UNAPPROVED

THE COURT OF APPEAL
CIVIL

Woulfe J.
Power J.
Binchy J.

Neutral Citation Number: [2022] IECA 242
Record Number: 2019/486
High Court No. 2013/5514P

BETWEEN/

BRENDAN KIRWAN

PLAINTIFF/
APPELLANT

- AND -

MARGUERITE CONNORS, MJ O'CONNOR SOLICITORS, EAMONN BUTTLE, FILBECK LIMITED, NORMAN BUTTLE, MARY BUTTLE, HILARY BUTTLE, JOHN O'LEARY, BRID O'LEARY

DEFENDANTS/
RESPONDENTS

Record Number: 2020/14
High Court No. 2013/5514P

BETWEEN/

BRENDAN KIRWAN

PLAINTIFF/
APPELLANT

- AND -

MARGUERITE CONNORS, MJ O'CONNOR SOLICITORS, EAMONN BUTTLE, FILBECK LIMITED, NORMAN BUTTLE, MARY BUTTLE, HILARY BUTTLE, JOHN O'LEARY, BRID O'LEARY

DEFENDANTS/
RESPONDENTS

Record Number: 2019/485
High Court No. 2012/2995S

BETWEEN/

BRENDAN KIRWAN

PLAINTIFF/ APPELLANT

- AND -

EAMONN BUTTLE

DEFENDANT/ RESPONDENT

JUDGMENT of Ms. Justice Power delivered on the 26th day of October 2022

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Introduction

1. There are three appeals before this Court arising from interrelated High Court proceedings which were instituted in 2011, 2012 and 2013, respectively. The appellant in each appeal is Mr Kirwan and, for ease of reference, I shall refer to him throughout this judgment as Mr Kirwan or 'the appellant'. When referring to matters as they proceeded before the High Court, I shall refer to the respondents in these appeals as the defendants.

2. For reasons which will become evident and, again, for ease of reference, I shall, from time to time, refer to the 2011 proceedings as the 'creditor action'; the 2012 proceedings as the 'Buttle' proceedings; and the 2013 proceedings as the 'combined' proceedings. In the 2011 proceedings Mr Kirwan was the defendant. In the 2012 and the 2013 proceedings, he was the plaintiff.

3. The High Court delivered judgment in the combined proceedings on 2 September 2019. The first and second appeals herein relate to orders made by the High Court in relation to the 2013 combined proceedings following that judgment. In the High Court's view, that judgment had consequences for the 2012 'Buttle' proceedings and the third appeal relates to a consequential order that was made in the 2012 proceedings by the same court and on the same day.

Orders Under Appeal

4. The three orders under appeal were made by the High Court (Meenan J.). They are:

(i) the order of 23 October 2019 dismissing the 2013 combined proceedings on the grounds of inordinate and inexcusable delay ('the first appeal');

(ii) the order of 17 December 2019 made under the 'slip rule' wherein the judge amended the 23 October order made in the 2013 combined proceedings so as to reflect, more accurately, his judgment in the matter ('the second appeal');[1] and

(iii) the order of 23 October 2019 reinstating a motion to dismiss the 2012 proceedings on the grounds that they were frivolous and vexatious and, thereafter, granting the relief sought on foot of that motion ('the third appeal').

5. No appeal was brought in respect of an order made by the High Court in the 2011 proceedings wherein the High Court reinstated Mr Kirwan's motion to set aside an order

[1] The amendments in question were made on 17 December 2019.

entering summary judgment against him in the creditor action and, thereafter, refused to grant his application to set that order aside.[2]

6. The first appeal, bearing record number 2019/486, is the core appeal. The second appeal bears record number 2020/14. The third appeal bears record number 2019/485.

7. A brief word about the unsuccessful property transaction that gave rise to the litigation outlined above may be helpful by way of context for these appeals.

The Disputed Property Transaction

8. The relevant facts, as found by Meenan J., are set out in the judgment of the High Court. Mr Kirwan was the owner of property in Wexford town and he wished to have this property developed. To this end, negotiations between himself and Mr Buttle were conducted throughout 2005. Meenan J. noted that Mr Buttle rejected an initial proposal of Mr Kirwan's under which Mr Buttle would pay Mr Kirwan €4,000,000, comprising a €1,000,000 cash payment, with Mr Kirwan retaining property to the value of €3,000,000 in the development, once constructed.

9. An accord was eventually reached and on 5 July 2006, Mr Kirwan and Mr Buttle entered into two agreements. Under the first, Mr Buttle contracted to purchase land from Mr Kirwan subject to Mr Buttle, as purchaser, securing planning permission for the development of the land in question. Under the second, the parties entered into a loan agreement whereby Mr Buttle advanced a loan of €1,000,000 to Mr Kirwan which was to be repaid either when the aforesaid contract was terminated or when planning permission was secured. As security for the loan, a mortgage deed was executed on 5 July 2006 giving Mr Buttle security over certain lands belonging to Mr Kirwan.

[2] Though made on 23 October 2019, the order was also amended on 17 December 2019.

10. One consequence of the 2008 recession was a downturn in the property market. The agreed property transaction did not proceed. The debt that was due to Mr Buttle on foot of the loan was assigned to a company called Filbeck Limited,[3] of which Mr Buttle was and is a Director.

11. Mr Kirwan disputes the above account of what transpired and criticises Mr Buttle for not applying for planning permission in respect of the agreed development. His objections to the contract and to the reliability of the documents evincing the property agreement are woven into his claims before the High Court and before this Court. A central complaint in the litigation is that the firm of solicitors (the second named respondent herein) that represented Mr Kirwan, as vendor, in the failed property transaction also represented Mr Buttle, as purchaser, thereby creating a conflict of interest. He complains that whereas Mr O'Leary, solicitor (the eighth named respondent) acted for Mr Buttle, he, the appellant. was assigned Ms Connors, a legal executive with the firm and the first named respondent herein.

The Litigation

The 2011 'Creditor' Action - Filbeck Limited v. Brendan Kirwan [2011] 4998S

12. On 30 November 2011, and prior to the institution of any proceedings, Mr Buttle's legal advisors, Arthur Cox, wrote to Mr Kirwan's solicitors formally putting them on notice of the fact that Mr Buttle intended to assign, absolutely, all his rights under the aforesaid agreement to Filbeck Limited (hereinafter 'Filbeck').[4]

13. Shortly thereafter, on 20 December 2011, the proceedings bearing the record number 2011/4998S were commenced by way of Summary Summons served upon Mr Kirwan by which Filbeck sought to recover what it claimed was an outstanding sum of €980,000 plus

[3] See para. 19 of Mr Buttle's affidavit sworn 22 February 2013 in the context of the 2012 proceedings.
[4] In fact, on 4 June 2008, Mr Buttle had orally assigned his interest in the loan agreement to Filbeck. Mr Kirwan had acknowledged this assignment in a letter dated 21 July 2009. See para. 19 of Mr Buttle's affidavit sworn 22 February 2013.

interest. Mr Kirwan did not enter an Appearance but, as shall be seen (at para. 17 below), did institute separate proceedings against Mr Buttle in August of the following year (2012).

14. On 15 November 2012, Filbeck secured judgment against Mr Kirwan in the sum of €1,056,936 in the 2011 creditor action.

15. On 4 December 2012, Mr Kirwan issued a motion seeking to have that judgment set aside. In reply, Mr Buttle filed an affidavit on behalf of Filbeck resisting the application. The motion was due to be heard in the non-jury list on 5 December 2013. However, Mr Kirwan, in an affidavit sworn on 27 May 2013, averred that '*[i]t would be inappropriate to proceed with this [2011] case until the outcome to Plenary Case 2013 5514p is known*.'

16. Then, when the matter was in the non-jury list on 5 December 2013, the High Court made an order directing that Mr Kirwan's motion would be heard at the same time as other proceedings which he had instituted in May 2013 against several defendants of whom Mr Buttle was one (see below at para. 21). Effectively, the motion to set aside judgment in the creditor action was adjourned, generally, to the hearing of the 2013 proceedings.

***The 2012 'Buttle' Action - Brendan Kirwan v. Eamonn Buttle* [2012] 2995 S**

17. As noted above, Mr Kirwan, on 8 August 2012, instituted proceedings by way of Summary Summons (record no. 2012/2995S) against Mr Buttle. He sought an order granting him judgment in the sum of €3,000,000, being the amount allegedly due and owing to him on foot of what he describes as the 'contract' dated 9 May 2006.[5] Mr Kirwan also sought an order granting him judgment against the defendant in the sum of €20,000 that was said to be due and owing to him on foot of a loan.

[5] The details of this 'contract' match the undated memo entitled '*Details of Agreement*' referred to in the High Court judgment.

18. Mr Buttle, on 25 February 2013, sought an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts ('RSC') dismissing or staying the 2012 proceedings as disclosing no reasonable cause of action. Alternatively, he applied, pursuant to the inherent jurisdiction of the court, to strike out the proceedings on the grounds that they were frivolous and vexatious and/or bound to fail. His application was grounded on an affidavit of 22 February 2013 in which he set out, in detail, his version of events giving rise to the litigation.

19. That application was also due to be heard in the non-jury list on 5 December 2013. Essentially, the court directed that the motions in both the creditor action and the Buttle action were to be adjourned, generally, in order to allow Mr Kirwan to prosecute the 2013 combined proceedings.

20. It appears that, thereafter, no further steps were taken in the 2012 proceedings until in or about November 2018 (see para. 27 below).

The 2013 'Combined' Action - Brendan Kirwan v. Marguerite Connors & Others

21. Long before then, however, a third set of proceedings, bearing record number 2013/5514P, had been commenced by way of Plenary Summons dated 30 May 2013. The 2013 proceedings essentially '*combined*' Mr Kirwan's objection to judgment having been entered against him in the 2011 creditor action with his claim against Mr Buttle in the 2012 proceedings. In addition, Mr Kirwan, in the 2013 proceedings, makes several claims against the solicitors who were involved in the failed property transaction.[6]

[6] In the 2013 proceedings, Mr Kirwan sought numerous reliefs, including, damages against MJ O'Connor Solicitors for loss occasioned by reason of professional negligence, breach of duty and breach of contract, as well as various other declaratory reliefs against that defendant, its solicitors and employees. He also sought judgment in the sum of €3,000,000 against Mr Buttle for breach of contract plus the return of a €20,000 loan to Mr Buttle. Further, he claimed damages against Filbeck and its directors for fraudulent claims and attempts to extort monies plus an order striking out the judgment it had obtained against Mr Kirwan in the 2011 action. He sought an order removing a charge/lien on certain property belonging to him together with a host of other orders and reliefs.

22. In the combined proceedings, the first named defendant is Marguerite Connors, a legal executive who worked with the firm of MJ O'Connor Solicitors, the second named defendant therein. She had assisted Mr Kirwan in the lead up to the disputed property agreements of July 2006 and she had retired in 2008. Solicitors, John O'Leary and Brid O'Leary, the eighth and ninth named defendants, both worked with the same firm. I shall refer to the first, second, eighth and ninth defendants, collectively, as the 'solicitor' defendants or respondents.

23. The third and the fourth named defendants are Eamonn Buttle and Filbeck. The remaining defendants – the fifth, sixth and seventh named defendants – are Directors of Filbeck. I shall refer to these defendants, collectively, as the 'Buttle' defendants or respondents.

24. Once the motions in the 2011 creditor action and 2012 Buttle proceedings had been adjourned on 5 December 2013 (see para. 19 above), it would appear that, apart from serving a Notice for Particulars dated 10 January 2014 on the Buttle defendants, Mr Kirwan took no further steps for several years to progress the 2013 combined proceedings.

Subsequent Procedural Steps

25. Several years later, on 17 August 2018, the Buttle defendants brought a motion pursuant to O. 122, r. 11 RSC and/or the inherent jurisdiction of the Court, seeking to have the 2013 proceedings dismissed for want of prosecution.

26. In addition, since no steps had been taken by Mr Kirwan to prosecute the 2012 action, Mr Buttle sought to re-enter his adjourned motion[7] in that case seeking to have Mr Kirwan's claim against him struck out for being frivolous and vexatious.

27. On 13 November 2018, Mr Kirwan issued two motions in the 2012 action wherein several orders were sought. These orders included an order to strike out Mr Buttle's defence

[7] This motion was made returnable to 19 November 2018.

for '*want/lack of fact and truth*' and an order to strike out the Mr Buttle's re-entered motion that had been brought on the basis of the action being frivolous and vexatious.

28. On the same day, Mr Kirwan brought a motion in the 2013 proceedings, seeking *inter alia* an order striking out the defence of the Buttle defendants for '*want/lack of fact and truth*' and '*want/lack of procedure*'.

29. On 15 November 2018, the solicitor defendants then issued a motion pursuant to O. 122, r. 11 RSC and/or the inherent jurisdiction of the Court, also seeking to have the 2013 proceedings dismissed for want of prosecution. Additionally, or in the alternative, they sought an order striking out the 2013 case or, in the alternative, the case against them, on the grounds that it was bound to fail.

30. On 5 April 2019, Mr Kirwan issued a Notice of Motion seeking *inter alia* an order directing that his son, Barry Kirwan, may be entered as his Next Friend in the 2013 proceedings.

31. The defendants' applications to strike out the 2013 proceedings for want of prosecution were heard before the High Court over three days on 15, 16 and 17 May 2019. It is from the orders made on foot of those applications, including, a consequential order for the 2012 proceedings that flowed therefrom, that Mr Kirwan brings these appeals. To the High Court judgment in the first or core appeal I now turn.

The High Court Judgment

32. On 2 September 2019, Meenan J. delivered judgment in the matter ([2019] IEHC 954).

33. Having set out, briefly, the background to the 2013 proceedings, the trial judge turned to the relevant documentation that was exhibited during the hearing. This included:

(a) an unsigned and undated memo entitled '*Details of Agreement*', which stipulated the terms under which Mr Kirwan proposed to sell certain property to Mr Buttle;

(b) a contract for the sale of the land, dated 5 July 2006, signed by Mr Kirwan and Mr Buttle;

(c) a letter signed by Mr Buttle and Mr Kirwan, dated 5 July 2006, in which the terms of a loan from Mr Buttle to Mr Kirwan were set out;

(d) an indenture of mortgage dated 5 July 2006 securing the aforesaid loan;

(e) a letter dated 20 April 2009, signed by Mr Kirwan, in which he stated that the contract of 5 July 2006 was terminated and that he was not in a position to repay the money received in 2006 but that he was in a position to offer Mr Buttle property '*in lieu*' of the debt that was due to him; and,

(f) a letter dated 21 July 2009 signed by Mr Kirwan wherein he stated that he had received the sum of €1,000,000 in 2006 and that, as the sale was rescinded, he owed Mr Buttle €1,000,000. In that letter, Mr Kirwan also confirmed that he had agreed and accepted that this debt was assigned to Filbeck and that he had paid the sum of €20,000 to that company, thereby reducing the outstanding debt to €980,000.

34. It is important to observe at this point that the trial judge noted that the litigation which followed the failed property project which was the subject of the contract of 5 July 2006, encompassed not only the 2013 proceedings that were before him, but also the 2011 and the 2012 proceedings.

35. As against the solicitor defendants, Meenan J. noted that Mr Kirwan claimed: (i) that the document of 5 July 2006 did not reflect the true nature of the transaction in issue; and (ii) that those defendants had committed fraud and/or forgery because he, Mr Kirwan, was on holiday in France on 5 July 2006 and could not, therefore, have signed either the contract or the mortgage deed. The trial judge noted that the fraud/forgery claim did not appear in the original claim but was added at a later stage.

36. As against the Buttle defendants, the trial judge (at para. 11 of his judgment) described the claim in the following terms:

> "*The plaintiff's claim against the other defendants (the Buttle/Filbeck defendants) are (sic) a repeat of the claim made in the 2012 proceedings. Further, the plaintiff claims an order 'striking out' the judgment obtained in the 2011 proceedings and that those proceedings were 'frivolous and vexatious'. Therefore, essentially, these proceedings combine both the 2012 proceedings and the plaintiff's objections to the fourth named defendant having obtained judgment in default of appearance in the 2011 proceedings.*"[8]

37. The trial judge then considered Mr Kirwan's application to permit his son to make submissions on his behalf. It was alleged that Mr Kirwan suffers from a degree of dyslexia which made it difficult for him to present his case. A medical report was submitted to support this assertion. Meenan J. did not consider that the medical report, which was brief and several years old, was sufficient evidence, in and of itself, upon which to grant the application. He therefore, directed the doctor who had authored the report to attend court in order to give direct evidence. Dr Michael Reardon testified that Mr Kirwan has dyslexia and, as a result, has difficulty reading and writing. Having regard to the fact that the application to dismiss on the grounds of delay involved numerous affidavits and exhibits, the High Court was satisfied that there were '*exceptional circumstances*' such as would justify permitting Mr Kirwan's son to address the Court on his father's behalf.

38. The trial judge set out a chronology of steps taken by the parties in the 2013 combined proceedings. The final event in those proceedings, he noted, was the delivery of the defence by the Buttle defendants on 6 December 2013. He concluded, therefore, that Mr Kirwan had taken no steps to prosecute those proceedings in the six intervening years.

39. In coming to his decision, Meenan J. considered the application in the light of two authorities on the Court's jurisdiction to dismiss proceedings for want of prosecution, namely,

[8] Emphasis here and throughout the judgment is mine unless otherwise indicated.

Primor PLC v. Stokes Kennedy Crowley [1996] 2 IR 459 ('*Primor*'), and *Flynn v. Minister for Justice* [2017] IECA 178 ('*Flynn*'). The common principles identified in *Primor* and *Flynn* provide that where a party seeks a dismissal of proceedings for want of prosecution, it must establish that there was both inordinate delay and that such delay was inexcusable. Moreover, where the Court is satisfied that such inordinate and inexcusable delay has been established, it must then proceed to consider whether the balance of justice lies in dismissing the case or in allowing it to proceed.

40. In the light of the above the High Court, in this case, considered:

(i) whether the delay in issue in the 2013 proceedings was inordinate;

(ii) whether, in the light of the two '*excuses*' put forward by Mr Kirwan, such delay was excusable;

(iii) what the balance of justice required;

(iv) whether there was any culpable delay on the part of the defendants; and

(v) the personal and social background of the person bringing the proceedings.

41. On the basis of this Court's judgment in *Flynn*, Meenan J. was satisfied that, in considering inordinate and inexcusable delay, the Court may also bear in mind that a delay in the issuing of proceedings creates an obligation to proceed, thereafter, with due expedition. Meenan J. was satisfied that the delay in this case was inordinate.

