civil Sittings. This provided that:-

> **"High Court Civil Business Update**
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> Ahead of the new legal term commencing next week and in light of the current Level 5 restrictions, public health guidance and the high incidence of the virus in the community President of the High Court Justice Mary Irvine has issued a Notice in relation to the conduct of Civil Business in the High Court. The new ways of working adopted by the Courts to manage the pandemic, and keep footfall to Courts low, will enable as much business as possible to be facilitated in the coming weeks.
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> […]
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> **Summary: Civil Proceedings and Applications**
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> Until further notice the following work will continue subject to (i) staff availability, (ii) the availability of Technology/WIFI enabled courtrooms, (iii) strict compliance with public health guidance, the Court's own guidance on face coverings and (iv) weekly review:

1. All non-remote applications and proceedings at hearing at the time of the introduction of Level 5 restrictions;
2. All applications and proceedings that are currently being heard remotely or are capable of being heard remotely;
3. All applications and proceedings which can fairly be classified as urgent;
4. All applications for injunctions and their enforcement and applications which must be brought within a time limit provided for by statute;
5. All Judicial Review *ex parte* applications;
6. All bail applications;
7. All Article 40/Habeas Corpus applications;
8. All applications for extradition;
9. All wardship applications;
10. Applications to appoint an Interim Examiner or Provisional Liquidator.
11. All urgent Hague Convention and Child care matters.
12. All urgent Family Law matters. Applications concerning "urgency" to be made to Jordan J.
13. All case management/directions hearings, lists to fix dates and "for mention" lists, where capable of being dealt with remotely.
14. All High Court personal injury cases listed for hearing will remain in the list for the allocated date for negotiation and case management purposes.
15. All Common Law Motions, with the exception of the Motions in Common Law List 1, will proceed as normal.

Mary Irvine 5th January 2021"

10. Because of the imminent commencement of the trial in these proceedings, and in light of the President's Notice, I listed this action for mention on the 8th of January 2021in order to see whether or not the parties would be happy to go ahead with the trial as a fully remote hearing. I will return to the position taken by the parties on this issue. However, in order to complete this account of the history of these proceedings there is one separate but related aspect of the hearing of the 8th of January which I should describe.

11. During the course of that hearing, I raised the possibility that the opening (at least) of the case could take place on the 15th of January; that would have allowed some use to have been made of the time set aside for the trial. However, this was opposed by Mr. Browne's counsel. He gave two main reasons for this position.

12. Firstly, he preferred a 'seamless' progress of the trial from opening to conclusion. While this preference for a traditional hearing was understandable, I did not see why a more novel approach was not possible and appropriate given the desirability of making some progress in respect of the trial. Even if there was ultimately a long gap between opening and evidence, the eventual second tranche of the hearing would be materially shorter if the opening (and I.B.R.C.'s responding speech) took place now.

13. Secondly, counsel informed me that the second senior on his side was 'for the moment unable to engage' as he was isolating. Ultimately, counsel accepted my formulation of his

position, which was that as lead counsel he could not prepare for and conduct the opening of the case in a satisfactory way given the personal circumstances of the other senior on his team. I therefore fixed the opening of the case for the 27th of January 2021, in order to allow Mr. Browne's side time to regroup and prepare fully. The opening proceeded that day, the I.B.R.C. position on the substantive issues in the case was outlined by its counsel the following day, and after some debate about the appropriateness of the witness statements put forward by Mr. Browne's three experts I fixed the 5th of February for the delivery of refined statements by these individuals. I made an Order under section 11(2) of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, directing a fully remote hearing of the trial using the TrialView platform. I also made certain consequential Orders. I will now set out the position of the parties on the question of a fully remote trial, and the reasons why I have decided that such a hearing should take place.

B. The Submissions of the Parties

14. Despite the fact that I identified section 11 of the 2020 Act as the provision giving me jurisdiction to direct a fully remote hearing, there was only one submission made to me about the scope and operation of that section. Counsel for Mr. Browne submitted that 'such a remote hearing can only be of a limited nature'; by this, I believe that counsel meant that the section could not be used to order the remote hearing of a witness action. I do not accept that proposition. The section is in no way so circumscribed. When I consider, later in this ruling, what the section allows I come to the view that it allows witness actions to be the subject of an order directing a remote hearing, once that is not unfair to any of the parties and is not otherwise contrary to the interest of justice.

