Director Liability in Banks under Danish Law

Business as usual?

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1. Introduction

Law is said to be path-dependant, only evolving gradually and piecemeal and carefully building on established positions. Experience tells us that this is not always true; it also tells us that it ought to be. To be a revolutionary calling for the overthrow of the 'system' to be replaced by a new and much better world betrays not only an immature lack of patience but also and more seriously a lack of imagination, intellectual stamina, and basic curiosity as how to identify and navigate each step of the long way from the identified problem to the desired end result and solving the various problems and confusion that each step may cause. A recent decision by the Danish Supreme Court in the case of Capinordic Bank A/S adds to this perception of the law as reassuringly slow moving and predictable, but it also illustrates the perils that may spring from unwarranted impatience.[1] As it concerns director liability in banks under Danish law, it is well suited to form part of this tribute to Prof Jan Kleineman.

Besides serving as a model founder of the Stockholm Centre for Commercial Law, who has done much to influence the way the Faculty of Law is organised at the University of Copenhagen, Prof Kleineman is also widely appreciated for his contributions to the law of torts, especially in respect of commercial affairs. In this, Prof Kleineman resembles a Danish professor of an older generation, Prof Bernhard Gomard, who sadly passed away last year. I cannot resist the temptation of offering a homage to the former by recounting the continued relevance of the latter in his eminent piece on director liability from 1984,[2] as there can be no doubt that their contributions will continue to be relevant for years to come both to their

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[1] The decision is reported in Danish in Ugeskrift for Retsvæsen 2019.1907. Hereinafter: *Capinordic*.

[2] B Gomard, Company Board Liability for Damages, 28 Sc. St. L. 43 (1984). Hereinafter: Gomard (1984).

national jurisdictions, which they addressed, and the shared Nordic legal tradition that they both represent.

2. The Relevance of Tort Law to Corporate Governance

2.1. Nordic Corporate Governance

There are many definitions of corporate governance and plenty that confuses it with best practices, although the latter is normative, whereas the former is descriptive. Here, the concept of corporate governance simply means a description of who can do what, that is, the distribution of powers, or competences as we prefer to say on the Continent or at least in its northern, cooler regions.

It is one of the most vibrant and important results of more than a century of Nordic cooperation among jurists, that the corporate governance model of the five Nordic countries, Denmark, Finland, Iceland, Norway, and Sweden, is basically identical and constitutes a unique model clearly discernible from governance models of other jurisdiction in Europe and elsewhere.[3]

It is inspired by both the one-tier model mostly associated with the UK and the two-tier model found in Germany, but it is significantly different. First and foremost, it is strictly hierarchical with shareholders firmly on top when organised as a General Meeting and with a dual-executive structure below. As there is a considerable prevalence of dominant shareholders even in listed Nordic companies, such shareholders traditionally exercise direct control in the companies they dominate, naturally not by engaging in the actual running of the company, but by closely following the company and continuously engaging with its management. This direct influence of major shareholders on the governance of the company is perhaps the most distinguishing characteristic of the Nordic model and is normally only associated abroad with the business practice of private equity firms and capital funds. It is likely a key factor in the explanation why Nordic enterprises do so well compared with enterprises internationally.

The dual-executive structure consists of a Board of Directors and a Management Board. Whereas it is usual to make a distinction between *directors*, who are formally part of the governing bodies of a company, and *executive officers*, who are not, the Nordic model necessitates a distinction between directors and managers, who are both represented on each their

[3] The model as it is adapted in each of the five Nordic countries and as it may be condensed is analysed and discussed in Lekvall (Ed.), The Nordic Corporate Governance Model (2014), available at SSRN.com.

governing body. In this paper, reference is made only to directors, but it should be kept in mind that this reference also pertains to managers on the Management Board. Each board has its own separate functions and corresponding powers, which may resemble the German two-tier model with its distinction between a Supervisory Board and a Management Board but is different in that both boards enjoy executive powers and together form the management of the company. Thus, there is no division between management and mere supervision as in the German two-tier model. Both bodies are vested with managing the company and their division into two separate bodies reflect the overall hierarchical nature of the model: the Management Board is subservient to the Board of Directors. Whereas the Management Board is vested with the day-to-day management of the company, the Board of Directors decides the overall strategic aims of the company and decides on all far-reaching or extraordinary decisions. It is fair to say that the Nordic model is closer to the one-tier system, which is not surprising since it was developed from a one-tier system when the 1930 Danish Companies Act introduced the Management Board as a separate company body below the existing Board of Directors, a feature picked up by Sweden in 1944 and soon after replicated in the other Nordic countries.

In a way, this dual-executive structure resembles the reform undertaken in English company law some 60 years later, when following the 1992 Cadbury Report it was decided to introduce a distinction between company directors depending on whether they were non-executive, i.e. 'outside', directors or executive directors in charge of day-to-day management of the company. Considering that the former enjoy executive powers, e.g. to enter into contracts on behalf of the company, on par with the latter, the preferred English term of 'non-executive' is less apt and better suited for the German Supervisory Board, where the supervisors are barred by statute from possessing any executive powers. The old term of 'outside directors' is better as these directors genuinely are outsiders to the company, only taking part in the company's affairs by way of their directorship but usually having their day-job or main activities elsewhere.

Consequently, the Nordic corporate governance model with its distinction between a Board of Directors and a Management Board both wielding executive powers is very similar to the English distinction between non-executive directors (NEDs) and executive directors, except that in the Nordic countries important regulation of companies is traditionally done by statutes passed by a democratically elected Parliament whereas the English still prefer a formally voluntary system of self-regulatory codes adopted by a mostly self-appointed quasi-public body promulgating mere recommendations, which are then based on the Comply-or-Explain Principle that is intended to enforce them notwithstanding their formally voluntary character. Although for some reason the English way of regulating corporate

governance has become very popular, so much so that it is now a staple of EU company law legislation and copied by all the Nordic countries, the fundamental outline of the Nordic corporate governance model was and remains cast in the various Nordic acts on companies such as the 2009 Danish Companies Act (Selskabsloven, hereinafter SL).