42. As to the '*explanations*' put forward for the delay, Mr Kirwan submitted that he had served a Notice for Particulars on the Buttle defendants on 10 January 2014 and that they had failed to respond thereto. This, in the trial judge's view, was not a valid excuse for the ensuing delay, for several reasons. First, he noted that the deponent on behalf of the solicitor defendants, Mr Peter Kiely, had stated that there was no record to confirm that those defendants had ever received the aforesaid Notice for Particulars. Irrespective of this, he considered it '*most surprising*' that, in the five and a half years that followed service of said Notice, Mr

Kirwan had not followed up, whether by way of a reminder letter or a motion seeking to compel replies to particulars.

43. A further excuse proffered by the plaintiff for the delay in prosecuting the proceedings was the fact that he had been awaiting receipt of the file from a former solicitor who had been instructed by him at an earlier stage in the proceedings. The judge observed that the solicitor defendants' deponent, Mr Seamus Turner, confirmed that the *original* file had been returned to Mr Kirwan in April 2017 and that, long before then, a *copy* of the entire file had been sent to Mr Kirwan's then nominated solicitor in April 2010. The original file had been retained, Mr Turner averred, because there were outstanding issues relating to undertakings given by the solicitor defendants. In support of his averment, Mr Turner exhibited a letter to Mr Kirwan's former solicitors enclosing a copy of the file. In light of this evidence, the trial judge considered that the second reason offered by Mr Kirwan for the alleged delay in the proceedings was not valid. The Court was satisfied that Mr Kirwan had been guilty of both inordinate and inexcusable delay in prosecuting the 2013 proceedings.

44. The High Court judge then proceeded to consider where the balance of justice lay. He noted that serious allegations of professional negligence and fraud had been made against the solicitor defendants. In his view, they were entitled to have those serious claims determined reasonably expeditiously and that this had not occurred. Having regard to: (i) Ms Connors' retirement in 2008; (ii) Ms Connors' ill health; and (iii) the general diminution in a person's ability to recall events over time, the judge was satisfied that the solicitor defendants had suffered prejudice and that this produced a significant risk of an unfair trial.

45. As to the Buttle defendants, the High Court judge was satisfied that they, too, had suffered prejudice. He observed that, pending the outcome of these (2013) proceedings, Filbeck had been unable to execute the judgment it had obtained against Mr Kirwan. Moreover, in view of the fraud allegation that had been made against them – an allegation that

was damaging to their reputation and standing – the judge considered that the Buttle defendants were entitled to an expeditious determination of the claims against them.

46. Moreover, the High Court judge was satisfied that, for their part, the defendants had not been guilty of any culpable delay. Nor, in his view, could it be said that either set of defendants had implicitly encouraged Mr Kirwan to incur further expense in pursuing his claims. Additionally, he had regard to the principle, identified by Irvine, J. (as she then was) in *Flynn* (at para. 19(15), that the Court must bring to its considerations '*a necessary sensitivity to the personal and social background of persons who present before them*'. The trial judge found that the proceedings before him were based on a failed commercial venture and he was satisfied that there was no factor that would warrant the exercise of the Court's discretion in favour of Mr Kirwan.

47. Having considered the facts of the case and the legal principles relevant thereto, the trial judge decided to grant the defendants' applications to dismiss the proceedings for want of prosecution.

48. Of particular note, Meenan J. considered that the dismissal of the 2013 proceedings had consequences for the 2011 creditor action and for the 2012 Buttle action. He stated (at para. 28 of his judgment): '*Having dismissed these proceedings, there are consequential orders that are required to be made in both 2011 and 2012 proceedings*'. The judge indicated that he would hear the parties in respect of such orders. He did so on 23 October 2019 and, on that date, final orders were made. Before that date, however, other events unfolded.

Subsequent Applications and Hearings

Mr Kirwan's Application to Correct Alleged Errors

49. On 18 September 2019, Mr Kirwan issued a motion pursuant to O. 28, r. 11 RSC, in which he sought to correct certain errors in the High Court judgment. Order 28, r. 11 RSC,

provides, *inter alia*, for the correction of clerical errors in judgments and orders and such corrections are made under what is sometimes referred to as the 'slip rule'. It stipulates:

"*Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected without an appeal:*

(a) where the parties consent, and with the approval of the Court, by the registrar to the Court,

(i) on the application to the registrar in writing of any party, to which a letter of consent to the correction from each other party shall be attached or

(ii) on receipt by the registrar of letters of consent from each party; or

(b) where the parties do not consent, by the Court,

(i) on application made to the Court by motion on notice to the other party or

(ii) on the listing of the proceeding before the Court by the registrar on notice to each party."

50. Grounding his application Mr Kirwan swore an affidavit on 17 September 2019, setting out the matters in the judgment of the High Court which, in his view, required to be corrected by means of the 'slip rule'. The alleged errors made by the trial judge were stated to be as follows:

(i) the trial judge had mischaracterised Ms Connors as a solicitor rather than a legal executive and had failed to acknowledge that any legal work prepared by her could not be '*recognised and or condoned and or relied upon*' by the Court;

(ii) the trial judge's statement that the proceedings were not issued until seven years after the subject matter of the proceedings occurred, did not take into account the fact that, until September 2010, Mr Kirwan had himself been the subject of a legal action instituted by MJ O'Connor Solicitors;

(iii) the trial judge's finding that the '*plaintiff took no step to prosecute these proceedings since December 2013 some six years ago*' did not reflect that, in this period, there were three '*separate notices for particulars outstanding*';

(iv) the trial judge had depicted in a '*misleading and false*' manner, that the outstanding file (the one at issue in the second '*excuse*' offered for the delay) had been given to him, in full, in 2010;

(v) the trial judge had described him (Mr Kirwan) approaching Mr Buttle about a deal when, in fact, it was Mr Buttle who had instigated the scheme; and

(vi) the trial judge had erred in stating that he, Mr Kirwan, had signed documents in July 2006, when this would have been impossible for him to do given that he was on holiday in France at the time.

51. On 9 October 2019, Meenan J. adjourned Mr Kirwan's application under the 'slip rule' for a period of two weeks to afford the defendants an opportunity to reply.

52. On the same day, the Buttle defendants indicated that they wished to bring their own application to 'renew' the judgment secured by Filbeck in the 2011 creditor action and have that served upon Mr Kirwan the following week.

The 23 October 2019 Hearing

53. On 23 October 2019, a further hearing took place before the High Court. The trial judge (Meenan J.) confirmed that he would amend paragraph 9 of the High Court judgment, which was still in unapproved form, so that it recorded that Ms Connors, the first name defendant, was, in fact, a legal executive and not a solicitor. The judge stressed, however, that the fact that Ms Connors was not a solicitor did not '*materially alter in any way*' his conclusion that the proceedings should be dismissed for want of prosecution. He refused to hear Mr Kirwan's application any further stating:

> "*I am not hearing your motion because I do not regard your motion in any way relevant and also, given the fact that I reached the judgment in the matter which is entirely clear, your motion is of absolutely no relevance whatsoever, so I am not hearing the motion*."[9]

[9] Transcript, 23 October 2019, page 6, lines 19-23.

54. During the course of the 23 October hearing, Mr Kirwan, on several occasions, argued that he had been deceived and that he had fees stolen from him, namely, legal fees which he had paid for Ms Connors' assistance. This, he alleged, was contrary to '*the Solicitors Acts*' and '*many other laws including the Criminal Justice Acts…*'[10] and, in his view, rendered void, from the beginning, every document upon which reliance was placed. Meenan J. reiterated that he had already made his determination on the matter of the status of Ms Connors as a legal executive. Later in this judgment, I shall consider, in greater detail, the hearing of 23 October 2019 for the purpose of outlining the background to and context of the second appeal.

55. The Court then considered the application of Filbeck, brought pursuant to O. 42, r. 24, RSC, to execute the judgment it had secured in the 2011 creditor action. The trial judge granted leave to execute that judgment observing that it had been entirely appropriate for Filbeck to have desisted from executing the judgment pending the outcome of the 2013 proceedings.

56. Noting that the 2011 creditor action and the 2012 Buttle proceedings were both '*combine[d]*' in the 2013 action, Meenan J. considered that, as the outcome of the 2013 proceedings was now known (namely, that they had been struck out), it followed that the 2012 Buttle action and Mr Kirwan's motion to set aside the judgment obtained in the 2011 creditor action should also be struck out. The trial judge also dismissed Mr Kirwan's motion on the 'slip rule' but made no order in respect of costs in that application.

57. Arising from the above, four orders were made by the High Court on 23 October 2019. These were:

- an order dismissing the 2013 combined action pursuant to O. 122, r. 11 RSC, and awarding the defendants the costs of the applications to dismiss and the costs in defending the 2013 proceedings;

[10] Transcript, 23 October, page 19, lines 9-10.

- an order that the defendant (Mr Buttle) be at liberty to re-enter the motion to strike out the 2012 action as being frivolous and vexatious and an order granting the relief sought on foot of that motion with costs in favour of the defendant;
- an order granting Filbeck leave to execute the judgment it had obtained in the 2011 creditor action in the sum of €1,056,936.00 against Mr Kirwan plus interest in the sum of €76,936.00; and
- an order re-entering and refusing Mr Kirwan's motion to set aside the judgment obtained by Filbeck in the 2011 creditor action with costs of the proceedings in favour of Filbeck.

The Defendants' 'Slip Rule' Application

58. On 17 December 2019, both sets of defendants sought various corrections, under the 'slip rule', to the above orders that were made on 23 October 2019. The following was outlined to the Court:

- First, counsel for the Buttle defendants indicated that the motion brought on behalf of the *solicitor* defendants to dismiss the 2013 proceedings was not mentioned in the order. Moreover, whereas the order recorded that the Court had acceded to the application of the *Buttle defendants* to dismiss the 2013 proceedings, it had not mentioned that the case against the *solicitor defendants* had also been dismissed;[11]
- Second, counsel for the solicitor defendants noted that the order failed to stipulate that Mr Kirwan was to pay the costs of all of the Buttle defendants and the solicitor defendants;[12]
- Third, counsel for the solicitor defendants indicated that whereas it was recorded that the order to dismiss was made pursuant to O. 122, r. 11 RSC, it should, in fact, have

[11] Transcript, 17 December 2019, page 2, lines 11-26.
[12] Transcript, 17 December 2019, page 9, lines 6-9.

stated that it was made pursuant to the inherent jurisdiction of the Court. On this point, counsel referred to para. 16 of the High Court judgment which had considered the '*jurisdiction to dismiss…for want of prosecution*' and in which the trial judge had stated that he would rely on the authority of *Primor*. The principles cited therein, it was submitted, related to the inherent jurisdiction of the Court to dismiss proceedings for inordinate and inexcusable delay, as distinct from O. 122 RSC;[13] and,

- Fourth, counsel for the solicitor defendants contended that amendments to the paragraph in the judgment that referred to Ms Connors as a 'solicitor' were needed, so that it correctly recorded that Ms Connors was a 'legal executive' and not a solicitor.[14]

Counsel for the solicitor defendants submitted a draft order for consideration by the trial judge.

59. In respect of the 2011 action, Counsel for the Buttle defendants submitted that the order that was, in fact, made had mistakenly struck out Mr Kirwan's motions of 13 November 2018 (see para. 27 above) which related to the 2012 Buttle proceedings. The order should, in fact, have re-entered Mr Kirwan's original motion of 4 December 2012 (see para. 15 above) seeking to set aside the judgment in the 2011 creditor action and should have dismissed *that* motion.[15] Counsel for the Buttle defendants also provided the Court with a draft order setting out the proposed amendments, which said draft order had been furnished to Mr Kirwan in advance of the hearing.

Decision on 'Slip Rule' Application

60. Having considered the submissions of the parties and the draft orders tendered in support of the applications under the 'slip rule', the trial judge was satisfied that Mr Kirwan was not prejudiced by the Court's granting of the defendants' applications and he ordered that the High

[13] Transcript, 17 December 2019, page 10, lines 3-10.
[14] Transcript, 17 December 2019, page 11, lines 7-10.
[15] Transcript, 17 December 2019, page 4, lines 12-15.

Court orders of 23 October 2019 be amended, accordingly. The (amending) order of 17 December 2019 ordered that the combined 2013 proceedings be dismissed as against all defendants for inordinate and inexcusable delay on the part of the plaintiff (without reference to O. 122, r. 11 RSC) and that the costs of all defendants be awarded against the plaintiff (Mr Kirwan). It further ordered that paragraph 9 of the unapproved draft text of the High Court judgment be amended to reflect that the title of the first named defendant is 'legal executive' and not 'solicitor' as set out in the unapproved draft.

61. As to the 2011 proceedings, the amending order of 17 December 2019 directed that the plaintiff [Filbeck] be at liberty to re-enter Mr Kirwan's motion to set aside the judgment obtained by it in the 2011 creditor action and that the said motion to set aside be refused. The High Court decision in respect of the 2011 proceedings has not been appealed.

62. The High Court's consideration of the applications to amend the orders of 23 October 2019 relating to the 2013 combined proceedings and the decision of 17 December 2019 made by the trial judge on foot thereof, form the subject of the second appeal. I shall, therefore, return to the applications under the 'slip rule' that were before the High Court on 17 December 2019 when I come to consider the second appeal.

The Appeals

63. As noted at the outset, two of the three appeals before this Court arise in respect of the 2013 combined proceedings. The first or core appeal relates to the order dismissing the combined action on the grounds of inordinate and inexcusable delay.

64. The second, mentioned above, relates to the order made by Meenan J. on 17 December 2019 and perfected 18 December 2019, wherein he amended the earlier orders made on 23 October 2019 in the combined action, so as to reflect more clearly his judgment in the matter (the 'slip rule' appeal).

65. The third appeal relates to the 2012 Buttle action. Mr Kirwan seeks to appeal the order (also made by Meenan J. on 23 October 2019) wherein he reinstated Mr Buttle's application to dismiss the 2012 proceedings as being frivolous and vexatious and, thereafter, granted that application.

66. There is no appeal in respect of the order made concerning the 2011 creditor action whereby Meenan J. reinstated Mr Kirwan's motion to set aside the summary judgment obtained against him and, thereafter, refused that motion.

The First Appeal

Grounds

67. The grounds of appeal in the core appeal (2019/486) are extensive and, at times, take the form of arguments and submissions. They may be summarised thus. The High Court judge erred in law and in fact and denied Mr Kirwan due process by allowing, *inter alia*, the defendants to have misled the court by way of false claims, perjury, hearsay, the production of false documents and the deliberate breaking of '*the solicitors acts*'. As a result of this, the Court failed to take '*judicial notice*' of Mr Kirwan's affidavits and submissions and, as a result, they were not considered in the determination of where the balance of justice lay. His motions were refused a hearing, points and facts of law were suppressed or ignored by the trial judge and, as such, his '*constitutional and human right to litigate was denied*'.

68. The court was not apprised of the fact that Ms Connors had given legal advice without a practising certificate, and had prepared documents in breach of '*the solicitors acts*', and was permitted to so do by the second named defendant. Mr Kirwan was denied proper and sound legal advice. Moreover, the fact that the court was not aware of this and that the second named defendant had allowed Ms Connors to act as she did, ensured that a perceived conflict of

interest persisted. This evidence and, therefore, the balance of justice, was ignored by the High Court. This justifies an intervention by the Court of Appeal as *per Lynch v. Cooney & Winkworth* [2016] IECA 1. Ms Connors was a legal executive and not a solicitor. The judge ignored the fact that she was '*impersonating a practising solicitor so as to defraud*' Mr Kirwan. The judge erred in holding that there was no factor that would warrant the exercise of the Court's discretion in Mr Kirwan's favour. He also failed to address the conflict of interest arising from John O'Leary's '*complete control*' over Ms Connors, his employee.

69. The balance of justice was neglected as the judge failed to engage, properly, with the evidence before the court, including with affidavits sworn by Barry Kirwan of 7 June 2019 and 17 September 2019, and certain of Mr Kirwan's legal submissions of 25 April 2019. The trial judge further erred in refusing to clarify or accept that '*the solicitors acts*' applied. Mr Kirwan was prejudiced when on 23 October 2019, the judge refused to hear his motion on the 'slip rule' application to correct or amend factually incorrect statements in the court record.

70. The judge erred in finding that the '*lapse of time*' had prejudiced the defendants. He neglected the balance of justice when he allowed '*the breaking of the law*' on the part of the defendants to be covered up. There were several errors of fact in the High Court judgment, such as, the trial judge's statements (at para. 1) that initially the plaintiff had made a proposal that Mr Buttle would pay €4,000,000 in respect of the properties (that is, a €1,000,000 cash payment with Mr Kirwan retaining property to the value of €3,000,000 in the development, once constructed). It is contended that this statement is false by reference to exhibit number two of the second named defendant's affidavit of 8 November 2019.[16] Paragraph 4 of the High Court judgment also contains a false statement relating to the date Mr Buttle assigned his legal rights to Filbeck. It is stated that *'in the letter of 21 July 2009*', the third named defendant assigned his legal rights under said loan agreement to the fourth named defendant. As Mr

[16] Exhibit number two is Mr Kirwan's own affidavit.

Buttle only assigned his legal rights under the loan to Filbeck in 2011, the judge erred in failing to give due regard to this point.

71. Meenan J. further erred in law by refusing to hear Mr Kirwan's motion to set aside the summary judgment secured by Filbeck against him in the creditor action. This infringed his right to a fair hearing. The judge attempted to disadvantage him in his capacity as a lay litigant and demonstrated an '*unacceptable and undue bias*' in favour of the defendants. The existence of contradictory evidence exhibited in John O'Leary's affidavit of 8 November 2019 undermined '*the entirety of the Buttles [sic] false claims made throughout the trial*'. The contradictions include discrepancies over the intention as to the €4,000,000 and disagreements over various dates relating to the contracts entered into between the parties.

72. The trial judge also erred in law in resisting the attempts made by Mr Kirwan to have the solicitors' files put before the Court which would confirm the €4,000,000 price for his property. Finally, the trial judge erred in law in failing to accept that the alleged mortgage transaction was fraudulent and fully voidable given that Mr Kirwan did not receive proper legal advice, and in failing to ascertain whether documents relied on by the defendants were authentic in circumstances where there were '*so many question marks*' over whether they had been executed by Mr Kirwan. The contracts allegedly signed and witnessed on 5 July 2006 could not have been entered into by Mr Kirwan as he was in France at that time. There was no basis for the second named defendant's contention that the contracts were pre-signed in April 2006 and kept in escrow until a mortgage was, allegedly, vacated.