15. The main submissions of Mr. Browne can be summarised as follows.

16. Firstly, it was argued that the taking of Mr. Browne's evidence should take place in person before the Court. The implied distinction between the need for Mr. Browne's evidence to be taken physically and the lack of such need for the evidence of other witnesses is one which Mr. Browne's counsel had to make, and to justify. It must be remembered that, for some time, both parties had accepted that certain of the evidence would be taken remotely. Two expert witnesses to be called by I.B.R.C. (Mr. Bennett and Mr. Barnes) were and are to give their evidence remotely from the United Kingdom. A witness of fact, Mr. McAreavey, being called by I.B.R.C. was and is likely to give his evidence by video link from Northern Ireland. It was impossible, therefore, for Mr. Browne to argue persuasively that no evidence could be taken remotely; he had already agreed that several important witnesses would give their evidence that way. This raises the question of why, if the evidence of certain witnesses can safely be given remotely, the evidence of Mr. Browne must be given in person.

17. This leads to the second, if related, submission made by counsel for Mr. Browne. It was that I could not assess the credibility of Mr. Browne or Mr. O'Sullivan (an I.B.R.C. witness) on a remote basis. No real effort was made to explain how this was so, given that it was accepted that I could judge the evidence of other witnesses. I should say, in passing, that the fact that two of the three witnesses I have listed at paragraph sixteen are expert witnesses is of no significance in my view. Even if the examination of an expert

is confined to an esoteric debate about the finer points of, say, organic chemistry the judge still has to assess the witness and their testimony. If other issues intrude, such as the qualifications of the witnesses or their status as an independent expert, then the examination can take on an earthier nature and involve disputed facts that relate not to the subject of the evidence but to other collateral matters. Either way, the fact that the parties agreed that I could assess the remote evidence of other witnesses means that I would need a persuasive reason as to why I should agree that I could not assess the evidence of Mr. Browne or Mr. O'Sullivan in the same way.

18. The specific reason offered was not convincing. It was put in the following way:-

> "[…] for instance, Judge, the great thing about the Court is everybody can see what is happening. I won't know what's happening in the room in which Mr. Browne may be remote from me if I am asking him questions. And you won't know what is happening. For all we know somebody may be holding up a prompt sheet. So, sorry, that may seem an outstanding statement but it is simply the reality that the parties to the action cannot know what's happening elsewhere."

19. There are practical ways of dealing with this perceived problem, and I do not consider this a real reason to come to the view that I cannot assess the evidence of the two central witnesses (as they are represented to me) if they give their evidence remotely. I believe that, from my own experience and what I understand to be the experience of other judges, I can assess the evidence of all the witnesses due to testify in this action, notwithstanding that this evidence is given remotely.

20. Thirdly, it was submitted that liaison with counsel's support team would be difficult in the event of a remote hearing, particularly given the amount of paper in the case. I do not accept that such a concern is well founded. Counsel can consult fully with his team in preparation for the examination of witnesses or the making of submissions; this may be done by video link, by phone call or by the provision of a memorandum, but that form of support is no less effective than a meeting. Indeed, it may be preferable. In terms of the examination of a witness, I am aware that (even in pre pandemic times) it was not unusual for solicitors to set up a WhatsApp group for the legal team in order to allow messages, prompts and advice to be communicated to counsel in real time while the court was sitting and while the witness was being examined. In truth, this was nothing more than a modern version of the note handed to counsel while they were on their feet. The note may not be possible now, but other forms of communication are available, as I have just described. It is worth noting that, during the opening of the case and the I.B.R.C. reply, both counsel were operating out of offices. Counsel for Mr. Browne made his submissions in the presence of his junior. If a similar arrangement was in place for the examination of Mr. Browne, or any other witness, counsel would have the benefit of conducting an examination with the benefit of a knowledgeable colleague who can be consulted across the table, in a sequestered room. This does not, in my view, represent a disadvantage.