Consequently, the main tenets of the Nordic corporate governance model as described here are still statutory provisions, but further details must be found in the national codes and their recommendations.[4] These Nordic codes are heavily influenced by English company law, which at some points grates with the main principles of the traditional Nordic system. One such problem, among others,[5] has been the blank acceptance of the English notion of director 'independence' of major shareholders, probably because it was endorsed by the Commission in its recommendation (2005/162).[6] This perception of independence goes against the clear hierarchical structure in the Nordic model placing shareholders on top with a direct statutory power to appoint the majority of directors and, more importantly, the power to replace at any time one or more directors at will, thus ensuring effective and immediate control of the Board. It also introduces a need to distinguish between the directors within the Nordic Board of Directors similarly to that done in the unitary English body, even though they are all non-executives compared to the managers of the Board of Management. However, it has to be said that the detrimental effects of this unwarranted copying have been negligent since the concept of director 'independence' under these circumstances of statutory guaranteed unfettered shareholder power over directors is pragmatically reinterpreted as 'integrity', which makes much more sense and does not prevent the direct shareholder control that Nordic company law legislation guarantees.

One reason why direct control by major shareholders is viewed favourably in Danish law, where it is known as 'active ownership', is the substantial minority protection provided by SL, including, inter alia, a prohibition on

[4] For the adoption of this English usage of codes and the Comply-or-Explain Principle by the Nordic countries, see JL Hansen, Catching Up With the Crowd – But Going Where?, Int J Discl Gov 3, 213–232 (2006).

[5] That EU company law has also accepted the idea of a mandatory bid rule in its Directive (2004/25) to castigate shareholders who dare to exercise the control that the Directive on Shareholders' Rights (2007/36, rev. 2017/828) explicitly grants them over management is somewhat schizophrenic and also illustrates the problem of uncritically accepting features from one jurisdiction, where it may make sense, and forcing it upon others where it does not.

[6] Although the strange idea that directors should be 'independent' of the shareholders who appoint them is generally accepted, the application of the idea varies from the Swedish Code, which operates with a distinction between independence of major shareholders and of the company accompanied by an explanation why the influence of shareholders on directors is viewed favourably, and the Danish Code, which simply copies the English approach without any special comments.

the dual-executive structure to make any decision that would unjustly enrich a shareholder to the detriment of the company or other shareholders and a ban on any director from participating in any decision which involves a conflict of interest. Provisions like these are quite old in Nordic company law and have over time proved sufficient to safeguard against abuse of control from dominant shareholders while enabling them to monitor and if necessary discipline management on behalf of all shareholders.

Banks are organised as limited liability companies and are as such subject to the national companies acts, though with certain special requirements or limitations mandated by the special character of banks. In Danish law, it follows from the Act on Financial Enterprises (FIL), that certain of the options available under the SL are not applicable to banks. Among these options that are banned in the FIL are the possibility of multiple-voting shares and of managers serving as directors, which, by the way, is rather unusual in Danish companies anyway even though it is formally allowed in the SL. On top of these very basic company law features in SL comes a vast amount of specific regulation of banks in FIL dealing with how to run a bank, most of it nowadays the result of the harmonisation of banking law within the EU, which dwarfs the company law regulation flowing from SL. Nevertheless, company law and the distribution of powers implied in the Nordic corporate governance model is important when deciding director liability even in banks.

2.2. Tort Law as Enforcement of Corporate Governance

It is a well known feature of law that a statutory provision cannot encompass each and every relevant detail but must be written in more general terms that hopefully will cover the many different instances that reality may present. This inability of any written text, be it a statute or a contract, to fully capture all eventualities is cited as a reason why firms exists in the first place.[7] Persons are employed within a firm when it is not possible to fully describe *ex ante* their services in a contract instead enabling the employer to issue instructions *ad hoc* to the employees. It can be no surprise then, that company law statutes are not very detailed when describing the executive powers to be wielded by management. Mostly, such statutory provisions describe only general standards, for example that the power should be exercised responsibly or not irresponsibly without detailing what exactly that entails, and where they are more detailed they usually take

[7] RH Coase, The Nature of the Firm, 4 Economica 386 (1937) is usually seen as the classical contribution.

the form of operational descriptions laying out certain procedures to be followed or certain caveats to be observed.

Equally unsurprising, the same goes for the liability standard in company law. The present provision in Danish company law is SL § 361, which in 2009 replaced the former ASL § 140 without any material change. The provision is very short and states that members of the dual-executive structure, directors and managers alike, are personally liable for any damage they cause in their line of duty by intent or negligence. This is a standard of fault liability, also known by its Latin name as the Culpa Rule and as such a staple of European tort law dating back to the Lex Aquilia from 3rd Century BC. In order to be liable, you must have acted at least negligently, and in Danish tort law the standard normally comprises both gross negligence (culpa lata) and simple negligence (culpa levis). In older versions of the Companies Act, the provision made reference to damage to the company, which was probably explained by its inclusion in a Companies Act, but that carried the risk that the provision was seen as specific and thus excluding the usual range of fault liability, and later versions have made clear that no such limitation should be assumed. Thus, SL § 361 is basically just stating that the generally applicable standard of fault liability is also applicable to management's exercise of its powers on behalf of the company they serve, which is so obvious that it probably would be the case even in the absence of a specific statutory provision. It is no wonder that the Danish Supreme Court has held that even persons who are not formally serving as members of the dual-executive structure may be held liable under this provision if in fact they act as if they were.[8]

Before leaving the question of the standard of director liability to which we shall later return in more detail, it should perhaps be noted that although the Nordic countries share much the same law in many aspects, notably those pertaining to commercial issues, there are a few differences. Admittedly your author is biased, but it appears that Danish law has escaped at least some of the quirks that have bothered our Nordic brethren. One such issue is whether you can be liable for any pure economic loss that you cause by your actions. Danish law offers a simplistic answer: of course you can, if, that is, the loss can be adequately linked to your actions, whereas Swedish

[8] A leading decision is the Satair-case, reported in Danish in Ugeskrift for Retsvæsen 1997.364, where the sole shareholder (a parent company) was held liable for neglecting to protect the interest of the creditors of the company as the entire share capital was sold to another party. The price of the shares indicated that the buyer had no intention of paying the back-taxes owed by the company and indeed the buyer emptied the company and fled with the money owed to the Tax Authorities. As the sole shareholder had effectively managed the company, it was held liable according to the statutory provision on director liability in the then applicable Companies Act disregarding the provisions on shareholder liability in the same Act.

law traditionally would require the loss to follow a criminal offence.[9] These concerns are thus not relevant to the Danish case presented here and the liability standard is thus applicable to all kinds of loss and all kinds of actions if and so far the damage can be proven to be a causal and unavoidable consequence of the actions.

It is obvious that tort law may serve to enforce how corporate governance works. If directors and managers are personally liable in tort for the way they execute their company powers, they must be expected to behave more responsibly.