Response

73. The solicitor respondents' notice (dated 18 December 2019) may be summarised thus. The High Court judge correctly found that the delay was inordinate in circumstances where Mr Kirwan only initiated these proceedings in 2013 in respect of events that occurred in 2006 and

where he took no step in the proceedings until after the motion to strike out for want of prosecution had issued. The trial judge correctly found that the delay was inexcusable where the two excuses offered by Mr Kirwan were unsubstantiated.

74. There are four grounds as to why the trial judge correctly found that the balance of justice lay in striking out the proceedings:

(a) that as professional persons facing serious allegations affecting their professional standing, they were entitled to have the claims against them determined reasonably expeditiously, which had not happened;

(b) that there was a significant risk of an unfair trial and prejudice where the events giving rise to the proceedings were remote in time having occurred in 2006 and where the first named respondent had retired in 2008;

(c) that there was no culpable delay on their part; and

(d) that the proceedings arose from a commercial venture where there were no factors relevant to social background that would warrant the exercise of the Court's discretion in favour of Mr Kirwan.

75. The solicitor respondents say that Mr Kirwan misconceives the basis for the judgments and orders appealed against, mistakenly believing that the High Court erred in failing to address the substance of his allegations where those allegations were not before the Court. The application in question was their application to strike out the proceedings for want of prosecution. It did not concern the substance of Mr Kirwan's case against them. Mr Kirwan's claim that he was denied a fair hearing should be rejected given that the hearing lasted three days during which he was, at all times, present.

76. The Buttle respondents' Notice (dated 7 February 2020) in relation to the main appeal adopts a similar position to that of the solicitor respondents' Notice with some minor additions. The Buttle respondents note that an additional factor supporting the conclusion that the balance

of justice lay with striking out proceedings was that, as a collateral effect of Mr Kirwan's delay, Filbeck had been prevented from enforcing the judgment it obtained in the creditor action against Mr Kirwan.

Legal Principles on Delay

77. The issue to be determined in the core appeal is whether there is any basis upon which this Court should interfere with the trial judge's findings that the delay in prosecuting the 2013 proceedings was both inordinate and inexcusable and that the balance of justice lay in favour of striking out those proceedings for want of prosecution.

The 'Primor' Test

78. The principles applicable to an application to dismiss for want of prosecution due to inordinate and inexcusable delay are well settled. The seminal judgment of Hamilton C.J. in *Primor* offers guidance concerning the approach to be adopted when considering such an application. The *Primor* test was summarised succinctly by Irvine J. in *Millerick v. Minister for Finance* [2016] IECA 206 ('*Millerick*') wherein she stated (paras. 18-19):

> "*The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.*
>
> *In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as*

delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay."

Factors in Assessing the Balance of Justice

79. As noted above by Irvine J. in *Millerick,* the Court must not dismiss the proceedings unless it is satisfied that the balance of justice would so require. A non-exhaustive list of factors that the Court is entitled to take into consideration and to which it may have regard when determining the balance of justice is to be found in the *Primor* judgment (at p. 475-476). These include:

(i) the implied constitutional principles of basic fairness of procedures;

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action;

(iii) any delay on the part of the defendant — because litigation is a two-party operation, the conduct of both parties should be examined;

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay;

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case;

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant; and

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and may be other than that merely caused by the delay, including, damage to a defendant's reputation and business.

These factors to which the Court is entitled to have regard when considering where the balance of justice lies are not to be treated as '*distinct cumulative tests*' but rather as '*related matters affecting the central decision as to what is just*' (see *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 IR 510 ('*Anglo Irish Beef*').

80. The *Primor* principles have been considered and applied in numerous cases since they were first articulated, including in *O'Connor v. John Player & Son Ltd* [2004] IEHC 99, *Gilroy v. Flynn* [2004] IESC 98 ('*Gilroy*'), *Manning v. Benson Hedges Ltd* [2004] IEHC 316 *(*'*Manning*'), *Stephens v. Paul Flynn Limited* [2005] IEHC 148, as well as [2008] IESC 4, *Quinn v. Faulkner t/a Faulkner's Garage & Anor* [2011] IEHC 103 ('*Quinn*'), and *Comcast International Holdings Inc. v. Minister for Public Enterprise* [2012] IESC 50.

81. In *Stephens v. Flynn* [2008] IESC 4 ('*Stephens*'), Kearns J. considered that even moderate prejudice could justify the dismissal of proceedings when considering the balance of justice in any given case. The public interest in the timely administration of justice under Article 34.1 of the Constitution and the fact that there should no longer be an '*endless indulgence*' towards delay on the part of the Courts was recognised by Hogan J. in *Quinn*.

82. A separate and distinct basis for the Court to exercise its inherent jurisdiction is to be found in a line of jurisprudence that places the emphasis more on the idea of unfairness to the defendant rather than the '*balance of justice*' (see, for example, *O'Domhnaill v. Merrick* [1984] IR 151 ('*O'Domhnaill'*); *Toal v. Duignan* (No. 1*)* [1991] ILRM 135; and *Toal v. Duignan* (No. 2) [1991] ILRM 140). This line of authority has been described by Geoghegan J. in *McBrearty v. North Western Health Board* [2010] IESC 27 ('*McBrearty*') as '*an important and partly overlapping jurisprudence*'.

83. In *Gannon v. Brown* [2019] IEHC 799, O'Regan J. noted the comments of Hardiman J. in *Gilroy* to the effect that the Courts have a heightened consciousness of the possibility of unfairness accruing where an action may be allowed to proceed, in circumstances where there is a dependence on witness testimony and where the cause of action arose at some considerable remove (at para. 18). Article 6.1 of the European Convention on Human Rights ('the Convention') requires that proceedings be prosecuted within a reasonable time. What is reasonable requires, *inter alia*, a consideration of the circumstances of the case and the conduct of the plaintiffs (see *McMullen v. Ireland* App. No. 42297/98, ECHR, 29 July 2004; see also *McFarlane v. Ireland* App. No. 31333/06, ECHR, 10 September 2010).

84. This Court has considered and affirmed the relevant principles on applications to strike out for want of prosecution in several cases, including, *Collins v. Minister for Justice* [2015] IECA 27 ('*Collins*'); *Gorman v. Minister for Justice, Equality and Law Reform & Ors* [2015] IECA 41 ('*Gorman*'); *Cassidy v. The Provincialate* [2015] IECA 74 ('*Cassidy*'); *Millerick*; and *Flynn*.

85. In *Gorman*, even in the absence of specific prejudice to the defendant, a twelve-year delay between the relevant events and the trial of the action was held to warrant the dismissal of the case. In *Cassidy*, the test set by the Supreme Court in *O'Domhnaill* was noted (at p. 158), namely, that a case might be dismissed if there was a real or substantial risk of an unfair trial, or where defending a case would entail an inexcusable and unfair burden. When considering a defendant's role in delay in determining where the balance of justice is to be found, Irvine J., in *Millerick*, noted the distinction between culpable delay and mere inaction of the part of a defendant. She also considered (at para. 32) that where the delay was inordinate and inexcusable, even marginal prejudice may justify a dismissal. However, the absence of proof of prejudice does not necessarily mean there should not be a dismissal of inexcusably

delayed proceedings. The onus rests upon the plaintiff to identify countervailing circumstances that might cancel the effect of the delay.

86. Where there is a delay prior to the institution of proceedings a plaintiff is obliged to proceed with expedition (see *Millerick* at para. 21). Delay, if established, must be shown to be culpable delay and, in this regard, the Court may take into account the conduct of a defendant, including, whether there has been acquiescence in the delay or an implicit encouragement of the plaintiff to incur further expense in pursuing the claim (see *Millerick* at para. 31). Where serious allegations are made that affect a person's professional standing, that person should not have to wait for several years before being afforded an opportunity to clear his or her name (*per Collins* at para. 113, see also *Flynn* at para. 19(10)).

87. In *Tanner v. O'Donovan and Ors* [2015] IECA 24 ('*Tanner*'), this Court affirmed (at para. 22) that it may conduct its own assessment as to whether the proceedings should be struck out for inordinate and inexcusable delay. Hogan J. stated that:

> "*[t]he jurisdiction of this Court in cases concerning substantive decisions – such as those dismissing actions for reasons of undue delay and want of prosecution – is not confined to those cases where an error of principle has been shown and that this Court is free to exert is own independent judgment in the matter. It will, of course, pay particular heed to the manner in which the High Court has exercised its own discretion in cases of this kind.*"

88. Finally, articulating what the court must do, McKenchie J. in *Mangan v. Dockeray* [2020] IESC 67 ('*Mangan*') stated at para. 128:

> "*[T]he court must ask whether, in all the circumstances, even where the plaintiff is entirely exonerated from blame and even where the statute cannot be successfully pleaded, nonetheless it would still be patently unjust to require a defendant to defend such proceedings in light of the period of delay and the intervening circumstances so adjudged to have occurred.*"

Discussion

A Necessary Clarification

89. It is important to stress, at the outset, that, in this appeal, this Court is confined to reviewing, in the light of the above principles, the trial judge's decision that the 2013 proceedings should be dismissed for want of prosecution. It must, therefore, review whether there is any basis upon which this Court could and should set aside the finding that the delay in the case was inordinate, that it was also inexcusable and that the balance of justice lay with striking out the proceedings.

90. Before proceeding to conduct that review, however, it is necessary that I address a misconception under which Mr Kirwan appears to labour and to clarify, precisely, the nature of the assessment undertaken by the High Court when examining applications to dismiss on the grounds of delay.

91. In his lengthy submissions of 14 September 2020, the appellant does not engage, to any real extent, with the question as to whether the trial judge erred in finding that the delay was inordinate. His arguments relate to and range over several claims: that no consideration was given to him (and his next friend) as '*[l]ay litigants against the full might of teams of lawyers*'; that '*demonstrable bias*' was shown in favour of the solicitor defendants; and that there was '*no proper engagement with the evidence*' by the trial judge. He also complains that: the trial judge '*wrongfully permitted*' an '*[eleventh] hour*' filing of an additional affidavit by Mr O'Leary to '*shore up some glaring hole or deficiency*' in the defendants' case; the judge never asked why Ms Connors did not file an affidavit given her role in the case; the judge failed to inquire as to whether there was a '*conflict of interests*' or why the defendants had failed to comply with an order for discovery that had been made on 4 March 2013 by Cross J. against all defendants; the judge accepted '*without a whit of proof*' that Ms Connors was unwell but required his (the appellant's) doctor to testify as to his (Mr Kirwan's) dyslexia. Moreover, the

appellant complains that no proof of service justifying the judgment granted in the 2011 creditor action was produced. '*[A] measure of tolerance and forbearance*' must be given to lay litigants who demonstrate a determination to articulate their case in the absence of legal advice. The '*obfuscation*' of the defendants should have been condemned rather than rewarded on the basis that '*a long-standing open case*' may damage their professional reputations.

92. The appellant proceeds to cite various cases which he submits represent the law on fraud, on the non-enforcement of illegal contracts and on the '*improvident transaction*' and '*inherent conflict*' that arises where solicitors act for both vendor and purchaser.[17] He complains at length throughout his submissions about the fact that the trial judge, in his view, had not given proper attention to the fact that Ms Connors was not, in fact, a solicitor but was, rather '*impersonating a practicing [sic] Solicitor so as to defraud [the appellant] and unlawfully divest him of his property*'.[18] She had given '*legal advice*' and '*prepared documents in breach of the solicitors acts without a practicing certificate [sic]*'. This was '*facilitated'* by her boss, John O'Leary, who had permitted this to happen and who had thereby denied him '*independent and proper and sound legal advice*', making sure that '*this conflict of interest continued*'.[19] He had been '*fobbed off'* to Ms Connors whilst Mr O'Leary had opted to take Mr Buttle, '*the client with the deeper pockets.*'[20] All the defendants were aware of the fact that he was denied access to and proper representation by a fully qualified and practising solicitor.[21] He was deceived into believing that she was a practising solicitor when she was not.

93. The case law cited, Mr Kirwan complains, was disregarded by the trial judge. The court, he said, ought to have defined what a '*potentially improvident transaction*' meant before '*collapsing*' the substantial case.[22] This was all the more important, he contends, when the

[17] Appellant's submissions, page 6.
[18] Appellant's submissions, page 14.
[19] Appellant's submissions, page 13.
[20] Appellant's submissions, page 7.
[21] Appellant's submissions, page 9.
[22] Appellant's submissions, page 6.

contract was dependent on Mr Buttle applying for planning permission for the remainder of the transaction, something which he never did. His failure to do so should have been within his solicitor's knowledge but this is where the '*inherent conflict and improvident transaction becomes a reality.*'[23] This reality and all that constituted the backdrop to it, were matters that could have been established by discovery. The '*hard drive of the computers of both O'Leary and Connors would have revealed the dates when documents were actually created*'. The trial judge grossly erred or ignored the law by failing and/or refusing to accept or understand the key component or element in the case.[24]

94. The appellant's submissions recite his account of the various motions and applications on the 'slip rule' that followed the delivery of the judgment. He complains that a large volume of evidence was withheld from him and from the High Court. Documents relevant to '*the confirmed intent of the €4million sale*' were all within the Buttles' files but were concealed or suppressed by '*all respondents*'.[25] He complains about the respondents' contention on affidavit that he and Mr Buttle entered contracts on 5 July 2006. When '*contrary evidence*' showed that he was in France at this time and could not have witnesses or signed any document, Mr O'Leary then '*backtracked*' and swore that all documents were pre-signed in April 2006 and kept in escrow until a mortgage was allegedly vacated.[26] He submits that the date of execution of legal documents cannot be interfered with and the trial judge erred in failing to ascertain whether the alleged documents were even authentic when so many '*question marks*' remain over whether same were ever executed by the appellant and where same are '*quite likely forged*'.[27] He complains about the errors of fact in the High Court judgment which the judge refused to correct by refusing to hear his motion brought pursuant to O. 28, r. 11 of the RSC.

[23] Appellant's submissions, page 6.
[24] Appellant's submissions, page 10.
[25] Appellant's submissions, page 16-17.
[26] Appellant's submissions, page 17-18.
[27] Appellant's submissions, page 18.

He says that no motion or affidavit was served or filed by the defendants, and the judge nevertheless entertained their motion to correct errors in perfected orders.[28]

The Nature of a Motion to Dismiss

95. It is clear from the appellant's extensive submissions that many of his complaints arise from the fact that he believes that his case – the merits thereof and the background thereto – was not 'heard' by the trial judge. He considers that the motion to dismiss for want of prosecution was granted without the judge having had regard to all the circumstances that pertained to the creation of the contract over the failed property project, and those associated with the same firm of solicitors acting for both vendor and purchaser. I have set out in some detail the substance of his submissions in this regard notwithstanding their divergence from the central question in issue before this Court in the first appeal. I have done so lest Mr Kirwan persist in his belief that he has still not been heard. This Court has, indeed, '*heard*' all of his complaints about how the High Court approached the matters before it.

96. The fundamental thrust of Mr Kirwan's submission is that the trial judge ought to have considered the full facts of the case – the background to the failed property transaction, the true terms agreed in respect of the development contract, and the alleged conflict of interest on the part of the solicitor respondents in acting for both parties to the deal. In his view, the entire substance of his case against the defendants should have been heard by the trial judge when assessing what the balance of justice requires. In support of his position, he refers the Court to what Hamiliton C.J. said in *Primor* as authority for the proposition that assessing the balance of justice involves a consideration of '*ALL*' the circumstances of the case.[29]

[28] Appellant's submissions, page 19-20.
[29] Appellant's submissions, page 24.

97. Mr Kirwan's understanding of *Primor* is flawed. The Supreme Court in *Primor* did not articulate the principle that assessing the balance of justice in applications to strike out proceedings for delay requires that the court to run the entire case or to adjudicate on the full merits of the substantive claim. Applications brought to dismiss proceedings (whether under O. 122, rule 11 RSC or pursuant to the High Court's inherent jurisdiction) are brought precisely because the entire case has not put before the court in a timely manner. They are primarily focused *not* on the merits of the case *per se* but on where the case actually stands, procedurally, when the application is being made. In other words, the court is examining what has or has not happened since the proceedings were first initiated. Regrettably, that is the question that Mr Kirwan does not address in his submissions. Put simply, in an application to dismiss proceedings for want of prosecution, the court is not concerned with the rights and wrongs of the case, as such, but with the rights and wrongs of allowing the proceedings to remain in being after a considerable period of time has elapsed and without much progress, if any, having been made therein. If that period of time is both inordinate and inexcusable then the court will ask, essentially, whether it is fair to allow the case to proceed. In answering that question, the court is looking at what justice (or the balance of justice) requires and, in that context, it will, of course, look to see what the case, if it should go to trial, is all about. The more serious the issue, the greater weight it will carry but that weight will still fall to be examined against the damage done or the prejudice caused to the defendant by allowing the proceedings to remain in existence. It is in that sense that Hamilton C.J. in *Primor* stated that the delay in prosecuting a case and the conduct of the parties are to be assessed having regard to the circumstances of the case (*Primor* at 475 and 476).

98. The reality is that most of the appellant's submissions in the core appeal relate not to the issue which was *actually* before the High Court – namely, whether the delay in prosecuting the case was inordinate and inexcusable – but rather to the merits of his overall case against all the

defendants which he has not, in any meaningful way, prosecuted in a timely fashion. His several complaints that the trial judge ignored the reality and background to the case and failed to consider the merits of the claim or engage with the evidence as to the substance thereof are misplaced bearing in mind the nature of the application that was actually before the court. The appellant's several complaints alleging fraud, duplicity and a conflict of interest – all serious matters in themselves – could have been aired before the High Court at the trial of the action if the appellant had moved with the expedition that was required of him in prosecuting those complaints. He was obliged to move with due expedition, particularly, in circumstances where he had issued the proceedings many years after the disputed property project that gave rise to the litigation in question. Instead of doing that, he allowed those proceedings to lie in abeyance for several years. During all that time when nothing was happening in the case, the defendants (who may or may not have succeeded in their defence of the claim if the case had gone to trial) were left with very serious allegations hanging over their heads, as it were, in legal proceedings that were not being prosecuted.

99. The appellant makes much of the unfairness he believes he has suffered but fairness cuts both ways. Having left the case languish in abeyance for several years, he sought to raise and litigate the merits of it only when the defendants sought to dismiss it for want of prosecution. That was something that he was not entitled to do.

