



**THE COURT OF APPEAL
CIVIL**

Court of Appeal Record No. 2020/7
High Court Record No. 2017/252 SP
Court of Appeal Record No. 2020/8
High Court Record No. 2017/252 SP
Court of Appeal Record No. 2020/9
High Court Record No. 2017/252 SP
Neutral Citation No. [2021] IECA 337

**UNAPPROVED
NO REDACTION NEEDED**

Faherty J.
Murray J.
Collins J.

BETWEEN

DAVID DULLY

PLAINTIFF/RESPONDENT

- AND -

ATHLONE TOWN STADIUM LIMITED

DEFENDANT/APPELLANT

AND

**BY ORDER OF THE HIGH COURT DATED 17TH DECEMBER 2018
DECLAN MOLLOY, CIERAN TEMPLE AND PADDY MCCAUL**

**DEFENDANTS/APPELLANTS
AND RESPONDENTS**

AND

THE FOOTBALL ASSOCIATION OF IRELAND

NOTICE PARTY

**Judgment of Faherty J, Murray J. and Collins J. dated the 17th day of December
2021**

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APPENDIX

I FACTS AND ISSUES

These appeals

1. Three questions arise from these unusual appeals. The first is whether the conduct by the High Court Judge of the trial of a number of issues directed to whether Athlone Stadium Limited ('the Company') was bound by a settlement agreement entered into between some of the parties to this action ('the settlement') was, as the Company alleges, unfair and irregular to a degree that his decision should be set aside and a re-hearing ordered. The second is whether the settlement was entered into without the authority of the Company and/or was otherwise unenforceable at law. The third is whether the Judge erred in directing that the plaintiff (hereinafter "Mr. Dully") recover as against the Company, the second named defendant ('Mr. Molloy') and the third defendant ("Mr. Temple") jointly and severally on a solicitor and client basis the costs of the motions the subject of the substantive appeal, and that the fourth defendant ("Mr. McCaul") recover his costs of those motions against the Company and Mr. Molloy jointly and severally on a solicitor and client basis.
2. The legal action has had a complex procedural history. From its initiation in June 2017 to its conclusion one and a half years later the case has spawned twenty-three separate orders and eight written judgments of the High Court, the last of which gives rise to this appeal ([2019] IEHC 892). That judgment followed a hearing held over four days in 2019 (November 29, December 3, 4 and 5). The hearing arose from motions issued by

the Company dated 20 September 2019 and 25 November 2019, the relief sought being directed to the enforceability of the settlement and (as originally presented to the Court) the return of monies that had been lodged by the Company as security for costs of an appeal against an earlier judgment in the action. The motions were heard on affidavit and with cross-examination of four witnesses. The Court in an *ex tempore* judgment delivered following the evidence and at the conclusion of the submissions of the Company and Mr. Molloy (but without hearing the other parties to the application) rejected their claims that the settlement was not enforceable, ultimately making the costs orders to which we have referred.

- 3.** The Company and Mr. Molloy now appeal the dismissal of the motions and costs orders, while separately Mr. Temple appeals the two costs orders made against him jointly and severally with the Company and Mr. Molloy.

Background

- 4.** It is one of the many unfortunate features of this bitter dispute that it arises from the affairs of a sporting body, Athlone Town Football Club (“the Club”). This unincorporated association was established in 1887. It has the distinction of being the oldest soccer club in Ireland. From 1927 to 2007, the Club’s home was at St. Mel’s Park in Athlone.

- 5.** As of 2004, licensing regulations imposed by UEFA meant that the Club required a new stadium. To this end, the Club acquired from Westmeath County Council an 8.5-acre

site at Lissywollen, Athlone (Folio 30190F Co. Westmeath). In order to give effect to the arrangements with the County Council and in exchange for the lands at Lissywollen it was necessary for the Club to transfer its old grounds, St. Mel's, to the Council. The St. Mel's lands were held for the Club by its last known trustee, Mr. Johnny Keena (now deceased). In 2004, the Company was incorporated to facilitate the transition by the Club to the new premises, the equity therein being held as to 97% by Mr. Molloy, 2% by Mr. Temple and 1% by Mr. McCaul, these also being the only directors of the Company. Mr. Keena executed a transfer of the St. Mel's grounds to the Company which, in turn, transferred the property to Westmeath County Council in exchange for the 8.5 acre site at Lissywollen. The new stadium was then constructed on the Lissywollen lands.

6. The cost of construction of the stadium at Lissywollen was in the order of €4.5m. This was funded by lottery monies in the amount of approximately €2.5m together with donations and payments in the amount of €2m which, it appears, includes a sum put into the Company by Mr. Molloy. This is said by him to be in the region of €665,000. The stadium was completed in 2007 and the first match was played at the new facility in that year.
7. On 23 February 2007, a purported lease was entered into between Mr. McCaul (in his role as an officer of the Club) and the Company. As found by Humphreys J. in his first judgment delivered on 12 April 2018, certain provisions of the lease were contrary to the Club's *de facto* position regarding the use of the stadium. No rent was paid by the Club to the Company in respect of the Club's use of the stadium on foot of this lease.

- 8.** In December 2012, Mr. John Hayden was appointed chairman of the Club. By this time the stadium had fallen into a state of disrepair, its condition being in part attributable to serious flood damage. In January 2013, concerns were expressed by the Club to the Company about the state of disrepair of the stadium. The response received was that the Company owned the property, thereby failing to acknowledge its trustee status. In early 2013, Mr. Molloy claimed the right to sell the stadium without resort to the Club.
- 9.** The first judgment of the High Court in these proceedings (to which we will return later) records (at para. 5) that on 8 December 2014, Mr. Dully was appointed by the Club as a trustee. On 23 April 2015, a deed of trust was executed by Mr. Hayden and Mr. Dully (as the executive committee of the Club), of the one part, and the Company, of the other. The recitals to the declaration of trust provided, at para. B, that the legal title in the property has at all times been held by the Company on trust for the executive committee of the Club as beneficial owner. At para. 1, it was declared that the trustee held the title on trust for the beneficial owner and that it would deal with the property at all times only as directed by the beneficial owner. Clause 2 provided that the beneficial owner covenanted to indemnify the Company “*in respect of all present and future liabilities, actions, proceedings, claims, demands, duties and taxes and all associated interests, penalties and costs and all other costs and expenses whatsoever in respect of the property*”. On the same date, the parties executed a 35-year lease with effect from 1 January 2014 at a rent of €10,000 per year.