As jurists we naturally look to criminal law as another way to enforce good behaviour. It should be noted, though, that there is a great difference between tort law and criminal law. First of all, criminal law is not just a reaction to displayed behaviour; it is a sanction, a punishment that will normally be associated with opprobrium by the general public and an ensuing defamation of the person found guilty of such criminal behaviour. In financial circles, any criminal conviction effectively carries with it a commercial death sentence, since a convicted criminal is not likely to pass the Fit & Proper tests required for most senior positions in financial enterprises. It is important, therefore, that criminal sanctions are only used with moderation to safeguard against actions that are deemed very detrimental to society and cannot be prevented or remedied in other ways, and that the procedural safeguards developed by society as we slowly grow ever more civilised are continuously respected, such as the requirements that the criminal offense be clearly sanctioned by written statute to afford sufficient foreseeability and a presumption of innocence before an independent and unbiased court of law. These requirements are still mostly respected in the Nordic countries, although they are under pressure from demands that sanctions should be 'administrative' to alleviate the pressure on ordinary courts caused by insufficient funding and 'effective', which too often is used as a euphemism for neglecting the presumption of innocence and achieving the outcome dictated by public opinion and the media.

Tort law, in contrast, is not a sanction, but a remedy of restitution. Damages are not the automatic consequence of breaching a statutory obligation, but depend on several further requirements such as causality and sufficient

[9] Another and more remotely relevant is the question of whether shareholders can sue their own company if the company has defrauded them when issuing the shares or if the company has manipulated the price in the secondary market. Again, Danish law sees no obstacle as is evidenced by numerous case law, notably the Hafnia-case reported in Danish in Ugeskrift for Retsvæsen 2002.2067, whereas Sweden used to and Norway still finds it problematic in respect of capital maintenance, although the CJEU has made it clear in its decision of 19 December 2013 in case C-174/12, *Alfred Hirmann v Immofinanz AG*, ECLI:EU:C:2013:856, that this is not really required by the capital regime of EU company law, which of course does not prevent Member States from setting up obstacles of their own invention.

proof of an unavoidable loss. It is perfectly possible that a director may have recklessly violated one or more duties, but escapes liability in tort due to the failure of the plaintiff to sufficiently prove the existence of these requirements.

Furthermore, to really understand the full picture of how corporate governance is enforced, we must look beyond black letter law since most enforcement of directors is done without reliance on tort or criminal law. Starting with the simple scolding and ending with either being fired as a member of the Management Board or disposed as a director from the Board of Directors, there is a continuum of reactions that can serve to discipline members of management. Reputational capital is of the outmost importance to most businesspeople and directly influences their personal welfare and career opportunities and thus considerations of one's reputation as a trustworthy and competent person is likely to influence their behaviour. It is very likely that to be dethroned as a once all powerful CEO or chair of the board and to live on with the shame of failure clearly realised by friends, family and local community is every bit as burdensome as any legal sanction that criminal law may provide. So we do not have to assume that it is only up to us jurists and legislators to ensure the proper enforcement of corporate governance by ever more granular legislation. Even when people are not tried by courts, they may be sanctioned severely nonetheless.

Also important, before venturing on to discuss how corporate governance should be enforced, is to acknowledge that business failure is not necessarily anybody's fault. The Wizard of Menlo Park, Thomas Edison, had a rather unfortunate beginning to his later and more splendid career, noting undeterred that 'I have not failed. I've just found 10,000 ways that won't work.' Although it is said that failure, unlike victory, has no fathers, it may nonetheless spring from many things that are beyond the influence of the failing business' management such as changes in consumer habits or preferences, technological innovation or simply the better performance by competitors, just to mention a few. And even where it is possible to discern, with the unfair benefit of hindsight, that another cause of action would have been preferable to the one chosen, it does not necessarily follow that this constitutes a fault that should involve the courts. Other remedies are available that may be more suitable and the civic penalty and its personal and economic costs of being unsuccessful should not be disregarded. As Gomard rightly observed in respect of tort law, which obviously also applies even more so for criminal law: Liability is not a suitable means for educating honest but unsuccessful businessmen.[10]

[10] Gomard (1984) p. 70.

3. The Capinordic Case

3.1. The evolution of the Danish Supreme Court

The Danish Supreme Court was born out of the Absolutism that was introduced in the aftermath of yet another unsuccessful war with the Swedes in 1660 and in its beginning, the King took part in its deliberations. Although the King soon abandoned his chair, the air of Absolutism lingered on for centuries, even beyond the passing of a free Constitution in 1849. In the beginning, the Supreme Court offered no reasoning for its judgements, which accords with the Absolutist idea that the powers of State was handed down by God and needed no justification. Only in 1856, some seven years after the Constitution, the Supreme Court grudgingly accepted to offer its reasoning along with the judgement, and in 1936 it even admitted that dissent was possible among the learned justices and started reporting these. It took another generation to name the dissenting justices, which was only done from 1958. Even after this time, dissent was frowned upon, and the justices did their outmost to avoid them. This resulted in judgements that betrayed the learned discussions taking place among the justices and produced decisions that was worded in such a way that all justices could accept it, although it may not have matched what they actually believed.[11] A similar deficiency can still be observed at the Court of Justice of the EU, which is also prevented from offering dissent, although it is more justified in that system as a protection of the individual judges from the Member States that appointed them.

Fortunately, this is all history now. The 2007 Court Reform reduced the number of the first instance city courts and made the resulting fewer but larger city courts competent to handle a greater deal of cases that used to be admitted directly at the next instance country courts enabling these to function more as courts of appeal. This effectively left the Supreme Court as a court of third instance and enabled it to assume a new role as a 'court of precedents', that is, engaged with stating the governing principles of law that should apply to case law in all other courts.

The Supreme Court has handled its new role excellently providing us with detailed reasoning that is easy to understand, but the history is necessary to recall in order to appreciate that it is only now that we get

[11] Henrik Zahle was a Danish law professor, who was appointed to the Supreme Court in 1999, which was not unusual for a gifted law professor, but who resigned and returned to academia after only three years, which was and remains unique. He compared the style of writing decisions at the Supreme Court with the annual measurement of conscripts which would indicate the height of the average conscript that would not necessarily match the actual height of any of them.

decisions from the Supreme Court that spell out clearly what the law is even though we often have much older cases effectively stating the same outcome but without specific reasoning. This is why the Supreme Court's decision in *Capinordic* was so important. Not because it said anything new, but because it said it clearly and in greater detail.