100. It is clear from his submissions that Mr Kirwan is deeply aggrieved by the fact that the merits of his case were not addressed or considered in detail by the trial judge. His citation of *Primor* as authority for the proposition that 'all' the circumstances of the case are to be considered when determining the weight to be given to various factors in ascertaining where the balance of justice lies is, as I have said, misconceived. The factors to which regard must be had are set out in *Primor* (see para. 79 above), but that judgment cannot be interpreted as requiring a motion judge to hear and determine the merits of the entire case as if it were at trial.

The motion concerned the alleged delay in bringing the proceedings, and the fact that those proceedings raised serious issues, did not discharge Mr Kirwan, as plaintiff, from the obligation to process them, expeditiously. The trial judge, therefore, in my view, cannot be criticised for approaching the application to dismiss the proceedings in the manner that he did.

101. With that clarification now made, the question of whether the trial judge erred in finding that the delay in this case was both inordinate and inexcusable falls to be considered.

Inordinate Delay: Submissions

102. At the '*Conclusion*' of his written submissions, the appellant cites a number of cases, including, *Primor* and *Flynn*, but submits that to list the relevant *dicta* therefrom would be '*otiose*'. He finds it remarkable the judge failed to provide a '*workable definition*' of the '*twin concepts*' of inordinate and inexcusable delay. He added that the judge relied on tests established in the case law without ascertaining if they applied to the facts of this case. As already noted, Mr Kirwan contended that in *Primor* Hamilton C.J. had indicated not only were the interests of justice to be considered, but that the weight to be given to the various *indicia* depended upon a consideration of ALL the circumstances of the case (emphasis in original). The trial judge, in the appellant's view, failed to do so and was '*intoleran[t]*' when asked to look beyond the actual motion and to consider the totality of the case.[30]

103. The appellant submitted that the concept of culpable delay, as referred to by Irvine J. in *Flynn*, is outweighed by the application of implied constitutional principles relating to fairness of procedure, to which, he submitted, they (the appellant and his next friend) *'were complete strangers.*'[31]

[30] Appellant's submissions, page 24
[31] Appellant's submissions, page 24.

104. During the oral hearing of the appeal, Mr Kirwan's counsel confirmed that he was challenging both the first and second limbs of the *Primor* test, submitting that the authorities establish that the onus is on a defendant to establish inordinate and inexcusable delay. Even where both features are present, the court must exercise its discretion as to whether the balance of justice lies in favour of dismissing. He referred the Court to *Rogers v. Michelin Tyre Plc & Anor* [2005] IEHC 294 ('*Rogers*') where, he submitted, Clarke J. (as he then was) had dealt with the '*respective and disparate position[s] of both parties*'. In that case also, Clarke J. noted that Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 had regard to the fact that the dismissal of the plaintiff's claim would have '*dire consequences*' for the plaintiff. In his submission, the trial judge's exercise of his discretion in the instant case was not reasonable.

105. Counsel for the appellant placed considerable emphasis on the fact that Mr Kirwan was a lay litigant who had gone up '*against lawyered-up defendants*'. He submitted that the law doesn't seem to make a distinction on this basis but that it should. Contending that the courts have become intolerant of lay litigants, he submitted that tolerance should be restored, contending that it was unfair to expect a lay litigant to know of the procedures for advancing a claim where a defendant has been in default. Counsel referred the Court to several judgments, including *Tanner,* where Hogan J., citing *Lismore v. Bank of Ireland* [2013] IESC 6 and *Collins,* observed that this Court's jurisdiction in applications of this nature is not confined to cases where there was an error of principle in the court below but is, in fact, free to exercise its own independent judgment in the matter.

106. The solicitor respondents filed submissions on 6 November 2020 in which they address both the first and the second appeals. By way of reply, they contend that, without amending his pleadings, the appellant's case developed during the course of the application to dismiss for want of prosecution, making new allegations of forgery and fraud based on the fact that, allegedly, Mr Kirwan had become 'alive' to the existence of a French alibi to substantiate his

claim that he was out of the country as of the date of the signing of the contract on 5 July 2006. As to the evidence, more generally, they also say that the appellant seeks to rely upon affidavits sworn on 17 September 2019 and 20 April 2020 (with exhibits) but without having sought or been granted leave so to do.

107. The issues in the core appeal, they submit, are whether: (a) there was any error of fact in the court below such as to render its decision untenable, especially as it relates to the extent of the delay, the circumstances of the delay, and the circumstances of the proceedings, generally, insofar as those circumstances bear on the balance of justice; or (b) any error on law on the part of the High Court judge. Referring to *Ryanair Ltd v. Biligfluege.de GmbH* [2015] IESC 11, they say that, as this is an appeal of a decision made on affidavit evidence, the burden on the appellant is to establish an error in the trial judge's findings such as to render his decision untenable.

108. At the oral hearing, counsel for the solicitor respondents submitted that the 2013 proceedings were statute barred. Mr Kirwan had said that he had gone to the High Court and secured an adjournment of the 2011 creditor action on the basis that these 2013 proceedings needed to be prosecuted before the 2011 action could proceed. These proceedings had the '*inevitable badge of defensive litigation*' in that they were started to '*stymie[d] the creditor action*'. Once that was achieved, they were then left in abeyance.

109. The solicitor respondents outline the principles relevant to the issue of dismissal for delay as articulated in several cases, including, *Primor*, *Flynn* and *Anglo Irish Beef*. They point, for instance, to the fact that the court may have regard to delay prior to issuing proceedings and that, where proceedings are issued late, there is an obligation to proceed with expedition thereafter (*Flynn*, para. 19 (4)). To be relevant in the assessment, they say, a defendant's delay must be '*culpable*' so as to involve acquiescence or implicit encouragement in the plaintiff's

delay with the court distinguishing carefully between culpable delay in taking any step and a mere failure to apply for a dismissal of proceedings (*Anglo Irish Beef* at p. 519).

110. A plaintiff, they submit, may not '*sit on his hands*' when met by an unresponsive defendant and may be criticised for failing to utilise the machinery of the court to compel a defendant to proceed (*Flynn*, para. 33). Once inordinate and inexcusable delay is established, the solicitor respondents say that a court may dismiss by reference to a wide range of factors, including, '*relatively modest prejudice arising from that delay*' (*Flynn* at para. 19(8)). They say a defendant is entitled to rely on what might be called *'general prejudice*' (*Rogers*) which could reasonably be expected to occur in any case where delay is involved. Long delays (ten years or more) tend to compromise the court's ability to fulfil their constitutional mandate to administer justice (*Flynn*, para. 49). Prejudice from memory loss is to be assessed from the date of the alleged wrong to the hearing date, and for an elderly witness delays of four to five years may reduce their potential to give meaningful assistance (*Manning* at p. 574). Where a serious accusation is made that affects a person's professional standing, they say that he or she should not have to wait for over a decade for the opportunity to clear his or her name (*Flynn*, para. 19 (10)).

111. In exercising its discretion as to the balance of justice, the solicitor respondents submit that the court is concerned with circumstances that are essentially '*procedural in nature*' and does not conduct a '*mini-trial of the proceedings*'.[32] Noting that the appellant commenced proceedings on 30 May 2013, they say that the subject matter of that case dates back to 5 July 2006 and earlier. The defences in the proceedings were filed before the end of 2013. They say that Mr Kirwan relied on these 2013 proceedings to '*stave off*' Filbeck's judgment against him. Even accepting that he had delivered a Notice for Particulars to them in January 2014 (which

[32] There appears to be a typographical error in para. 13 of the solicitor respondents' submissions with the omission of the word 'not' at the end of the first line thereof.

they do not), they point out that, nevertheless, nearly five years passed without him taking any action in the case until they issued their motion to dismiss for want of prosecution. There was nothing in the history of the proceedings to slow down the progress of the case for any length of time. They say the trial judge was correct to find that Mr Kirwan's delay was inordinate.

112. The Buttle respondents, for their part, set out the background to the case, referring to the 2011 and the 2012 proceedings and point to the trial judge's observation (at para. 18) that the litigation therein was, effectively, '*consolidated*' in the 2013 proceedings. They refer to the inactivity in the proceedings noting the trial judge's observation (at para. 15) that Mr Kirwan '*took no step to prosecute these proceedings since December, 2013, some six years ago*' and they contend that such delay was inordinate.

113. Citing *Hay v. O'Grady* [1992] 1 IR 210 at p. 217, they say that unless the appellant can show that the findings of fact made by the High Court were not supported by credible evidence, there are no grounds for overturning those findings. They say that the appellant does not challenge a single finding of fact relevant to the issue of delay and that he has failed to identify any basis for his claim that the trial judge fell into error. Rather than addressing the High Court's findings, the appellant groundlessly attacked the conduct of the hearing and the impartiality of the trial judge. His allegations of bias and unfairness are devoid of any factual basis, in their view.

114. The Buttle respondents say that the appellant's submissions are an impermissible attempt to litigate the substance of his claim where the only issue before the court is whether the trial judge erred in determining that the claim should be dismissed on the grounds of delay. They, too, submit that the appellant seeks to rely on affidavits and exhibits which are impermissible given that they were sworn after the judgment and the appellant had not applied to the Court for leave to rely on them.

The Court's Assessment

115. There is little doubt but that in recent years the courts have become more conscious of avoiding a culture of indulgence towards delay. As Hogan J. in *Quinn* observed at para. 29:

> "*While as Charleton J. pointed out in Kelly v. Doyle [2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost 'endless indulgence' towards delays led in turn to a situation where inordinate delay was all too common […]*"

116. That cases should proceed within a reasonable time is also required under Article 6.1 of the European Convention on Human Rights ('the Convention') and whilst the Convention is not directly effective in domestic law, the considerations of the Strasbourg have been of some relevance to the development of jurisprudence on delay in this jurisdiction.

117. The proceedings in issue in this appeal were initiated in 2013 in circumstances where the subject matter giving rise to the claims dates back to 2006. Indeed, Mr Kirwan – though, clearly, disputing how events unfolded – did not pursue any legal redress at all until some five years later when he was obliged to respond to Filbeck's application for summary judgment in respect of his alleged default upon the loan agreement. He did not enter an appearance to those 2011 proceedings but chose, instead, to institute his own proceedings against Mr Buttle in 2012. Thereafter, he sought to set aside the judgment obtained in the 2011 action and resisted an application to dismiss the 2012 proceedings for failure to disclose a cause of action and/or for being frivolous and vexatious.

118. Both of these matters were, effectively, adjourned, in order to allow Mr Kirwan to prosecute the combined proceedings in 2013. Those combined proceedings were not commenced until some seven years after the disputed property transaction. The jurisprudence

is clear. The slower the start the greater the onus to move the proceedings forward once commenced (*Quinn*). A delay in issuing proceedings creates an obligation to proceed with expedition (*Flynn*). As Irvine J. observed (para. 29) in *Connolly's Red Mills v. Torc Grain and Feed Ltd* [2015] IECA 280:

> "*[…]it cannot be disputed but that the longer the period that is allowed to elapse between the events the subject matter of the claim and the trial date, the greater the risk that justice will be put to the hazard.*"

119. Instead of progressing the 2013 proceedings with due expedition having delayed in issuing them, Mr Kirwan took no action at all to prosecute his claims in anything resembling an expeditious manner. The trial judge set out (at para. 15 of his judgment) the steps which had been taken in the proceedings since the issue of the Plenary Summons on 30 May 2013. The defences had been delivered by 6 December 2013 and, even on Mr Kirwan's own case, the last step taken in the proceedings was in January 2014. Throughout 2014, 2015, 2016, 2017 and most of 2018, Mr Kirwan did nothing to progress his claim in the 2013 proceedings. His alleged unawareness of the '*conventions and remedies*' available to him to compel the defendants to respond to his alleged request for particulars or to a court order for discovery is not a valid excuse. He did nothing at all to even attempt to progress his claim during those years, preferring instead to leave matters lie notwithstanding the fact that he had made such serious allegations. The reality is that he only took action after the defendants' applications to dismiss the proceedings issued in the latter part of 2018. Such a failure to take any step whatsoever in proceedings that, on their face, are relatively straightforward, constitutes inordinate delay and, in my view, the trial judge's finding in this regard cannot be impugned.

120. Accordingly, it follows that the first limb of the *Primor* test has been met.

Inexcusable Delay: Submissions

121. The High Court judge noted that Mr Kirwan put forward two reasons to explain or excuse the delay. Neither was accepted by the trial judge. The first was that Mr Kirwan had served a Notice of Particulars on the solicitor respondents, to which they had failed to reply. The court noted that Mr. Peter Kiely, the solicitor defendants' deponent, swore on affidavit that there was no record of such a Notice having been received. Meenan J. observed that if such a Notice had been outstanding, it was '*most surprising*' that no follow up ensued whether by way of a reminder or a motion to compel replies.

122. The second excuse offered by Mr Kirwan was that the delay was caused by the failure of MJ O'Connor Solicitors to send him his file until 2017. The trial judge observed that Mr Seamus Turner, for the solicitor defendants, had dealt with this issue in his affidavit and had exhibited a copy of a letter from April 2010 sent to Mr Kirwan's then nominated solicitor which enclosed the copy file.

123. One further reason for the delay was submitted during the hearing of the appeal. Counsel for the appellant added that Mr Kirwan was not in a position to institute proceedings until 2013 as he was being sued for legal fees.

124. In written submissions, the appellant contends that the trial judge used the term '*excuses*' in a '*pejorative manner*' and tone. This, he alleged, was incorrect, as the term '*excusable*' in law means something distinct from the everyday use of the word. He relied on Black's Law Dictionary as a source in that regard. The trial judge, he submitted, misunderstood the test to be applied to determine if a delay was excusable, and misunderstood the discretion to be availed of by the Court.

125. The appellant's counsel contended that, in terms of the second '*excuse*' concerning the absence of the file, Mr Kirwan considered that he was being '*drip fed*' the file and had questioned how he could properly plead his case. The trial judge had failed to factor in the

appellant's status as a lay litigant when assessing whether there was inordinate and inexcusable delay.

126. During the appeal, the solicitor respondents addressed each of the reasons put forward by the appellant for the delay in the case. As to his contention that he did not receive a Reply to his Notice for Particulars, they referred to *Flynn* (at para. 33) and to para. 5-155 of Delaney & McGrath on *Civil Procedure*[33] to say that a litigant must prosecute a claim with reasonable diligence and that a failure to furnish replies is not a valid excuse as a litigant is obliged to use the tools that are available to him. Counsel also referred to the '*glaring anachronism*' in the Notice for Particulars (January 2014) when the first question raised refers to the French alibi and yet Mr Kirwan had said that he was not aware of such an alibi until 2018. Moreover, Mr Kirwan had not explained how the fact he did not receive particulars affected his prosecution of the case. Counsel further submitted that no real explanation was given as to how not receiving the original file had created some disability on Mr Kirwan's part. The excuse about the absence file was inherently ineffective as Mr Kirwan had long since pleaded and articulated his case and had not particularised the alleged disability that flowed from the absence of the file. He offered nothing to suggest that the trial judge's finding as to the delivery of a copy of the file in 2010 was untenable.

127. As to the third or 'new' excuse offered during the appeal to the effect that as Mr Kirwan was being sued for fees he could not institute proceedings, the solicitor respondents submitted that this only explained pre-commencement delay and did nothing to explain the delay that ensued thereafter. Moreover, they stated that, as this excuse was delivered late in the day, it was not properly before the Court.

[33] Biehler, McGrath and McGrath, *Delaney and McGrath on Civil Procedure* (4th ed. Thomson Reuters Ireland, 2018)

128. The solicitor respondents contended that the appellant's unexplained delay was rendered more inexcusable by the fact that he was under an obligation to prosecute the proceedings with expedition given that there was a delay in the commencement of proceedings, and he had given an implicit commitment to prosecute proceedings when he applied, successfully, to adjourn Filbeck's judgment against him.

129. The Buttle respondents submitted that the appellant merely recites definitions of the word '*excusable*'. He failed to indicate any basis on which this Court could conclude that the trial judge fell into error in finding that the delay was inordinate and inexcusable.

The Court's Assessment

130. A consideration of the trial judge's approach to the explanations put forward by Mr Kirwan for the delay in prosecuting a claim now falls to be considered.

131. The first argument raised, essentially, invited the court to believe that Mr Kirwan was waiting for Replies to Particulars before pressing on with the proceedings. The solicitor respondents deny having received said Notice for Particulars to which the appellant refers. They point to the fact that, whilst allegedly delivered in 2014, it contained a reference to something which the appellant claimed he had only become aware of in 2018. This obviously raises a question as to when the Notice was drafted or when the appellant's knowledge of the 'alibi witness' arose. In any event, whether this Notice for Particulars ever issued and/or was received, it is clear that the appellant took no steps thereafter. It is well settled law that the first reason offered to excuse the delay is not a tenable one (see *Houlihan v. O'Sullivan* (1930) 64 ILTR 178 and *Costello v. Commissioner of An Garda Síochána* [2007] IEHC 330). In the absence of any reply to his alleged Notice for Particulars, Mr Kirwan was not entitled to simply '*sit on his hands*' and allow the proceedings to stagnate. He had tools available to him to compel the replies he sought and his status as a litigant in person does not absolve him from

his responsibilities in this regard. Irvine J.'s observations in *Flynn* (albeit in that case on the failure to cooperate in seeking full and proper discovery) are apposite. She stated (at para. 33):

> "*[…] the onus is on a plaintiff to prosecute their claim with reasonable diligence and if a defendant fails to co-operate, for example by ignoring correspondence in relation to discovery, the Rules of Court provide a method whereby that co-operation can be secured. Mr. Flynn had, as was considered material in O'Domhnaill, the ability to control any such delay.*"

132. The appellant in this case also retained the ability to control the delay that ensued. Faced with the lack of response to the Notice for Particulars, he was obliged to use the machinery of the Rules of the Court to move matters on. His failure to do so cannot be relied upon as a valid ground for excusing the delay and the trial judge was correct so to find.

133. As to the second excuse, similar considerations apply. The appellant could have taken steps to secure the original file if he genuinely believed that the absence thereof was hampering him in the progress of these proceedings. He failed so to do. Moreover, in circumstances where he had been sent a copy of the file as far back as 2010, he does not specify how the absence of the original file impeded his progress of the case. The reality is that its absence appears to have had no bearing on prosecuting the case as he had already pleaded and articulated his claim in a comprehensive manner and had exhibited a copy of the disputed contract in an affidavit he had filed back in September 2013. The trial judge, in my view, was correct in rejecting the second excuse proffered by the appellant in his attempt to justify the delay.