- 10.** On 20 July 2015, the Club formed a company limited by guarantee, Athlone Town AFC Co. (“Athlone Town AFC”). Athlone Town AFC was to be the vehicle through which the Club members could act in a legal capacity.
- 11.** On 26 April 2016, the Company was advised that in view of various identified failures on its part, the Club was terminating its relationship with it, and the Company was called upon to convey the stadium to Mr. Hayden and Mr. Dully as trustees of the Club. No such conveyance ensued, and these proceedings followed.

The commencement of the proceedings and the first judgment

- 12.** The action was commenced by special summons issued on 19 June 2017. The summons describes Mr. Dully as having been nominated as a member of the Executive Committee of Management of Athlone Town AFC to ‘*take these proceedings on behalf of the members of the club*’. The relief sought comprised orders for the removal of the Company as trustee and its replacement with another trustee, either as proposed by the FAI and/or Athlone Town AFC, or Athlone Town AFC itself. On 28 June 2017, an AGM was held which passed a resolution transferring the Club’s affairs to Athlone Town AFC.
- 13.** The basis for the relief claimed was, as set forth in the summons, that the Company was refusing to provide the assent necessary to obtain funding from the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media, had failed to put in place proper

insurance, had failed to maintain the facilities to the requisite standards, had prevented access to the grounds, and had failed to investigate a proposal whereby the Club might have achieved an income from a wireless mast at the stadium.

14. The action proceeded to oral hearing over a number of days in April 2018. Mr. Dully gave evidence, as did Mr. Molloy on behalf of the Company. While many contentions were raised by the Company in the course of those proceedings, its critical substantive defence (as explained in at least one version of the submissions delivered in the High Court on its behalf in the applications the subject of this appeal) was that it was agreeable to execute the transfer but only provided that satisfactory arrangements were made to secure an indemnity it alleged it had for the sums it had contributed towards the development of the stadium. It estimated these as being in the region of €700,000 either comprising or including the monies advanced by Mr. Molloy which he contended were by way of loan to the Company.

15. The specific grounds of relevance here were as follows:

- (i) It contended that the proceedings ought to be dismissed because the plaintiff was acting in a representative capacity without obtaining the appropriate order from the Court pursuant to Order 15 Rule 9 of the Rules of the Superior Courts ('RSC').

- (ii) It said that in this case there was no authority from the members of the Club for the bringing of the action by Mr. Dully.

- (iii) The proceedings were said to be defective having regard to the failure to set out details of the members in the proceedings.
- (iv) The Company rejected the claims of breach of trust or that it was otherwise appropriate that it be removed as trustee.
- (v) Insofar as the deed of trust stated that the beneficial owner covenanted with the Company to indemnify it in respect of all present and future liabilities and all other costs and expenses in respect of the property, the Company contended that this covered an alleged agreement by the Company to repay Mr. Molloy €665,000 that was either loaned or invested by him.

16. The trial gave rise to the first judgment of the High Court, delivered on 12 April 2018 ([2018] IEHC 209, Humphreys J.). In the course of his decision the Judge explained why he had refused to accede to an application made at the conclusion of the plaintiff's case to dismiss the claim on the basis that the plaintiff had no entitlement to bring the proceedings. In summary, he first found that insofar as the Company had contended that Mr. Dully had failed to state on the summons the capacity in which he sued (in alleged breach of Order 4 Rule 9 of the Rules of the Superior Courts ('RSC')) that in fact the plaintiff's capacity was set out at para. 2 of the summons.

17. Second, Humphreys J. said the following (at para. 26):

'Dr. Forde's submission assumes that one cannot have a representative capacity without a specific representative order under O.15 r. 9. That is not so. Where an unincorporated body sues by its trustees or management committee it is not

necessary for there to be a representative order under O.15 r.9. The entitlement to bring the proceedings arises from the club constitution and rules which have the legal status of a contract between the members'.

18. Thus, Humphreys J. concluded, the Court had jurisdiction to entertain representative civil proceedings without the prior permission of the Court as envisaged by Order 15 Rule 9 RSC. Humphreys J. found that there was no necessity for direct authority by the members as the rules entrusted management of the club directly to the committee and that there was a lawful decision of the committee (which was entitled to act on behalf of the entire membership) to authorise Mr. Dully to bring the proceedings. Moreover, he said, even if there was a defect in the plaintiff's authority this was a question of indoor management which the Company had no standing to question. In the absence of a requirement for a representative order there was no need to set out details of the members, by which omission the Company was not in any event prejudiced. Even if there was a defect in the representative capacity of the plaintiff, the Court held, he was himself a beneficiary and also sued in that capacity. If it was the case that an individual beneficiary brought proceedings to resolve trust questions independently of an executive committee of a club the court could direct notice to be given to the executive committee (but that, he said, was not a problem in the case before him). He said (at para. 54):

'Whether a claim for removal of a trustee or interpretation of a trust is brought by a majority, a minority or just one of the beneficiaries, the court can manage the proceedings and ensure any necessary parties are brought in'.

19. Finally, Humphreys J. said that if this was in error, he would exercise his power under O. 15 r. 13 RSC ‘*to rectify matters*’ in any event. The provision states *inter alia*:

'No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.'

20. In terms of the substantive issues in the case, Humphreys J. expressed the view that Mr. Molloy was ‘*an unreliable witness, that his evidence was unsatisfactory, confused and in certain respects evasive, was riddled with contradiction, complication and unexplained or implausible propositions*’ (at para. 48). He concluded that the Company was aware at all times that it was acting as trustee for the beneficial owners, that there had been multiple breaches of trust and that independently of that it was in the beneficiaries’ best interests to have the defendant removed as a trustee. The defendant had denied the validity of the trust on affidavit, itself a fundamental breach of trust. It had failed to honour the declaration of trust by not conveying the interest in the property

having been called upon to do so in accordance with the declaration of trust. It breached the trust by threatening to sell the stadium without recourse to the club. It allowed the stadium to fall into disrepair, failed to deal with the correspondence in relation to insurance and restricted the entrance to the stadium for use by club members, adversely affected the licence held by the club to participate in League of Ireland competitions, and ignored correspondence from a third party expressing interest in erecting a telecoms mast within the stadium.

- 21.** The court was critical of the Company and of the manner in which it had conducted the proceedings. Humphreys J. said (at para.62):

'The defendant's whole approach has been obstructive and it has acted [as] an antagonist and not a trustee in relation to a range of matters. It failed to facilitate the proposed development which possibly could have avoided the proceedings. I also consider the manner of the conduct of the proceedings was generally obstructive notwithstanding occasional flashes of co-operation ...'