21. I would also observe that the examination of a witness is essentially a solitary pursuit; it is not a team sport. For each session, counsel will have prepared at least enough lines of examination (by which I in all cases include cross examination) to last the two hours. It may well be that there is an important prompt that needs to be given to counsel, but as I have described this can be done in a remote hearing. Even if the prompt cannot be given, and this is at least as likely to happen when evidence is taken physically, it can often be advantageous for counsel to return to the point after the break in proceedings. In fact, the incidences of helpful notes passed to counsel in the cross examination of a witness can be overwhelmed by the number of barely legible but distracting Post Its placed before the cross examiner at a critical time in the challenging of a witness's evidence. The absence of such contact with the rest of the team may therefore be as much a help as a hindrance.

22. For all of these reasons, I do not accept that this objection to a fully remote hearing is established. However, I do intend to break the hearing every hour during the course of the evidence in order to facilitate engagement between counsel (on both sides) and their respective teams.

23. Fourthly, counsel for Mr. Browne submitted that the gist of the Covid-19 Notice was that urgent cases should proceed, and that this is not an urgent case. I think that this misunderstands the aim of the Notice. The President's Notice is designed to ensure that the most business that can be safely done will be done in this Court during the lifetime of the current restrictions. This involves the striking of a balance, as is the case in many of the public health measures which have been put in place since the pandemic struck. It is therefore possible for a fully physical hearing to continue, once it had started before the Notice came into effect, as it was felt that this would be appropriate since the abandonment of a trial already underway would be disproportionate or unnecessary. However, a purely physical trial cannot begin after the Notice came into effect, as other considerations obviously apply to such a hearing.

24. Urgent hearings can proceed in person, as it is unthinkable that such applications would not be permitted to take place. The making of an urgent application is not dependent on whether it can be made remotely.

25. However, quite apart from urgent applications, a hearing that can be conducted remotely is permitted under the Notice. There is no need for a hearing done remotely to be urgent. The question is therefore not whether *I.B.R.C. v. Browne* is an urgent case; it is rather whether it is a case that can properly be done remotely. The urgency, or lack of urgency, of this action is not relevant. Having said that, I remain of the view expressed at the hearing that there comes a time when a case is so aged that there is a public interest in having it finally decided.

26. The submissions on behalf of I.B.R.C. can be dealt with more briefly.

27. In the first place, counsel submitted that it would be preferable that the 'principle witnesses' give evidence in person; by that, I understand him to mean Mr. Browne and

Mr. O'Sullivan. However, he went on to submit that I.B.R.C. would be happy to proceed even if these witnesses were to give evidence remotely.

28. Secondly, counsel sought to downplay the likelihood of any real factual difference between Mr. Browne's evidence and the evidence to be led on behalf of I.B.R.C. I am not convinced by this submission. An important part of Mr. Browne's case is that he was completely unaware of the fact that a Mr. Sean Quinn had built up a large shareholding in Anglo Irish Bank through the use of contracts for difference. At paragraph 38 of his witness statement (opened to me by his counsel in outlining his case) Mr. Browne says:-

> "[…] At the time that it provided the loan to me for the exercise of these [share] options, the Plaintiff was aware that Mr. Sean Quinn, his family and associated companies [...] controlled over 25% of the shares in the Plaintiff, primarily by way of contracts for difference. In that knowledge, the Plaintiff advanced huge sums of money to the Quinn Family in November and December 2007 for the purposes of funding margin calls on the Quinn Family's contracts for difference positions [...] I confirm that, had I been aware of either of these matters at the time, I would not have borrowed monies for the purposes of exercising my share option entitlements and I would not have engaged in further borrowings with the Plaintiff or with any other institution in light thereof."

29. I understand that I.B.R.C. will challenge this intended evidence by suggesting that Mr. Browne is minuted as attending a Board meeting of Anglo Irish Bank at which the Quinn position as a shareholder was discussed. The dispute on this factual issue does not currently strike me as a trivial one. For this reason alone, I will proceed on the basis that there will be significant challenges to the evidence of Mr. Browne and, in all probability, the evidence of Mr. O'Sullivan.

