Unapproved / Redacted

THE COURT OF APPEAL
CIVIL

Woulfe J.
Power J.
Binchy J.

Neutral Citation Number: [2023] IECA 120
Record Number: 2019/486
High Court No. 2013/5514P

BETWEEN/

BRENDAN KIRWAN

PLAINTIFF/
APPELLANT

- AND -

MARGUERITE CONNORS TRADING UNDER THE STYLE OF MJ O'CONNOR SOLICITORS, MJ O'CONNOR SOLICITORS, EAMONN BUTTLE, FILBECK LIMITED, NORMAN BUTTLE, MARY BUTTLE, HILARY BUTTLE, JOHN O'LEARY TRADING UNDER THE STYLE OF MJ O'CONNOR SOLICITORS, BRID O'LEARY TRADING UNDER THE STYLE OF MJ O'CONNOR SOLICITORS

DEFENDANTS/
RESPONDENTS

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

BETWEEN/

BRENDAN KIRWAN

PLAINTIFF/
APPELLANT

- AND -

MARGUERITE CONNORS TRADING UNDER THE STYLE OF MJ O'CONNOR SOLICITORS, MJ O'CONNOR SOLICITORS, EAMONN BUTTLE, FILBECK LIMITED, NORMAN BUTTLE, MARY BUTTLE, HILARY BUTTLE, JOHN O'LEARY TRADING UNDER THE STYLE OF MJ O'CONNOR SOLICITORS, BRID O'LEARY TRADING UNDER THE STYLE OF MJ O'CONNOR SOLICITORS

DEFENDANTS/
RESPONDENTS

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

BETWEEN/

BRENDAN KIRWAN

PLAINTIFF/
APPELLANT

- AND -

EAMONN BUTTLE

DEFENDANT/
RESPONDENT

RULING OF THE COURT

Delivered on the 18th day of May 2023

Background to Proceedings

1. Three appeals in the above matters were heard before this Court on 1 July 2021. The appellant (hereinafter 'Mr Kirwan') was represented in each appeal by a firm of solicitors (no longer on record) and by counsel. The first or 'core' appeal (2019/486) was in respect of an order made by the High Court on 23 October 2019 striking out proceedings on the grounds of inordinate and inexcusable delay. Those proceedings, instituted in 2013, concerned a disputed property agreement between Mr Kirwan and Mr Buttle which dated back to 2006. In that action, Mr Kirwan sued several persons, including, Mr Buttle, and the firm of solicitors that had been on record for both parties to the agreement. The second appeal concerned amendments made to a High Court order under the 'slip rule' and the third appeal was in respect of a consequential order made by the High Court striking out a separate set of proceedings which Mr Kirwan instituted in 2012 on the grounds of being frivolous or vexatious and/or bound to fail.

2. On 26 October 2022, this Court delivered judgment in respect of the appeals (hereinafter 'the Judgment'). All three appeals were dismissed. This Court held that the High Court (Meenan J.) had not erred in its judgment of 2 September 2019 wherein it struck out the 2013 proceedings on the grounds of inordinate and inexcusable delay. It was also satisfied that the High Court had not erred in permitting amendments to be made under the 'slip rule' to orders made on foot of its ruling so as to reflect, more accurately, the decision handed down by the court below. This Court was further satisfied that the High Court had not erred in making a consequential order striking out a separate set of proceedings instituted by Mr Kirwan in 2012 in the light of the judgment delivered in respect of the 2013 proceedings.

3. It was noted in the Judgment that Mr Buttle had assigned his rights under the disputed property agreement to Filbeck Limited ('Filbeck'). That company had secured judgment against Mr Kirwan in proceedings it had instituted in 2011 ('the 2011 creditor action'). Mr Kirwan sought to set aside that judgment and his motion in this regard was adjourned, generally, to the hearing of the 2013 proceedings. Following the High Court's judgment in the 2013 proceedings, Meenan J. directed that Filbeck be at liberty to re-enter Mr Kirwan's motion to set aside the judgment in the 2011 creditor action. That motion was then refused, and an order was made on 23 October 2019 granting liberty to Filbeck to execute the judgment it had obtained. That order was not appealed by Mr Kirwan (see paras. 12 to 16 and para. 257 of the Judgment).

4. After Judgment was delivered in these appeals, a hearing on costs was held before this Court on 13 December 2022. Having considered the parties' written and oral submissions, the provisional view of the Court (as indicated at para. 259 of its Judgment), that an order for costs in favour of the respondents should be made, was affirmed.

5. Final orders made by this Court in respect of the above appeals were perfected on 23 December 2022.

Application for Review

6. Meanwhile, and following delivery of the Judgment in these appeals, Mr Kirwan had issued a Notice of Motion on 7 December 2022 seeking an order setting aside that Judgment or, in the alternative, an order correcting the alleged errors and omissions contained therein, errors which, in Mr Kirwan's view, are based upon this Court's acceptance of the '*false narrative*' of the Buttle respondents. The application, which, essentially, asks this Court to review its own Judgment and to grant several reliefs on foot of such review, is grounded upon an affidavit of 7 December 2022 sworn not by the appellant but by his son, Mr Barry Kirwan.

7. At the outset, the Court observes that Mr Barry Kirwan has neither sought nor obtained the permission of the Court to swear the grounding affidavit on his father's behalf in this application for review. Although the deponent describes himself as the '*Guardian and Next Friend*' of the appellant, no such status has ever been granted to him and there is no evidence whatsoever of any *legal* incapacity on the part of the appellant, himself. Barry Kirwan was permitted by the trial judge in the High Court only to speak on his father's behalf because of the appellant's dyslexia. No reason has been put before this Court as to why Barry Kirwan's testimony in respect of events in 2006 in which his father was involved, should be accepted by this Court in place of the appellant's own sworn testimony. Nor is there any reason offered as to why the content of the grounding affidavit could not have been dictated by the appellant, Brendan Kirwan, and his signature thereto then witnessed in the usual manner. The appellant's failure to swear the affidavit grounding his application for review is a serious deficiency therein. Nevertheless, with that obvious defect noted, the Court will proceed to consider the application.

8. In his application for review, Mr Kirwan contends that his constitutional rights have been breached and that his allegations of fraud, forgery and perjury arising from and/or in connection with the disputed property transaction and the litigation that followed, have not been addressed

by this Court. He claims that several motions that he filed in the High Court and the Court of Appeal have not been heard. In his view, '*[t]he only logical conclusion*' as to why this occurred, is that some of the respondents interfered with booklets that he filed in the Court of Appeal Office and/or have succeeded in removing certain documents from the said booklets. He says that '*proof*' of the fraudulent matters of which he complains was contained in those booklets. He claims that this '*interference*' with the files was addressed by him in what he contends was a '*filed but unheard motion of 18th May 2021*'.

The Law

The Constitutional Principle of Finality of Judgments

9. The principle of finality of decisions is an important constitutional guarantee. That guarantee is set out in Article 34.5.6° of the Constitution[1] which provides that:

> '*The decision of the Supreme Court shall in all cases be final and conclusive.*'

The public interest in the finality of proceedings at appellate level has been described as one of '*fundamental importance to the certainty of the administration of law*' (*per* Hamilton C.J. in *Re Greendale Developments Limited (No. 3)* [2000] 2 IR 514 ('*Greendale*') (at p. 528)).

10. With the coming into effect of the *Thirty-Third Amendment of the Constitution (Court of Appeal) Act, 2013*, decisions of the Court of Appeal also enjoy finality, subject only to the right of appeal to the Supreme Court. In this regard, Article 34.4.3° of the Constitution provides that:

> '*The decision of the Court of Appeal shall be final and conclusive, save as otherwise provided by this Article.*'

The 'saver' in question refers to Article 34.5.3°, which provides that the Supreme Court, '*subject to such regulations as may be prescribed by law*', has appellate jurisdiction from

[1] This provision was previously Article 34.4.6° but following the reorganisation of the Constitution's provisions in respect of the courts, with the establishment of the Court of Appeal, it was re-numbered as Article 34.5.6°.

decisions of this Court if it is satisfied that the decision '*involves a matter of general public importance*' or that such an appeal is necessary '*in the interests of justice*'. This means, in effect, that, unless a case meets the specified constitutional threshold, the reality is that a decision of this Court '*may be final and conclusive*' on disputes and litigation between parties (see *Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63, at para. 30).

11. Since 15 February 2023, there is now in force in the Court of Appeal, a Practice Direction in respect of applications for review, namely, CA14. It specifically provides that applications to set aside a judgment on the grounds that it was obtained by fraud, should be brought by way of plenary proceedings.[2] Whilst, of necessity, CA14 differs from the Supreme Court's Practice Direction in this area (SC17), it is, nevertheless, inspired by the same principles and a similar practice. Practice Direction CA14 sets out the approach of this Court to applications such as the one now brought by Mr Kirwan. Paragraph 1 of section A directs applicants to lodge papers. Paragraph 2 provides that, unless the President of the Court directs otherwise, the application will be considered by the panel which heard the appeal. Paragraph 3, in the relevant part, states that:

> "***The panel of judges*** *referred to in paragraph 2* ***shall determine on the papers*** *referred to in paragraph 1 . . .* ***whether or not****, having regard to the principles referred to in the relevant case-law including the case-law referred to in the recitals to this practice direction,* ***the application intended to be made is one in respect of which a hearing on the merits is justified****.*"[3]

[2] Section B, at para. 9(3)).

[3] Emphasis here and throughout this Ruling is added unless otherwise indicated. The case law referred to in the recitals to Practice Direction CA14 includes *Re Greendale Development Ltd* [2000] 2 IR 514, *Nash v. DPP* [2017] IESC 51, *Student Transport Scheme v. Bus Éireann* [2021] IESC 22, *Launceston Property Finance DAC v. Wright* [2020] IECA 146, and *Dowling and Others v. Minister for Finance* [2022] IECA 285.

If the panel considers that such a hearing on the merits is justified, then the applicant will be granted leave to issue a motion, on notice, for a specified return date.[4] If the panel does not find that such a hearing on the merits is justified, then such leave shall be refused.[5]

The Required Threshold for Review

12. It is settled law that the jurisdiction of a court to review its own decision is an exceptional one to be exercised only in circumstances that meet a high threshold for review. In *Greendale*, the Supreme Court identified the principles to be applied when considering an application for review of a judgment and those principles have since been applied in subsequent case law. A key consideration is, of course, the aforesaid constitutional principle of finality of decisions, the importance of which was articulated by Barron J. (at p. 546) in the following terms:

> "*The Constitution requires the decisions of this court to be final and conclusive for good reason. There must be certainty in the administration of justice. Uncertainty can lead to injustice. In my view, these provisions must prevail unless there has been a clear breach of the principles of natural justice to which the applicant has not acquiesced and such that a failure to take steps to remedy such breach would, in the eyes of right-minded citizens damage the authority of this court. I believe that the jurisprudence of this court has always been to this effect.*"

13. In *Greendale* (at pp. 527-528), Hamilton C.J. observed that, under the common law, a final order made and perfected could only be interfered with in '*special or unusual circumstances*' or where there had been an accidental 'slip' in the judgment as drawn up, or where the judgment as drawn up did not accurately state what the Court had decided or intended. That restriction on the power of a court to amend or vary an order applies with equal force to an application to set aside an order.[6] Hamilton C.J. rejected the application in

[4] At paragraph 7.
[5] At paragraph 6.
[6] Hamilton C.J. in *Greendale* (at pp. 529-30) did acknowledge that an action may be brought to set aside a judgment or order made by a court which had been obtained by fraud and, in this regard, he referred to the

Greendale because, in his view, it was clear from the judgment delivered by the Supreme Court that '*all the issues raised by the applicants therein…were dealt with in the judgment of the court*' and that regard had been had to the submissions (both oral and written) of counsel for the appellants, stating, (at p. 536):

> "*The judgment of the court was delivered and the order made in pursuance thereof correctly stated what the court actually decided and was of a final nature. It was the final determination of the appeal . . . and did not contain any liberty to any party to apply in respect of any matter contained in the order*."