- 22.** Commenting also that the Company had allowed Mr. Molloy's financial regrets to influence it in the exercise of its trust functions, the Court determined that in these circumstances and having regard to the applicable legal principles the Company should be removed as trustee.

- 23.** In respect of the claim made regarding the indemnity, this was also rejected. As a matter of fact, Humphreys J. rejected the claim that the monies were loaned by Mr. Molloy to the Company and did not accept that there was any liability of the nature claimed. Mr.

Molloy's evidence in this regard was '*somewhat contradictory and contrived*' (at para. 71(v)). The contention was inconsistent with the deed of trust. The words of the indemnity used in context did not include the purchase of shares by Mr. Molloy in respect of the Company or any loans by him to the Company.

- 24.** Consequent on his judgment, Humphreys J. granted, *inter alia*, a number of reliefs. Pursuant to the inherent jurisdiction of the court and/or s. 25 of the Trustee Act 1893 and/or s. 22 of the Land and Conveyancing Law Reform Act 2009, he ordered that the Company be removed as trustee and replaced with Athlone Town AFC with immediate effect and that the Company execute assignments of all its interest in Folio 30190F and entitlements under the lease and any other entitlements in connection with the property such as the benefit of mobile mast agreements or insurance policies. He also declared that the indemnity in favour of the Company covered liabilities incurred at the time of its execution and into the future in respect of the trust property but did not cover any alleged liabilities of the Company to Mr. Molloy to repay him any sums allegedly paid by him to acquire shares in the Company or advanced by way of alleged loans to the Company.
- 25.** Humphreys J. noted that Mr. Dully was opting to pursue a claim for damages as claimed in the special summons. That aspect of Mr. Dully's claim was adjourned for further mention.

The second to fifth judgments

- 26.** In a judgment delivered on 16 April 2018 ([2018] IEHC 225) (his second judgment), Humphreys J. refused the Company's application for a stay on his orders including an application that there would be a stay on the order for the execution of the conveyance by the Company of the lands in Folio 30190F to Athlone Town AFC.
- 27.** In his third judgment ([2018] IEHC 366) (delivered on 30 May 2018) Humphreys J. made an Order pursuant to O.3, r. 22 RSC allowing Mr. Dully to deal with his damages claim by way of special summons and permitting him to file an affidavit he had sworn on 23 May 2018 where he set out details of the claim for damages. Humphreys J. also allowed time for a replying affidavit. He directed that a previous Order for cross-examination on all affidavits would apply to these and any further affidavits and that, additionally, the parties would be entitled at the damages hearing to cross-examine on pre-existing affidavits insofar as such cross-examination related to issues relevant to the claim for damages.
- 28.** On 16 July 2018 (his fourth judgment) Humphreys J. dealt with a motion for discovery and particulars brought by the Company and directed Mr. Dully to swear a further affidavit in that regard ([2018] IEHC 433).
- 29.** Mr. Dully's damages claim against the Company and the latter's counterclaim are the subject of the fifth judgment of Humphreys J. This was delivered on 14 November 2018 ([2018] IEHC 704). There, Humphreys J. explained why he dismissed the Company's counterclaim and made a decree in favour of Mr. Dully in the sum of €160,673 to be

held in trust for the members of the Club. Humphreys J. awarded costs to Mr. Dully including reserved costs to be taxed in default of agreement, again to be held by Mr. Dully in trust for the Club for the purposes of discharging the legal costs of the proceedings. He gave liberty to Mr. Dully to bring a motion to have the directors of the Company (Messrs. Molloy, Temple and McCaul) held personally liable for the costs and, if necessary, the damages award.

30. There followed an application by Mr. Dully to have the three directors of the Company joined as defendants for the purposes of making them personally liable for the damages award and the costs, consequent upon which an Order was made on 17 December 2018 pursuant to O.15, r.13 RSC joining Mr. Molloy, Mr. Temple and Mr. McCaul as co-defendants to the action with liberty given to Mr. Dully to amend the special summons accordingly. None of the directors appealed the Order joining them as defendants.
31. The Company, however, appealed several of the Orders of Humphreys J. to this Court. One of the many grounds of appeal advanced was that Mr. Dully lacked the legal authority to sue on behalf of himself and the members of the Club. In tandem with the substantive grounds of appeal, it was also contended that there were several procedural irregularities in the conduct of the trial that gave rise to the first High Court judgment.
32. In the context of the appeals brought by the Company, and by notice of motion dated 24 May 2018, Mr. Dully brought an application for security for costs. By Order of 8 February 2019, this Court (Irvine J.) granted security for costs in the sum of €50,000 in

respect of Appeal No. 2018/184. The €50,000 was duly lodged in court, the funds having been provided for that purpose by Mr. Molloy.

II THE SETTLEMENT AND THE COMPANY'S SUBSEQUENT APPLICATION

The damages claim against the directors

33. The application to have Mr. Molloy, Mr. Temple and Mr. McCaul made liable for the damages award and costs award made in favour of Mr. Dully was listed for hearing before the High Court on 21 May 2019. By this time, Messrs. Molloy, Temple and McCaul were represented by Prospect Law Solicitors, and by counsel. The Company was not, directly, a party to this application but the extent to which its advisors were aware of the proceedings was important to what followed.
34. Mr. McNelis (the solicitor on record for the company) had been in correspondence with Prospect Law prior to 21 May 2019. The available records show that he and Mr. Colm MacGeehin of Prospect Law spoke by telephone on the morning of 15 May 2019 following which Mr. McNelis emailed Mr. MacGeehin. This e-mail assumed considerable significance at the hearing. It reads:

'Further to your phone call this morning I spoke to [counsel].

The following points were made by [counsel].'

1. *The Company essentially consists of the three directors, whatever the three directors agree upon in any settlement or meeting or in any proposals that might be put to them, will result in them giving instructions from their own point of view and for the Company. So unless it is something that impacts exclusively on me as Solicitor for the Company, which is highly unlikely it is safe for you to assume that the instructions the directors give concerning the case will apply with equal merit to the instructions relating to the Company.*
2. *There is little that the Club can offer, if anything it is a matter really for the Company and the directors to decide what it is that they are prepared to offer, the Club now has the Stadium it is hardly likely that they are going to give it back. I have not as yet received a copy of the instructions provided to you by the three directors concerning the proposed settlement meeting and what they are looking for from that meeting. I would need to see those instructions.*
3. *No contact has been made with Dr. Forde to canvass or see if there are any points or submissions that (sic) sees need to be made regarding the damages claim being made against the three directors. It would be best to have your counsel make direct contact with Dr. Forde to discuss the case with him in advance of the hearing on Tuesday.*
4. *Although the three directors have provided additional evidence in the form of three Affidavits from witnesses who did not provide Affidavits before... Dr. Forde is of the view that [Judge Humphreys] may decide that he has made*

his findings of fact against the Company and those findings of fact are binding in any event on the directors of the Company and the new material does not shift those findings of fact although certain distinctions might be drawn. It would be a matter for the Court of Appeal to decide taking into account all the evidence and the new evidence for the purposes of the Appeal.