3.2. Capinordic Bank A/S

Capinordic was authorised as a bank in October 2006, only to fold in February 2010 in the aftermath of the Financial Crisis that peaked in September 2008. The bank was unusual in that contrary to most other Danish banks it had no ambition to be a universal bank for the general public. Capinordic addressed only wealthy clients predominantly from the personal commercial network of the founders, who took active part in running the bank as directors. Depending on taste, one could either say that the bank was born with an inherent conflict of interest or that it catered only to customers it knew well.

The traditional way of handling distressed banks in Denmark was for a major bank to take it over, often helped, sometimes cajoled, by the FSA and the Central Bank. Like in decent society, problems were kept within the family. Denmark got through the financial crisis in 1992 lightly, contrary to Sweden, and perhaps for this reason the outcome of the Financial Crisis was the opposite. The number of small and medium banks that faulted was considerably higher in Denmark than in Sweden, and even though the major banks survived in spite of suddenly finding the day-to-day money market that they relied upon for funding frozen over, serious legislative effort was necessary to shore up the major banks and provide a new way of dealing with those banks that could not be saved. The new way involved setting up a limited liability company, Finansiel Stabilitet A/S (literally: Financial Stability, hereinafter: FS) owned, funded and, crucially, guaranteed by the State. The purpose of FS was to serve as a 'garbage company', taking over failed banks with the aim of selling off the bits that were viable, retrieve whatever money there was to be had and covering the ensuing losses.

Thus, when Capinordic failed in 2010 it was taken over by FS, or more precisely a subsidiary of FS. It was part of the task of FS to retrieve whatever money that was available and that included exploring any potential personal liability of the directors of the failed banks. In fact, it was seen as a special task of FS to help clarify to what extent the many bank failures were caused by reckless behaviour of banks as part of its public obligation as a State owned vehicle. At this point, public opinion was forming that the Financial Crisis was entirely the responsibility of the banks and although it is not obvious that in the relationship between a lender and a borrower any

recklessness must exclusively reside with the former, it placed the blame at the feet of a limited number of otherwise privileged people and so the sentiment quickly became widely shared. As to be expected in a democracy, politicians soon followed their voters' convictions.

Whenever a crisis follows a boom, as the Financial Crisis did in 2008, it inevitably exposes the excesses that took place. As Warren Buffett remarked: Only when the tide goes out do you discover who's been swimming naked. And as it turned out, some bankers had indeed been swimming without proper attire. Several court cases followed as banks failed, some concerned criminal charges, mostly of manipulation of share prices, others concerned personal liability for directors in tort. As would be expected in a civilised society observing the rule of law, some court cases ended with convictions, others with acquittals. The media's response, however, was mostly one of lamentation and strangely uniform despite the great variance between the actual cases: convictions were not harsh enough and acquittals were scandalous.

It was on this background that it was eagerly anticipated that one of the bank trials concerning director liability would reach the Supreme Court enabling it to state the general principles to be observed by the lower courts in all other pending and future cases. It so happened that it was Capinordic that reached the Supreme Court first. This could be seen as unfortunate, because the bank was rather different than the other failed banks as described above. However, the Supreme Court settled the case with a decision that was clearly intended to serve as a precedent and model for the other bank cases. The decision was in fact exemplarily clear, precise, and one of its best composed decisions. In a few pages, the basic principles to be applied were laid out in a first part of the decision clearly intended to serve as the precedent, after which followed the second part where the Court applies the principles to the case before it.[12]

It is intriguing that the principles laid down by the Supreme Court in *Capinordic* corresponded well with the statement of the law of tort in the area of director liability produced by Gomard back in 1984, and, as is clear from his own article, with earlier literature of his own making and those before him. There were literally no surprises to any jurists familiar with tort law, but because of the Court's previous parsimonious attitude to reasoning it was nonetheless the first time these principles were stated in full.

[12] In the written judgement as reported, the first part on general principles is Paragraph 3 entitled The Basis for Liability and the second part is Paragraph 4 entitled The 11 Credit Engagements.

4. The Capinordic Decision

4.1. Liability for Corporate Failure or for Business Decisions

In the many litigations on director liability in tort brought before the courts by FS, as was that company's obligation, FS frequently argued that directors could be liable for the bank's failure as such. This claim was based on the contention that they had run the bank in a reckless way which had caused the failure. The procedural benefit of the claim is obvious: if the failure of the entire corporation was caused by its management, then they would be liable for all losses arising out of the failure. On the other hand, if they were not liable for the corporate failure itself, FS would have to argue and prove their liability for each of the business decisions that had resulted in a loss, which would be much more onerous for FS as plaintiff.

Even where FS was successful in achieving a conviction based on liability for business decisions, it failed in achieving a victory in respect of liability for corporate failure. However, due to the special nature of Capinordic as a bank with its close proximity between its directors and major customers, it was widely believed that this would be the best chance to establish such liability. However, in the decision of the Eastern Country Court in Capinordic, liability for corporate failure was rejected, although the three defendants, who were the chair of the Board of Directors together with a fellow director and the CEO of the bank, were found personally liable for a string of loss-giving business decisions.

On appeal to the Supreme Court, FS refrained from claiming liability for corporate failure and concentrated on securing conviction on the other counts of liability for business decisions, which concerned 11 credit engagements. This was duly noted by the Supreme Court, which nonetheless observed before opening the second part of its decision on the actual case at hand that concerned the individual business decisions, that »The Supreme Court finds that it is not established that the bank has been structured or run in a way, which in itself can justify liability for [the defendants] for the losses from the 11 credit engagements. It thus rests on a specific evaluation of the individual credit engagement whether they are liable«.[13] In this way, the Supreme Court made it clear that even in respect of the 11 credit engagements under appeal, it was not possible to argue that the bank had been run in such a way that the defendants were liable *in toto*. In

[13] Unauthorised translation by the author from Capinordic (2019) p. 1957. The original reads: »Højesteret finder det ikke godtgjort, at banken har været indrettet og drevet på en sådan måde, der i sig selv kan begrunde et erstatningsansvar for A, B eller C for tab på de 11 udlånsengagementer. Det beror således på en konkret vurdering af det enkelte udlånsengagement, om de kan pålægges erstatningsansvar.«.

its reasoning on several of the individual engagements, the Supreme Court noted that certain engagements had been risky, but not in a way that in itself would render them reckless to make.