30. I have set out the submissions made to me at the hearing on the 8th of January 2021. At a subsequent hearing on the 11th of January 2021, I asked whether the parties had said everything they wished to say about having the trial proceed as an exclusively remote hearing. Counsel for Mr. Browne made a submission that I should consider the position of the public and of Mr. Browne. As far as the public is concerned, counsel submitted that I should consider the question of whether the public "can see and have confidence in the process". He also submitted that Mr. Browne may not have such confidence in the process; he stated that litigants who are observing remote hearings may not be sure what is happening. In terms of both the public and Mr. Browne, a remote hearing on the TrialView platform allows them to have exactly the same view of the proceedings as the judge has. It is difficult to imagine a more transparent process. As I observe later, I have ensured that Mr. Browne was able to attend an earlier portion of the trial, and both he and I.B.R.C. will continue to be allowed to be present in court for the hearing. While it is the case that members of the public cannot attend, the trial is nonetheless being conducted in the open and the interests of the public can be met by the reporting of the hearing by members of the press.

C. The Legislation

31. Section 11(2) of the 2020 Act provides:-

> "Without prejudice to the power of a court under subsection (1), and subject to this section, in any civil proceedings before it, a court may, of its own motion or on the application of any of the parties, direct that the proceedings concerned shall proceed by remote hearing."

32. The earlier subsection, section 11(1), empowers the President of the High Court to designate a category or type of proceedings as ones which shall proceed by remote hearing.

33. The power provided by section 11(2) is one which enables a judge of the High Court to decide that a specific action proceed remotely. At the risk of stating the obvious, in enacting section 11 of the 2020 Act, the Oireachtas has chosen to facilitate the remote conduct of litigation. While undoubtably the enactment of this provision was brought forward by the Covid-19 pandemic, the section is not restricted to remote hearings necessitated by the current public health crisis. It therefore represents a view by the legislature that remote hearings should be enabled in appropriate circumstances.

34. At the hearings before me, no submissions were made by either party as to the circumstances in which the Court would make such an Order of its own motion, as opposed to making the Order on the application of a party to the proceedings. There was no dispute that I could make such an Order without an application to me in the circumstances of the current case.

35. However, I should set out some considerations which I have taken into account in deciding to raise, on my own initiative, the making of an Order under section 11(2). These are:-

(a) The fact that the Commercial List is a case managed list, in which the Court is entitled and expected to take an active role in the advancement of the proceedings. In The Commercial Court (Dowling, Second Edition) the author suggests:-

> "Under Ord. 63A, the Judge of the Commercial Court takes a proactive role in the progress and management of the litigation. Pursuant to rr.5 and 6, directions can be given which will direct the intensity, pace and management of the litigation. Control is transferred from the parties to the court. It is quite clear that the purpose behind this is to enable the court to reduce delay and cost [...]."

This passage may slightly overstate the omnipotence of the Court; for example, the ultimate control of all proceedings lies in the hands of the parties who may always agree to settle them, in most cases without any heed to the views of the judge. However, the fact that the active management of proceedings is vested in the relevant Commercial Court judge is undeniable.

(b) The fact that six weeks had been set aside for the trial of the action. This is a consideration that is not dependent on the fact that the case is in the Commercial List. The limited resources of the Court had been deployed to ensure that this action would be heard now. If the hearing dates could broadly be held by having a remote trial, then that is something which should be explored regardless of whether or not the parties took the initiative in doing so.

(c) The fact that this action had endured such a lengthy and chequered history. While I have already set out the story of these proceedings, it is worth repeating that the action began over a decade ago. Four trial dates had been fixed, for years as disparate as 2012, 2020 and 2021. The time had come when it was desirable that the proceedings at last be brought to a conclusion, at least at the level of this Court.

36. While these reasons were ones which I felt made it appropriate to raise the possibility of a remote hearing, they did not in themselves mean that such a hearing can or should be ordered.

37. On the face of it, the discretion provided to the Court under section 11(2) is untrammelled. However, clear boundaries to the exercise of that discretion are set by the provisions of section 11(4), which provides:-

> "In any relevant proceedings, where it appears to the court that the conduct of the proceedings in accordance with such a direction would be unfair to any of the parties or otherwise be contrary to the interests of justice, the court, of its own motion or on the application of any of the parties, and having heard the parties, shall, as the case may be—
>
> (a) direct that the direction under subsection (1) shall not apply in respect of the proceedings concerned, or
> (b) revoke the direction under subsection (2)."