5. *I have asked Dr. Forde if in my absence he would be able to attend, he has advised that your Counsel should make contact with him, but his view is that there is no need for the Company to be separately represented since the three directors will be providing their instructions and such instructions would apply equally to the Company. You can simply relay whatever has been decided.*

In light of the above there is no need of (sic) point in me being there on Friday. I am at the end of a phone if needed.

You might revert to me on this however I would request that your Counsel make contact with Dr. Forde please to discuss... ”

35. It appears that there was no further contact between Mr. McNelis and Mr. MacGeehin prior to the damages claim against the three directors coming on for hearing on 21 May 2019. All three directors were in attendance in the High Court on that date. Mr. McNelis was also in the vicinity. In his affidavit sworn 11 September 2019 for the purposes of the hearing which gives rise to this appeal, Mr. McNelis averred that he attended at the

High Court on 21 May 2019 and that he was informed by the Judge that his presence was not required. However, on 5 December 2019 counsel informed the Judge that the exchange which Mr. McNelis had referred to in his affidavit had referred to an earlier attendance in court in December 2018 and that Mr. McNelis' presence in the High Court on the 21 May 2019 was more of a “*perfunctory showing up*”. On 5 December 2019, Mr. McNelis himself clarified that on 21 May 2019, he had just dropped papers at the court but did not attend.

The settlement

36. In the course of the hearing, a settlement was negotiated, following which the Court was advised that the matter was resolved. We will return later the sequence of events leading to that agreement. What is clear is that the agreement was accepted by Mr. McCaul and Mr. Temple on their own behalf and on behalf of the company, and that Mr. Molloy objected to it. The Court was thereafter requested to make certain Orders, these being ultimately reflected in an Amended Order of that date. The Order records as follows:

“*By Consent*

IT IS ORDERED that the claim as against the second third and fourth named Defendants be and is hereby withdrawn

*IT IS ORDERED that the first named Defendant to discontinue the Appeals lodged with the Court of Appeal with no order*¹

¹ This part of the Order was deleted by further Order of 16th October 2019.

AND IT IS ORDERED that all or any costs order made previously herein be and are hereby vacated

AND THE COURT notes the Undertakings given and recited in said agreement".

- 37.** The settlement agreement took the form of an “Agreed Statement to the Court”. This was appended as a schedule to the High Court Order. It reads as follows:

“The claim as against the second, third and fourth named defendants is withdrawn with no order. Athlone Town Stadium Limited discontinues the appeals lodged with the court of appeal with no order.

All and any costs orders made heretofore in these proceedings are vacated. The plaintiff on behalf of Athlone Town Association Football Club (the Club) and on behalf of Athlone Town AFC Company CLG agrees and undertakes that Mr. Paddy McCaul and one further nominee of Athlone Town Stadium Limited will form part of a committee with nominees of the plaintiff for the purpose of engaging with third parties to secure the transfer of the legal title of the premises known as Athlone town stadium at Lissywollen Athlone. Such third party to hold same on trust for the benefit of the Club or any successor club.”

The Club thereafter to occupy the said lands pursuant to license to the use of the lands for the purposes of soccer and for the benefit of the community at large.

The defendant, Athlone Town Stadium Limited and the third and fourth named defendants jointly and severally undertake to transfer to the Club the sum of €100,000 within 6 weeks. Athlone Town Stadium by part payment agrees to this Court authorising by order to the plaintiff's solicitor's Richard Stapleton Moate, Co. Westmeath the sum of €50,000 lodged as security for costs of the appeal to the court of appeal in these proceedings. The balance of €50,000 also to be paid to the said Richard Stapleton."

38. It is the agreement said to be evidenced by this statement, and the High Court Order of 23 May 2019, that was the trigger for the motions brought by the Company dated 20 September 2019 and 25 November 2019 giving rise to the judgment and Orders under appeal here.

Events following the settlement of 23 May 2019

39. On 28 May 2019 Mr. Colm MacGeehin of Prospect Law wrote to Mr. McNelis, the Company's solicitor, enclosing the statement that had been read out in court on 23 May 2019. He went on to say:

“While Declan Molloy wanted to fight on, the other two Directors did not. They are putting up €50,000 between them towards the settlement. They have also directed that the sum lodged by the Company in Court in relation to the Appeal is released in favour of the club.”

40. Following the settlement agreement, Mr. McCaul paid over his €25,000 contribution. Mr. Temple paid €10,000 of the €25,000 to which he had committed, a payment which he later countermanded.
41. On 27 June 2019, an Extraordinary General Meeting of the Company took place at which all the directors and shareholders (namely Messrs. Molloy, Temple and McCaul) were in attendance. As recorded in a manuscript note of the meeting, the topic for discussion was “*whether to accept the settlement proposed on May 23rd 2019 in the High Court*”. Mr. McCaul proposed “*accepting the alleged ‘settlement’*”. The proposal was seconded by Mr. Temple. The record shows Mr. McCaul voting to accept, stating “*it’s our only option*”, and that Mr. Temple also voted “*Yes*”. Mr. Molloy is recorded as voting “*No*”. On 27 June 2019, Mr. Temple wrote to Mr. MacGeehin and advised him of the outcome of the meeting.
42. A further Extraordinary General Meeting of the Company took place on 30 July 2019. The manuscript note of this meeting shows Mr. Molloy, Mr. Temple and Mr. McCaul in attendance. The topic on the agenda was described as follows: “*motion to Instruct solicitor Mr. McNelis to do what needs to be done to secure Company’s case in the*

Court of Appeal/proposed by Mr. Molloy". The note records Mr. Molloy and Mr. Temple as voting in favour of the motion with Mr. McCaul voting against.

The motions

43. The Company did not proceed to issue fresh plenary proceedings to set aside the Settlement Agreement. Instead, it determined to proceed by way of a notice of motion in the proceedings. The notice of motion duly filed by the Company on 20 September 2019 (later amended in the course of the High Court hearing) sought that the Order of the High Court of 23 May 2019 requiring the Company to discontinue its appeals be vacated and a declaration that the Company was not bound by the several undertakings in the second page of the "*agreed Statement to the Court*".