134. The third excuse was offered to this Court after the trial judge had delivered judgment and thus the High Court did not have the opportunity to consider it. Moreover, Mr Kirwan neither sought nor was granted leave to file the affidavit in which the third excuse was proffered. In such circumstances, it was not properly before this Court. Even if it were, it is clear that the fact that legal proceedings in respect of fees claimed by MJ O'Connor Solicitors

were ongoing against him until mid-September 2010, did not account for the delay that ensued once the proceedings had issued. It was the delay post-commencement that was raised in the applications before the trial judge, and thus, this excuse about being involved in litigation until 2010, does not explain or justify the failure to prosecute proceedings that were instituted in 2013.

135. In view of the foregoing, I can find no reason for holding that the trial judge erred in concluding that the delay in prosecuting these proceedings was inexcusable.

136. Accordingly, the second limb of the *Primor* test has been satisfied.

The Balance of Justice: Submissions

137. It remains for me now to consider the trial judge's approach to the third limb of the *Primor* test. The question to be addressed is whether the court below erred in the exercise of its discretion when determining that the balance of justice lay with striking out the proceedings. In reviewing what transpired, I am mindful that this Court's jurisdiction empowers it to exercise its own discretion when approaching the balance of justice.

138. At the heart of the appellant's submission on the balance of justice is his contention that the High Court hearing was not conducted properly, that there was a failure on the part of the trial judge to engage with the evidence and that he was disadvantaged because of his status as a litigant in person. He says that his submissions and evidence were not considered '*in the balance of justice*' as the High Court had been misled by the respondents' false claims, perjury, hearsay, and false documents. The judge, he claims, ignored the balance of justice when he failed to consider the affidavit evidence which highlighted the alleged '*breaking*' of '*the Solicitors Acts*' by the solicitor respondents, and when their breaking of the law was '*permitted to be covered up*'. The appellant criticises the judge for refusing to look beyond the actual motion to dismiss and to consider all the circumstances of the case. He contended that

Hamilton C.J. in *Primor* held that not only was the balance of justice to be assessed, but also that the weight to be given to *indicia* would depend on the general circumstances of the case.

139. Counsel for the appellant submitted that while the trial judge considered the prejudice caused to the respondents, his client had also suffered prejudice. His livelihood was going to be lost in circumstances where there was an improvident transaction in which the solicitors for the purchaser and the solicitors for the vendor were the same. Counsel submitted that there was a possibility of conflict and difficulties arising from this situation, such that the Law Society has outlawed this process, save in exceptional circumstances.

140. Much was made by the appellant, in his written and oral submissions, of the fact that he is a litigant in person. He contended that the trial judge should have had regard to his status but ignored it. As a non-lawyer, he was '*completely, deliberately and dishonestly ambushed*'. He was put at a disadvantage when the trial judge foisted case law upon him on 16 May 2019 and expected answers in an unreasonably short amount of time.[34]

141. Moreover, he says that the respondents '*used and abused*' every potential legal obstacle in order to frustrate the prosecution of this case. He stated that he, as a litigant in person, was '*in so far over* [his head] *it was suffocating*' and contended that the law must afford a level of forbearance and tolerance towards litigants in person who have demonstrated, at least in part, a determination to articulate their complaint. Notwithstanding his lack of knowledge of the law or protocol, he contends that he has ventilated his complaint '*better than most*'. Counsel on his behalf submitted that it may be an unfair assumption to ask litigants in person, who are not versed in the law, to take on board what members of the legal profession deal with on a daily basis. He referred the Court to the transcript of proceedings before Meenan J. on 16 May 2019, wherein it is recorded that Mr. Barry Kirwan stated:

[34] See Appellant's submissions at para. 25; see also Transcript, 16 May 2019, page 34, line 20 – page 35, line 12.

"*We are doing our best. We are not barristers or solicitors and never claim to be. All we want is justice and we have been honest with you today and yesterday and we just hold our hands up.*"[35]

142. The Court was also directed to what Mr. Barry Kirwan had said during that hearing when instructed to read a judgment over the break:

"*I would really need a lot more time to go through the rest of this document […] I'm not fit to read it in this high stress environment and timeframe and to respond to you, but I have done my best there with those. I hope you will take on board and see through the Buttles' lies and we believe that justice will be done eventually.*"[36]

143. A complaint in similar terms was made by the appellant in respect of the allegation of forgery.[37] The trial judge condemned him for failing to plead fraud at the outset of the combined action. He pointed to the well settled principle that no party should plead fraud unless in a position to prove it. Whereas, initially, he could not prove that his signature had been forged, he had, in the interim, put together evidence (the flight tickets and the holiday photos) which, substantiated the claim of forgery (the 'French alibi'). He submitted that he was not alive to the French alibi until 2018 and that the Court deliberately shrouded its eyes to the reality of what had transpired.

144. The appellant further submitted that his right to a fair hearing was breached when Meenan J. refused to hear his motion to set aside the judgment against him that Filbeck had obtained in the 2011 creditor action. In his view, there was a demonstrable bias on the part of the trial judge in favour of the respondents and he was treated as a '*second class citizen*' throughout the proceedings. He contrasted the judge's initial disbelief as to Mr. Kirwan's dyslexia with his acceptance of Ms Connors' ill health.

[35] Transcript, 16 May 2019, page 45, lines 17-20.
[36] Transcript, 16 May 2019, page 46, lines 14-20.
[37] Transcript, 16 May 2019, page 55, line 28 – page 57, line 19.

145. The solicitor respondents pointed to a number of factors which they submit should be considered in the balance of justice. In their view, the trial judge correctly identified the real and substantial prejudice – far more than modest prejudice – which they had suffered by reason of the appellant's delay. They had endured a long postponement of the opportunity to clear their names and professional reputations. There were allegations of negligence, forgery and fraud. Anyone accused of such matters would find this oppressive, let alone solicitors who depend on their reputations within the community. There was also a significant risk of an unfair trial, given that Marguerite Connors, a former employee, has been retired since 2008 and was thus well out of work for over a decade. Being asked to come back to deal with proceedings at this remove put justice at hazard.

146. Counsel stressed that Mr Kirwan had obtained an adjournment in the creditor action on the basis that these proceedings needed to be resolved.

147. Relying on *Anglo Irish Beef* as authority for the proposition that inordinate and inexcusable delay will not be absolved unless there are countervailing circumstances on the part of the defendant, counsel for the solicitor respondents submitted that there was no question of any acquiescence or culpable delay on his clients' part. In his view, there were no circumstances to justify not striking out the proceedings. A failed property transaction attracted no special consideration that would weigh in favour of the continuation of proceedings. Mr. Kirwan is a businessman and is well able to litigate. The balance of justice was all one way and weighs in favour of striking out the proceedings.

148. The solicitor respondents rejected the appellant's core complaint in the appeal, which was, essentially, that the trial judge's failure to engage with the substance of the case amounted to an error in his consideration of the balance of justice. The judge, in their submission, was correct to refuse to address the merits of the case and the appellant was not entitled to ventilate the substance of his claims in this appeal. They submitted that Mr Kirwan has failed to ground

his allegation that the trial judge was biased and unfair. In their view, that the trial judge engaged with the evidence before him and applied the law to the facts as found.

149. At the hearing of the core appeal, counsel for the Buttle respondents adopted, in full, the submissions made by counsel for the solicitor respondents. The trial judge had correctly found that the delay in prosecution of the case has prejudiced them. They were entitled to an expeditious conclusion of proceedings given the serious allegations of fraud made against them. The likelihood of an unfair trial increased with the passage of time.

150. The Buttle respondents pointed to the judge's finding that they were not guilty of culpable delay themselves, and his finding that the personal and social background of the appellant did not warrant the exercise of the High Court's discretion in his favour.

151. In their submission, the appellant had '*groundlessly attacked*' the impartiality of the judge. The claim that the judge was biased and unfair was unsustainable as the judgment '*disclose[d] a comprehensive engagement*' with the facts of the case.

152. The appellant has made an impermissible attempt to litigate the substance of his claim in the 2013 combined action. The only issue before this Court, they stated, is whether the trial judge was in error when he determined that the appellant should not be allowed to continue with his claim, on the basis of the delay in his prosecution of the case.

The Court's Assessment

153. A key principle in applications such as the one under appeal is that the High Court must not dismiss the proceedings unless it is satisfied that the balance of justice would so require. In coming to a determination as to where, precisely, that balance lies, regard must be had to the constitutional principles of basic fairness of procedures. That indeed is the first factor identified by the Supreme Court in *Primor*. Traditionally, as noted by Hogan J. in *Tanner*, (para. 36), the courts have been reluctant to strike out claims on the ground of undue delay

since this necessarily impacts upon a litigant's constitutional right of access to the courts. Such a right of access is, undoubtedly, affected by an order dismissing the proceedings for want of prosecution (see *Cavanagh & Anor v. Spring Homes Development Ltd & Anor* [2019] IEHC 496).

154. However, the constitutional right of access to court must be balanced by other constitutional imperatives, including, the right of litigants on both sides of a dispute to fairness of procedures. When assessing where the balance of justice lies, the constitutional requirement that the courts administer justice requires, as Finlay Geoghegan J. in *Manning* noted, that the courts be capable of conducting a fair trial. Delays in prosecuting a case may give rise to a substantial risk of unfairness at trial. Thus, it is important to recall, as Irivine, J. did in *Collins* (at para. 34) that, in the context of the Draconian nature of the relief sought, the court's jurisdiction to strike out a claim is not intended to be a punishment for a plaintiff's delay, but it is, rather, to ensure that justice is done.

Prejudice

155. The trial judge was satisfied that prejudice had been caused to the respondents by reason of the delay in these proceedings and that this constituted a significant risk of an unfair trial. He had regard to the fact that the events in issue occurred back in 2006 and that one of the defendants, Ms Connors (a person likely to be a key witness in the case) has long since retired and was unwell.[38]

156. Even moderate prejudice can justify the dismissal of proceedings when considering where the balance of justice lies in any given case (*Stephens*). There is no doubt that delay affects the ability of a witness to recall the minutiae of important events that occurred several years earlier. The reality is that Ms Connors has not been employed by MJ O'Connor Solicitors

[38] See affidavit of Brid O'Leary of 13 November 2018, para. 11.

since 2008. She retired five years before Mr Kirwan instituted these proceedings. At the time of the application before the High Court, eleven years has passed since her retirement. To my mind, the lapse of time between 2006, when the events occurred, and 2019, when the application was heard, cannot but be seen as inherently prejudicial. The capacity of witnesses on all sides, but particularly Ms Connors, to recollect detail as to the events in issue must be regarded as considerably impaired. Finlay Geoghegan J. in *Manning* considered that '*delays of four to five years as a matter of probability will reduce the potential of such persons to give meaningful assistance or to act as a witness.*' Moreover, in *Rogers*, a delay of ten years was sufficient for Clarke J. to find that the defendant had suffered '*at least a moderate degree of prejudice in defending the action*'.

157. Given the thirteen-year passage of time between the disputed events and the High Court applications in this case, I am satisfied that the trial judge was correct to find that prejudice to the solicitor respondents had been established because of the delay in prosecuting the case. The capability of the courts to conduct a fair trial in such circumstances must be regarded as compromised. Ms Connors' recollection of the details of the transaction may, quite understandably, be impaired at this remove. In these circumstances, the trial judge, in my view, did not err in finding that there was a risk of an unfair trial by reason of the delay in prosecuting the proceedings.

Reputational Damage

158. Another factor to which the trial judge had regard when determining the balance of justice was the reputational prejudice caused to the respondents. The Supreme Court in *Primor* recognised that prejudice to a defendant may arise in many ways, including, by the damage caused to reputation or business. Litigation, even where prosecuted promptly, is undoubtedly stressful for the parties involved but where it is protracted, unnecessarily, that stress can only

be exacerbated. Undoubtedly, the solicitor respondents' reputation has been called into question by these proceedings with allegations of fraud, a conflict of interests and forgery being made against them. Equally serious claims were made against the Buttle respondents. Whether or not they are true, for several years now, the respondents have lived under the shadow of these serious and damaging allegations. If the appellant believed that he could prove that which he alleged, then he ought to have acted promptly in the prosecution of these proceedings.

159. In my view, it is incompatible with the requirements of justice that allegations of the kind made in this case may be levied against persons in their personal, private or professional capacity and then left to lie unresolved. The High Court in *Celtic Ceramics Ltd v. Industrial Development Authority* (1993) ILRM 248 ('*Celtic Ceramics*') described as seeming very unfair and unjust the fact that persons whose professional standing and competence are under attack should be left with litigation hanging over their hands for years by reasons of the inordinate and inexcusable delay on the part of a plaintiff. In *Celtic Ceramics*, O'Hanlon J. (at p. 254) was reiterating what Henchy J. in *O'Domhnaill* had stated when he held that it should be possible to invoke '*implied constitutional principles of basic fairness of procedures . . . to justify termination of a claim which places an inexcusable and unfair burden on the person sued*'.

160. To my mind, the respondents' constitutional right to their good name necessarily implies that claims, which have obvious implications for their professional standing, should be heard and determined within a reasonable time for, as Hogan J. observed in *Tanner*, '*[a]ny other conclusion would undermine the substance and reality of that express constitutional guarantee.*' This is not, as Mr Kirwan appears to believe, about lawyers looking after lawyers. It is about basic fairness. No one should be the targeted with claims of fraud or forgery and then be deprived of an opportunity to clear one's name within a reasonable time.

161. As to the question of prejudice to the Buttle defendants, I am satisfied that the judge was correct to find that Filbeck had been prevented from executing the judgment it had obtained against Mr. Kirwan whilst awaiting the outcome of the 2013 combined proceedings. It is unacceptable, in my view, for a court to be told that certain applications ought not to proceed pending the outcome of another case, and then for nothing to be done to progress that other case with due expedition. There may be some truth to the respondents' contention that the 2013 proceedings were issued, not as any genuine attempt on the part of the appellant to litigate the matters in issue between the parties, but rather to '*stymie*' the applications that had been adjourned in the 2011 and 2012 proceedings. In the circumstances that prevailed and, particularly, having adjourned the applications brought in the earlier cases, there was an even greater onus upon the appellant to proceed with pace. The trial judge was correct to find that the appellant's failure to do so was prejudicial to Filbeck in its entitlement to proceed with the 2011 creditor action in which it had secured an order for judgment in its favour.

Respondents' Conduct

162. The trial judge also had regard to the respondents' conduct when considering the balance of justice. In *Millerick*, Irvine J., observing that even marginal prejudice to the defendant by reason of the delay may justify the dismissal of the proceedings, went on to say, (with reference to *Anglo Irish Beef*), that '*where delay has been found to be inordinate and inexcusable the author of that delay will not be absolved of fault unless they can point to some countervailing circumstances as may be considered sufficient to cancel out the effect of such behaviour*.' Litigation being a two-way process requires consideration of the conduct of both parties. The appellant, in this case, pointed to no countervailing circumstances on the part of the respondents to cancel out the effect of his delay in these proceedings. Nor was there anything in the evidence before the High Court to suggest that the respondents' conduct induced the appellant

to incur further expense in pursuing the action. Such factors, in my view, were correctly weighed in the assessment made by the trial judge in considering where the balance of justice lay.

Lay Litigant Status

163. As to the personal and social background of the appellant, this, too, was a factor to which the trial judge had regard. As noted (at para. 19(15)) in *Flynn,* the court must bring to its considerations '*a necessary sensitivity to the personal and social background of persons who present before them*'. The trial judge found that there was nothing in the personal or social background of the appellant that would warrant exercising his discretion in such a way as to favour the continuation of the proceedings.

164. In submissions and oral arguments before this Court, a considerable amount of time and emphasis was placed upon the fact that the appellant is a lay litigant and that difficulties are created thereby. These difficulties, he says, put him at a disadvantage and, in this regard he refers, for example, to case law being foisted upon him and to the respondents employing legal obstacles to frustrate his prosecution of the case.[39] In his view, the judge failed to have due regard to his status as a lay litigant when conducting the assessment as to where the balance of justice lay.

165. The appellant's approach to his lay litigant status and its relevance to the assessment of the balance of justice is somewhat misconceived. Undoubtedly, litigants in person may be vulnerable and unfamiliar with court proceedings and, traditionally, judges have demonstrated courtesy and patience towards their position. However, the fact that they are litigants in person does not entitle them to be treated in a manner that is preferential to that of other litigants who are represented. In *McGuinness v. Wilkie and Flanagan Solicitors* [2020] IECA 111 (para. 6),

[39] Appellant's submissions at para. 25, and in the introduction thereof.

the appellant sought to rely on the fact that he was a litigant in person as a ground for making new arguments and presenting new evidence without leave of the court. Explaining that this was impermissible, Noonan J. observed that, '*the rules apply equally to all parties whether represented or not*', and the appellant could not seek to rely, solely, on his being a litigant in person as a reason for exceptional treatment.

166. The appellant in this case was not entirely unfamiliar with the courts. Whilst his counsel, on appeal, made several references to his lay litigant status as a ground for greater tolerance to be shown towards him, no indication was given as to where the line for such extended tolerance is to be drawn in respect of a litigant who does nothing to prosecute his case. A litigant in person should not be placed in a better position than litigants who have representation (*ACC Bank Plc v. Kelly* [2011] IEHC 7, para. 2.6). Represented or not, no plaintiff is entitled to institute proceedings and then to leave them lie, unprosecuted, indefinitely.

167. As a litigant in person before the High Court, the appellant was entitled to advance his arguments objecting to the defendants' application to dismiss the proceedings and the transcript discloses that this is, precisely, what he did. The transcripts further show that he was treated with courtesy and had matters explained to him in plain terms. Indeed, considerable tolerance and forbearance was shown by the trial judge even in the face of remarks that were, at times, somewhat lacking in respect. What the appellant was not entitled to do was to assume that because he was a litigant in person he was, thereby, entitled to treatment over and above that which is afforded to any other litigant. The mere fact that he chose to represent himself before the High Court was not sufficient, in and of itself, to warrant the exercise of that court's discretion in his favour such as would enable him to protract, further, what had clearly become, by reason of delay, inactive and stale proceedings in respect of events of some antiquity.

168. Having reviewed the transcripts of the High Court application and the judgment of the trial judge, I am satisfied that he was entitled to reach the view that the delay had caused

prejudice to the respondents and that it gave rise to a risk of an unfair trial. The fact that Mr Kirwan was a litigant in person did not detract from the fact that the respondents suffered prejudice by reason of his delay in prosecuting the proceedings.