14. In *Greendale,* Denham J. (as she then was) recognised the importance of the finality of judgments but was equally conscious that the Supreme Court has an inherent jurisdiction to protect constitutional rights and justice. She considered that there may be exceptional cases where the Supreme Court should, in fact, exercise its non-appellate jurisdiction (referring, in this regard, to her dissenting opinion in *Attorney General v. Open Door Counselling Limited (No. 2)* [1994] 2 IR 333). She stated (at pp. 544-545):

> "*This jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order.* ***A very heavy onus rests on a person seeking to have such jurisdiction exercised.*** *It would only be in* ***most exceptional circumstances*** *that the Supreme Court would consider whether a final judgment or order should be rescinded or varied. Such a jurisdiction is dictated by the necessity of justice. A case will only be reopened where, through no fault of the party, he or she has been subject to a breach of constitutional rights.*"

15. That the circumstances must be truly exceptional in order to give rise to the Court exercising its jurisdiction to review a final judgment was later underscored by Murray J. (as he then was) in the case of *L.P. v. M.P*. [2002] 1 IR 219 ('*L.P.*') (at p. 230). He pointed out that exceptional circumstances could not include, for example, rulings made in final instance

judgment of Barrington J. in *Waite v. House of Spring Gardens Limited* (Unreported, High Court, 26 June 1985).

concerning matters such as the admissibility of evidence even if such matters had implications for the manner in which a party was allowed to present its case.

16. In *Abbeydrive Developments Limited v. Kildare County Council* [2010] IESC 8, the Supreme Court invoked the *Greendale* jurisdiction to revisit its judgment in circumstances where Kearns P. was satisfied that, having regard to the exceptional and unusual circumstances in which the Court found itself, it had no alternative but to remit the matter to the High Court for hearing. The declaration previously granted by the Supreme Court in that case was made subject to the determination, upon remittal, of a specific issue by the High Court.

17. The Supreme Court, again, considered the *Greendale* jurisdiction in *Nash v. The DPP* [2017] IESC 51 ('*Nash*') and confirmed that a material error of fact may give rise to review and correction. O'Donnell J. (as he then was) noted that there are good reasons why a court is reluctant to review its own judgment, but that they have nothing to do with a supposed infallibility of judges. Factors, such as, the additional costs incurred by parties and the stress imposed on all involved in revisiting old ground are but some of the matters to which a court may have regard.

18. There is a fundamental obligation upon the courts to administer justice and this is articulated in the Constitution in unqualified terms. It is, as O'Donnell J. pointed out in *Nash* (at para. 10), the governing principle of Article 34. He found that any tension between the finality of judgments and the obligation on the courts to administer justice may be reconciled by considering that, where, '*by reason of judicial error or some other extraneous consideration*', it is plain that the outcome of a case cannot be said to be the 'administration of justice', then it cannot be said to be a '*decision*' for the purpose of Article 34. In his view, '*[i]t is plain it must be something fundamental to the decision. One clear example is where a case of objective bias is established for some reason in respect of one or more members of a court*' (See, for example, *Bula Limited v. Tara Mines (No. 6)* [2000] 4 IR 412 (at p. 476)).

19. In *Nash*, O'Donnell J. revisited the important guidance that was to be found in *DPP v. McKevitt* [2009] IESC 29 ('*McKevitt*'), in which the Supreme Court had delivered a ruling on an application to set aside its final decision to dismiss an appeal pursuant to s. 29 of the Courts of Justice Act, 1924 (as amended). Noting the provisions of (what was then) Article 34.4.6˚ of the Constitution on the finality of judgments, he observed that a preliminary question arose as to whether the Court has jurisdiction even to entertain such an application.

20. The jurisdiction was thus characterised by O'Donnell J. (citing Murray C.J. in *McKevitt*) as '*a potential jurisdiction*', because two important factors had to be considered in determining an application to reopen a decision. First, the application must, patently and substantively, concern an issue of constitutional justice other than the merits of the decision, as such. Second, the grounds of the application must demonstrate, objectively, that there is a substantive issue concerning a denial of justice in the proceedings consistent with the onus of proof on an applicant (at paras. 12-13). Having reviewed the application in *Nash*, the Supreme Court was satisfied that errors contained in the Court's judgment were not central to or necessary for the determination of the particular issue in the case. Accordingly, it did not consider it necessary to revisit its decision and it refused the application.

21. Clarke C.J. in *Student Transport Scheme Limited v. The Minister for Education and Skills and Bus Éireann* [2021] IESC 35 reiterated (at para. 8.1 of his judgment) that a party seeking a *Greendale* order must establish to the very high threshold identified in the case law that there has been a '*clear and significant breach of the fundamental constitutional rights of a party, going to the very root of fair and constitutional administration of justice, in the manner in which the process leading to the determination in question was conducted*'.

Review of Judgments by the Court of Appeal

22. The case law outlined above has been reviewed, in detail, by this Court in *Dowling and Others v. Minister for Finance* [2022] IECA 285 ('*Dowling*'). As noted above (at para. 11), this Court, when exercising a *Greendale* type jurisdiction, applies the same principles as those applied by the Supreme Court, albeit cognisant of the fact that an application for leave to appeal a judgment of this Court may be brought before the Court of Final Appeal. In *Dowling*, the obvious constitutional difference between both courts was noted and it was observed (at para. 26) that, for a disappointed appellant who has failed before this Court, an appeal to the Supreme Court may be the more appropriate avenue to take. Nevertheless, where such an appellant seeks a review of a Court of Appeal judgment, this Court then proceeds on the basis that it enjoys a power similar to that enjoyed by the Supreme Court in its non-appellate function.

23. In *Dowling*, the Court recalled (at para. 30) that the parameters of the exceptional jurisdiction to review a judgment had been summarised, previously, in *Launceston Property Finance DAC v. Wright* [2020] IECA 146 ('*Launceston*') in the following terms (at para. 7):

"*In summary, the jurisdiction: -*

(i) is wholly exceptional;

(ii) it must engage an issue of constitutional justice;

(iii) requires the applicant to discharge a very heavy onus;

(iv) is not for the purpose of revisiting the merits of the decision;

(v) alleged errors which have no consequence for the result do not meet the required threshold;

(vi) cannot be invoked on the basis of the discovery of new evidence;

(vii) requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result;

(viii) cannot be used as a species of appeal where a party seeks to address, critically or otherwise, the judgment;

(ix) is to be distinguished from the application of the Slip Rule in respect of errors of fact which have no bearing on the outcome."

24. More recently, in *Kavanagh v. Larkin* [2023] IECA 17 ('*Kavanagh*'), this Court declined an application for review having considered it on the papers. In delivering the Ruling of the Court, Binchy J. noted that the appellant had attempted to raise issues which were not properly before the Court. The claims made by the appellant in *Kavanagh* were not dissimilar to some of the claims made by Mr Kirwan in this application. Binchy J. observed (at para. 13) that:

> "*The appellant claims that this court, 'although fully aware of the facts and fraudulent criminal activities of the plaintiff and their legal counsel, have failed, refused and/or neglected to address these matters in [their] purported judgment.' However, these were not matters that fell for adjudication in this appeal.*"

The Appropriate Procedure

25. In view of the foregoing, a preliminary question arises as to whether the instant application should be entertained at all (see *Nash*, at para. 12) or dismissed on the basis of the finality of the orders made and perfected in the appeal. If the Court answers this question in the negative, then that is the end of the matter. If, on the other hand, the Court decides that a reconsideration is appropriate, in principle, then a second question arises as to whether the Court's discretion should be exercised in such a way as to change the order that has been made.

26. The Court is satisfied as to the appropriate course to be adopted in the present application. In accordance with Practice Direction CA14, the panel that heard and determined the appeals will, in the first instance, consider, **on the papers**, Mr Kirwan's application for review of its Judgment in order to determine whether his application meets the threshold for review and, if it does, whether a hearing on the merits is justified. Its consideration will be conducted in accordance with the relevant principles as articulated in the jurisprudence of the Superior Courts.

The Notice of Motion

27. The Court recalls that after it had delivered its Judgment in the three appeals, the applicant brought a motion dated 7 December 2022, requesting the Court to set aside its Judgment on several grounds. The motion bears the same three record numbers as the appeals heard and determined by this Court. Mr Kirwan seeks several orders (19 in total) and does so, in his view, '*to protect us from the fraud, perjury, forgery inter alia*' which he says are evidenced within his filings and in order '*to hear our filed motions*' to protect him, his '*good name and property rights*'.[7]

28. In the alternative, Mr Kirwan seeks an order that all errors and false statements within the Judgment be corrected so as to reflect the '*truth*' of the alleged forgery, perjury and fraud which he says are evidenced in his filed documents. He also seeks an order declaring that books filed were interfered with by the Buttle respondents' solicitor and/or his staff and that key documents, evidence and proof were not seen by this Court, which led the Court to untruthful and unjust conclusions proven to be false and with which the Court did not engage. He cites at para. 4 (a) to (g) of his Notice of Motion examples of what he contends are the falsehoods and the forgery he alleges. These include, an alleged forgery of a Deed of Release dated 23 June 2006, admissions by John O'Leary and Bríd O'Leary that they facilitated their unqualified employee, Marguerite Connors, to act as a solicitor and give legal advice, and alleged perjury by John O'Leary and the Buttles in making false statements or filing pleadings wherein they claimed to have either never agreed to the €4 million purchase of Brendan Kirwan's property or had no knowledge of the €4 million sale. Mr Kirwan also claims that documents were withheld, concealed or suppressed from his file in order to support the Buttles' '*false narrative*'. This, he says, prejudiced and hampered him in his efforts to progress matters.

[7] The appellant repeatedly refers to himself in the plural notwithstanding that he was and is the sole appellant in the appeals and remains so in this application before the Court.

In his view, these documents which he exhibited on affidavit after the High Court had delivered its judgment, undermine that '*false narrative*'. These allegedly forged documents are exhibited in this application.

29. Several of the reliefs sought by Mr Kirwan are grounded upon his repetitive allegations of fraud, perjury, and forgery on the part of the respondents. He seeks a wide range of orders based on what he contends are:

- alleged violations of the Constitution (paras. (1), (9), (12) and (15));
- allegedly 'unheard' motions (para. (8));
- alleged errors and omissions (paras. (3), (7), (17) and (18));
- alleged failure to engage with the 'suppression' of evidence (para. (2));
- alleged failure to engage with 'proof' of forgery (para. (4)); and
- several miscellaneous issues listed in paras. (5), (6), (10), (11), (13), (14), (16) and (19) of this motion.

30. In terms of the reliefs based on alleged violations of the Constitution, Mr Kirwan invokes Article 40.1 and/or Article 40.3 or, more generally, the principles of constitutional justice, as the basis for a variety of orders he requests. These include orders setting aside the Judgment, an order referring proceedings to the Supreme Court, and a declaratory order that all motions are equal before the law. He submits that the continued ignoring by this Court of the fraud, forgery, perjury and '*breaking of Solicitors Acts*' would violate the Constitution, as would the continued failure to hear his 'unheard' motions.

31. In terms of the allegedly unheard motions, Mr Kirwan seeks a declaratory order and/or an order setting the Judgment aside on the basis that it is '*unsafe*'. In this regard, he refers, specifically, to Court of Appeal motions dated 20 April 2020 and 11 May 2021 which, he contends, have not yet been heard.