As will be dealt with in greater detail below, the decision in *Capinordic* was severely criticised and this part of the decision was not exempted as it was complained that apparently directors could not be held liable for causing the failure of a bank. That, however, was a misconception, as was most of the criticism. The Supreme Court did not refute the possibility of liability for corporate failure. If that had been its intention, it would have said so in this very clear decision. On the contrary, the Supreme Court evidently had contemplated the possibility of such liability, but rejected it based upon the facts of the case. In fact, we have several other decisions establishing such liability for corporate failure and although much of the case law predates the 2017 Court Reform and is therefore not necessarily explicit, the fundamental principle is clearly present for all to see.[14]

The rejection by the Supreme Court of liability for corporate failure, which had already been replicated by the lower courts in other cases before that, raises another and quite different question from that of whether such liability is possible under Danish law, which it clearly is, namely the question of whether such liability is at all possible in banks.

The answer must in most cases be No. Banks are subject to considerable statutory requirements on their organisation and operation and subject to close supervision by the FSA both before a license to operate is granted and after on a continuous basis, including frequent on-site visitations, inspection of books, etc. It is not possible to imagine that a bank would obtain its license if it was organised in an irresponsible and totally disorganised way or that it would be allowed to continue to operate if it entered such a state of affairs. Consequently, the only conceivable possibility for liability for corporate failure would be where the directors enter into one or more credit engagements of such a magnitude that on their own these engagements cause the bank to fail. In this case, it would still be necessary to prove director liability in respect of these engagements, but once established the directors would not only be liable for the losses flowing from the engagements but for the corporate failure *in toto* without further proof being necessary. That, however, was not the case in *Capinordic*.

[14] One such case was cited in the Green Paper (Betænkning) 1498/2008 behind the 2009 Companies Act at p. 37. It concerns the Supreme Court's decision in the case of Calypso Verdensrejser A/S also and more fully reported in Danish in Ugeskrift for Retsvæsen 2007.497. The case concerned a travel agency, where the whole business operation was obviously economically untenable and consequently its directors were held personally liable for the losses inflicted on the company's creditors when the company went bankrupt after a brief period of business. In the Green Paper, the decision was actually cited as a specific example of the basis of liability applied by Danish courts.

4.2. The Basis of Liability

The Supreme Court began the first part of its decision on the general principles applicable to these cases by stating that the basis of liability is fault liability, i.e. the Culpa Rule, and made a reference to SL § 361, which is the relevant, and only, provision in the SL on the concept of director liability as discussed here in Paragraph 2.2 above.[15] The Court continued by observing: »There is not in other legislation or in case law any basis to establish that a stricter basis of liability should apply for directors of a bank«.[16]

This could hardly be a surprise for any jurists worth their salt. As Gomard had pointed out in his article on director liability more than 35 years before, with reference to even older Scandinavian literature, fault liability is the general rule of liability, and in respect of director liability probably also resembles the notion of a duty of care applied in Anglo-American case law.[17]

The Supreme Court also stated what is well-known, that business decisions entail risk, which is acceptable if made on a sufficiently informed basis. It noted that the Board of Directors had an obligation to procure information, thus emphasising the responsibility of the directors to actively procure the necessary informational basis for their decisions. It also noted in passing the obvious fact that the evaluation of a director's liability for a decision made should be based on the information available at the time the decision was made. That the Court states that the information should be »available« further underlines that the director has an obligation to retrieve information that is available if deemed necessary and cannot escape liability by simply relying on the information at hand or provided by others.[18]

4.3. A Business Judgment Rule – of Sorts

In the past 20 years or more, the English term »Business Judgment Rule« or simply BJR has been frequently used in Danish legal literature to denote that courts allow a certain discretion to directors when making business

[15] Capinordic (2019) p. 1955.

[16] Unauthorised translation by the author from Capinordic (2019) p. 1955. The original reads: »Der er ikke i lovgivningen i øvrigt eller efter retspraksis grundlag for at fastslå, at der gælder en skærpet ansvarsnorm for ledelsesmedlemmer i en bank«. Note, that the Court makes reference to members of the bank's management, which under the Nordic model includes directors and managers. Indeed, the three defendants in the case comprised two directors and the CEO, who is the manager primus inter pares on the Board of Managers.

[17] Gomard (1984) p. 51 at footnote 9.

[18] Unauthorised translation by the author from Capinordic (2019) p. 1956. The original reads: »havde eller have adgang til«, which more directly translates into »possessed or had access to«, that is, it was available.

decisions in such a way that not every decision which with the benefit of hindsight can be seen as unfortunate because it causes a loss should entail liability. Only clearly negligent behaviour or a failure to ensure a sufficient informational basis would entail liability.

A legal puritan would point out that it is unnecessary to refer to this by usage of an Anglo-American phrase, because this principle has been established in Danish law long ago and independently of the common law case law and that it is potentially misleading to cite what is effectively a very detailed legal concept from a foreign and rather different legal culture. Nevertheless, it has been taken for granted that a principle of this sort was applicable in Danish law and there is plenty of older case law to support it, including cases decided by the Supreme Court itself.[19]

There are many good reasons for such a principle. As discussed in Paragraph 2.2 above and as Gomard observed, liability in law is not the only instrument to discipline directors and only where the transgression is above a certain minimum should it be necessary to involve the courts. After all, even where directors or managers has been less than competent in the discharge of their duties, it is only fair to ask whether this is not within the risk that every creditor accepts when dealing with a company or the risk that the shareholders accept when they appoint a director. If it is, then they should not be afforded recourse to the courts, but manage this risk by their own means. Another argument in support is the practical fact that we need people to serve as directors. If we introduce a threshold of liability that is so low as to catch even what would normally be deemed 'honest mistakes', the appetite for commercial activity could become lower than it already is, which is likely to affect societal wealth and thereby welfare considerably. Yet another argument is that it is much easier with the calm provided by hindsight to determine the proper decision to be made than it is to make it under the stressful working conditions that form the daily experience of such decision-makers. Finally, it is fair to observe that judges with their legal training may not be the best equipped to second-guess business decisions; a point that may sound impolite but is readily conceded by most judges.

As the Supreme Court had already noted that decisions should be made on a sufficiently informed basis, the Court now explicitly specified the conditions of such a Danish BJR. First, the Court remarked that business

[19] As mentioned in Paragraph 2.1 above, it was not until the 2007 Court Reform that the Supreme Court began to offer more detailed reasons. However, in a decision from 2013, reported in Danish in Ugeskrift for Retsvæsen 2013.1312, the Court stated principles that were clearly confirming the notion of a Danish BJR of sorts. However, the decision concerned an association of landowners and not a commercial company and for that reason was not an entirely apt precedent.

decisions should only be censured by courts with »caution«.[20] Next, the Court stated that no such caution was warranted where the decision was not only made out of business considerations but also involved »other considerations irrelevant to the bank«, that is, the decision was governed mostly or in part by ulterior motives, usually of a self-serving kind.