Other Errors Alleged

169. Throughout his written submissions, the appellant claims that the trial judge treated him in a manner less favourably than that of the respondents. He claims to have been the subject of discrimination, citing, for example, his being obliged to produce medical evidence in respect of his asserted dyslexia when no medical evidence was required in respect of Ms. Connors' state of health. On this point, Mr Kirwan appears to misunderstand what was in issue. Since he was the only person named as plaintiff in the proceedings, the onus was on him, as plaintiff, to prosecute the proceedings. Whereas everyone has the right of access to court, not everyone has the right of audience. An unrepresented litigant must make his own case and is not entitled to have anyone of his choosing address the court on his behalf. Where a plaintiff is a minor or a person of unsound mind, he or she is entitled to be represented by a 'next friend'. A 'next friend' is not the same as a 'McKenzie friend'. An unrepresented litigant who wants another person to speak on his behalf must establish that 'exceptional circumstances' exist which justify his not speaking for himself.[40]

170. The contexts of Ms Connors and Mr Kirwan were not equivalent. There was sworn affidavit evidence from Brid O'Leary, one of the solicitor respondents, to say that Ms Connors was facing '*serious ill health issues*' and had been bereaved in November 2017. Her capacity to testify was one factor among many that the trial judge was obliged to consider when assessing the risk of an unfair trial caused by the lapse of time. By contrast, whether Mr Kirwan had a disability that prevented him from speaking for himself was a matter of fact that required

[40] High Court Practice Direction HC72.

to be determined *simpliciter* if a McKenzie friend were to be appointed to speak on his behalf. The trial judge was entirely justified in requesting the evidence necessary to establish the disability alleged in the context of the McKenzie application.

171. The trial judge was not discriminating against the appellant in seeking medical evidence in respect of his asserted disability. He was discharging his duty to be satisfied that Mr Kirwan could not, by reason of exceptional circumstances, address the court himself. Having heard the medical evidence, he was so satisfied, and he allowed Mr Kirwan's son to make representations on his behalf. There was nothing unusual or oppressive, to my mind, in the trial judge's approach in this regard.

172. There was no evidence whatsoever before this Court to support the appellant's claim of bias on the part of the trial judge or indeed any unfairness of any kind in the approach that was taken in this case. On the contrary, the judge showed remarkable patience and courtesy towards the appellant. Regrettably, as has been observed in several judgments, litigants in person can wrongly assume that a court finding against them is to be equated with bias on the part of the judge. As Noonan J. observed in *LM v. Rooney* [2021] IECA 195 (para. 36):

> "*The fact that a case is decided in a certain way is often interpreted by the litigant in person as a failure by the decision maker to properly consider the litigant's arguments on the premise that the tribunal must therefore be biased. That of course is no more than a mere assertion falling far short of demonstrating bias on even a prima facie basis. There is nothing here that approaches an arguable ground that there was bias, actual or objective, on the part of either the respondent or the trial judge.*"

Those observations apply with equal force to this case.

173. In my view, the trial judge cannot be criticised for the approach he adopted in assessing the balance of justice. Mr Kirwan was not entitled to expect that his entire claim against all the respondents – which he had failed to prosecute over several years – should have been heard and determined by Meenan J. on a motion to dismiss for want of prosecution. Instead of

addressing the reality of the fact he did nothing to progress these proceedings throughout 2014, 2015, 2016, 2017 and a good deal of 2018, the appellant attacks the integrity of the court that decided the application. His assumption that the finding against him is marred by bias is '*an absurd but unfortunately regularly occurring proposition and one that is to be deprecated in the strongest terms*' (see *Lannon v. A Judge of the Circuit Court & Anor* [2020] IECA 113, para. 24).

174. In view of the foregoing, I am satisfied that the appellant has failed to establish any basis for this Court to interfere with the assessment made by the trial judge as to what the balance of justice required in this case.

Conclusion on First Appeal

175. The three-limb *Primor* test to be applied to applications to strike out for want of prosecution is complemented by the '*basic fairness*' test in *O'Domhnaill*. In *McBrearty*, the *O'Domhnaill* line of authority was described by Geoghegan J. as '*an important and partly overlapping jurisprudence*'. A court may dismiss an action if satisfied that to ask a defendant to defend it would place that defendant under '*an inexcusable and unfair burden*' (see *Cassidy* at para. 38).

176. I am satisfied that however one approaches the question of delay in this case, the trial judge did not err in finding that the proceedings should be dismissed given the passage of time since the events in question and the consequent prejudice caused to the respondents. The delay was both inordinate and inexcusable and the balance of justice favoured the discontinuation of proceedings. Moreover, it would be unfair to the respondents to allow the proceedings which relate to events back in 2006 to remain live notwithstanding the appellant's abject failure to move matters on since 2013. The trial judge's decision, in my view, cannot be impugned.

177. The first appeal is, therefore, dismissed.

The Second Appeal

178. The second or 'slip rule' appeal arises from the order of 17 December 2019 in the 2013 proceedings. At the request of the solicitor respondents, the trial judge corrected the order which had been made on 23 October 2019 and perfected on 31 October 2019. The appellant complains about this amendment. The issue in this second appeal is whether the High Court judge fell into error in amending the order of 23 October 2019 in the manner in which he did.

Background

179. As noted above (at paras. 49 and 50), after the judgment of 2 September 2019 had been delivered, the appellant made an application to the High Court on 18 September 2019 grounded on an affidavit of Barry Kirwan sworn on 17 September 2019. Pursuant to O. 28, r. 11 RSC and under what is known as the 'slip rule', he sought to have to have factually incorrect statements in the judgment corrected. When his application was first before the court on 9 October 2019, the judge adjourned it for two weeks to allow the respondents to reply.[41]

180. I have already outlined, at paras. 53 – 57 above, what occurred on the adjourned date and a little more detail, at this point, will help set the context of the second appeal. On 23 October 2019, all parties were before the court. At the outset of the hearing, the appellant stated that the Court had been '*deliberately misled*'. He referred to para. 9 of the judgment wherein it was noted that the first, second, eighth and ninth named defendants were '*solicitors*' involved in the property transaction. Mr Kirwan said that Marguerite Connors was not a solicitor. He submitted that at no point could she give legal advice. The judge accepted that correction. However, he considered that this amended fact had no relevance to the finding of the Court that the proceedings should be dismissed for want of prosecution.[42] The appellant disagreed,

[41] Transcript, 9 October 2019, page 6, lines 20-21.
[42] Transcript, 23 October 2019, page 5, lines 2 - 5.

strongly, and persisted in arguing that his motion seeking several amendments (listed at para. 50 above) ought to be heard as it was an '*illegal and criminal act to give legal advice without a practising certificate*'.[43] The judge refused to hear further submissions concerning the status of Ms Connors, stating that the judgment had been delivered and that Mr Kirwan's motion was of no relevance at that stage.[44] The judge, at one point, observed that if Mr Kirwan did not cease in his submissions, he would be held in contempt of court.[45] Meenan J. had already agreed to amend paragraph 9 of the unapproved judgment to reflect the fact that Ms Connors was a legal executive.[46]

181. Counsel for the Buttle defendants also addressed the court. He submitted to the judge draft orders which he requested the court to make in respect of each set of proceedings, contending that consequential orders in respect of the 2011 and 2012 proceedings must follow from the order made in the 2013 proceedings.[47] The proposed orders reflected his various applications as follows. He applied for costs in the 2013 proceedings in favour of *all* defendants.[48] He applied to re-enter the adjourned motion to dismiss the 2012 proceedings and to grant it, as those proceedings must '*fall away*' given that the substance of everything advanced in the 2012 claim had been repeated in the 2013 case.[49] He asked the Court to re-enter Mr Kirwan's motion in the 2011 action seeking to set aside the judgment obtained therein and then to refuse that motion.[50] Finally, he applied, pursuant to O. 42, r. 24 RSC, for leave to execute the judgment secured in the creditor action.[51]

182. The judge sought Mr Kirwan's views on the applications that were before him in respect of the three sets of proceedings. He specifically recalled what had been put on affidavit by Mr

[43] Transcript, 23 October 2019, page 9, lines 2-3.
[44] Transcript, 23 October 2019, page 6, lines 21-23.
[45] Transcript, 23 October 2019, page 7, lines 20-22.
[46] Transcript, 23 October 2019, page 15, lines 8-12.
[47] Transcript, 23 October 2019, page 10, lines 12-17.
[48] Transcript, 23 October 2019, page 9, lines 27-30.
[49] Transcript, 23 October 2019, page 10, lines 13-17.
[50] Transcript, 23 October 2019, page 10, lines 27-29.
[51] Transcript, 23 October 2019, page 13, lines 3-9.

Kirwan to the effect that it would be '*inappropriate*' to proceed with the 2011 and 2012 proceedings '*until the outcome of the plenary case 2013 is known*'.[52] In response, Mr Kirwan complained again about the status of Ms Connors and about the fact that the court had been misled and he indicated that would be appealing the judgment.[53] The judge reminded him that in an application for costs he was not entitled to re-run his case.[54] Mr Kirwan objected to costs until the case had come to a conclusion. In respect of the application to dismiss the 2012 action, he reiterated his complaints about Ms Connors and how he was '*conned*' by her, John O'Leary and Mr Buttle, submitting that the 2012 case was '*far from finished*'.[55] As to the application to re-enter and dismiss the application to set aside the judgment obtained by Filbeck against him in the 2011 creditor action, Mr Kirwan stated that he wanted that judgment set aside, again referring to how he was '*conned*' by the solicitor respondents and how all the documents created, and any actions performed by them, were '*null and void*'.[56] He responded to the application for leave to execute in similar terms insisting that they (the appellant and his McKenzie friend) were moving the 2011 case to a full plenary hearing after setting aside the order obtained.[57]

183. Having heard and considered the submissions, Meenan J. proceeded to make the four orders as requested by the respondents on 23 October 2019 (see para. 57 above). He granted costs to the defendants in the 2013 proceedings. Before considering the other three orders, however, Meenan J. set out what he considered to be the relevance and importance of the decision made in the 2013 proceedings.[58] He found that, having regard to his finding in the 2013 proceedings, it followed '*as a matter of logic and as a matter of law*' that the 2012

[52] Transcript, 23 October 2019, page 13, lines 21-28.
[53] Transcript, 23 October 2019, page 14, lines 21-27.
[54] Transcript, 23 October 2019, page 16, lines 1-2.
[55] Transcript, 23 October 2019, page 18, lines 6-12 and 27-28.
[56] Transcript, 23 October 2019, page 21, lines 7-15.
[57] Transcript, 23 October 2019, page 22, lines 26-29.
[58] Transcript, 23 October 2019, page 24, lines 22-23.

proceedings should also be struck out.[59] By the same reasoning he re-entered Mr Kirwan's motion to set aside the judgment that had been obtained in the 2011 creditor action and he struck it out.[60] He granted Filbeck an order for leave to execute the judgment it had obtained in the creditor action.[61] The orders were perfected on 31 October 2021.

The 17 December 2019 Hearing and Ruling

184. By letter dated 5 December 2019, the solicitor respondents wrote to the Registrar requesting that certain amendments be made to the orders that were made on 23 October 2019.

185. A hearing was held on 17 December 2019 to deal with that application. The details of the errors in the earlier orders, as submitted by the respondents, have been mentioned above (see para. 58). These concerned the failure in the earlier order to reflect that the application to dismiss was granted in favour of both sets of respondents; the failure to stipulate that Mr Kirwan was to pay the costs of all defendants; the failure to indicate that the order dismissing the proceedings was made pursuant to the Court's inherent jurisdiction and not O. 122, r. 11 RSC; and the requisite amendment of the order to reflect the fact that Ms Connors was a legal executive and not a solicitor. It was also pointed out that the order made in respect of the 2011 proceedings did not reflect the fact that the motion to set aside the judgment had been re-entered and then refused together with an order for costs.[62] As noted earlier, Counsel handed in drafts of the proposed amended orders to the Court.

186. Mr Kirwan objected to the defendants' applications. At the hearing, he contended that the defendants were receiving preferential treatment from the Court. He submitted that whereas '*it takes [him] months to get a motion*', the defendants had had their applications heard

[59] Transcript, 23 October 2019, page 25, lines 14-21.
[60] Transcript, 23 October 2019, page 25, lines 23-26.
[61] Transcript, 23 October 2019, page 25, line 28 – page 26, line 8.
[62] Transcript, 17 December 2019, page 4, lines 12-14, page 6, lines 10-11.

within a matter of days.[63] He further complained that he had received just one day's notice of their motions.[64] Mr Kirwan also submitted that the defendants had had 28 days to object to any problems with the Orders as made and that they failed to do so.[65] He submitted that the High Court had no jurisdiction to make the amendments requested by the defendants because the case was '*within the Court of Appeal'*, he having lodged his first and third appeal on 26 November 2019. He also stated that since the judgment of the High Court had been delivered, there had been '*developments*' in that John O'Leary had filed affidavits in disciplinary proceedings which now proved that the Buttle respondents had lied and, thus, that the judgment of Meenan J. was '*void*'.[66]

187. Meenan J. explained to Mr Kirwan that the defendants' application was under the 'slip rule' and that the orders made on 23 October 2019 had not, in fact, reflected the judgment he had given in the case. It was, therefore, necessary to amend those orders.[67] Mr Kirwan argued that the court had refused to hear his motion under the 'slip rule' on 23 October 2019. He submitted that if the trial judge was now going to hear the defendants' motion under the 'slip rule', then, as he put it, '[*Y*]*ou have to hear ours as well*.'[68] Meenan J. held that he was under no such obligation, adding that he was satisfied that the draft orders provided by the defendants reflected his judgment.[69]

188. Having heard the submissions of all parties, Meenan J. recalled that the application before the court was brought under the 'slip rule'. He was satisfied that the draft corrected orders accurately reflected those that had actually been made and he acceded to the applications.[70]

[63] Transcript, 17 December 2019, page 12, lines 7-10.
[64] Transcript, 17 December 2019, page 12, lines 2-3.
[65] Transcript, 17 December 2019, page 13, lines 27-28.
[66] Transcript, 17 December 2019, page 14, lines 14-15.
[67] Transcript, 17 December 2019, page 12, lines 12-21.
[68] Transcript, 17 December 2019, page 13, lines 12-13.
[69] Transcript, 17 December 2019, page 14, lines 20-22.
[70] Transcript, 17 December 2019, page 14, lines 17-24.

Accordingly, on 17 December 2019, the orders of 23 October 2019 were amended (see paras. 60 and 61 above).

189. The appellant now seeks to appeal the order of 17 December 2019 permitting the amendments made under the 'slip rule' to the orders of 23 October 2019.

Legal Principles on 'Slip Rule' Applications

190. Order 28, r. 11 RSC provides that clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected without an appeal. This is often referred to as the 'slip rule'. Additionally, the Court has an inherent jurisdiction to amend an order where an error or 'slip' has been made. In *McMullen v. Clancy* [2002] 3 IR 493 ('*McMullen*'), Murray J. explained (at p. 502) that there is a fundamental public interest in the due administration of justice which requires that the decision of a court should not be frustrated by an '*accidental slip or error or clerical mistake*', adding that this is why the courts, in defined circumstances, have an inherent as well as an express (O. 28, r. 11 RSC) jurisdiction to amend a final order.

191. In *Everyday Finance DAC v. Jerry Beades* [2021] IECA 48, this Court upheld an amendment to an order, noting (at para. 77) that:

> "*Ultimately O. 28 is purely procedural in nature. Where the making of an order under the rules would minimise or obviate the risk of injustice, doubt or uncertainty, particularly as to title, the High Court judge was entitled to make the order as he did. There was no evidence that prejudice was visited upon the appellant by the making of the order which merely ensured explicit conformity as between the identity of the party appearing on the face of the order for possession of 6 March 2014 as plaintiff and the party seeking to enforce the said order. Otherwise the judge had inherent jurisdiction to make such an order in the circumstances pertaining as found by him.*"

Discussion

Grounds of Appeal

192. The appellant's grounds of appeal (14 September 2020) share some of those filed in the core appeal and the third appeal.[71] Grounds 1-15 herein are somewhat distinct (although they are included in the identical submissions that were filed in all three appeals).[72] The additional grounds in this appeal may be summarised as follows. As well as the errors in law and fact and the denial of due process as in the core appeal, there were wilful and wanton acts that occurred which defrauded the State of mandatory stamp duty. The High Court judge assigned a hearing date of 17 December 2019 to the defendants' 'slip rule' applications, but he did so without any motion having issued and, therefore, without the associated stamp duties having been paid. In this way, the State has been defrauded in the sum of €60 stamp duty on the motion and €20 on an associated grounding affidavit. This fraud deprived the Court of its jurisdiction. The trial judge also erred in refusing to hear the appellant's motion pursuant to O. 28 to have errors and omissions in the judgment corrected.

193. Moreover, the appellant contends, that the High Court did not have jurisdiction to change the perfected orders because the original orders were already the subject of an appeal to this Court in case numbers 2019/486 and 2019/485 (the first and third appeals). There was an '*interference*' with the appeals before the Court of Appeal. The appellant, it is submitted, should not be burdened with appealing this '*motion*' as the order arising from the hearing should be deemed void *ab initio*. In his view, he is entitled to have the order set aside or vacated *ex debito justitiae*. The trial judge, having been misled by the respondents, erred in law by changing or interfering with orders made after the 28-day time period within which to appeal

[71] Grounds 16-21 in the 'slip rule' appeal correspond to grounds 27-32 of the notices of appeal in the first and third appeals. Only grounds 1-15 in this appeal are distinct. The *submissions* in the 'slip rule' appeal, however, correspond exactly to the submissions in both other appeals. The submissions transplant exactly the full grounds of the first and third appeal.

[72] Ground 15 differs very slightly from its equivalent in the other notices/para. 26 in the submissions but concerns essentially the same point in relation to the '*new evidence*' of Mr John O'Leary.

them had expired. This, it is said, constituted an abuse of process and was prejudicial to the appellant.