44. The motion records that the basis of the application was, *inter alia*, that:

"a) The 'consent' recorded in the order was not given by [the Company], which was not a party to the dispute and was not represented at any stage of the hearing that resulted in the order being made.

b) Any purported consent given would have been unlawful, and breach of several requirements of Company Law.

c) Accordingly, this Court had no jurisdiction to so order."

45. The 20 September 2019 motion was grounded on the affidavit sworn by Mr. McNelis.

He averred as follows:

"The stage of the proceedings that resulted in the consent order of the 23rd May 2019 involved a claim against Messrs. Molloy, McCaul and Temple personally only and no relief was sought against the Company, which is an entire stranger to what occurred there and never consented to the order made there. As a matter of courtesy I attended (without counsel) at the commencement of that hearing. I informed the Court that I was the solicitor on record for the Company. I was advised by the Judge that my presence was not required and that I could be excused, whereupon I left and took no part in this phase of the proceedings. Nor was I ever consulted in any way by or on behalf of those individuals about the proposed terms of any settlement. Had I been so consulted, I would have requested advice from the Company's counsel about inter alia the legality of what was proposed. The first I learned of the settlement was a telephone call from those individuals' solicitor to advise it had been concluded.

In mid July, having been presented with a copy of the order herein, I consulted counsel and was advised that, even assuming all three of these individuals had agreed to the settlement terms, it was unlawful on several grounds. Counsel requested clarification of the extent to which, if any, Mr. Molloy had participated in the settlement.

On the 4th September, I was advised in writing by Mr. Molloy that he never agreed to the settlement terms and had made it clear to his solicitor that he was not interested in settling; that a settlement of sorts was arrived at involving Messrs. McCaul and Temple in their personal capacities, as his and their legal team had claimed that they had found a mechanism where his involvement could be by-passed.

I have no knowledge of what information may have been sought by or given to the Judge about the nature of the consent given, especially the purported consent of the Company, or what may have been stated at the hearing about the legality of [its] purported consent. At an earlier state (sic) of the proceedings, although not contended for by the Plaintiff, the Judge raised several issues of law with the Company's counsel, including the Company Law doctrine of ostensible authority, referring counsel to an unreported judgment of the Irish Courts which he considered relevant to the issues before him.

The order as drawn up herein does not record that Messrs. Molloy, Temple and McCaul were additional Defendants in these proceedings and that the firm Prospect Law was on record for them."

- 46.** On 4 October 2019, Mr. McNelis swore a further affidavit averring that he had been advised on 1 October by Mr. Dully's solicitors (Richard Stapleton Solicitors) that the funds lodged as security for costs for the Company's appeal had been paid out to them by the Office of the Accountant. He stated that this was despite his having advised the

Office of the Accountant on 22 July 2019 “*of an irregularity in the settlement agreement*” and requesting that if a request for payment out of the €50,000 was made that he be notified in advance of payment out. Accordingly, Mr. McNelis sought to amend the reliefs claimed in the 20 September motion by requesting that Mr. Dully repay the funds to the Office of the Accountant or, alternatively, lodge €50,000 to the credit of the Company’s appeal. Mr. McNelis also sought that the motion be amended to reflect the reality as being that the applicable parties were the three directors rather than the Company.

47. The matter came before the Court on October 7 (a Monday). Counsel for Mr. Dully (whose involvement in the Club was as a volunteer) attended in Court to meet the motion. The Court was told that the matter was not suitable for a Monday and (so counsel for Mr. Dully advised this Court in the course of his submissions) that it would take one day. The hearing was adjourned to Tuesday October 15.
48. On October 15, Mr. Molloy swore an affidavit. Essentially, that affidavit supported the reliefs sought by the Company in its 20 September 2019 motion. There he averred, *inter alia*, that the Company and its directors (being himself, Mr. Temple and Mr. McCaul) had been advised that the Company had an excellent prospect of success in its appeal and that it remained anxious to pursue its appeal. With regard to the settlement of 23 May 2019, he averred that he had been asked a number of times on 23 May 2019 to agree to a settlement and had refused but that he had agreed to a different settlement proposal which was not accepted. He stated that when considering the question of settlement, his then legal team never canvassed with him or the other directors the

interests of the Company's creditors if the Company's appeal was abandoned, "*nor the requirement to have properly convened meetings of directors and/or shareholders to approve any deal prejudicing the Company nor the relevance of the Company's insolvency to these matters.*" He averred that on his limited understanding, his legal team ought to have engaged with Mr. McNelis who remained on record for the Company in the appeal.

49. Mr. Molloy, however, accepted that Mr. Temple and Mr. McCaul agreed to the terms of settlement. However, given that they were being sued in their personal capacity, they had no authority to agree to "*what in substance was the Company's undertaking being deployed to avoid their potential liability.*" Mr. Molloy stated that he was not privy to what, if any, legal advice Messrs. McCaul and Temple got "*in respect of the fiduciary duties in agreeing to this part of the settlement*". He further averred that he was not aware nor advised that the Company's directors/shareholders "*were legally barred from agreeing to a settlement along those lines*" and that had he been so advised, he would have put up "*a more firm resistance to the Company's undertaking being deployed in that way*".

50. He proceeded:

"9. Insofar as there may be a perception that I had agreed to these terms, the position is as follows. On 23 May, my and Messrs. McCaul and Temple's legal advisors advised us the appeal had only a 5% chance of succeeding, without explaining why, and that even if the claim against us was dismissed, we most

likely would have to pay the costs. I refused to agree to the settlement that was being mooted. We were then so advised that my agreement was not required it seems for the part of the settlement that prejudiced the Company but cannot recall the explanation given. I still refused to agree to what was being proposed. My legal team along with Mr. McCaul then appear to have reached some agreement with Mr. Dully's team and the first I became aware of that, but not its precise terms, was when my legal team were typing up a draft. They never even gave me a copy of those terms. In court it was given by them to Mr. McCaul, who passed it on to me just as the settlement was about to be ruled on. In retrospect, I should have openly protested in court but that I made it clear to my and their legal team that the offending part did not have my agreement. But, as stated, I had been led to believe that my non-agreement to that part could be bypassed and was not then aware of the illegality of those terms. In a letter of the 28th May from the solicitors to Mr. McNelis, he was advised informally that "(while Declan Molloy wanted to fight on, the other two directors did not) ... "

The hearing of October 15

51. The matter came before Humphreys J. again on the day Mr. Molloy's affidavit was sworn. Counsel for the Company was clearly proceeding on the basis the matter was before the Court for some type of substantive hearing and Mr. Dully's counsel attended for a second time to meet the motion. Counsel then instructed by Prospect Law presented himself as representing all three directors, and protested that he did not have

instructions from anyone and did not know what the motion was or, as he put it, he did not ‘*know what this has to do with*’. Papers had been sent to his solicitors the previous night.