32. The reliefs sought on the grounds of 'errors, omissions and false statements' are based upon what Mr Kirwan alleges to be fraud, forgery, perjury and the suppression of evidence. He seeks orders that the Judgment be amended to reflect the truth, as *per* his filed booklets. In the alternative, he seeks an order setting aside the Judgment on the basis of the alleged errors, omissions and falsehoods. He contends that many (but not all) of these errors, omissions and false statements are addressed in a Notice of 7 November 2022, which is exhibited in his affidavit grounding the application.

33. As to the alleged interference with booklets filed in the Court of Appeal Office, Mr Kirwan seeks a declaratory order that the current solicitors for the Buttle respondents engaged in interference with Court files, based on his contention that '*key*' documents, evidence and proofs have not been seen by the Court. He alleges that the Court has failed to engage with this suppression of evidence. Furthermore, he claims that this interference has led the Court to untruthful and unjust conclusions which, he claims, he has proven to be false, and that the alleged interference was the cause of this Court's alleged failure to engage with the evidence concerning the truth of the disputed property deal.

34. The miscellaneous issues raised by Mr Kirwan as grounds for bringing his application include: an alleged interference with his filed booklets; a belief that all judgments and orders in these proceedings are based on falsehoods regarding the 2006 agreement; an alleged procedural irregularity arising from the absence of a Certificate of Readiness; a contention that a document referred to as an '*Indenture Deed of Release of 23 June 2006*' is forged; an allegation that some of the respondents' legal representatives have conspired to pervert the course of justice or deceive the Court; a claim that costs incurred in procuring DAR transcripts would be prejudicial to him; a belief that the Judgment does not uphold '*the national interests of Justice*'; and, a contention that those committing fraud, perjury and malicious deception have been rewarded.

35. Based on the above miscellany of issues Mr Kirwan seeks a variety of reliefs, including (respectively), a declaratory order that certain statutes are '*inferior to interpretations of authorities*' (para. (5)); a declaratory order that all judgments and orders in these proceedings are void from the beginning (para. (6)); a declaratory order that a procedural irregularity occurred and/or an order setting aside the Judgment on that basis (para. (10)); an order that the forgery of the '*Indenture Deed of Release*' renders all documents depending on its execution null and void (para. (11)); an order striking off the said legal representatives (para. (13)); an order that an audio file of the DAR from each hearing before this Court be provided to him (para. (14)); an order setting aside the Judgment (para. (16)); and, lastly, an order for costs and '*expenses*' (para. (19)).

The Grounding Affidavit

36. The grounding affidavit runs to some thirteen paragraphs. In the preamble, the deponent avers that the affidavit is '*part of Appeals 2020-14, 2019-486 and 2019-485 proceedings being heard together.*' In para. 2 he refers to the fraud, forgery and perjury which he contends were not addressed in the Judgment. He further refers to the Court's failing to hear three motions that were filed and claims that the Buttles' representatives succeeded in removing or interfering with his filed booklets which contained '*all the proof*'. In particular, he refers to an unheard motion of 18 May 2021 which, he says, addressed such '*persistent interference*'. In his view, had such motions been heard the outcome would have been '*entirely different*'.

37. At para. 3, reference is made to a '*Notice of Trespass and Notice of Coram Nobis and Notice to correct errors and omissions*' dated 7 November 2022 which Mr Kirwan says was sent to the Registrar and the Panel dealing with his appeals. He refers to a copy of the said Notice (hereinafter 'the Notice' or 'Exhibit 1').

38. The deponent then refers to a further Notice dated 27 November 2022 which he claims was sent by registered post and attached to which he says were '*proofs of forgery*'. These, he says, were all before the Court of Appeal but were '*withheld from our file*' and from the High Court proceedings. Also included in the said Notice is what the deponent describes as a Subpoena for Garda Brian Delaney '*to appear*' regarding the evidence of forgery and fraud in his possession. This second Notice is also exhibited to the affidavit (hereinafter 'Exhibit 2').

39. The deponent then goes on to state that a '*Notice of consent*' to set aside the Judgment was sent to and received by addressees, including, the solicitors for both the Buttle and the solicitor respondents (hereinafter 'Solicitor A' and 'Solicitor B', respectively). He claims that all the addressees of 'the Notices' have in their possession and are aware of the proof of the ongoing fraud, perjury and forgery and '*breaking of the solicitors acts*' with which, in the deponent's view, the High Court and Court of Appeal have failed to engage.

40. The deponent claims that, as sworn officers of the Court, they have a mandatory duty to bring all the facts to the Court's attention, especially when the Judgment relies upon what they know to be the '*false Buttle narrative*'. T do anything less is '*a blatant criminial* (*sic*) *act*' and conspires in the Buttles' alleged fraud '*to make a gain and cause a loss*', deliberately deceiving and misleading the Court. The deponent says that it is in '*the national interest*' that justice is done and seen to be done and that this cannot take place when evidence has been removed from the Court's eyes and/or has not been '*engaged with*'. He then refers to a copy of the '*Consent to set aside Notice*' dated 4 December 2022 which he exhibits (hereinafter 'Exhibit 3').

41. The deponent then refers to his submissions of 25 November 2022 which were made in advance of the costs hearing and after this Court had delivered its Judgment. He says that the Court is now fully aware of the fraud, forgery and perjury and that it will be compounding this unless the Judgment is set aside. He relies upon the judiciary not to step outside their constitutional oath nor to act with ill will or help to cover up '*the Buttles scam forgery fraud*

and perjury (*sic*)' now that they (the judiciary) are aware that the High Court relied on the Buttles' '*false narrative*' which, he contends, is repeated and relied upon in the Judgment of this Court.

42. The deponent then goes on to describe himself as '*whistleblowers*' (*sic*), having put all the evidence before the Court of Appeal, having notified all Notice Parties and having repeatedly documented and informed the Court of the fraud, forgery and perjury alleged. He says that '*[m]uch of the proofs were concealed from us and from the high court but later exhibited by John Oleary* (*sic*) *leading to many reasons for this appeal*'.[8] He avers that many documents are still being '*concealed, supressed and withheld*' by the respondents from Mr Kirwan's file and from the Court and that '*motions for these documents to be proffered to us remain unheard, prejudicing us, the truth and the interests of justice*' (at para. 8).

43. The deponent then says (at para. 9) that the Judgment of this Court does not reflect the truth and the facts that all delays were '*orchestrated and manipulated*' by John O'Leary '*and co*'. He says that documents were concealed and suppressed long enough to prevent him from '*defend[ing] ourselves*' in the 2011 creditor action or from progressing the other cases, so that '*they and the Buttles could deceive the high court that we delayed*'.

44. At para. 10, the deponent swears that:

> "*Comparing our notice of appeal & 3 unheard motions and grounding affidavits to the unapproved ruling of 26th October 2022, highlights none of the truths or facts or evidence is engaged with or addressed in any meaningful manner, as would be expected of any just and fair judicial system*".

Instead, he says, the perpetrators are protected and rewarded for breaking numerous criminal and civil statutes. This, he claims, is violating '*the Article 40.3 enshrined constitutional protection, that our civil servants privileged to act as judges have sworn oaths to uphold*'. The

[8] The affidavit to which he refers would appear to be the affidavit of 8 November 2019 sworn by John O'Leary in proceedings before the Solicitors Disciplinary Tribunal which post-dated the delivery of the High Court's judgment.

deponent refers again (at para. 11) to Exhibit 1 and avers that therein were mentioned many errors and omissions that must be engaged with, as otherwise the Court is endorsing and compounding the fraud, forgery and perjury and the '*breaking of Solicitors Acts*'. He says that many errors and omissions have not been mentioned and that any honest, moral officer of the Court representing John O'Leary and Eamonn Buttle and abiding by their Solicitors' and/or Barristers' code of conduct and mandatory duty to provide all of the facts to the Court, would ensure that the Judgment of 26 October 2022 and the judgment of the High Court are corrected to reflect the truth of the facts. He alleges a failure so to do, to date, '*despite many many notices*' and claims that they continue to conspire in deceiving and misleading, and in propagating Eamon Buttle's and John O'Leary's '*scam*'.

45. The deponent goes on to state, at para. 12 of the grounding affidavit, that the logical conclusion is that his filed booklets were interfered with by Solicitor A and/or his staff and that key documents, evidence and proof were not seen by the Court, which then led the Court to untruthful and unjust conclusions proven to be false and not engaged with fully or addressed in the interests of justice. He then lists examples of forged documents, admissions of facilitating unlawful actions, fraud, acts of perjury and the withholding, concealing and suppression of documents. These examples are the same as those listed at para. 4 of the Notice of Motion.

46. Finally, the deponent avers that Brendan Kirwan's '*constitutional enshrined Article 40.1 and 40.3 protection of his good name, property rights and equality before the law of having all motions heard*' is being violated to advance the proven fraud, perjury and forgery of the Buttles. He concludes that if the judgment is not set aside the fraud is only being compounded and that '*[t]urning a blind eye*' is not acceptable.

The Exhibits

The First Exhibit

47. As already noted above, three exhibits are referred to in the affidavit of Barry Kirwan. Exhibit 1 (a Notice of 7 November 2022) is signed, electronically, at the end of page 12, with the names '*Barry and Brendan Kirwan*', under which is stated '*Acting in our national capacity Pursuant to Articles 1-3 of Bunreacht Na hEireann* (*sic*)'. Thereafter, several persons are listed as '*Addressees*'. These include the Registrar of the Court of Appeal, the Attorney General, the Chief Justice, the three Members of the Panel hearing the appeal, the President of Ireland, the Minister for Justice, An Taoiseach and the Garda Commissioner.

48. The exhibited Notice states at the beginning '*To whom it may concern (addressees)*' and there follows what appears to be a Preface and Notice to the Registrar under Order 28, rule 11 of the Rules of the Superior Courts to correct errors and omissions. The electronic signatories state that they are putting all on notice to correct all alleged errors and omissions in the Judgment which caused false and factually incorrect statements, proven in filings to be untrue, to exist on the face thereof. The Notice says the gross error maintaining the false narrative of the Buttles and John O'Leary is repugnant to the interests of justice. As people of this nation, 'they' trust that their appointed civil servants will immediately correct all errors and omissions as the Judgment is not fit to go to a higher court until corrected.

49. The signatories to the Notice describe themselves, again, as '*whistle-blowers on Eamonn Buttle and his agents, including solicitors involved in corruption, perjury, forgery and fraud*' to scam them (the signatories). They state that they expect their civil servants to be diligent and meticulous to a degree worthy of the positions that they have been granted, and to find and correct all errors and omissions and to address the true facts on file before the Court. The Notice states that all liability for ensuring that facts are correct and that no errors or omissions exist, rests with the authors of the Judgment. It then requires the Registrar to send on the DAR

audio file of the Court of Appeal hearings and/or the transcripts without prejudicing them (the signatories) with the costs thereof. With the bold and underlined heading, '**Take notice**', Exhibit 1, thereafter, describes '*[a]ttempts to pervert the course of Justice by Eamon Buttles* (*sic*) *representatives and repeated attempts at Interference with our filed booklets*'. Alleging that the Judgment is full of errors and omissions and statements proven to be false by their filed booklets, the Notice states that the question to all '*involved*' is whether Eamonn Buttle's agent succeeded in removing the '*proofs of fraud, proof of breaking the solicitors acts* (*sic*), *perjury and forgery*'. This, it says, appears to be clear, as no engagement was made with the true facts, facts which were proven in exhibits contained in affidavits sworn by Brendan Kirwan in January 2020 and by John O'Leary on 8 November 2019. In the alternative, it claims that gross injustice has occurred by reason of a failure to take judicial notice of filed documents.