194. Finally, the appellant submits that the High Court judgement of 2 September 2019 was void in the light of new evidence which emerged, but which was '*withheld*' from the court thus pointing to '*malicious deception*' on the part of the Buttle defendants. John O'Leary's affidavit, sworn 8 November 2019, exhibited a number of documents which had been withheld, concealed and/or suppressed from both the High Court and Mr Kirwan. The court had '*turn[ed] a blind eye*' to the fact that Ms Connors '*masquerade[d]*' as a solicitor when she was not one and had purported to act as a practising solicitor. The appellant's right of access to a qualified solicitor who would protect his interests was prejudiced. Officers of the court have failed to correct the record and, as such, the trial judge acted in contravention of the inherent duty to bring the full facts to light. In summary, the High Court orders which are the subject of this appeal are *void ab intito* by reason of a fundamental defect in the proceedings and for having been made without jurisdiction.

Notice of Response

195. In their Response of 12 February 2020 to the Notice of Appeal, the solicitor respondents make a number of points. First, they say that the corrections brought the perfected order into conformity with the orders as pronounced by the trial judge on 23 October 2019 and reflected the judgment of 2 September 2019. Second, they contend that the order of the 17 December 2019 was made by the Court pursuant to its inherent jurisdiction. This was on foot of their solicitors' invitation to the Court by way of a letter to the Registrar, dated 5 December 2019, which was copied to all parties to the proceedings. Third, they say that the affidavit of John O'Leary, referred to at para. 15 of the Notice of Appeal, appears to be an affidavit delivered in a separate set of proceedings before the Solicitors Disciplinary Tribunal. Fourth, they reject all

allegations made against them regarding the alleged suppression of information or documents and the misleading of the Court. Finally, they object to the appellant's '*inappropriate*' attempt to raise in this appeal unrelated issues, first aired in motions returned before the High Court on 23 October 2019 and in the affidavit of the appellant's son, Mr. Barry Kirwan, of 17 September 2019.

196. The Buttle respondents oppose the entire appeal. They state that they are not proper parties to the second appeal, given that it was the application of the solicitor respondents made on 17 December 2019 that resulted in the Order made under O. 28, r. 1 RSC, which is the subject of this 'slip rule' appeal.

The Parties' Submissions

197. The appellant's submissions are identical those lodged in the core appeal. He makes a number of points. First, he says that the trial judge refused to hear his motion pursuant to O. 28, r. 11 RSC, to correct and amend factually inaccurate statements in the High Court judgment of 2 September 2019. Second, and by way of contrast, he says that the respondents were permitted by the court, without any motion but purportedly under the 'slip rule', to make an application to amend the High Court judgment and earlier orders made on 23 October 2019. This difference in the trial judge's approach to the parties was prejudicial to him and amounted to '*preferential treatment*' of the respondents.[73] It was unjust, unfair and an abuse of process that the respondents were facilitated with a hearing date, having failed to give adequate notice to him and having failed to file any motion or grounding affidavit.[74]

198. At the hearing of the appeal, the appellant's counsel submitted that it was concerning that the trial judge repeatedly brought the proceedings back before the Court, in that he made

[73] Appellant's submissions, para. 42.
[74] Appellant's submissions, para 42.

amendments to the orders after they had been made and after the judgment had been delivered. Counsel stated that the High Court was denied jurisdiction once the matter was before the Court of Appeal. The crucial date to which this Court should have regard is the date upon which this Court took '*seisin*' of the case. The question in issue is whether the High Court had jurisdiction to make an order after that date.

199. It was submitted that the McKenzie friend of the appellant was threatened with contempt of court when he sought answers to his questions in respect of the McKenzie application and that he was obliged to bring a doctor from Wexford to prove the appellant's dyslexia. The appellant had also been asked to read case law (*Flynn*) and to address the court on legal principles. This, it was submitted, was not only unfair but was a handicap to a lay litigant. It was an example of the intolerance that the trial judge demonstrated towards the appellant.

200. In submissions dated 6 November 2020, the solicitor respondents argued that this appeal should be dismissed. In their view, the earlier order '*plainly*' did not reflect the judgment or what had been pronounced by the judge on 23 October 2019. The corrections made by the order of 17 December 2019 correctly reflected (a) that the trial judge was addressing applications to dismiss the proceeding from both sets of respondents; (b) that the costs had been awarded to both sets of respondents; and (c) that the court, in clarifying that the first named respondent was a legal executive rather than a solicitor, had pronounced that the text of that judgment was '*unapproved*'.

201. The solicitor respondents submitted that the amending order of 17 December 2019 was made following a letter dated 5 December 2019 from their solicitors to the High Court Registrar, in which all other parties were copied. They objected to what they described as the appellant's '*inappropriate attempt*' to raise unrelated issues in this appeal.

202. The appellant's objection to the procedure adopted on the basis of alleged invalidity for want of a motion on notice to him, they say, ignores '*the clear statutory jurisdiction that the*

Court enjoyed to act of its own motion' under O. 28, r. 11(b)(ii) and pursuant to its inherent jurisdiction. The appellant, they contend, was not disadvantaged procedurally, as he had notice of the intended corrections and he was given an opportunity to make submissions on the matter. The corrections made, in their view, were clearly within the scope of both the 'slip rule' and the court's inherent jurisdiction and '*served to ensure that the order expressed the manifest intention of the court below*.'

203. The Buttle respondents, in submissions dated 6 November 2020, considered themselves not proper parties to this appeal. The order of the High Court, as originally perfected, had omitted to recite the solicitor respondents' application to dismiss nor had it recorded that the order made dismissing the proceedings was made on foot of their application, too. That order had only referred to the motion in respect of the Buttle respondents. As a result, the Buttle respondents had not made any application relating to the order in the 2013 proceedings. This, they submitted, was not reflected in the appellant's Notice of Appeal.

The Court's Assessment

204. The purpose of the 'slip rule' is to correct slips or errors on the face of an order. It is in the public interest in the due administration of justice that a decision of a court should not be frustrated by an '*accidental slip or error or clerical mistake*' (*McMullen*). It is clear from a review of the transcript of 23 October 2019 that the terms of the order made on that date did not, in fact, reflect what the trial judge had actually ordered at the end of the hearing. He had made his order having regard to the four applications that were before him and in the light of the judgment he had delivered on 2 September 2019. That there were obvious errors on the face of the order that followed the hearing on 23 October 2019 is evident. A comparison of the earlier order with the transcripts of 2 September 2019, 9 October 2019 and 23 October 2019

makes this clear. It is equally evident that these errors were corrected, appropriately, by the amended order of 17 December 2019 in the following manner.

205. First, the amended order, in contrast to the original order of 2 October 2019, expressly referred to the solicitor respondents' motion to dismiss the appellant's 2013 combined action and stated that the proceedings were dismissed against *all* of the respondents. This correctly reflected para. 27 of the High Court judgment:

> "*By reason of the foregoing I will grant <u>both</u> the Solicitor defendants, and the Buttle/Filbeck defendants the reliefs which they seek in their respective notices of motion seeking orders to dismiss these proceedings for want of prosecution.*"

206. Second, while the order of 23 October 2019 did not record that the appellant was responsible for the costs of the solicitor respondents, the amended order clarified this. This reflects the trial judge's ruling on 23 October 2019, wherein he granted the respondents the costs of *both* of their applications and the costs of defending the proceedings to date, including any reserved costs.[75] This ruling on 23 October was on the basis that the appellant had not pointed to anything which would allow the Court to deviate from the normal rule, as it then was, that '*costs follow the event*'.[76]

207. Third, the amended order specified that the proceedings be dismissed against all defendants '*for inordinate and inexcusable delay on the part of the Plaintiff to the detriment of the Defendants.*' This was a change from the order of 23 October 2019, which ordered that the proceedings be dismissed, pursuant to O. 122, r. 11 RSC. The High Court judgment had indicated, clearly, that the proceedings were dismissed for inordinate and inexcusable delay and this is evident in the judge's reliance on the *Primor* principles. At paragraph 21 of the judgment, the trial judge concluded: '*Therefore, it follows that in prosecuting these*

[75] Transcript, 23 October 2019, page 24, lines 6-14.
[76] The new rule came into effect on 3 December 2019, under O. 99, r. 1 RSC.

proceedings the plaintiff has been guilty of inordinate and inexcusable delay.' No reference at all is made to O. 122, r. 11 RSC, in the High Court's judgment. Thus, the change in the amended order of 17 December 2019 served only to align the order made with what was actually stated in the judgment.

208. Finally, the order of 17 December 2019 made some minor changes to the paragraph of the earlier order of 23 October 2019 which had referenced the change made in the judgment to reflect that Ms Connors was a legal executive rather than a solicitor. These changes amounted only to the inclusion of a reference to the fact that the judgment delivered on 2 September 2019 was an '*unapproved*' text. The earlier order of 23 October 2019 stated:

> "***AND IT IS ORDERED*** *that paragraph nine of the Judgment delivered on the 2nd day of September be amended to reflect that the title of the First Named Defendant Marguerite Connors is Legal Executive and not Solicitor as she is so described in the said Judgment*"

The amended order of 17 December stipulates:

> "*And* ***IT IS FURTHER ORDERED*** *that paragraph 9 of the unapproved draft text of the judgment of the Court delivered on the 2nd of September 2019 be amended to reflect that the title of the First Named Defendant Marguerite Connors is Legal Executive and not Solicitor as indicated in that said unapproved draft;*"

I am satisfied that the slightly amended version of the earlier order does not, in any way, alter the substance of what had been ordered.

209. I am not at all persuaded by the appellant's argument that the appeal should be allowed because a fraud was committed. This point was related to his complaint that whilst he was obliged to file a motion and swear an affidavit grounding his application under the 'slip rule', no such requirement was imposed upon the respondents. This, he claims, constituted '*preferential treatment*' of the respondents, and the failure to oblige them to take the same route

that he was obliged to take, defrauded the State of €80 in terms of unpaid stamp duty that would otherwise have been payable had a motion and affidavit been filed.

210. I can only assume that the appellant intended to say 'deprived' rather than '*defrauded*' when referring to the State's alleged loss of €80, there being not a shred of evidence to suggest the existence of the most basic element of any criminal intent (or *mens rea*) in failing to issue a motion. The reality is that the solicitor respondents wrote to the court registrar on 5 December 2019 indicating their intention to bring the identified errors in the court's earlier order of 23 October 2019 to the court's attention. That letter was copied to the appellant. Whereas he may perceive that '*preferential treatment*' was afforded to the respondents in being permitted to approach the court in this manner whilst his formally lodged application was not entertained, the reality is that it was entirely within the discretion of the trial judge to approach the issue in the way that he did. This did not constitute discrimination. It was an exercise of the court's discretion when dealing with two ostensibly similar but, in fact, very different applications.

211. There is no comparison between the application made by the respondents to correct errors on the face of the orders made on 23 October 2019 and Mr Kirwan's application that was purportedly also made under the 'slip rule'. A review of the affidavit grounding his application is sufficient to demonstrate that he sought to raise matters that could not, under any guise, be characterised as a 'slip' or an 'error'. For example, one of the amendments he sought was grounded on his contention that the trial judge's finding (at para. 15) that the '*plaintiff took no step to prosecute these proceedings since December, 2013, some six years ago*' did not reflect that, in this period, there were three sets of replies to Notices for Particulars outstanding. This is, clearly, not a question of seeking to correct a technical error or 'slip'. It is an attempt to dispute the trial judge's analysis of the second limb of *Primor* which requires consideration of the excuse or explanation offered for the inordinate delay. In those circumstances, the trial judge was entitled to take the view that the appellant was attempting to collaterally raise matters

that had already been dealt with by the court in its judgment. In this regard, his decision not to permit the appellant to proceed with his application, in circumstances where he acceded to the solicitor respondents' application, does not constitute discrimination. It was justified and cannot be impugned.

212. As to the question of the High Court's alleged lack of jurisdiction, it is true that the Notice of Appeal in the core appeal was dated 26 November 2019, that is, prior to the amendments ordered on 17 December 2019. However, the fact that this Court had '*seisin*' of the appeal (to use the phrase of counsel for the appellant) did not, in my view, deprive the High Court of its jurisdiction to correct a technical error in the record. As Murray J. confirmed in *McMullen*, there is a fundamental public interest in the due administration of justice which requires that the decision of a court should not be frustrated by an '*accidental slip or error or clerical mistake*'. It is important that when this Court reviews, on appeal, the orders made by the High Court, that it reviews the orders that were actually made and is not frustrated in the administration of justice by being obliged to review some erroneous version thereof.

213. Moreover, I can see no prejudice caused to the appellant by the High Court permitting the amendments to be made since those amendments were entirely in line with what the trial judge had found in his judgment which was then under appeal. I am satisfied that, in the circumstances that prevailed and having regard to the nature of the changes made, there was no want of jurisdiction and the High Court was entitled to correct the official record by the amendments it made to the order of 23 October 2019.

214. I accept the solicitor respondents' contention that the appellant's attempt to rely on an affidavit sworn by John O'Leary in a separate set of proceedings before the Solicitors' Disciplinary Tribunal is also misplaced. It has no relevance to the issue in this appeal which is whether the High Court erred in permitting amendments to be made under the 'slip rule' pursuant to its inherent jurisdiction.

215. Finally, whereas counsel for the Buttle respondents had attended and addressed the High Court on the occasion of 17 December 2019, I accept that, for the purpose of this ruling, they are not proper parties to this appeal in that they did not move the application that resulted in the amending order of 17 December 2019 being made.

Conclusion on Second Appeal

216. For the reasons set out above, the High Court judge's decision of 17 December 2019 to amend his earlier order of 23 October 2019 in order to correct errors identified on the face of that earlier order cannot be impugned.

217. The second appeal is, therefore, dismissed.

The Third Appeal

218. The appellant's claim in the third appeal (2019/485) is that the trial judge erred in striking out the 2012 action as a consequence of his decision to dismiss the 2013 combined proceedings for want of prosecution. Mr Buttle is the sole respondent to the third appeal since he and Mr Kirwan are the only parties named in the title of the 2012 proceedings. One of the orders made on 23 October 2019 that did not require any amendment was the order re-entering Mr Buttle's application to strike out the 2012 proceedings as disclosing no cause of action and/or as being frivolous and vexatious and, thereafter, granting that application (see para. 57 above).

Background

219. It is recalled that, having declined to enter an appearance to the 2011 creditor action, the appellant initiated the 2012 proceedings against Mr Buttle seeking *inter alia* the sum of €3,000,000. Mr Buttle then sought an order, pursuant to O. 19, r. 28 RSC, dismissing or staying

those proceedings as disclosing no reasonable cause of action.[77] In the alternative, he sought an order pursuant to the inherent jurisdiction of the court striking out the proceedings on the grounds that they were frivolous and vexatious and/or bound to fail.

220. In Mr Buttle's grounding affidavit sworn on 22 February 2013 he averred that the 2012 proceedings were instituted solely as a means to delay the execution of the judgment which Filbeck had secured against Mr Kirwan in the related 2011 creditor action. Quite apart from the fact that there was no substance to the 2012 action, Mr Buttle contended that the appellant had provided no details in the summons as to how the sum claimed had, allegedly, fallen due for payment. Moreover, he claimed while the appellant had sought an order in the 2012 proceedings vacating a charge held on his property, such a relief could not be the subject of summary proceedings.

221. As noted earlier, the hearing of Mr Buttle's motion was, effectively, adjourned on 5 December 2013. On that date, it was ordered that the 2012 action be listed for hearing '*with the proceedings bearing record number **2013** 5514 P between Brendan Kirwan Plaintiff and Marguerite Connors & Ors Defendants*.' As also noted earlier, no further step was taken for several years thereafter, in the 2012 action pending the hearing of the 2013 claim.

222. The first application to dismiss the 2013 proceedings for want of prosecution was made by the Buttle defendants on 17 August 2018. Three days later, on 20 August 2018, Mr Buttle sought to re-enter his adjourned motion in the 2012 proceedings to have those proceedings struck out as being frivolous and vexatious. This was grounded on his affidavit of 16 August 2018 wherein he asked the court to grant his re-entered motion '*as a <u>consequence</u> of the failure of the plaintiff to prosecute related proceedings Record No.<u>2013</u>/5514P*'.

223. That application to re-enter the adjourned 2013 motion was before the High Court when it delivered its judgment in the 2013 combined proceedings. In his judgment, the trial judge

[77] By motion returnable for 22 April 2013.

noted that, as a result of the 2013 combined action being dismissed, '*there are consequential orders that are required to be made in both the 2011 and 2012 proceedings*.' On 2 September 2019 (the date of the judgment) counsel for the Buttle respondents submitted that the 2012 action had been subsumed in the 2013 combined proceedings, such that it must now also '*fall away*' given that the 2013 proceedings had been dismissed (see para. 181 above). Moreover, he added that, in any event, the 2012 action did not identify any '*sustainable cause of action*'.[78] Mr Kirwan indicated to the court that he was appealing the judgment delivered. The judge decided to put the matter back to October 2019 '*to formulate an order for the purposes of dealing with the 2011 and 2012 proceedings.*'[79]

224. On 23 October 2019, counsel for Mr Buttle recalled that the re-entered motion in the 2012 action was before the Court and it was a motion to dismiss those proceedings. He reiterated that in circumstances where the court had dismissed the 2013 combined action, it followed '*naturally*' that the 2012 proceedings must fall away since the substance of everything advanced in the 2012 action was repeated in the 2013 combined action.[80]

225. In seeking Mr Kirwan's response to the application, the trial judge reminded him of what he had averred on affidavit,[81] namely that:

> "*Due to reflection and in light of new evidence which suggests all documents prepared and advised by M.J. O'Connor Solicitors are null and void from the outset (sic). It will be inappropriate to proceed with this case until the outcome of plenary case 2013 is known.*"[82]

226. Mr Kirwan submitted that the 2013 case did not deal with the core issue of the 2012 action, which, in his view, was that Marguerite Connors could not give legal advice.[83] The

[78] Transcript, 2 September 2019, page 7, lines 17-30.
[79] Transcript, 2 September 2019, page 8, lines 21-22.
[80] Transcript, 23 October 2019, page 10, lines 4-17.
[81] Affidavit of Brendan Kirwan, 27 May 2013, para. 2.
[82] Transcript, 23 October 2019, page 13, lines 24-28.
[83] Transcript, 23 October 2019, page 17, lines 9-11.

judge pointed out that Marguerite Connors was not a party to the 2012 proceedings. Nonetheless, the appellant reiterated this point, stating that:

> "*We are far from finished on the 2012 case […] It is crystal clear that John O'Leary and Brid O'Leary and Marguerite Connors had conned us, and it is laid out in great detail how that cannot happen in law (sic) and how John O'Leary is trying to swindle the Court and mislead us […].*"[84]

He added:

> "*[the 2012 Buttle action] cannot be struck out until the core matter of the fraud and the breaking of the Solicitors Act and the breaking of many other laws including the Criminal Justice Acts (sic) that Marguerite Connors, John O'Leary and Eamonn Buttle all together have conned and stolen from us […].*"[85]

227. Having heard the submissions of the parties, the trial judge recalled that Mr Kirwan had averred that it would be inappropriate to proceed with the 2012 proceedings until the outcome of the plenary 2013 case was known. He then stated:

> "*The outcome of the plenary case 2013 is now known, and that is that I have struck out those proceedings. So therefore, it seems to me it follows, as a matter of logic and as a matter of law, that the 2012 proceedings. . .would also be struck out, and I will strike out those proceedings and I will award the costs of those proceedings including any reserved costs to the named defendant Mr Buttle.*"[86]

228. Consequently, on 23 October 2019, the Court ordered:

> "*[T]hat the Defendant be at liberty to re-enter the motion that [the] within proceedings be struck out and the Plaintiff do pay to the Defendant the costs of these proceedings herein to include all reserved costs to be taxed in default of agreement*".