This statement of a Danish BJR is roughly similar to that known in American jurisprudence, which is probably not the result of direct inspiration but generally applicable common sense. One possible difference is that whereas the BJR in American jurisprudence can serve as a bar to any examination of a business decision by the courts where no ulterior motives are present, the Danish BJR only obliges the courts to exercise caution. Courts may examine the appropriateness of a business decision even if there were no ulterior motives and the Supreme Court itself went on to examine the 11 credit engagements that were subject to appeal. The notion of »caution« is thus probably best understood as the minimum threshold discussed in Paragraph 2.2 that separates the honest mistakes and acceptable incompetency from inexcusable negligence.

4.4. Disregarding Legal or Own Standards

It should be noted, as highlighted by the Court, that in a bank and contrary to non-financial companies, where the Board of Directors usually deals only with strategic governance, this body is mandated to engage in the daily operations of the bank as all credit engagements are the direct responsibility of the Board of Directors, cf. FIL § 70.[21] This is of course unpractical in respect of all the many engagements a bank may encounter and FIL allows delegation by the Board of Directors to the Board of Management, but the delegation must be described in a specific credit instruction. As mentioned in Paragraph 2.1 above, banks are subject to very detailed regulation, most of it in the many provisions of FIL, one of our more substantial statutes, and there are specific provisions on how the bank should be organised and how the dual-executive structure should operate.

It is probably the most interesting part of the *Capinordic* decision that the Supreme Court stated that the failure to follow statutory rules on organisation etc. was not in itself sufficient to cause liability.

It is thus not in itself irresponsible to disregard the statutory rules on procedure, organisation etc.; only if the behaviour was irresponsible when

[20] Capinordic (2019) p. 1955. The Danish word was »forsigtighed« and the words used to describe a decision was »forretningsmæssigt skøn«, which translate into »commercial assessment«, which emphasises that the business decision being discussed was a discretionary one, for example that of accepting a credit engagement.

[21] Capinordic (2019) p. 1956.

taking into consideration all the facts at hand including the decision made, would the director be liable.[22] This view was then repeated in respect of what could be called the bank's own rules on procedure and operation, for example routines drawn up by the bank on its own inclination or because they were required by statute.[23]

Again, this should come as no surprise. Director liability in tort law is not an automatic reaction triggered by the mere non-compliance of statutory provisions. It concerns a holistic evaluation of whether the particular decision was irresponsible. If an automatic sanction is required, another area of law must be applied, like criminal law or something similar outside the realm of tort law. Tort law is about restitution, not penalisation.

4.5. The Relevance of Opinions by the FSA or Auditors

A similar stance as that described in Paragraph 4.4 above was taken by the Supreme Court in respect of how to assess the opinions expressed by the FSA in regard of the bank's credit engagement as part of its supervisory duties or by the external auditors.[24] The Court noted that the FSA's inspections and assessment of the creditworthiness of the bank's customers was done as part of the FSA's obligation as a supervisor and did not necessarily include the conditions that were relevant when making the business decision to grant credit. However, the Court found that the information could be relevant and should be taken into account. The same applied to opinions expressed by the bank's external auditors.

Again, the Supreme Court applied a holistic approach to the assessment of a business decision, that is, was it responsible or not, and naturally, it is relevant when making such an assessment of how things looked at the time to take into account how others viewed the matters. But it is clear from the Court's remarks that no special emphasis should be afforded these opinions, they »could« be relevant, not »must«.

[22] A small example may illuminate the distinction. It is required by law that the driver of a car must possess a driver's license which ensures that the driver has received the necessary training to drive the car. The license should accompany any drive in the car. However, if a driver forgets to bring his license, this does not in itself makes the driver liable for any accident that may subsequently happen during the ride.

[23] Ibid., in the reported version Paragraph 3.2 concerns statutory rules and Paragraph 3.3 concerns own rules.

[24] Ibid., in the reported version Paragraph 3.4 concerns the FSA and Paragraph 3.3 concerns auditors.

4.6. Other Considerations

Finally, the Supreme Court addressed other considerations that are particular for banks and therefore of less general relevance for director liability in non-financial companies. In the actual case, the bank had been »flexible« to say the least in allowing the CEO to grant credit in cases that should be decided by the Board of Directors, in the expectation that the credit would be confirmed later, which usually happened. The Court remarked again that this behaviour was not a basis for liability in itself, but the directors would be liable for the whole credit engagement if it turned out to have been granted irresponsibly which should be determined by the facts at hand at the time of their confirmation of the CEO's decision. It also noted that it did not absolve the CEO of responsibility that the credit was confirmed by the Board of Directors.

The director defendant, named B in the reported case, had on several occasions been very active in soliciting credit engagements and had effectively ordered that such credit be made, and again the Court remarked that this in itself did not make the grant of credit irresponsible, something which had to be decided by looking at all the facts at hand.

4.7. The Verdict

After laying out the principles generally applicable in these cases, which as already noted were in accordance with the general perception of the law on director liability and basically confirmed the results reached by the lower instance appeal court and for that reason would probably apply to other commercial enterprises than banks as well, the Supreme Court set upon deciding the 11 credit engagements up for appeal. Each decision was individually examined and assessed, and the Court took into account whether the business decisions were made before the onslaught of the Financial Crisis or after, that is, each decision to either grant or prolong a credit or to increase or release security posted for the individual engagements was examined taking into account the conditions of the time the particular decision was made.

Based on this, the Supreme Court reached its final verdict. The chair of the Board of Directors was held personally liable for damages of about 54 mio. DKK, the other director was personally liable for damages of about 80 mio. DKK, and the CEO was personally liable for damages of about 82 mio. DKK. On top of this came interest calculated from the commencement of the case in 2010 at a hefty legally set rate of 8%. The three defendants were held jointly liable for most of these damages which does not alter the fact that the verdict imposed a devastating economic

burden on them. The Supreme Court had considered whether to apply the statutory provision on mitigating damages but decided not to apply this considering that the behaviour displayed did not merit mitigation. All in all, a very harsh outcome.[25]

5. The Aftermath

5.1. Instant Criticism of the Decision

So much more surprising was it that the Supreme Court's decision in January 2019 was instantly met with considerable criticism by elected politicians.[26] One MP from the main opposition party speculated why banks should be treated like ordinary companies and not subjected to stricter standards. A parliamentary election was coming up in June and soon most MPs were competing to express their concern that the Supreme Court had issued such a lenient decision that failed to appreciate the need to apply a stricter regime to banks than to pizza shops, as was the popular expression.