50. The Notice refers to an affidavit of 2 May 2019 and, in particular, to paras. 13-18 thereof, which, according to the appellant, dealt with the withholding and suppression of documents and the removal of key documents or evidence from his booklets before the High Court, which, in his view, was detrimental to the Buttles' false claims. It goes on to state that Solicitor A '*repeatedly tried to remove our filed booklets and replace them with his that had many of our key documents removed.*' It claims that the Chief Justice and the presiding Judges of the Court of Appeal are '*critically aware*' of same, referring to '*many notices*', dated 20 April 2021, 29 April 2021 (which '*lists some of the removed critical documents*'), 7 May 2021, 13 May 2021, 15 May 2021 and others, some of which, it is said, are exhibited in an affidavit of 14 May 2021. The Notice alleges that officers of the Court are actively engaged in removing evidence and asks how the interests of justice can prevail when this occurs. The Notice further queries how it is possible that there was no engagement with the facts contained '*in motion or affidavit*' and queries whether documents were removed, or the judiciary were stepping outside their Oath of Office and '*turning a blind eye*'.

51. The Notice refers to the numerous times 'they' were ambushed, with '*extreme sharp practice*' and '*dirty tactics*' being played upon them '*by officers of the courts*'. It also complains about constant ambushes, sniggering, being made fun of, snide remarks and constant interruptions while 'they' were speaking. The Notice claims that the '*interference*' by Eamonn Buttle's agent, Solicitor A, in removing Mr Kirwan's evidence and proofs from his booklets filed in the Office of the Court of Appeal, was so repeated and intense that the signatories were forced to file a Garda Complaint along with subpoenas '*to appear and explain their interference and the truth of the matters*'. The Notice then lists a number of persons in respect of whom subpoenas were filed and served and states that '*[a]ll failed to attend court and Judiciary denied us opportunity to cross-examine, prejudicing us and the truth and the facts*'.

52. In the Notice it is asserted that 'they' have only had time '*to scan the Judgement* (*sic*)' and that it would take many months to examine it properly due to a severe dyslexia disability. The Notice states that, on a quick scan, it is blatantly obvious and clear that there remain many issues that are known to all, yet for some reason the judiciary refuses to address them. The failure to address such issues is described as '*elephants in the room*' in the case.

53. The next section of the Notice is headed '*Elephants in the room regarding Procedure*'. It deals with alleged irregularities in respect of procedure, including, Mr Kirwan being forced to trial when he was not ready to proceed in the Court of Appeal and doing so without 'their' Court of Appeal motions having been heard. The Notice states that Mr Kirwan did not file and consent to the required '*Certificate of Readiness*' and that, if that had not been filed, then the Court proceeded unlawfully in its absence.

54. The Notice then lists several motions in the 2013 and 2012 proceedings which were not heard. Five of these motions are described as remaining '*open*' in the High Court, '*unheard*' and having '*a fundamental bearing on the ruling at hand*'.

55. The High Court motions include a motion (in the 2013 proceedings) of 13 November 2018 which is described as a motion:

> "*to demonstrate the authenticity of documents relied on, reply to particulars, suppression of critical documents (some of which were later exhibited by John O'Leary after High Court proceedings proving forgery, fraud and malicious deception of Judge Meenan and which is proof they existed and that the full file was withheld from us so as we could not prosecute or defend matters throughout)*".

56. The second allegedly unheard High Court motion in the 2013 proceedings is described as a '*Motion for clarity*'. It is dated 5 April 2019 and appears to relate to three Notices for Particulars sent to the defendants and in respect of which replies thereto were sought. An order directing that all suppressed and concealed documents be proffered immediately was also sought. The Notices for Particulars to which reference is made would appear to be two dated 10 January 2014 which the appellant claims were sent the Buttle and the solicitor respondents (though this was contested by the solicitor respondents) and an earlier one dated 12 March 2013, which was said to have issued in the 2012 proceedings.

57. The third '*unheard*' High Court motion (also in the 2013 proceedings) is dated 18 September 2019 and the Notice states that this was a motion under '*High court Order28 rule 11*' to correct errors and omissions. This Motion, the Notice says, was never heard and was deemed not relevant by Judge Meenan.

58. The fourth '*unheard*' High Court motion, filed in the 2012 proceedings, is dated 13 November 2018. It is described in terms identical to the allegedly unheard motion in the 2013 proceedings of the same date (13 November 2018).

59. The fifth allegedly unheard High Court motion is said to be a '*Motion for Clarity*' (in the 2012 proceedings) and is dated 5 April 2019. It is described in identical terms to the allegedly unheard motion of the same date in the 2013 proceedings.

60. Exhibit 1 then refers to three motions which, it is said, remain pending before the Court of Appeal. Once again, these three motions are described as remaining '*open*', '*unheard*' and having '*a fundamental bearing on the ruling at hand*'.

61. The first of these is a motion and grounding affidavit of 20 April 2020 and is described as exhibiting '*Brendan Kirwan 22nd Jan 2020 affidavit* (*sic*)' and John O'Leary's affidavit of 8 November 2019 and containing '*many proofs*' with which the Court is alleged to have failed to engage.

62. The second allegedly unheard motion before the Court of Appeal is dated 11 May 2021. The Notice describes this as a motion:

> "*to verify whom concealed from us and the court, the fact of the only agreement was for 4million, whom knew about the fraudulent and forged deed of release 23rd June 2006 proving perjury and fraud, order number 4 sought, for the perjury in the filed defence by John O'Leary, [Solicitor B] and [counsel for the solicitor respondents] that they "are strangers" to the 4million sale, that John O'Leary was able to later exhibit the 2005 fax after high court proceedings, discovery of all remaining concealed, suppressed and withheld documents that should have been in our file between MJ O'Connors and NIB, discovery of all concealed files of Brid O'Learys* (*sic*) *actions in matters, an order to cross examine all those subpoenaed and other orders*".

The Notice states that this motion was stamped and filed in the Court of Appeal Office.

63. The third '*unheard*' Court of Appeal motion is dated 18 May 2021. This, the Notice says, is a motion in relation to '*Interference in Booklets*'. It appears to have been asking the Court of Appeal Office Manager to check that no documents had been removed from the files that the judges would be working from and for '*subpoenaed persons to present themselves for cross examination*'.

64. Paragraphs 10 to 37 of the Notice are placed under a heading which, broadly speaking, refers to '*Elephants in the room*' and '*many reasons for the appeal*' which '*were refused to be engaged with and were failed to be dealt with and omitted*' by the Court of Appeal in its

Judgment. I do not propose to go through each of these paragraphs *seriatim*. It is clear from a review of the 28 paragraphs in question that they contain repeated references to complaints already made by Mr Kirwan and referred to in submissions before the Court of Appeal. These complaints concern, for example, what the Notice describes as '*the Breaking of solicitors acts* (*sic*)', which has not been engaged with by the courts, and Mr Kirwan being duped, induced and influenced by an unqualified person (Marguerite Connors) who, it is said, was acting in the best interests of John O'Leary and Eamon Buttle. These facts, the Notice says, were '*trampled and ignored by the High Court*' and this Court '*erred and omitted*' to engage with them. The Notice asks several questions throughout these 28 paragraphs, such as, '*Would it not behove and be logical for a competent Judge to ask can the parties demonstrate that the vulnerable severely dyslexic client received expert independent advice from a practicing certificate holder at all material times?*' It also asks why the Court of Appeal omitted to address this glaring fact or to question counsel particularly when '*they were also deceived to believe Marguerite Connors was a solicitor?*' (at para. 10 of the Notice).

65. In further reference to the fact that Marguerite Connors was not a qualified solicitor, the Notice refers to affidavit evidence sworn by John O'Leary and it '*demand[s]*' that all addressees to the Notice reply with a detailed response, asking '*[A]t what point is the judicial arm gone rogue?*'. The Notice further asks how it is possible that a '*whistleblowing victim is punished and vilified to save the reputation of repeated law breakers?*' (at para. 12 of the Notice).

66. The Notice also states that new evidence '*proving facts*' was concealed and suppressed and that documents from '*our file*' were exhibited by John O'Leary's affidavit of 8 November 2019, making Judge Meenan's earlier conclusion '*erroneous and false*'. The Notice states that the Court of Appeal ruling simply ignores this. The Notice states there was no engagement with any of these '*evidenced and exhibited facts*'.

67. The Notice states that any reference to them (the signatories) being '*in possession of the full file*' as stated in the Judgment of this Court is '*absolutely false*' given the existence of what he describes as '*the concealed and forged 23rd June 2006 Deed of release and the concealed proof of the 4million sale agreement.*'

68. The Notice states that Marguerite Connors, in a Memorial,[9] '*swore declareth* (*sic*) *and made oath*' that she witnessed and saw the Deed of Release executed by Brendan Kirwan on 23 June 2006. It states that a letter exhibited by John O'Leary in his affidavit of 8 November 2019 encloses the Deed of Release, stamped received by M.J. Connors four days later on 27 June 2006 and states '*obviously it could not be signed and witnessed before it was actually received.*' Other statements in the Notice refer to John O'Leary's explanation for the document dated 5 July 2006 being signed after the prior Deed of Release was executed and to Brendan Kirwan being in a different country on the date of the alleged signing of the contract, namely, 5 July 2006. Again, it is stated that the Judgment of this Court failed to engage with these facts.

69. The Notice directly addresses the Chief Justice and asks whether the judicial arm and his subordinates have '*degenerated to this insanity*'. It asks: '*How can the people of the nation trust anything from the judicial arm of state when the interests of justice are undermined?*'

70. Many of the other statements in the Notice refer to alleged perjury on behalf of John O'Leary, Solicitor B and counsel for the solicitor respondents in their filed defence to the 2013 proceedings, dated 15 November 2013, denying any knowledge of a €4 million sale.

71. The Notice refers again to concealed documents in the possession of M.J. O'Connor's being removed from the file.

72. In Exhibit 1, the signatories are described as '*whistle-blowers*' who have faced corruption. The Notice calls upon the Garda Commissioner and the Attorney General to '*[t]ake note*'. It further demands that the President of Ireland and An Taoiseach intervene if the Court

[9] At pp. 463-467 of Core Book 2020/14.

refuses to correct what it alleges are errors and omissions in the Judgment. It also calls upon the Gardaí to '*take note*' of Court Officers who do not discharge their duty to bring all facts and truths to the Court's attention. It queries why the courts are not stopping what it describes as '*fraudulent norms*'.

73. Setting out what is described as a hierarchy of law (at para. 24 of the Notice), the Notice states that the Judgment appears to rely on '*lowly authorities*' to excuse the breaking of Acts and to deny the '*constitutional enshrined equality of motions to be heard*', access to justice, and right of appeal. It states that '*we*' (the signatories) are deeply upset, injured and defamed by some of the '*disparaging, disingenuous and easily proven false remarks made*'. It refers to '*a character assassination*' on '*us*' and asks whether being described as '*vexatious litigants*' is '*retaliation against a whistle-blower*'. The Notice draws comparisons between Mr Kirwan's position as a '*whistle-blower*' and others, such as, those involved in the penalty points Garda whistle blowers' issue, victims of institutional abuse, and the Mother and Baby Homes cover up, and states that '*the same pattern is being used to cover up the Buttles and their agents* (*sic*) *breaking of the laws*'. The Notice demands that the Judgment defaming '*us*' (the signatories) is removed from the Courts' website.

74. The Notice (at paras. 27-32) then lists a series of questions. These include asking whether it is morally right to reward those who break the law and to assassinate the character of a whistle blower and whether the judges can abandon their constitutional duty to be fair and unbiased. It asks the addressees to be '*very detailed and specific*' in their reply to its '*demand*'. It addresses the addressees and asks whether it is possible, whether through '*laziness, incompetence, malfeasance and/or negligence*', that judges are somehow unaware of the true facts, pointing out that it is mandatory for a judge to have '*read all affidavits and exhibits before any hearing and have within their knowledge the facts therein*'. It states that none of

those facts are reflected in the Judgment of the Court which the Notice describes as '*nearly a copy and paste of the false Buttle narrative*'.