- 52.** Counsel for the Company opened the affidavits to the Court, including the affidavit of Mr. Molloy which he sought liberty to admit. He then summarised his case, reducing it to five points. First, that Mr. Molloy had not agreed to the settlement. Second, that even if he had agreed, the agreement would be invalid because it would have been – particularly in light of the fact that the company was at the time insolvent – in breach of fiduciary duties for him to do so. Third, for there to be an agreement of this kind it would have been necessary for it to be preceded by an EGM of the company. Fourth, even if there had been an EGM and all three shareholders had agreed, the provisions of the settlement agreement were manifestly unlawful on a variety of grounds, but principally because the company was insolvent. Fifth, that the plaintiff was aware that the Company had its own legal representation, ought to have been aware of the conflict of interest arising from the fact that the directors had a personal interest in the settlement, and knew that the company was insolvent.

- 53.** Counsel for Mr. Dully outlined his position that he was entitled to rely upon the rule in *Turquand's Case (Royal British Bank v. Turquand (1856) 6 E&B 327)*. This principle – also known as the ‘*indoor management rule*’ - was expressed by counsel for Mr. Dully on October 15 as being that the directors had ostensible authority to bind the company and that the plaintiff was entitled to rely on the fact that everything should be done and needs to be done by the company to effect the agreement is done.

54. Counsel instructed by Prospect Law noted that the tenor of the application before the Court was that he as counsel and Mr. MacGeehin as solicitor had overstepped their remit in purporting to engage the Company in terms of settlement and that they were entitled to reply to that. He said that their remit to negotiate a settlement was specifically authorised by Mr. McNelis. This was a reference to the e-mail of May 15 to which we have referred above. Counsel for the company said he was not aware of this e-mail (it had not been exhibited in Mr. McNelis' affidavit) and indeed suggested at one point that if it did confer authority to enter into the settlement this may be the end of the matter. Mr. Molloy then expressed his preference that Prospect Law come off record for him. At that point it became apparent that there was some confusion as to what had been said to the Court when the settlement was presented to the Court in May, so the Judge rose to listen to the Digital Audio Recording of the proceedings.

55. Following that hearing, Humphreys J. delivered his sixth judgment ([2019] IEHC 734). Relying on the slip rule (O. 28, r.11) he permitted a number of amendments to be made to the High Court Order of 23 May 2019, resulting in the "Amended" Order already referred to. Furthermore, he made an order declaring that Prospect Law had ceased to act as solicitors for Mr. Molloy. He also made an order granting liberty to the Company's solicitors to file an affidavit that had been sworn by Mr. Molloy on 15 October 2019. The matter was further adjourned.

56. It should be repeated that up and until this point the application appeared to be focussed on the issue of authority to enter into the settlement and that it was suggested that the

matter would take one day. However, counsel for Mr. Dully contended in oral submissions that from the revelation of the May 15 e-mail, the case evolved into a ‘*blunderbus*’ of points based upon a variety of provisions of Company law. As he put the matter, from there his client faced ‘*a profusion of applications and allegations*’ and thereafter the case ‘*sprouts legs*’ and ‘*starts to run in all manner of directions*’.

The subsequent affidavits

57. Mr. Dully swore a replying affidavit in respect of the 20 September 2019 motion on 20 October 2019 averring that he was “*a stranger in respect of dispute which has now emerged between the Defendants which has led to notice of motion issued by the First Named Defendant on the 20th September 2019*”. He further averred:

“3. *I say that when the compromise agreement was agreed between all the parties to the proceedings herein, all directors and shareholders of [the Company] were present when the settlement was advised to the Court.*

4. *I further say that in furtherance of the terms agreed, that the Club’s solicitor received a cheque in the sum of €25,000 by way of cheque from Paddy McCaul; a further cheque in the sum of €10,000 from Ciaran Temple which was attached to [the Company’s] headed notepaper (said cheque was later countermanded without explanation). I also say that [the] Defendants also made the necessary*

arrangements to release the Security of Costs monies to us and I confirm the Club's solicitor received the sum of €49, 431.90 in respect thereof.

5. I further say that the agreement was freely entered into by the Plaintiff and all the Defendants and all parties to the agreement reached are therefore bound by terms of said agreement.”

- 58.** On 30 October 2019, Mr. McCaul swore an affidavit averring, *inter alia*, that he did not agree with or support the Company’s application for a declaration that it was not bound by the undertakings given on 23 May 2019 and confirming that he had paid over the sum of €25,000 in part performance of the 23 May settlement. Mr. McCaul proceeded to take issue with the Company’s 20 September 2019 motion stating that neither Mr. McNelis nor Mr. Molloy were authorised to swear affidavits on behalf of the Company and that the contents of their affidavits had not been approved by the Company. At para. 11, he outlined his understanding that at all relevant times Mr. McNelis had been apprised of proposed settlement talks and that Mr. McNelis had confirmed to Prospect Law solicitors by email of 15 May 2019 “*that the matter of an overall compromise could be left to the decision of the Directors and the formal engagement of the legal team for the company was not required for the settlement of the action*”. To that end, Mr. McCaul exhibited a copy of the 15 May 2019 email.

- 59.** Mr. McCaul averred that he had not been advised by Mr. McNelis that there was any legal impediment to the Company’s directors settling the matter nor that the matter could not be compromised given the Company’s position as to solvency. He further said that

Mr. McCaul had not been advised that any settlement as might be reached would require subsequent approval at an EGM.

- 60.** As far as Mr. McCaul was concerned, all the directors were actively engaged in the settlement discussions and had been apprised of the “*various risks and uncertainties associated with the litigation*”. He further stated that the directors understood that they were entitled to make decisions for the Company. At para. 16, he averred:

“I say that Mr. Molloy, while obviously not content with the terms of the settlement, did not as a Director object to the matter being decided by a meeting of the Directors...The company by majority decision of the Directors agreed the terms as informed to the Court and incorporated in a Court Order...”

- 61.** In respect of the appeals the Company had lodged with the Court of Appeal, Mr. McCaul further said that he was “*not aware of any fetter on the power of the Board of Directors to discontinue an appeal*” and that “[t]he decision to discontinue [the appeals] as part of the settlement was made bona fide and for proper and legitimate purposes”.