What was at issue was notably the Court's remark about the basis of liability being SL § 361 and thus the same as that applicable to all other companies.[27] Also the rejection of liability for corporate failure in the particular case may have been misunderstood as a more total rejection of the possibility in Danish law. That the decision actually made the three defendants personally liable for many millions DKK was apparently overlooked.

On 27 March 2019, two months after the judgement and in the heat of the looming elections, a cross-party agreement was made, which concluded the need for a stricter regime for banks and expressly lamented the paragraph from *Capinordic* about the basis of liability, a rare instance of elected politicians publicly denouncing a Supreme Court decision as unsatisfactory.

Once the elections in June handed government to the main opposition party, things began to calm down. It is difficult to see the criticism as anything but a misunderstanding, provoked by the need felt by MPs to channel public anger at banks especially with an upcoming election and exacerbated by the advent of instant electronic news channels constantly looking for

[25] In an unrelated criminal court case, the chair and a director were sentenced to jail for criminal offences, whereas the CEO was acquitted. The case did not concern the credit engagement covered by the case discussed here.

[26] On 17 January 2019, only two days after the judgement, the online media FinansWatch could report about widespread anger among MPs and observed: »This is after the financial caretaker company Finansiel Stabilitet has been unsuccessful making bank directors liable for the many bank failures during the crisis«.

[27] See Paragraph 4.1 above.

comments and breaking news which require politicians to immediately comment on court cases that would otherwise require considerable time to analyse and understand.

At least for jurists, it was clear that the Supreme Court in that criticised paragraph of its decision had only been talking about the basis of liability and not what that liability would entail in banks. To put it more bluntly, fault liability as the basis of liability for directors simply dictates that you cannot be liable unless you are at fault. It says nothing about when you are at fault, which depends on other conditions, notably the provisions in legislation that may detail the obligations of the director. In his 1984 paper on director liability, Gomard had remarked not only on the fact that fault liability was the commonly observed basis of liability in the West, but also noted the flexibility of fault liability as a basis of liability. It would apply differently to different enterprises. The criticism's main concern, that it should be more demanding to run a bank than a pizza shop, was already considered, because there is much more regulation on running a bank than on running a pizza shop and so it is unquestionably more demanding to do the former than the latter. The basis of liability may be the same, but the responsibilities are very different, as they ought to be, and so, one may add, is the personal liability that could be incurred as it is difficult to imagine any pizza shop owner made subject to multimillion damages. It was, obviously, a sad misunderstanding and not exactly Danish MP's finest hour.

5.2. Amagerbanken

In these tense circumstances and on 26 June 2019, the Eastern Country Court decided on appeal a similar case concerning director liability in Amagerbanken A/S, which had also failed in the wake of the Financial Crisis. It became the first decision to rely on the precedent laid down by the Supreme Court in *Capinordic*. At the City Court, the director defendants had been acquitted and it was probably a sign of how bloodthirsty public and political opinion had become, that the judgement of the Country Court was received, at least at first, with considerable relief not least in the banking community. The Court found that the directors were liable for continuing a credit FX facility and for that single business decision, they were personally liable for damages in excess of 250 mill. DKK, more than a quarter of a billion, and of course with the extra whopping 8% interest that is applicable in court cases. Contrary to *Capinordic*, this outcome was so harsh that it finally silenced the call for harder sanctions on bank directors and eventually some came to question whether the decision was right.

It is possible that the decision could have been appealed to the Supreme Court as a third instance, which would require the presence of a question

of the proper application of the law. This was arguably the case because it was undisputed that the directors had no special interest in continuing the credit FX facility besides helping an important customer survive at a time of financial distress and that they had procured the necessary information to make their decision, which according to the Danish BJR in *Capinordic* would require the Court to exercise 'caution' when assessing the decision. The question would be whether the Country Court had in fact been sufficiently cautious in finding the decision irresponsible. However, it follows from *Capinordic* that a court is not prevented from making such an assessment even where the directors act in the interest of the company and on a sufficiently informed basis, it must just do it with caution, and in that regard, the Country Court's assessment could also be seen as an exercise of its discretion which is usually not enough to afford a third instance hearing. We shall never find out, because the defendant directors agreed to give up appeal for an out of court settlement in order, very understandably, to avoid the devastating accrual of interest on the already considerable damages.[28]

Whether the decision by the Country Court in *Amagerbanken* was right, in the sense that other similar cases would produce similar outcomes, is difficult to tell as the outcome was very harsh.[29] It did, however, stop the criticism of how the courts handled director liability, and the media found other things to write about.

5.3. The Liability Commission

Nevertheless, the political agreement from March could not be ignored and on 20 November 2019 a public commission was established by the new Government. The new commission was given the telling name The Commission on a Stricter Liability Assessment for the Management of Financial Enterprises (colloquially: The Liability Commission) clearly expressing the political expectations of its work.[30]

[28] The right to collect interest on damages awarded by a court is partly based on EU law and may therefor be difficult to change, but it is well worth contemplating whether a premium of 8% on top of the current central bank rate is fair, especially in the present environment of negative interest rates. High interest rate may deter people from applying their civil rights recourse to the courts as evidenced in this case.

[29] What is clearly more doubtful is the Country Court's decision to find the two employee directors personally liable but then absolve them from paying damages by using the provision in the Act on Tort § 24 because 'as employees they would find it difficult to object to proposals from the CEO'. This line of reasoning, but not necessarily the outcome, is incompatible with the principle that employee directors are liable on a par with shareholder-appointed directors.

[30] In Danish: Udvalg om skærpet ansvarsvurdering af ledelse af finansielle virksomheder (Ansvarsudvalget).

The mandate for the Commission begins by explicitly stating the political desire to see more bank directors incarcerated and again makes reference to *Capinordic* stating that it was unsatisfying that the decision posits that there is not 'an extended liability' for bank directors. It is not entirely clear what is meant by this phrase as it is not an exact quote from the Supreme Court's decision. One likely explanation is that the mandate was written by civil servants doing their best to avoid restating the misunderstanding that had originally captured the politicians and rather than fixating on the basis of liability tried to point to the broader question of the extent to which directors would be held liable. Another indication of this is that the Commission, which according to the March agreement was established to correct an erroneous Supreme Court, was to be headed by one of its justices who had participated in *Capinordic*. This did not indicate a desire to prevent the Supreme Court from laying the line in future cases, rather the opposite. Finally, if one reads the fine print of the mandate and not just the introductory paragraph, it becomes clear that the Commission was expected to examine whether criminal law could be used more and 'assess whether there is any need to make liability for bank directors stricter'; so this need was no longer as obvious as it was presented in the introduction to the mandate.