75. The Notice states that no questions were put to counsel or solicitor in the appeal as to why the solicitor respondents' counsel '*in his filed defence, deceived and misled the high court*' in saying that '*all at MJ O'Connors were "strangers" to the 4 million sale and denied all knowledge*' thereof. It states that he (counsel) should have been questioned on such matters.

76. At para. 35 of the Notice, several questions are listed, which include, why a vulnerable, severely dyslexic Brendan Kirwan would demand to take legal advice from what is described as '*a secretary*', and why Brendan Kirwan or the solicitor representing him would negotiate that he would get paid for his property with a loan. It asks how a man in a foreign country gets independent legal advice and after such advice agrees to documents when he wasn't there, and other questions related to the disputed Property Agreement.

77. The Notice goes on to state that all addressees are deemed as being men and women who are held by Mr Kirwan to be '*personally 100% liable for all expenses, costs, damages and for the vast waste of our time, for failing to protect us from these ongoing breaking of many laws* (*sic*)'.

78. The final paragraphs of the Notice are addressed to the Chief Justice about post allegedly received by him. It states that he is put on notice of the errors and omissions and numerous '*elephants in the room*' not corrected and that all three appeals will be 'delivered' to the Chief Justice's doorstep to sort out as an '*other matter*' under s. 7(4) of the 1961 Courts (Supplemental Provisions) Act and s.7(4) and (5) of the Courts and Courts Officers Act, 1995.

79. The Notice then states:

> "*We hereby herein grant you 21-days from the date of this registered notice is delivered, to correct and amend your errors etc within that ruling, as otherwise on default of corrections, you admit and agree to the instigating of setting aside procedures, to reverse;* (*sic*)"

80. The Notice ends with a statement that the signatories intend to sue the State '*in our national capacity, for all lacks and wants by its state employees, servants and licensees*', if the addressees (who are thereafter listed) '*default the timeline*'.

The Second Exhibit

81. The second exhibit to the affidavit grounding the application for review is headed '*Reminder of 7th November 2022 Notice of Errors & Notice for Coram Nobis*' (hereinafter 'Reminder'). A number of documents are appended to this Reminder which is dated 27 November 2022. It is addressed to the Registrar of the Court of Appeal Office, Garda Brian Delaney, Wexford Garda Station, and what are described as '*Notice Parties and Fraud witnesses*', the list of which is stated to be '*detailed below*'. The Reminder consists of a two-page document wherein the Registrar of the Court of Appeal and the other addressees are 'reminded' that there is one day left of the 21-day warning that was given in the Notice dated 7 November 2022 within which they can take action. The Reminder goes on to state that attached for filing is what is described as '*PRAECIPE FOR SUBPOENA*' and '*ORDER OF SUBPOENA DUCES TECUM*' for Garda Delaney to appear on 13 December 2022 (the date of this Court's hearing on costs).

82. The second exhibit also refers to previous subpoenas in '*the court file*' dated 4 May 2021 and states that several of the respondents and individuals named are '*to attend*' on 13 December 2022. The Reminder refers to para. 14 of the original Notice of 7 November 2022 and attaches, once again, what is described as '*the forged document and proofs of forgery that were in our filed booklets before they were interfered with and removed from the courts* (*sic*) *eyes by the agents of the Buttles*'. The allegedly forged documents and proof thereof are then listed and described.

83. The first of these documents is a cover letter dated 23 June 2006, from National Irish Bank ('NIB') to M.J. O'Connor Solicitors, with the reference '*MC/PLKI/200/4*'. This letter encloses what is described as a '*Deed of Partial Release duly executed as requested*'. The letter states:

> "*I note that you approved our deed but forwarded a Deed of partial Release in duplicate that differed from the approved Deed. I have therefore engrossed our own Deed as approved, and had same executed.*"

84. The next document is stated to be a Deed of Partial Release dated 23 June 2006 (described on its face as an '*Indenture Partial Release*'), which is '*made the 23rd day June* (*sic*) *of 2006 between NATIONAL IRISH BANK LIMITED… (hereinafter called "the Mortgagee") of the one part and BRENDAN KIRWAN… (hereinafter called "the Mortgagor") of the other part*'. This document is witnessed by Marguerite Connors and bears a signature '*Brendan Kirwan*'. The Reminder states that this document was not signed by Brendan Kirwan and could not have been witnessed by Marguerite Connors. The Reminder goes on to state that Marguerite Connors was not a qualified solicitor.

85. The third document referred to in the second exhibit is stated to be a Memorial of 14 February 2008. It records the fact that Marguerite Connors '*is a Subscribing Witness to the Indenture of which the above writing is a Memorial*'. The Reminder states that it is not possible for Marguerite Connors to have witnessed the Indenture of Release dated 23 June 2006. It states that these documents are forged because Mr Kirwan was out of the country from 22 June 2006 until 14 July 2006. The Reminder says the Court of Appeal Judgment relies on and is grounded on the false narrative of the Buttles and their alleged documents dated 5 July 2006.

86. The Reminder concludes that Mr Kirwan would expect the representatives of the respondents to have asked the Court to set aside the Judgment now that they are aware of the fraud, perjury and forgery of their clients.

The Third Exhibit

87. The third exhibit is entitled '*Notice For Consent to Set Aside due to Fraud, Forgery and Perjury*'. It is a two-page document dated 4 December 2022. It is addressed to '*[Solicitor A and Solicitor B] and all your staff, insurers and all Counsel you instruct*' and to '*Notice parties to the Forgery, perjury and Fraud (addressees)*', a list of which is '*detailed below*'. The document then poses a question to the persons referenced above, asking whether they consent to set aside the Judgment of this Court. The document sets out a letter addressed to '*Dear [Solicitor A and Solicitor B]*'. It states that they are aware of (and in possession of) the '*proofs of forgery, perjury and fraud*' and are aware that '*facts/crimes of same were not considered or addressed or brought by you to the courts* (*sic*) *attention*'. This, it is stated, has led to what they (the addressees) know to be false statements appearing in said Judgment. The letter states that if the Judgment is not set aside '*a grave injustice/crime that rewards the perpetrators will occur*'. The letter refers to the mandatory duty of the recipients to bring to the Court's attention all of the facts and the letter states that, if they fail to do so, the recipients will be '*aiding and abetting the Buttles* (*sic*) *scam, furthering the fraud, forgery and perjury*'. The letter states that its authors (Barry and Brendan Kirwan) look forward to their reply within three days to consent to set aside the Judgment. Having signed, electronically, the letter, the authors set out a list of addressees and these include the Registrar of the Court of Appeal Office, Garda Brian Delaney, the Attorney General, the Chief Justice, the three Members of the Panel of the Court of Appeal, the President of Ireland, the Minister for Justice, An Taoiseach, the Garda Commissioner, Solicitor A and Co. Solicitors, and Solicitor B of a named firm of solicitors.

Discussion

88. Having set out the pleadings in some detail, it now falls to be determined whether this application to review this Court's Judgment meets the required legal threshold. It is recalled

that two important factors must be considered when examining an application to reopen a decision. First, the appellant's application must '*patently and substantively concern an issue of constitutional justice other than the merits of the decision as such*'. Second, the grounds of his application must demonstrate, objectively, that there is a '*substantive issue concerning a denial of justice in the proceedings in question consistent with the onus of proof on an applicant*' (see *Nash*, at para. 12). Moreover, the type of exceptional circumstance which could give rise to the Court exercising its inherent jurisdiction to review a final judgment would be one which must '*constitute something extraneous going to the very root of the fair and constitutional administration of justice*' (as *per* Murray J. in *L.P.* (at p. 230)).

89. It appears to the Court that, as in the appeal, Mr Kirwan remains preoccupied, entirely, with what he alleges are proven wrongs on the part of the respondents in respect of the 2006 property transaction and the litigation that ensued several years later. It was noted in the Judgment that if he had pursued the proceedings he issued in 2013, he may or may not have succeeded. He may or may not have convinced a trial court that there was a level of unfairness in the original deal and in how it was handled, but that was not the subject matter of the application that was before the High Court, whose decision was reviewed, on appeal, to this Court. This Court was concerned with the High Court's decision in respect of each appeal and, in particular, with what justice required in the specific context of the application of the principles identified in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 IR 459 ('*Primor*'). In this application for review, the Court has to consider whether Mr Kirwan has met the threshold of establishing, patently and substantively, an issue of constitutional justice and, objectively, a substantive issue concerning a denial of justice in the proceedings in *those* specific circumstances.

The Alleged Violations of the Constitution

90. The constitutional breaches alleged by the appellant centre upon his contention that, in several respects, he has not been 'heard'. In his view, this Court's continued ignoring of what he alleges to be the fraud, forgery and perjury committed by the respondents, violates his rights under the Constitution, as does its continued failure to hear what he describes as '*unheard*' and '*open*' motions. This Ruling will deal, first, with the more general claim concerning an alleged breach of his right to be heard, and, thereafter, will address the more specific claim in respect of '*unheard*' motions.

91. The lengthy pleadings and repeated submissions made by the appellant in this application for review have been outlined in some detail. As in the Judgment, this has been done in order to confirm to the appellant that his allegations and contentions have, indeed, been 'heard' and considered by the Court. The fact that this Court may not accept a litigant's submissions in an appeal does not mean that a fundamental breach of the constitutional right to a hearing has occurred.

92. The starting point in considering the application for review is to ask whether the appellant has demonstrated, patently and substantively, whether an issue of constitutional justice arises in respect of the Judgment delivered in the appeal. Has Mr Kirwan established the existence of '*special*' or '*exceptional*' circumstances such as would merit a review of the application to set aside or rescind the Judgment? It seems to the Court that, with the exception of his somewhat expanded claim in respect of 'unheard motions', all of the issues raised by the appellant in this review application were raised by him, previously, in the appeal. These issues included his claim to have been the victim of a fraud by reason of the fact that Ms Connors was not a solicitor; that a fraud and/or forgery was committed in respect of several documents, including, documents he is alleged to have signed at a time when he was on holiday in France; that there was a glaring deficiency in the defendants' case; that a large volume of evidence relevant to the €4 million sale was withheld from him and from the Court; that such evidence

was concealed or suppressed by all respondents; that there was non-engagement with the evidence; that this evidence included documents exhibited by John O'Leary in his affidavit of 8 November 2019, which came to light after the High Court judgment, in proceedings before the Solicitors Disciplinary Tribunal; and that there was a failure to ascertain whether documents were even authentic when they were quite likely forged (see paras. 71, 91, 92, 94, 98 and 194 of the Judgment).

93. All of these matters raised in the application for review were raised and noted in the Judgment of the Court (see paras. 91-94). Most were considered to be not relevant to the issues that were, actually, before the Court (and, specifically, the issue of delay) but were concerned, rather, with the merits of his overall case against the defendants (at para. 98). Other matters were deemed not to have been properly before the Court when hearing the appeals, and, in this regard, particular mention must be made concerning an affidavit Mr Kirwan swore on 20 April 2020.[10] That affidavit was one of two[11] which, according to the respondents, had not been before the High Court and which, impermissibly, the appellant had sought to rely upon without having sought or obtained the leave of this Court so to do. The Court, in its Judgment (at para. 127), referred to that affidavit when noting the respondents' submissions that Mr Kirwan's third excuse for the delay '*was delivered late in the day*' and thus was '*not properly before the Court*'. The Court accepted the respondents' submission in respect of Mr Kirwan's failure to obtain the requisite leave, noting that '*in such circumstances*', the affidavit in question (20 April 2020 with its 'exhibit' of 17 September 2019) '*was not properly before the Court*'[12] (see paras. 123, 127 and, particularly, 134).