38. Clearly and unsurprisingly, section 11(4) requires that a direction that proceedings be heard remotely *must* be revoked in the event that it would either result in an unfairness to *any* of the parties or otherwise be contrary to the interests of justice. I believe that these possibilities should be taken into account in making an Order under section 11(2); it would not be consistent with the legislation to fail to take into account these matters in making an Order, given that the Order is to be immediately discharged should these circumstances arise. This exercise may be easier to carry out at this stage of the proceedings given that I am only dealing with the trial and there is a reasonable level of certainty about what is left in the action. It may be more difficult to assess these issues at an earlier stage in the proceedings.

39. Therefore, in considering whether to make an Order under section 11(2) the Court must consider whether such a direction would be unfair to any party or would otherwise be contrary to the interests of justice; even when such an Order is made, the Court must

revoke it if it appears that either of these consequences would occur. The degree of engagement on the part of the Court is such that not only may it make the original Order of its own motion but it must also revoke the Order of its own motion should it feel that there is a resulting unfairness or an effect contrary to the interests of justice. The only brake on such a revocation is the need to hear the parties on the issue and, by extension, fully consider any submissions they may make.

40. While at first blush it may seem surprising that the holding of a remote hearing could be fair as between the parties but nonetheless be contrary to the interests of justice, it seems to me that the legislature here has in mind broader considerations which go beyond the interests of the litigants. For example, the interests of justice are not served by a trial which, because it is conducted remotely, does not take place in public. Of course, there are occasions when a hearing can proceed otherwise than in public; O'Donnell J. in *Gilchrist v. Sunday Newspapers Ltd*. [2017] 2 IR 284. However, I do not think that the interests of justice are served by a hearing (which would ordinarily be in public) being one from which the public or the press are excluded because it is taking place remotely. This is just one example of a situation where the remote hearing may be contrary to the interests of justice even if it is not unfair to the participants.

41. I therefore conclude that I have a wide discretion as to whether or not to make an Order under section 11(2), but that I must, in making such an Order, be satisfied that it is unlikely that such a hearing would be unfair to any of the parties or otherwise be contrary to the interests of justice. If such an Order is made, it must be revoked if such circumstances are established. Nothing in section 11(2) suggests that the Court cannot Order a remote hearing in respect of witness actions.

D. Decision

42. I will approach my decision by dealing firstly with whether or not the circumstances described in section 11(4) are likely to arise here. Secondly, I will decide whether I should exercise my discretion to direct a remote hearing. Thirdly, I will set out the conditions to be imposed on any such remote hearing.

43. Apart possibly from the submission which I have described at paragraph 30 of this Ruling, there has been no argument made to me that a remote trial would be contrary to the interests of justice, other than inasmuch as it might be unfair to Mr. Browne. Having considered the matter, I can also see no way in which a fully remote hearing would be contrary to the interests of justice unless, of course, the hearing would be unfair to Mr. Browne.

44. On that issue, I have decided that the remote hearing would not be unfair to Mr. Browne. By way of example, and bearing in mind what I have said earlier in this judgment, I would set out these considerations:-

    (i) The remote hearing creates exactly the same scenario for both parties. I.B.R.C. does not contend that it is caused any disadvantage by a fully remote hearing. Any disadvantage identified by Mr. Browne would also apply to I.B.R.C.; certainly no

argument to the contrary is made. Notwithstanding this, I.B.R.C. does not suggest any unfairness to it which suggests that no disadvantage will in fact arise.

(ii) The parties had agreed, some time ago, that key witnesses would give their evidence remotely. It is therefore accepted that I can assess this evidence. No good reason has been advanced why I cannot assess the evidence of Mr. Browne or Mr. O'Sullivan if that is also given remotely.