5.4. Possible Solutions to the Commission's Conundrum

The Commission is not to be envied. How shall it deliver on a mandate that is essentially building on a misunderstanding at least in respect of the law on tort?

It is very difficult to imagine an alternative to fault liability as the basis of director liability. It is flexible, well-known, and fair. A standard of objective liability is effectively a guarantee that the directors will cover any loss of the bank, which would make it impossible to recruit the diligent persons needed to run our banks, or any persons at all. Much the same applies if fault liability for business decisions is maintained but the onus of proof is generally reversed, as it would be too risky and most likely necessitate a crippling need to document every single move and decision made by management. If we want banks at all, neither option is viable. It must be tempting for the Commission to try distract public attention by something dramatic within criminal law, but again it is difficult to deliver a sane proposal if the expectations are the more dramatic outcome that more directors should go to jail when the next bank folds. As with any changes to tort law, changes in criminal law may end up discouraging honest and sane people from working in banks.

A better solution is probably to contemplate the difference between the standards of liability, both in tort and criminal law, and the regulation that adds flesh to them. The reason why it is acceptable to have the same basis of liability in tort, that of SL § 361, both in a bank and in a pizza shop, is because the rules applicable to the two different enterprises are themselves different. So one way to provide stricter liability and please the politicians would be to add another layer of detail upon the existing layers of financial regulation on how to run a bank, that is, more rules on procedure, documentation, and admonitions to the directors that when they make decision they must at all times act diligently, in the best interest of the bank and perhaps also some other generally accepted societal purposes. The only risk by this most traditional solution to any crisis, that of adding details upon details, is to further burden banks, which are already troubled by a change in business operation that is brought on by technology and which may end up replacing banks with something brand new that escapes our banking regulation altogether. Even back in 1984, Gomard warned about the idea that statute can ever provide a reliable guide to business conduct: »It is not possible – and it is unwise to attempt – within the brief wording of a statutory provision to regulate all aspects of the operation of a business enterprise«.[31] Even though we have long dispensed with the idea of 'brief' statutory provisions, it remains an apt warning.

Perhaps it is worth contemplating whether there is more room for a sensible solution in the gap between tort law and criminal law. The difference between the two is that tort law is not a sanction, it is restitution, which is only relevant once many different conditions have been satisfied, non-compliance of statutory regulation usually being only one of them. Criminal law, on the other hand, is a sanction and is automatically triggered by non-compliance. The problem is that a criminal sanction is one of the worst and most serious acts of State power that we can inflict on another human being and so can only be used sparingly and when sufficiently proven and justified. In its stead we may make use of the fact that, technically and traditionally, other sanctions that may serve as disincentives are not necessarily categorised as 'criminal', not even in the broad convention-autonomous way that the Human Rights Court interprets the 1950 European Convention on Human Rights (ECHR).

It was clear from *Capinordic*, that the mere non-compliance with statutory regulation or the bank's own rules does not, in itself, constitute liability in tort unless it is proven that the decision was irresponsible and even then it will still be necessary to prove causation etc. Rather than making the mere non-compliance a criminal offense, either by a fine or imprisonment, which could been seen as disproportionate and would trigger all the safeguards

[31] Gomard (1984) p. 47.

of the ECHR including the high burden of proof, a less intrusive measure would be to trigger a sanction that is not of a criminal law nature in its classical sense. Such a measure could be that the director found not to comply with statutory regulation or own rules is barred from serving as a director or a manager in a bank again for a number of years, perhaps indefinitely. The only trouble with this idea is that it too already exists, or sort of. FIL § 64 requires directors in banks to be fit & proper. However, the Commission may propose that the conditions for the F&P test be made more detailed with specific reference to the statutory regulation or own rules that must be obeyed or even design an individual F&P test for bank personnel, a sort of driver's license for bank officials. This could be used as a sanction without applying the very strict standards applicable in criminal cases. However, considering that it effectively destroys the livelihood of the director, this particular sanction should only be used where the non-compliance is viewed as grave, that is, the behaviour betrays a fundamental carelessness about the proper functioning of a bank. This would be borderline with the grave negligence that triggers liability in tort and should be subject to the same Danish BJR that applies in tort law, that is, an acceptance of minor transgressions of proper behaviour brought on by the circumstances.

All in all, what appears open to the Commission is mostly subtle changes to the existing system, which may disappoint those politicians who believed that there was much to be done to combat malfeasance in banking. We shall see; the Commission has not yet reported. It was originally asked to report in mid-2020, but Covid-19 put paid to that.

6. Conclusion

The Danish Supreme Court's decision in January 2019 in *Capinordic* clearly expressed Danish law on director liability and at the same time confirmed the understanding of director liability that had been expressed over a long time, notably by Gomard in a paper from 1984. It was reassuringly sensible, foreseeable and fair. It made it clear that fault liability was the basis of liability, which means that director liability is an individual liability that is dependent on individual malfeasance, that is, you are only liable if you do not do what is required of you by law and the circumstances. Although this is the same basis of liability that is shared not only by all commercial enterprises, but by most human activity, it is a highly flexible standard because it depends on the circumstances and the regulation applicable to the particular enterprise. So there is, after all, a great difference between running a bank and a pizza shop, as there ought to be. The decision also

confirmed the existence of a Danish Business Judgement Rule, requiring courts to be cautious when examining a business decision made on a sufficiently informed basis and without a conflict of interest, but not preventing the assessment as such even where these conditions are met. Furthermore, no such caution is required if the directors served other interests than the bank's or had not procured a sufficient basis of information, in which case the courts may be more sceptical of the reasonableness of the decision probably even to the point of effectively placing the onus of proof on the defendant.

However, this happy outcome was almost overturned by public sentiment apparently based on simple misunderstandings of what the Supreme Court actually said and a Commission was established to ensure a 'stricter' outcome of future bank failures. A major bank case, *Amagerbanken*, was soon after decided by the Country Court with explicit reference to C*apinordic* as precedent, but nevertheless with an outcome that was perhaps stricter than the Supreme Court had envisaged. It is to be hoped that the Commission does not try to revolutionise the law, be that banking, tort or criminal law, but that it will ensure that even banking business will be as usual, or at least almost so. A profound and unstoppable change to the banking industry may be underway for technological reasons, but for now, and especially post-Covid-19, we need banks.