[10] In that April 2020 affidavit, reference was made to an earlier affidavit that Mr Kirwan swore on 17 September 2019 (in which the third 'excuse' was raised) grounding a motion which the High Court had refused to consider, first, on 23 October 2019 and, again, on 17 December 2019 when dealing with the defendants' application under the 'slip rule'.

[11] The affidavit of 20 April 2020 'exhibited' an earlier affidavit of 17 September 2019.

[12] The affidavit in question is that of 20 April 2020 which 'exhibited' the affidavit of 17 September 2019. The Court, nevertheless, considered that even if that affidavit had been properly before it, the ground for delay set out therein did not excuse the period of delay that ensued once the proceedings had issued (at para. 134).

94. That affidavit of April 2020 is the same affidavit in which Mr Kirwan raised the matter of allegedly '*concealed*' evidence disclosed by John O'Leary in an affidavit sworn by him in proceedings before the Solicitors Disciplinary Tribunal. It was considered in the context of the second appeal (see paras. 186, 192, 194, 195 and 214) and was found to have no relevance to the issue under consideration, which was whether the High Court had erred in permitting the amendments that were made to its original order of 23 October 2019 so as to reflect, more accurately, what the Court had decided in its judgment.

95. The complaint about '*concealed*' evidence having come to light after the High Court delivered its judgment was a matter that had already been mentioned to the High Court on 17 December 2019. Mr Kirwan contended that when determining the respondents' application under the 'slip rule' on 17 December 2019, the High Court had refused to hear him on the '*developments*' arising from '*withheld*', '*suppressed*' or '*concealed*' documents subsequently disclosed in John O'Leary's affidavit of 8 November 2019. The parties' submissions to the High Court and the High Court's decision on this point were reviewed by this Court (at paras. 204 – 214) which accepted that, in truth, Mr Kirwan's application, purportedly made under Order 28, rule 11, RSC, was not, in fact, an application for minor amendments to be made to the High Court judgment but was, rather, an application to revisit and revise the merits of the decision that the High Court judge had made.

96. To the extent that, before this Court, Mr Kirwan referred, again, to John O'Leary's affidavit which allegedly disclosed '*concealed*' or '*suppressed*' evidence, he did so in the context of general and wide-ranging submissions in the three appeals. Whereas in his affidavit of 20 April 2020 (which was not properly before the Court) he referred, briefly, to case law on the admission of new evidence, there was no motion or application before this Court, when it came to hear the appeals, for the admission of any new evidence. An unstamped version of a motion and affidavit of 20 April 2022 had been included among the papers in the Court's file,

but, as already noted above, these were deemed not to have been properly before the Court in the circumstances that prevailed. The only applications properly before the Court at the hearing of the appeal were those as set out in para. 4 of the Judgment.

97. None of the matters raised by the appellant in his application for review were 'lost' or 'omitted', wrongfully, from the Judgment because those matters did not fall to be determined on the appeal. Equally clear is the fact that regard was had to all of Mr Kirwan's submissions (both oral and written) on all such issues. This was stated, expressly, in the Judgment, where (at para. 95) it records:

> "*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.*"

98. In his application for review, Mr Kirwan persists in seeking to agitate the merits of the proceedings that ensued from the disputed property transaction. The appellant was heard in the High Court, and, as noted in the Judgment (at para. 167) was extended a remarkable degree of patience and courtesy by the trial judge who delivered a considered judgment addressing the questions that fell to be determined by that Court. He was heard, again, by the Court of Appeal and, as noted above, was represented throughout his appeal by solicitor and counsel. In these circumstances, Mr Kirwan has failed to establish that any breach of his constitutional rights, whether to be heard or otherwise, has occurred. There is nothing that approaches even an arguable ground that might point to such a breach in this case. Having failed to resist the

respondents' application in the High Court and having failed, once again, on appeal, Mr Kirwan seeks to lay the blame for such failure at the hands of other persons, be they the defendants, the courts or the system itself.

99. Moreover, that specific consideration was given to the appellant's constitutional rights is clear from the Judgment itself. In paragraphs 153 and 154 thereof, it was noted that, in coming to an assessment of where the balance of justice lies, regard must be had to an applicant's constitutional right of access to court and the constitutional principles of basic fairness of procedures. It was noted that the constitutional requirement that the courts administer justice requires that they be capable of conducting a trial, fairly, and that the jurisdiction to strike out a claim is not intended as a punishment for delay but rather is aimed at ensuring that justice can be administered. The justice and proportionality of the High Court's decision were, therefore, front and centre of this Court's consideration when determining the appeal.

100. All of the claims made in this application for review, whether about an alleged fraud or forgery or perjury on the part of the respondents, were made, to a greater or lesser extent, in the appeal. There is neither substance nor merit to the appellant's claim that the Judgment constitutes a breach of his constitutional right to be heard because it 'ignores' submissions made in respect of the alleged fraud or forgery on the part of the respondents. It bears reiteration that the key issue that was before the High Court and before this Court in the core appeal was specific in nature. Mr Kirwan's failure to address, in any detail, the issue that was *actually* before the Court was noted in the Judgment (at para. 98).

101. The Court is satisfied that there is nothing approaching the type of exceptional circumstances that would require its Judgment to be set aside. As was pointed out in the Judgment itself, justice cuts both ways and it is imperative that any court involved in the administration of justice should have regard to the rights of all parties concerned, notwithstanding the fact that the onus was, obviously, on an applicant/defendant to persuade a

court that all three limbs of the *Primor* test had been established. The fact that Mr Kirwan has failed in his appeal does not constitute a breach of the principles of natural justice.

102. Having had a three-day hearing before the High Court and a full hearing before this Court, Mr Kirwan has not established what the Supreme Court in *Greendale* described as a '*clear breach of the principles of natural justice*' such that a failure by this Court to take steps to remedy such breach would damage this Court's authority in the eyes of right-minded citizens.

The Allegedly 'Unheard' Motions

103. The second aspect of Mr Kirwan's alleged breach of his constitutional right to be heard relates to the alleged failure by the courts to hear what he describes as '*open*' and '*unheard*' motions that are still pending in the proceedings. Mr Kirwan contends that, in total, eight motions remain '*open*' and '*unheard*', five of which he identifies as having been before the High Court and three of which, he submits, are pending before this Court. In his view, '*all motions are equal before the law and must be heard'* so as not to impugn the right of access to justice. The Judgment's failure to address these motions, he argues, contravenes his constitutional right to be heard and is a breach of procedure, and is, thus, the argument goes, a basis for the setting aside of the Judgment. Moreover, Mr Kirwan maintains, that the matters sought to be addressed by these motions would have a '*fundamental bearing*' on the Court's Judgment.

104. The Court considers that it was at all times open to the appellant to appeal any order of the High Court, including, any order either refusing to hear a motion he had filed or declining to grant the relief he had sought on foot thereof. It has already been noted that the only orders of the High Court which Mr Kirwan appealed to this Court were those set out in para. 4 of the Judgment. The three orders under appeal were:

(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');[13] 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').

105. All of the allegedly '*unheard*' motions to which the appellant refers were motions brought in either the 2012 or 2013 proceedings. The 2013 proceedings were struck out for inordinate and inexcusable delay on the part of the appellant. A consequential order striking out the 2012 proceedings on the ground of their being frivolous or vexatious and/or bound to fail was also made. Both decisions were upheld by this Court, on appeal. With both sets of proceedings struck out, it is abundantly clear that insofar as Mr Kirwan seeks to complain about outstanding or '*unheard*' motions pending in those proceedings, it is well beyond the time for raising such complaints at this remove.

106. The Court is satisfied that the appellant's contention that, notwithstanding a full hearing on three appeals and the delivery of a lengthy and considered judgment thereon, there still remain several motions yet to be heard by the High Court, is untenable. As already noted, any decision of the High Court not to hear motions could have been appealed and to the extent that Mr Kirwan failed so to do, the time for so doing has long since passed. That being so, it is not open to him, at this stage, to complain about motions that the High Court did not hear in

[13] The amendments in question were made on 17 December 2019. In the context of the second appeal, this Court addressed the appellant's submission that the trial judge had refused to hear a motion which he sought to bring under the 'slip rule'.

circumstances where the only orders of the court below which were the subject of his three appeals were those, as listed above.

107. As to the allegedly outstanding or 'unheard' motions said to be pending before the Court of Appeal, these would appear to be three in number—one of April 2020 and two of May 2021. The Court has already noted that it was during the hearing on costs that the appellant, for the first time, raised the question of motions purportedly pending before *this* Court. During the course of that hearing which took place on 13 December 2022 and after the delivery of the Court's Judgment, the appellant referred to what he described as '*the three motions*' before the Court of Appeal.[14] Mr Kirwan applied to have the costs hearing adjourned, submitting to the Court that it did not '*make sense*' to proceed with that application:

> "*before our motion is heard, and we still have three motions that were before the Court of Appeal that [A][15] didn't have time, eh, to bring up with you at the time so we'd like to have those three motions heard as well.*"

108. The Court has considered Mr Kirwan's claims in respect of these three motions. As to the first, the one dated 20 April 2020, it has already been noted (at para. 96 above) that an unstamped version of this motion and affidavit was, in fact, among the papers furnished by the appellant to this Court during the course of the three appeals. This was the motion in which he exhibited the John O'Leary affidavit of 8 November 2019 which Mr Kirwan contends disclosed '*concealed*' or '*suppressed*' documentation that had not been presented to the Courts. No return date had been furnished in respect of this motion and, as noted above, the respondents had argued that this motion was not properly before the Court as the appellant had neither requested nor been granted leave to bring the application. This Court accepted that submission and recorded it in its Judgment (at para. 134). Furthermore, it was also recorded that, in any event, the motion was not relevant to the matters under appeal. The Judgment confirmed that

[14] The precise dates of the three motions to which Mr Kirwan refers would appear to be (i) a motion of 20 April 2020; (ii) a motion of 11 May 2021; and (iii) a motion of 18 May 2021.
[15] The reference to [A.] is a reference to the appellant's former counsel.

the Court was not dealing with the merits of the substantive proceedings but rather with an appeal on an application to strike out those proceedings for inordinate and inexcusable delay. It bears repetition that the only matters before the Court in this appeal were those identified at para. 4 of the Judgment delivered on the appeal.

109. Procedural fairness matters, and Mr Kirwan was not entitled to attempt to bring a motion without first having sought and obtained the leave of the Court so to do. The Court is satisfied that its findings, both in this regard and in relation to the non-relevance of the April 2020 motion to the matters actually under appeal (raised in the context of the second appeal), are not a proper basis for seeking to have the Judgment set aside. As Murray J. in *L.P.* (at p. 230) pointed out, '*[r]ulings on questions of law and procedure are matters for judicial appreciation and discretion which are inherent in judicial proceedings and are properly governed by the principle of finality [in courts of last instance].*'

110. The second motion allegedly pending before this Court is a motion that the appellant contends was filed on 11 May 2021. From his description thereof (see para. 62 above) it appears that Mr Kirwan was seeking documentary material relating to the disputed property agreement. This material, if relevant, would appear to go to the merits of the case. The same observations as set out above concerning the issues that were *actually* before the Court apply with equal force here. In any event, this motion of 11 May 2021 was not before the Court when it heard the appeals nor was it among the papers received nor did the appellant raise any issue in respect thereof during the course of the hearing of the appeals.