- 62.** On 4 November 2019, Humphreys J. delivered a short, written ruling ([2019] IEHC 783) (his seventh judgment) consequent on an application brought by Prospect Law solicitors to come off record for Mr. Temple and the Company’s application to disallow the affidavit sworn by Mr. McCaul on 30 October 2019 and filed on 31 October 2019. The Company’s objection to Mr. McCaul’s affidavit was twofold although the second objection, namely that the affidavit had been filed late, was not ultimately pursued. With

regard to the first ground of objection, the Company's argument was that since Mr. Molloy had no dispute with Mr. McCaul and only with Mr. Dully, Mr. McCaul's affidavit should have been filed by the Company's solicitors. This argument did not find favour with the Judge who found that Mr. McCaul had personal obligations under the settlement agreement of 23 May 2019 and accordingly had rights as to his choice of legal representative. Humphreys J. proceeded to list the 20 September motion for hearing on 29 November 2019.

- 63.** On 18 November 2019, Mr. Molloy swore a further affidavit in response to the affidavit sworn by Mr. McCaul and an affidavit of Mr. MacGeehin. There, he described having been provided with "*Terms of settlement*" on 21 May 2019 which had been drafted by his legal team and which provided, *inter alia*, for the payment of €100,000 to Mr. Dully. He averred that after some initial reservations he agreed to those terms. At para. 8 he stated:

"I was under some pressure from the other directors when I decided, while having dinner in Hughes' Pub with them and my legal team, to agree to the terms. I volunteered to release the €50,000 which our Company had lodged at the Court of Appeal and to give another €25,000. Mr. McCaul made it clear, as he had previously done in relation to costs, that he simply couldn't access that kind of money. Mr. Temple then volunteered to pay the remaining €25,000."

- 64.** At para. 9, he stated that the "*deciding factor*" in his accepting the terms was that the "*opposition*" would never agree to them. He said, at para. 10, that, no agreement was in

fact reached on 21 May. At paras. 14 to 22, Mr. Molloy outlined his impression of the events on 22 and 23 May 2019 averring, at para. 15, as follows:

"Various attempts were made by my legal team, Mr. Temple and Mr. McCaul to persuade me to agree to a settlement which took any payment to our Company and any question of independent ownership [of the stadium] off the table. I repeatedly said 'I'm not interested' and words to that effect..."

65. On 25 November 2019, some four days in advance of the scheduled hearing of the 20 September motion, the Company filed the second of the motions which formed part of the judgment under appeal. The relief sought was an order directing that Mr. Dully and/or Mr. McCaul provide a full explanation, with supporting documentation, as to how the €50,000 standing to the credit of the Company in the Office of the Accountant (which had previously been furnished as security for costs) came to be paid out to Prospect Law, the solicitors for Mr. Molloy, Mr. Temple and Mr. McCaul in the damages/costs claim against them, without the consent of the Company. The motion was grounded on an affidavit sworn by Mr. McNelis.

III THE HEARING AND THE JUDGMENT

The hearing of the motions of 20 September and 25 November

66. The motions of 20 September 2019 and 25 November 2019 were heard concurrently by Humphreys J. on 29 November and 3,4, 5 and 6 December 2019. In all five individuals

swores affidavits. They were Mr. McNelis, Mr. Molloy, Mr. Dully, Mr. MacGeehin and Mr. McCaul. Altogether 16 affidavits were sworn. Four of the five deponents were cross-examined on their affidavits, namely Mr. McNelis, Mr. Molloy, Mr. McCaul and Mr. MacGeehin. Mr. Temple did not swear any affidavit and did not appear at the hearing of the motions. He later swore an affidavit for the purpose of his seeking a stay from this Court of the costs order made against him in the High Court. Mr. Dully was not cross-examined on his affidavit, and indeed the Company made it clear at an early stage that it would not require him for examination.

- 67.** The opening day of the case disclosed some confusion as to the precise relief being sought from the Court, with counsel for the Company urging that the Court should focus on its claim to have the monies paid by way of security for costs paid back into Court to the end that Mr. Dully could then sue for that money and for enforcement of the other parts of the agreed statement if he wished, with the Court not going into what he described as '*the merits of the dispute*' (being the issue of whether there was an enforceable agreement to which the Company was party). The Judge made it clear that he wanted all issues to be dealt with to be addressed, stating (in reference to the witnesses in Court) that he was not '*bringing them back*'.
- 68.** The hearing days of 29 November to 4 December were largely taken up with the cross-examination of Mr. McNelis, Mr. Molloy, Mr. McCaul and Mr. MacGeehin on their respective affidavits. By contrast, the majority of the hearing of 5 December 2019 was taken up with the oral submissions made by the counsel for Company. In the early course of his submissions, counsel in response to a query from the Judge advised that his

(updated) written submissions would be ready by lunchtime. It appears that at this juncture, the Judge was already in possession of the written submissions of the Company that were presented on 3 December 2019. The Judge also had the written submissions filed on behalf of Mr. McCaul. Mr. Dully did not file written submissions for the November/December 2019 hearing.

- 69.** Counsel for the Company also advised the Court that in light of certain amendments he proposed making to the 20 September 2019 motion - which the Judge duly permitted to be made - and in view of the fact that if the Company were to be successful in the now amended motion the entire of the settlement agreement of 23 May 2019 would be impugned, the Company was no longer pursuing the relief claimed in its 25 November motion or seeking the repayment of the sums which the Office of the Accountant had paid out, as had been sought by Mr. McNelis in his 4 October 2019 affidavit. In these circumstances, the 25 November motion was dismissed by Humphreys J. on 5 December 2019.
- 70.** In the course of making his oral submissions counsel for the Company intimated that in the amended written submissions which he intended filing there would be no reference to alleged fraudulent trading (something which had been referred to in the then extant submissions the Judge had from the Company). That allegation, it might be observed, resurfaced in the written submissions delivered for the purposes of this appeal.
- 71.** At the request of the Judge, counsel summarised his points as follows:

- (i) There was significant substance to the Company's appeal then pending before the Court of Appeal.
- (ii) There was no Court order requiring the payment of the moneys lodged in respect of the appeal to Mr. Dully.
- (iii) There was no settlement agreement with the Company.
- (iv) The Company had not given authority to settle the proceedings and in particular (a) the e-mail of 15 May 2019 did not confer such authority and (b) the solicitor on record was not present.
- (v) The settlement was unlawful (a) because there was no properly constituted director's meeting to approve the settlement, (b) because the directors had a conflict of interest which was never properly declared or minuted, (c) in deploying Company assets to settle the proceedings the directors were in breach of their fiduciary duty by using the Company's assets directly or indirectly for their own benefit, (d) at common law using the Company's assets other than for its benefit was *ultra vires*, (e) because the Company was insolvent at the time of the transaction there was a legal obligation to consider the interests of the creditors before making the decision to settle the case, (f) because there was no EGM confirming the settlement and (g) that even if there had been unanimity amongst the shareholders the transaction was a distribution of the Company's assets for the benefit of two of its members which was an *ultra vires* disposition at common law.