It is against the High Court order striking out the 2012 proceedings that the appellant brings his third appeal.

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[84] Transcript, 23 October 2019, page 18 line 27 – page 19, line 3.
[85] Transcript, 23 October 2019, page 19, lines 9-14.
[86] Transcript, 23 October 2019, page 25, lines 14-21.

Grounds and Submissions

229. The appellant's grounds of appeal are identical to those in the first or core appeal. For the most part, they take the form of submissions and it is difficult to identify grounds that are specific to the trial judge's alleged error in striking out of the 2012 proceedings. Taken together and, bearing in mind what has already been summarised in the context of the core appeal (see paras. 67-72 above), his 'grounds' of appeal and his submissions insofar as they may be said to concern to the third appeal may be summarised thus. The 2011 creditor action was not suitable for summary proceedings and the '*Buttles were served 2012 proceedings*'.[87] The trial judge had refused to hear his motion to set aside the judgment obtained in the 2011 creditor action. This amounted to an infringement of his right to a fair hearing. He had not been served in the 2011 proceedings. There was ample evidence of serious issues and deception at play throughout the proceedings. On the day following the service of the 2012 proceedings, the Buttle respondents lodged '*judgement papers*'. This '*abuse of process*' was not dealt with in the judgment.[88] The trial judge erred in finding that the judgment in the 2011 creditor action proved beyond all reasonable doubt that the respondents were not liable. This was prejudicial to him.[89]

230. Beyond the above and what has already been summarised in the context of the first appeal, the appellant did not elaborate on the central claim in this appeal. One can glean from his submissions to the High Court on 23 October 2019 that he considered that the 2012 action should not be struck out as he hoped to pursue the matter of Marguerite Connors' non-solicitor status through those proceedings.

Response and Submissions

[87] Appellant's Notice of Appeal para. 24.
[88] Appellant's Notice of Appeal/Submissions, para. 24.
[89] Appellant's Notice of Appeal/Submissions, para. 29.

231. The respondent's grounds of opposition ('Reply' filed on 7 February 2020) and his submissions (6 November 2020) may be summarised as follows. The trial judge correctly struck out the 2012 proceedings, given that the material issues therein were, in substance, the same as those in the 2013 combined action.[90] The appellant himself had deposed that it would be '*inappropriate to proceed with [the 2011 action] until the outcome to [sic] Plenary Case 2013/5514P is known.*'[91] The order of the High Court of 5 December 2013 directed that the 2012 action be heard with the 2013 combined action.[92]

232. The trial judge correctly concluded that the finding of the appellant's inexcusable and inordinate delay in the 2013 combined action was equally applicable to his prosecution of the 2012 action.[93] Moreover, the decision should be affirmed on additional grounds. The 2012 action was bound to fail, such that it was appropriate that it be struck out pursuant to the High Court's inherent jurisdiction.[94]

233. The continued prosecution of the 2012 proceedings would be frivolous and/or vexatious, and thus it was appropriate that it be struck out pursuant to the High Court's inherent jurisdiction. This is because (a) the issue has already been determined by a court of competent jurisdiction; (b) the action obviously cannot succeed; it would lead to no possible good and no reasonable person could expect to obtain the reliefs sought by the appellant in the case; and (c) the appellant had failed to pay the costs of his unsuccessful 2013 combined action.[95] Finally, having regard to the outcome in the 2013 combined action, the matters in the 2012 Buttle action are *res judicata*. The continued prosecution of the 2012 proceedings would amount to an abuse of the court's process.[96]

[90] Respondent's Reply, s. 1, para. 1(b).
[91] Respondent's Reply, s. 1, para. 1(a).
[92] Respondent's Reply, s. 1, para. 1(c).
[93] Respondent's Reply, s. 1, para. 1(e).
[94] Respondent's Reply, s. 2, para. 1.
[95] Respondent's Reply, s. 2, para. 2.
[96] Respondent's Reply, s. 2, para. 4.

234. No grounds on which the order made in relation to the 2012 action ought to be set aside have been identified.[97] The 2012 action was wholly encompassed within the 2013 combined action.[98] It was liable to be struck out given the judgment in the combined action of 2 September 2019.[99] The motion before the High Court in the 2012 action was distinct from the motion to dismiss for want of prosecution in the 2013 combined action. By the re-entered motion, Mr Buttle had sought to have the 2012 action struck out as having no cause of action and for being frivolous and vexatious. Nonetheless, the trial judge's finding that the appellant was guilty of inordinate and inexcusable delay in prosecuting complaints in the 2013 case was a sufficient basis to also strike out the 2012 action as frivolous and vexatious, as the complaints were the same in both sets of proceedings.[100]

235. In re-entering the motion to dismiss the 2012 proceedings the respondent had linked that application to the fact of delay in the 2013 proceedings. Paragraph 3 of Mr Buttle's affidavit of 16 August 2018 demonstrates this. He had averred that for reasons outlined in previous affidavits filed in the matter '*and as a consequence of the failure of the plaintiff to prosecute related proceedings Record No. 2013/5514P*' he had asked the court to grant the relief sought on the grounds that the 2012 proceedings were frivolous and vexatious and are bound to fail. All of this was before Meenan J. who had used the word '*combine[d]*' when referring to the 2013 proceedings.[101]

236. The 2012 action cannot succeed given the trial judge's findings in the 2013 combined action. It was, therefore, bound to fail. In these circumstances, the High Court has an inherent jurisdiction to strike out proceedings which amount to an abuse of the court's process, as disclosed by the pleadings and the facts of the case. *Barry v. Buckley* [1981] IR 306 was

[97] Respondent's Submissions, para. 14.
[98] Respondent's Submissions, para. 17.
[99] Respondent's Submissions, para. 18.
[100] Respondent's Submissions, para. 23.
[101] Counsel's oral submissions.

authority to say that if the Court is satisfied that the '*plaintiff's case must fail*' on consideration of the documents then '*it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and which are manifestly causing irrevocable damage to a Defendant*.'[102]

237. The circumstances of the instant case *are* different from those in which this jurisdiction is ordinarily exercised. However, this jurisdiction may be invoked where irreparable damage would be caused to the respondent, in the form of prejudice, if the 2012 action were permitted to proceed.[103] It is an abuse of process of the court to litigate any matter which had already been concluded by a final and binding order of the Court. If the appellant pursued the 2012 action, such re-litigation would be vexatious.[104] In the respondent's view, the three requirements for *res judicata* as outlined by Keane C.J. in *Sweeney v. Bus Átha Cliath* [2004] 1 IR 576 ('*Sweeney*') are met.[105] Those principles are:

> "*[…] firstly, that the same question has been decided, secondly, that the judicial decision which is said to create the estoppel was final and finally, that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.*"

238. In summary, the claims pleaded against the respondents in the 2013 combined action included a repeat of the claim pursued in the 2012 action. The appellant elected not to prosecute the 2012 action where the 2013 combined proceedings were ongoing. The delay in prosecuting the 2012 case was equal to or more egregious than the delay which led to the 2013 combined action being dismissed.[106]

[102] Respondent's Submissions, para. 24.
[103] Respondent's Submissions, paras. 25-26.
[104] Respondent's Submissions, para. 30.
[105] Respondent's Submissions, para. 32.
[106] Respondent's Submissions, para. 33.

The Court's Assessment

239. The Court observes the dearth of written submissions from the appellant that are focused, specifically, on the third appeal. Few, if any, oral submissions were made in this regard at the hearing of the appeal. The issue to be determined is whether the trial judge erred in striking out the 2012 proceedings as a consequence of the order made in the 2013 combined action.

240. It is important to note, at the outset, that the High Court judge in his judgment, specifically indicated (at paras. 5 to 8) that, in addition to the 2013 proceedings, there were two other sets of proceedings before the court, and he identified those as the 2011 and 2012 proceedings. He recalled that motions in those proceedings had been adjourned, generally, in order to facilitate Mr Kirwan to prosecute the combined 2013 action.

241. It is also important to note that in dealing with the application to re-enter Mr Buttle's motion to dismiss the 2012 proceedings as being frivolous and vexatious or as disclosing no cause of action, Meenan J. had referred, specifically, to the delay in prosecuting the related claim in the 2013 proceedings.[107]

242. It has to be acknowledged that the transcripts do not disclose that the trial judge considered in detail the relevant legal principles on frivolous or vexatious litigation or on *res judicata*. It seems clear that he dismissed the 2012 proceedings on the simpler basis that '*as a matter of logic and as a matter of law*' they fell to be dismissed in view of the outcome of the 2013 claim.[108] Was he entitled so to do in the circumstances that prevailed?

243. For several reasons, I have come to the view that the decision of the trial judge in striking out the 2012 proceedings was a decision that he was entitled to make. First, it is clear from the terms of the order made on 5 December 2013, that the 2012 proceedings were, formally, before the trial judge when he came to deal with the 2013 proceedings. That order specifically

[107] Transcript, 23 October 2021, page 25, lines 14-21.
[108] Transcript, 23 October 2021, page 25, lines 14-21.

recorded that the 2012 proceedings be listed for hearing '*with proceedings bearing record number 2013 5514 between Brenan Kirwan Plaintiff and Marguerite Connors & Ors Defendants.*' That being so, the trial judge was entitled to hear and determine any application that was made to the court in respect of the 2012 proceedings.

244. Second, the application that was before the court on 23 October 2019 in the 2012 proceedings was the respondent's motion to re-enter the adjourned application seeking to strike out that action for being frivolous and vexatious and/or for disclosing no cause of action. The application was brought pursuant to O. 19, r. 28 RSC and pursuant to the court's inherent jurisdiction to strike out claims for being frivolous or vexatious or bound to fail. As noted above (at para. 235), in seeking to re-enter that motion, the respondent had specifically linked his application to dismiss the 2012 case to the delay in prosecuting the related 2013 claim. [109]

245. Third, when the appellant had sought to adjourn the 2012 proceedings back in 2013, he had averred, on affidavit, that it would be '*inappropriate*' to hear that (2012) case until the outcome of the 2013 action was known. Such an averment cannot be seen as anything other than a clear acknowledgment, on his part, that the outcome of the combined action would have a bearing on the 2012 claim.

246. The court's jurisdiction to strike out proceedings that disclose no cause of action or that are bound to fail or that are frivolous and vexatious, serves the purpose of ensuring that access to court is reserved for genuine disputes and is not used as '*a forum for lost causes*'. It also aims to ensure that '*litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed*' (*Fay v. Tegral Pipes Ltd* [2005] IESC 34, para. 10).

247. Since the 2013 combined proceedings were dismissed for want of prosecution, it is difficult to see how the earlier 2012 claim (which was subsumed into the 2013 action) could

[109] Para. 3 of Mr Buttle's affidavit of 16 August 2018.

be regarded as anything other than '*a lost cause*' given its greater antiquity and the similar nature of the issues raised in both sets of proceedings. Moreover, little, if any, action was taken to progress the 2012 proceedings. The order that was made on 5 December 2013 stipulated that the 2012 proceedings be listed for hearing with 2013 combined action. Thereafter, it appears that no steps were taken in the 2012 action. Mr Buttle issued a Notice of Change of Solicitor on 1 December 2017. It was only after his application in August 2018 to re-enter his motion to strike out the 2012 claim for being frivolous and vexatious, that the appellant took a step in the 2012 proceedings, by issuing a motion on 13 November 2018 seeking to strike out the defence for '*want/lack of fact and truth*'. Thus, there was a delay in prosecuting the 2012 proceedings that was at least equal to, if not more egregious than, the delay which led the combined 2013 proceedings being dismissed.

248. Additionally, since the pleadings disclose that the claims made in the 2012 proceedings had been subsumed, effectively, into the 2013 case (see para. 17 and footnote 6 above), it must follow that when the 2013 action was brought to a conclusive end with the order dismissing the proceedings, the claims made in the earlier 2012 proceedings must also be deemed to have come to an end and, accordingly, could not succeed. There are sound reasons as to why proceedings that are bound to fail should not be litigated, including, the prejudice caused to a party asked to defend such a claim that has no prospect of success (*Fay v. Tegral Pipes Ltd*). For the trial judge to have allowed the 2012 proceedings to remain in being in circumstances where he had dismissed the 2013 combined action would have been entirely inconsistent. I am satisfied that not only would such a course of action have made no sense, it would also have been a waste of limited court resources.

249. I accept that the High Court did not analyse the 2012 proceedings, expressly, in terms of their allegedly 'frivolous' or 'vexatious' nature. However, it seems to me that, having dismissed the 2013 proceedings, the 2012 case that was left before the judge in the aftermath

of the judgment he had delivered, could well come within the meaning of '*vexatious*' as interpreted in the case law. In *Kearney v Bank of Scotland* [2018] IEHC 265, McGovern J. observed at para. 22 that:

"*In Ewing v Ireland [2013] IESC 44, McMenamin J. at para. 28 adopted the views of Ó'Caoimh J. in Riordan v Ireland (No. 5) [2001] 4 I.R. 463, who set out the following issues as tending to show that litigation was 'vexatious':-*

'(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;

(b) where it is obvious that an action that cannot succeed, or if the action could lead to no possible good, or if no reasonable person could reasonably expect to obtain relief;

(c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

(f) where the respondent persistently takes unsuccessful appeals from judicial decisions.""

250. In circumstances where the 2012 claim was subsumed or '*rolled forward*' or '*repeated*' into the 2013 action and, having regard to the fact that it had been left in abeyance for even longer than the 2013 proceedings, it seems to me that it must be regarded as obvious that the 2012 action cannot succeed. In this regard, it falls within the terms of sub-paragraphs (b) and (d) above. Moreover, as noted earlier (at para. 235), in seeking to have the 2012 claim struck out as being frivolous, vexatious and bound to fail, the respondent had made it clear that he was relying on the High Court's finding of delay in respect of the 2013 proceedings in support of his application in respect of the 2012 action.

251. The respondent (Mr Buttle) has averred that the 2012 action was '*employed solely as a device to delay execution of a judgment obtained against the plaintiff*'. It is not necessary for me to decide that Mr Kirwan's intention was to frustrate execution of the order made in the creditor action in the manner contended for by the respondent. What is clear, however, is that Mr Buttle's motion to dismiss the 2012 proceedings was paused and the execution of the judgment obtained in the 2011 creditor action was stalled pending the prosecution of the 2013 combined action. The matters in issue in those two earlier sets of proceedings were '*combine[d]*' in the 2013 proceedings, as the trial judge noted, and the essence of the appellant's claims against Mr Buttle in the 2012 action was repeated in the 2013 proceedings. That being so, once an order was made that the 2013 proceedings should be dismissed for want of prosecution, it must follow that this order was fatal to any prospect of success in the 2012 proceedings.

252. Nor, in my view, is it necessary for this Court to determine the respondent's claim of *res judicata*. The test for *res judicata* as set out in *Sweeney* was opened to the court. The respondent submitted that the 2012 action was subsumed into the 2013 combined action and that litigation of the 2012 proceedings would amount to re-litigation of an issue already determined and would, accordingly, be vexatious. As I have observed in the first appeal, the issue in the substantive proceedings was not determined on the application that was before the High Court. The decision of the court was concerned only with the inordinate and inexcusable delay on the part of the appellant in prosecuting his claim. In that sense, permitting the 2012 claim to proceed would not, necessarily, amount to '*re-litigation of an issue*' or a decision on '*the same question*'. It would simply make no sense to allow an earlier and substantively similar claim in which no action had been taken for five years to proceed, when the claim that issued a year later was dismissed for want of prosecution.

253. I am satisfied that the appellant could not reasonably expect to obtain the relief he seeks in the 2012 action in circumstances where: (i) the claims he made against Mr Buttle in that case were subsumed into the 2013 combined action; (ii) he failed to prosecute either set of proceedings for a period of at least five years; (iii) the 2013 combined action was struck out for his inordinate and inexcusable delay; and, (iv) the delay in the 2012 action was even longer than the delay in the 2013 combined action.

254. To my mind, the judge was entitled to factor into his determination of the respondent's application to dismiss or strike out the 2012 case, his finding in respect of the outcome in the combined 2013 proceedings. To allow the 2012 proceedings to remain extant would have been entirely inconsistent with his order in the combined proceedings. It would also have been unfair to the respondent by requiring him to defend proceedings that could not possibly succeed.

Conclusion on the Third Appeal

255. For the reasons set out above, I am satisfied that the trial judge did not err in his decision to strike out the 2012 claim as an order that was consequential upon his order in the 2013 proceedings.

256. Accordingly, the third appeal is dismissed.

Miscellaneous

Extant Order for Judgment in the Creditor Action

257. As noted above, the appellant sought to have the judgment against him in the 2011 creditor action set aside. His application was refused. The trial judge made an order on 23 October 2019 that Filbeck be allowed to execute its judgment against the appellant and that order has not been appealed.

Decision

258. For the reasons set out above, I would dismiss the three appeals bearing record no. 2019/486); record no. 2020/14); and, record no. 2019/485.

259. I see no basis upon which the appellant might avoid an order awarding the costs of the three appeals to the respondents and I would make such an order on a provisional basis. However, if the appellant wishes to argue for an alternative order, he may apply within fourteen days to the Office of the Court of Appeal to have the matter listed for a short hearing on costs. If, however, a hearing on costs is requested and if, having heard the parties, the Court makes the order it has, provisionally, indicated, then the appellant may be at risk of having to pay the additional costs incurred as a result of the hearing.

260. As this judgment is being delivered, electronically, Woulfe and Binchy JJ. have indicated their agreement with the reasoning and the conclusions reached herein.