111. Inquiries made within the Court of Appeal Office indicate that, although an unstamped version of an affidavit of 11 May 2021 was uploaded on to ShareFile, there is no evidence of any motion dated 11 May 2021 having actually been lodged in the Office of the Court of Appeal in accordance with the required procedures. There is, however, correspondence suggesting that the papers in such a motion may have been among documents that were returned by the

Office to Mr Kirwan. In a document dated 14 May 2021 created by Mr Kirwan, he states that he received a letter on that day from the Court of Appeal Office returning a motion and affidavit '*as liberty had not been sought by the parties or given by the court to issue such a motion*'. Any failure to follow the required procedure for the lodging of court applications rests with the appellant and it is certainly too late, after the Court has delivered its Judgment, to seek to have that Judgment set aside because a motion, improperly filed, has not been heard.

112. The third allegedly unheard motion is said to be dated 18 May 2021. From the appellant's description thereof (see para. 63 above) it appears to have been a 'request' to the Office Manager of the Court of Appeal for confirmation that documents had not been removed from the files. Mr Kirwan believed that documentation exhibited in the John O'Leary affidavit had been removed from his filed booklets and that, if such documentation had been known to the Court at the time of the High Court application or, indeed, the hearing of the appeal, then it would have changed the outcome of the case.

113. Once again, this 'motion' was not before the Court when it heard the appeals. Inquiries made within the Court of Appeal Office in respect of this motion indicate the following. An email of 18 May 2021 was sent to the Office, attaching (i) an affidavit of Barry Kirwan dated 14 May 2021 and (ii) what is described as an 'Emergency Notice of Motion' (dated 18 May 2021). The Notice was uploaded to ShareFile. However, notwithstanding that the documents appear to show that stamp duty was paid on 18 May 2021, there is no record of any hard copy of such papers having been filed in the Court of Appeal Office, as is required. Nor was any return date given to Mr Kirwan by the Office in respect of this motion. It would appear that Mr Kirwan simply granted himself a return date of 19 May 2021. That is the date on which the appeals (which were heard on 1 July 2021) had, originally, been listed for hearing.

114. Although the motion of 18 May 2021 was not before the Court when it came to hear the appeals on 1 July 2021, the contention of an alleged interference in Court files is undermined

by the facts. It has already been noted that the allegedly '*suppressed*' or '*concealed*' documents exhibited in the John O'Leary affidavit were, in fact, among the papers furnished to the Court and, thus, were not '*concealed*' and the findings made by the Court in respect of that April 2020 motion have already been noted. It appears to the Court that the origin of the notion that documents were '*concealed*' from this Court *may* have arisen in the following circumstances. In his Notice of 18 May 2021, which was not properly filed in the Court of Appeal Office but was uploaded on to ShareFile, the appellant stated that '*a disturbing development*' had occurred in the form of a letter he received from the Buttle solicitors. In that letter, dated 14 May 2021, Mr Kirwan was informed that counsel for the Buttle respondents considered that the booklets submitted by him should have been tabulated for the main appeal. Accordingly, Mr Kirwan was furnished with the indices provided by that solicitor and those indices of the tabulated booklets did not contain several of Mr Kirwan's papers and motions (which had not been properly filed before the Court). The appellant then complained that the Buttles' solicitor was thus '*withholding, concealing, suppressing facts and documents from the Judge by attempting to use his version of Booklets, having deliberately removed key documents of ours from his booklets, he has repeated this fraud on a larger scale on us and on the Appeals Court*'.[16]

115. Whether or not that is, in fact, the origin of Mr Kirwan's beliefs concerning the '*suppression*' or '*concealment*' of documents, the following appears to be clear. In summary, the papers in respect of the 20 April 2020 motion were among the papers in the booklets received by the Court and its findings thereon have been noted. The papers relating to the motions of 11 and 18 May 2021 were not among the papers received by the Court nor were they properly filed in the Office of the Court of Appeal. From the appellant's description

[16] Notice of Brendan Kirwan, dated 29 April 2021, as exhibited in his affidavits of 11 May 2021 and 14 May 2021 (neither of which was properly filed in the Court of Appeal Office nor included in the hardcopy booklets that were before this Court during the course of the hearing of the appeals).

thereof, they would, in any event, appear not to be relevant to the matters which fell to be determined by the Court in respect of the three appeals.

116. In the context of these proceedings, rulings have been made by the High Court and by this Court on questions of law and procedure. Such rulings, as noted, are a matter for judicial appreciation and discretion which are inherent in judicial proceedings and are properly governed by the principle of finality. A litigant may not wait until after a judgment has been given in a case before raising procedural issues in relation to allegedly '*unheard*' motions. Prosecuting an appeal in such a piecemeal manner with additional reliefs being sought only after a judgment has been delivered is impermissible. There is a public interest in the prompt and efficient administration of justice. Mr Kirwan's contention that his counsel '*didn't have time*' to mention something to the Court is wholly insufficient as a basis for interfering with the finality of the Judgment in question.

117. In view of the foregoing, Mr Kirwan's contention that the Court should set aside its Judgment on the basis that several '*unheard*' motions are outstanding is misconceived. Any '*implications*' which the non-hearing of such motions may have had for the manner in which the case was presented (and it is by no means accepted that such implications have been established) would be insufficient to demonstrate that the type of '*exceptional circumstances*' required to give rise to this Court's jurisdiction to review its Judgment arise in the instant case.

118. As noted by Denham J. in *Greendale*, a case will only be reopened where '*through no fault of the party*' he or she has been subject to a breach of constitutionally protected rights. A '*very heavy onus*' rests on a person seeking to have such jurisdiction exercised. That onus has not been discharged by Mr Kirwan in this application. A party who fails to bring motions properly before the courts or whose counsel '*didn't have time'* to mention matters to the courts bears responsibility for such failings which cannot be characterised as a breach of a constitutionally protected right. The type of exceptional circumstances which could give rise

to the inherent jurisdiction of the court must constitute '*something extraneous going to the very root of the fair and constitutional administration of justice*' (*L.P.* at p. 230). Accordingly, Mr Kirwan's contention that certain motions remain '*open*' and '*unheard*' and that, arising therefrom, his constitutional right of access to justice has been breached is rejected. His request to review and set aside this Court's Judgment on the basis of such a claim, does not bring his application within the terms or principles articulated by the Supreme Court in *Greendale* and in the case law that followed. Accordingly, and for the reasons set out above, the Court rejects the contention that the Judgment should be set aside on the basis of an alleged breach of Mr Kirwan's constitutionally protected rights.

The Alleged Errors and Omissions

119. When a court is informed that it has made errors, it sits up and takes note. As O'Donnell J. stated in *Nash* (at para. 3), mistakes can be made, and judges are not immune from error. Mr Kirwan's application for review is replete with contentions that the Judgment in his case was wrong on several fronts and careful consideration has been given to each of the errors and omissions alleged. He claims that the Court erred because it accepted a '*false narrative*', that it did not engage with the evidence and that it ignored '*proof*' of fraud, forgery and perjury.

120. It is recalled that in *Nash*, the Supreme Court confirmed that a material error of fact may give rise to the Court's exercise of its exceptional jurisdiction to review a final judgment. However, on the facts of that case, the Supreme Court dismissed an application for review, finding that there was no basis on which it could be said that the errors identified '*could approach the high threshold which is necessarily required for this court to consider setting aside a judgment*' (O'Donnell J., at para. 20). It rejected the application because it did not consider that the errors in question were relevant to the determination that had been made in the case.

121. Unlike the applicant in *Nash*, the appellant has not pointed to any error of fact made by this Court in upholding the High Court's conclusions that (i) the delay was inordinate, (ii) that it was inexcusable and (iii) that the balance of justice lay in striking out the proceedings. The errors and omissions in the Judgment, as alleged by the appellant, essentially, boil down to the fact that Mr Kirwan does not agree with the findings of the Court on the appeal, and, on that basis, he chooses to characterise such findings as '*errors*'.

122. Contrary to what he asserts, this Court did not accept a '*false narrative*' submitted by Mr Buttle in respect of the disputed property transaction. It made no findings whatsoever in respect of the events that gave rise to the litigation that ensued. The only 'narrative' that the Court considered was the one that asserted that the delay in prosecuting the 2013 proceedings was inordinate and that it was inexcusable, and that it was such that the balance of justice required that those proceedings be dismissed.

123. It is clear from the Judgment delivered in these appeals that, unlike what occurred in *Nash*, no '*error*' came to light after the final order had been made, let alone an error that was in any way relevant to the outcome of the appeal. The bulk of the appellant's contentions and complaints in respect of alleged errors and falsehoods in the Judgment were already canvassed by him, repeatedly, throughout the appeal. As has been noted in the Judgment, the appellant does not engage with the issues that were actually before this Court when hearing the appeals. Rather, he wants the Court to address matters which could only have fallen for determination at the trial of an action. Such matters concern the truthfulness or otherwise of the respondents' version of the events which occurred in 2006 and the reliability and authenticity of documents relevant to those events. The '*errors*' to which he points are not errors of fact in respect of the findings made in relation to the subject matter of the appeal. They are alleged errors made in respect of conclusions reached on the basis of what Mr Kirwan maintains was a false narrative and/or fraudulent and forged documentation. The narrative—whether true or false—and the

documentation—whether reliable or not—are matters that go to the merits of his case, a case in which the appellant failed, inexcusably, to take any action during the course of 2014, 2015, 2016 or 2017.

The Alleged Failure to Engage with the 'Suppression' of Evidence

124. The appellant claims that Court failed in its Judgment to address evidence in respect of several matters, including, the evidence of suppressed or concealed material that was subsequently 'disclosed' in the John O'Leary affidavit and the evidence in respect of allegedly forged documentation.

125. In terms of the evidence allegedly '*suppressed*' and subsequently uncovered in the John O'Leary affidavit, it seems clear from the Review application that, once again, Mr Kirwan's dissatisfaction centres on the Court's non-engagement with the truth or otherwise of matters concerning the disputed property transaction. He fails to appreciate that disputed evidence in respect of the substantive proceedings was not a matter that fell for resolution by the Court on the hearing of these appeals. The evidence with which the Court was obliged to engage was the evidence that was before the High Court and this Court on each limb of the *Primor* test.

126. In examining *that* evidence, there was no '*proof*', as the appellant contends, of fraud or forgery. There were only his contentions about documentation exhibited by John O'Leary in an affidavit filed after the High Court hearing before the Solicitors Disciplinary Tribunal. Whilst the Court found that Mr Kirwan's motion in respect of the John O'Leary affidavit was not properly before it, it is clear from the Judgment that the Court had read those papers and had concluded that the motion was not relevant to the determination that had to be made concerning the subject matter of the appeals. It is also clear that the affidavit of John O'Leary contained specific replies to Mr Kirwan's allegations of fraud and forgery—but neither the High Court nor this Court was engaged in the exercise of determining where the weight of the

evidence lay in respect of the principal dispute between the parties. That would have been a matter for the trial of the action if it had been just and proportionate to allow Mr Kirwan's claims to proceed. However, this Court upheld the High Court's determination that the balance of justice lay in striking out the 2013 proceedings. None of the assertions made by the appellant in respect of this Court's failure to engage with the evidence is relevant to the matters that fell to be determined on the appeals. Such allegations not only 'miss the mark' in terms of what the appeals were about; they are also not in the nature of matters that could justify the Court's re-visiting and, possibly, setting aside of its final judgment.