(iii) I believe that the TrialView platform is one which enables me to assess the evidence. I have come to this view based on my experience of the platform. I also note that in *Leinster Overview & Ors. v. FBD Insurance* [2021] IEHC 78 McDonald J. expressed the view that a hearing could adequately take place on the basis of a fully remote hearing by TrialView. He went on to say that the system was 'perfectly adequate from a judge's perspective in terms of being able to see the face of the witness clearly as the witness is being examined by counsel'. As I understand it, the trial featured the remote examination of witnesses giving factual evidence and expert evidence. In addition, as recently as the 1st of February 2021 Barniville J. (in *Trafalgar Developments Ltd. & Ors. v. Mazepin & Ors.* [2021] IEHC 69) made the following observation (at paragraph 80):-

> "I am satisfied that if I felt that it was necessary or appropriate for Mr. Waller-Diemont to be cross-examined, the appropriate arrangements could have been made for his remote cross-examination on the TrialView remote hearing platform (which has worked well in other cases) and an order could have been made to provide for that under s. 11 of the 2020 Act."

Put another way, despite the fact that TrialView has been used in other cases (including *Sherry v. Minister for Education*, recently concluded before Meenan J.) none of my colleagues have found themselves unable to assess a witness while using the platform. While my decision on his point is based on my own experience of TrialView, it is helpfully supported by these other instances.

(iv) I believe that the practical concerns described on behalf of Mr. Browne are without foundation. All the same, I am prepared to put in place some pragmatic measures to give comfort to Mr. Browne.

(v) While a submission was made by Mr. Browne's counsel based on perceived difficulties in liaising with his support team, it is notable that no submission was made that a remote hearing would disadvantage counsel in conducting either the examination or the cross examination of any witness. This is despite the fact that I expressly invited counsel to consider any such argument (at page 8 of the transcript of the hearing on the 8th of January 2021). The real objection turned on my ability to assess the witnesses and their evidence, a contention on which I have already given my opinion.

(vi) While Mr. Browne may feel himself at a disadvantage, when one considers the specific reasons why it is said such a disadvantage may arise there is no real substance to any of them. This should dispel any such perception. In addition, Mr. Browne (and I.B.R.C.) should take reassurance from the fact that section 11(4) allows the parties to seek a discharge of the Order directing a remote trial if at any time it appears that the remote hearing is operating in a manner which is unfair to either of them.

45. I therefore conclude that directing a remote hearing will not result in unfairness to either party. This decision means that there is no prohibition on me ordering a remote hearing. I must now decide whether I should exercise my discretion in favour of doing so.

46. I have decided that there should be a remote hearing of the trial of this action. I exercise my discretion to make this Order because the time is available to have this case heard, the case is an old one which really should be tried sooner rather than later, it is undesirable that a fifth trial date would be fixed for this action, and the trial can proceed in compliance with the Covid-19 Notice.

47. If the trial does not take place now, one has to wonder when it will get on. Even distinguished commentators, such as the hugely knowledgeable Professor Luke O'Neill, can do no more than provide provisional views about how the pandemic might progress. Despite the extraordinary breakthrough represented by the development of effective vaccines, it is simply impossible to know when a six week trial with physical evidence will be able to proceed. It could be in days, weeks or months. Such a hearing could well begin, but be unable to be completed because of a fresh surge in Covid-19 infections, hospitalisations and deaths. As the trial can certainly proceed now by using an acceptable platform, I find that every consideration favours an Order directing a fully remote hearing. The alternative is that the trial of a case begun in 2010 may not take place until 2022. If at all possible, I would prefer to avoid such a situation.

48. The Order will provide for use of the TrialView system; this was the platform agreed by the parties. In order to facilitate communication between counsel and the rest of the legal team, I will break the hearing of evidence every hour for ten or fifteen minutes unless it appears that it is unnecessary to do so. As the trial progresses, this may require longer sitting days in order to avoid falling behind schedule but this can be monitored as we go along; in any event, I will not sit earlier than 10.30 am or later than 4.30 pm. I will be sympathetic to requests on the part of counsel or witnesses for any further breaks that may be required to cope with any unexpected difficulties which the technology may present, though I would like to think that these may not arise. While not strictly provided for by the President's Notice, I have already allowed Mr. Browne and his solicitor attend in Court as observers and I intend to continue to facilitate Mr. Browne and I.B.R.C. in this respect.

49. I will also direct that each witness will give evidence from a venue to be approved by the Court, in the presence of attendees who are either agreed by the parties or determined by me.

50. As the evidence is due to begin on the 9th of February, I will list the case for mention only at 10am on the 8th of February to hear the parties on any other practical ancillary directions which they wish to suggest in respect of the remote hearing.