127. It is important to recall that, in *Greendale*, Denham J. affirmed that a mere allegation by an applicant that '*the order was wrong*' is not a reason to unlock the inherent jurisdiction of the Court, a jurisdiction that is exercised only in the most exceptional circumstances. All of the alleged errors pleaded by Mr Kirwan are based on his contention that a '*false narrative*' concerning the disputed circumstances of the failed property transaction in 2006 has been accepted by this Court. It is important to recall that this Court did not make any finding in respect of the disputed property transaction nor, indeed, in respect of the authenticity or otherwise of documents pertaining thereto. It was neither necessary nor appropriate for this Court to determine the merits of the claim made in the 2013 proceedings when it came to consider the appeals herein. It was concerned only with whether the High Court had erred in its decision to strike out those proceedings because of inordinate and inexcusable delay in prosecuting that case. The focus of this Court's attention was on the High Court's examination of the extent of the delay, the nature and plausibility of the excuses offered therefor, and where the balance of justice lay. Having considered the High Court's judgment and, indeed, having conducted its own review of the relevant issues, this Court was satisfied that there were no grounds for finding that the High Court had erred in its decision to strike out the proceedings.

The Alleged Failure to Engage with 'Proof' of Forgery

128. Another ground submitted by the appellant for the review and setting aside of this Court's Judgment is his contention that documents pertaining to the disputed property transaction of 2006 were either fraudulent or forged and that the Judgment failed to have regard to or engage with the evidence in this regard. For example, he takes issue, with a document entitled '*Deed of Partial Release*' dated 23 June 2006 and points to the fact that a cover letter from NIB, enclosing a Deed of Release, is date stamped as having been received by M.J. O'Connor Solicitors on 27 June 2006, that is, '*four days after the alleged signing date*'. He also submits that the date of signing occurred at a time when he was in France. Such matters, in his view, constitute '*proof*' of forgery.[17]

129. There is no doubt that the appellant is exercised by the contents of documents that date back to the original failed property agreement of 2006 and many of these documents, he contends, were '*suppressed*' or '*concealed*' from the courts. The documents to which he refers (and which were exhibited in the John O'Leary affidavit) may, and probably would, have formed part of the discovery process if the proceedings which Mr Kirwan initiated in 2013 had gone to trial. Any complaints about or challenges to those documents, whether in respect of the date of the signing thereof or the identity of the witnesses thereto, could have been placed before the trial court and relevant witnesses cross-examined as to their authenticity or accuracy or otherwise.

130. However, the High Court judge decided (at para. 23 of his judgment) that given the inexcusable delay in prosecuting his proceedings and the consequences of that delay, there existed, in September 2019, '*significant prejudice resulting in a significant risk of an unfair*

[17] On the face of the cover letter in question, it is clear that reference is made to two Deeds - the executed and '*approved*' Deed (which NIB enclosed with its letter) and another Deed that it had received from M.J. O'Connor Solicitors but which had differed from what had been approved.

trial' for the respondents and, on that basis, he concluded that the balance of justice lay in striking out those proceedings.

131. On appeal, this Court observed (at para. 156) that:

> "*[T]he 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.*"

It examined periods of delay in other cases and noted that Finlay Geoghegan J. in *Manning v. Benson Hedges Ltd* [2004] 3 IR 556 (at p. 574) had 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.*' Of course, comparisons with delays in other cases, are not, in and of themselves, necessarily instructive, as was noted by Collins J. in *Cave Projects Limited v. Peter Gilhooley and Others* [2022] IECA 245 ('*Cave*') (at para. 36). He quoted Geoghegan J. in *McBrearty v. North Western Health Board* [2010] IESC 27, where he observed that '*[e]very case is different. Factual resemblances are only of limited value*'. Nevertheless, on the facts of this case, and given the thirteen-year passage of time between the disputed events and the subsequent delay in prosecuting the proceedings, this Court was satisfied that the trial judge was correct to find that prejudice to the solicitor respondents had been not just asserted but established because of the delay and it considered that the capability of the courts to conduct a fair trial in such circumstances must be regarded as compromised.

132. Consequently, evidence in respect of the allegedly fraudulent documents or the authenticity of the parties' and/or the witnesses' signatures thereon did not fall for determination by this Court and, for that reason, the Court could not and did not '*engage*' with and determine the weight of the evidence in respect of such matters. Any complaints which the appellant now wishes to make about the authenticity of documents relate to the merits of

the case. These issues could have been addressed had the case been progressed to trial, but they are not a proper ground for setting aside the decision on delay.

133. Nor did the Judgment of this Court engage with the appellant's allegations in relation to the fraudulent execution of the contract on the basis that he was not in the country at the time of the signing thereof.[18] His absence or otherwise from the jurisdiction at the relevant time and the solicitor respondents' answer in respect of that assertion[19] were not matters that fell to be resolved by this Court when dealing with the High Court's decision on delay. All of his complaints about the alleged forgery of documents pertaining to the failed property agreement were, as noted repeatedly, arguments that went to the merits of his case – a case which he had failed entirely to prosecute for several years after it was first initiated. It was that failure to prosecute his claim and the consequences that flowed therefrom that was the core subject matter of the appeals.

134. As he did during the course of the appeals, Mr Kirwan now seeks, once again, in his Review application, to agitate matters that go to the merits of the case in an effort to have the Court set aside its Judgment. He does so under the guise of allegations that the Court committed errors and failed to engage with the evidence on what he claims to be forged or fraudulently obtained documents. His claims concerning the evidence in respect of the authenticity or otherwise of documents pertaining to the 2006 disputed property deal and his challenge to the recollections of witnesses in respect of that transaction are not valid grounds for the Court's exercise of its exceptional jurisdiction to review its Judgment.

135. Neither the High Court nor this Court was engaged in an assessment of the merits of the appellant's original claims against the respondents arising from the disputed property transaction. This was pointed out in the Judgment (at para. 97) wherein it is stated:

[18] The Judgment does note that the respondent solicitors questioned the appellant's alleged discovery in 2018 of this 'alibi witness' given that it had already formed part of the allegedly outstanding 2014 Notice for Particulars which he alleged he had served (at paras. 126 and 131).
[19] As set out in the affidavit of John O'Leary dated 16 May 2019.

"*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.*"

That is not to say that the merits of a case in which an application to dismiss is made are irrelevant in the overall assessment of where the balance of justice may lie. Of course, the nature of the case being litigated is a relevant factor and this was acknowledged in the Judgment (at para. 97) where it is stated:

"*If th[e] 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*."

136. There is no doubt that the issues alleged by the appellant in his 2013 proceedings are serious and, as Collins J. noted in *Cave* (adapting slightly what Barniville J. (as he then was) said in *Gibbons v. N6 (Construction) Limited and Another* [2022] IECA 112), the Court must be satisfied that denying the plaintiff access to a trial of his claim would, in all the circumstances, be just and proportionate. Applications of this nature are not granted lightly, and each case will turn on its own unique facts and circumstances.

137. The trial judge was satisfied that the period of delay in this case was 'inordinate' and 'inexcusable'. He was further satisfied that prejudice to the respondents had been caused by reason of that delay. He also had regard to the fact that the delay in prosecuting the 2013 proceedings had stalled other proceedings in which the recovery of a significant sum of money had been sought (at para. 24). These were among the factors weighed by the trial judge in concluding that there was '*a significant risk of an unfair trial*' and that the balance of justice

lay in striking out the proceedings. This Court considered that he was entitled to reach that conclusion. It was with the evidence in relation to those matters—the period of delay, the excuses offered therefor and the ascertainment of where the balance of justice lay—that this Court was concerned, as these were the sole matters that fell for determination on the core appeal. The appellant's claim that the Court's failure to engage with evidence in respect of the substantive matters of the proceedings—the precise terms of the disputed agreement, the fraudulent and mistaken claims in respect of thereof and the alleged forgery of documents in relation thereto—is not a basis upon which this Court could exercise its exceptional jurisdiction to set aside its Judgment delivered in these appeals.

Miscellaneous Grounds

138. Several of the miscellaneous issues raised by the appellant as grounds for bringing his application for review have already been considered within the context of grounds discussed above. These include his allegations of 'interference' with his filed booklets; his belief that all judgments and orders in these proceedings are based on falsehoods regarding the 2006 agreement; his contention that a document entitled '*Indenture Deed of Release of 23 June 2006*' is forged; and his allegation that some of the respondents' legal representatives have conspired to pervert the course of justice or deceive the Court. Mr Kirwan's additional claims that the costs incurred in procuring DAR transcripts would be prejudicial to him, that certain statutes are '*inferior to interpretations of authorities*', that there was a procedural irregularity in that he did not consent to a Certificate of Readiness either in the High Court or the Court of Appeal, that the Judgment does not uphold the national interests of justice and that those committing fraud, perjury and malicious deception have been rewarded, represent his particular views but they do not bring his application to the threshold necessary for the Court to grant his request for a review of its Judgment.

Conclusion

139. The matters which fell to be determined by the Court in these appeals were discrete and concerned whether the trial judge erred (i) in dismissing Mr Kirwan's 2013 proceedings for delay; (ii) in permitting amendments to High Court orders under the 'slip rule'; and (iii) in making consequential orders in respect of 2012 proceedings. Mr Kirwan's application for review of the Judgment which dealt with *those* matters, does not establish anything which goes '*to the very root of the fair and constitutional administration of justice*'.

140. In view of the foregoing, the Court is satisfied that this is not a case in which its non-appellate jurisdiction should be exercised. The appellant's reliance upon an alleged breach of his constitutional rights is unsubstantiated and ill-conceived. Having considered this claim and the several grounds he advances as reasons why this Court should review and set aside its own Judgment, the Court concludes that they fall well short of meeting the required standard that would justify the Court's exercise of its '*potential jurisdiction*' to reconsider its decision with a view to possibly setting it aside.

141. In considering this application, the appellant's detailed pleadings, contentions and allegations have been set out and assessed. Time and resources are scarce, and, as O'Donnell J. noted in *Nash* (at para. 7), their allocation to '*the revisiting of old ground*' denies both time and resources '*to litigants who have not yet had their case heard or considered on appeal*'. Mr Kirwan has received a considerable share of the courts' attention and his pleadings, exhibits and submissions, reiterating his complaints about forgery and fraud, have been considered and addressed.

142. That the '*potential jurisdiction*' to conduct a review is to be exercised only in exceptional circumstances is clear from the case law. An applicant must show cogent and substantive grounds that are, objectively speaking, sufficient to allow the Court to enter upon the exercise of this wholly exceptional jurisdiction. For the reasons set out above and in the light of the

relevant case law, this Court, having reviewed the application for review 'on the papers', has come to the view that it does not meet the required threshold for reopening its Judgment and that, accordingly, the application should be dismissed.

143. When viewed in the light of the *Launceston* principles governing the exercise of the Court's wholly exceptional jurisdiction to review its judgment, a considered review of the papers discloses that the application before the Court must fail. There is nothing therein that engages an issue of constitutional justice, and the appellant has not discharged the '*very heavy onus*' that rests upon him (*Greendale*). The essence of his claim is a '*demand*' that the Court revisit its Judgment on the merits of the decision it made. The errors alleged are not, in fact, 'errors' but constitute the appellant's view that the Court got it wrong. He is dissatisfied with the decisions made by this Court, but he has not pointed to any flaw in the proceedings, let alone one that could be deemed to constitute a denial of constitutional justice.

144. Mr Kirwan is, of course, free to seek leave to appeal this Court's judgment to the Supreme Court, and the Court observes that he has exercised his right so to do and has been successful in that application. In this Court's view, he has failed to demonstrate, objectively, that there is a fundamental issue concerning a denial of justice. He has not established anything of an '*exceptional*' or '*unusual*' nature that would justify a hearing on the merits of his application. In these circumstances, the Court is satisfied that there is no '*sufficiently compelling reason that may justify reconsideration; something which might outweigh the importance of finality*'.[20]

145. Mr Kirwan's application to this Court for it to review and to set aside its Judgment of 26 October 2022 has been considered in accordance with this Court's Practice Direction, CA14.

146. The Ruling of the Court is that the application is refused.

[20] See Coulson L.J. in *AIC Ltd v The Federal Airports Authority of Nigeria* [2020] EWCA Civ 1585 (at para. 60).