- 72.** In making his oral submissions, counsel opened a number of legal authorities and legislative provisions. These were duly provided to the trial Judge. The trial Judge's response to this material was that he would rise and read these materials to which counsel replied that the judge could '*come back and ask me questions on them*'.
- 73.** Following the conclusion of counsel's oral submissions, Mr. Molloy (who was representing himself) was invited by the Judge to commence his submissions. Mr. Molloy made submissions to the Judge to the effect that he was adopting the submissions of counsel for the Company save that he elaborated on one minor difference as between the Company and himself on the issue of the scope of the Company's appeals. The Judge then rose stating he was going to read the materials counsel for the Company had provided.
- 74.** When the hearing resumed approximately an hour later, counsel for the Company informed the Judge that his junior counsel had left to make a supplementary amendment to the written submissions which counsel intended to hand in to the trial Judge. This supplementary amendment was to reflect the fact that the Judge had acceded to the Company's application to amend its 20 September 2019 motion. Counsel then proffered the version of the written submissions he had in his possession at that point in time to the trial Judge.
- 75.** The trial Judge's response to this was that he was not accepting any further submissions. Humphreys J. stated that he proposed to dismiss the Company's applications in their

entirety. He then proceeded to commence delivery of his *ex tempore* judgment which he concluded on 6 December 2019.

The trial Judge's analysis

76. At the outset, the Judge noted that the Company's and Mr. Molloy's attempt to unravel the settlement agreement of 23 May 2019 had “*a number of unhappy features, perhaps too many to enumerate*”. He nevertheless went on to set out what he considered to be the more striking of those features which, in summary, were:

- The undesirable spectacle of unfounded aspersions being cast on a wide range of persons (including an allegation as to fraud by two of the directors that was withdrawn when queried by the trial Judge) and in respect of a wide range of professionals.
- The exponential manner in which the two short grounds set out in the 20 September 2019 notice of motion had grown.
- The considerable disarray of the materials provided by the Company and their almost continuous revision.
- The Company's campaign of “*procedural obfuscation*” in bringing “*evolving and mutating*” applications combined with “*virtually*

continuous application for adjournments" which were "made on the tendentious basis of demanding "fairness" a process that seemed to the Judge "to be entirely one-way as far as [the Company] is concerned".

- The impression generated at the time that some 21 points of law were not enough and that "*appeal points had to be generated on an ongoing basis as a kind of insurance policy*".
- The conduct of the case by the Company "*in a manner utterly oblivious to the other demands on the court*".

77. At paras. 5 to 63 inclusive, the Judge outlined the oral evidence given under cross-examination by Mr. McNelis, Mr. Molloy, Mr. McCaul and Mr. MacGeehin and made certain findings of fact in the process. He distilled what he regarded as "*the most pertinent [findings of] fact*" into some twenty-seven points. He stated that the findings were made "*after having the benefit of seeing and hearing each of the witnesses and on the totality of the evidence, having taken into account all material, whether evidential or legal, submitted to me, including in particular [counsel for the Company's] submissions regarding the inferences that he invited me to draw from the evidence*".

78. The findings of fact recorded by the Judge in these twenty-seven points are set forth in the Appendix to this judgment. Some of them will be returned to later. For present purposes suffice to say that generally, the Judge preferred the evidence of Mr. MacGeehin and Mr. McCaul to that of Mr. Molloy and of Mr. McNelis finding that the

latter's evidence had '*subconsciously been retrospectively coloured*'. He found that Mr. MacGeehin had advised Mr. McNelis that any settlement would likely involve the resolution of all issues and that it was likely that the Company would be bound to such a settlement. He found that the e-mail of May 15 could only be construed as an authority to Mr. MacGeehin to settle the proceedings on behalf of the Company. He found that a majority of the directors had agreed to the settlement. He decided that while Mr. Molloy did not agree to the settlement, he did not indicate disagreement in a forceful way and that it was not unreasonable for Mr. McCaul to have construed this as involving '*a degree of acquiescence*'. He found that Mr. McNelis had co-operated with implementation of the settlement at least to some extent. He also said that allegations against the directors' solicitor were launched on affidavit without exhibiting much of the relevant documentation, which would have shown those allegations to be unfounded, such documentation being in the possession of the first-named defendant's legal advisers at the time.

- 79.** The Judge proceeded to address the submissions that had been advanced by counsel in aid of the Company's application to set aside the settlement agreement. As observed by the trial Judge, the relief sought by the Company in its 25 November 2019 notice of motion, namely that Mr. Dully and Mr. McCaul would provide a full explanation for the payment out of the €50,000 which had been lodged in court, was not pursued at the hearing and the 25 November motion had been dismissed on 5 December 2019. The Judge stated that he would also dismiss the reliefs which Mr. McNelis sought in his 4 October 2019 affidavit.

- 80.** Humphreys J. next turned to the question of whether the Company was bound by the agreed statement as appended to the Order of 23 May 2019. The Judge likened the reasons advanced by counsel for the Company as to why the Company was not so bound to “*something of a forensic Mandelbrot set*” (at para. 68). He proceeded to address the Company’s arguments under some twenty-one headings, stating that insofar as the Company’s submissions amounted to arguments as to what facts he should find, he had taken the points made by the Company fully into account prior to making the findings of fact listed at (i) – (xxvii) at para. 64 of the judgment.
- 81.** In the first instance, the Judge rejected the Company’s (and Mr. Molloy’s) contention that the appeal lodged with the Court of Appeal was “extremely strong”, stating that in his view, “*the Company had no hope whatsoever of winning the appeal on the trustee issue*” and that “*it signed an explicit deed of trust, agreeing to step aside as a trustee if called upon to do so. It was so called upon, but failed to step aside. It also acknowledged that it held the property in trust rather than by way of legal ownership. That appeal to my mind has a nil chance of success, even bearing in mind fully the inevitability that I would say that.*” Humphreys J. could not see how the evidential deficits in the Company’s defence and counterclaim could be filled in in the Court of Appeal without huge unfairness to the plaintiff, Mr. Dully (at paras. 70 to 71).
- 82.** With regard to the argument that the Order of 23 May 2019 did not direct that money would be paid out to Mr. Dully and did not contain an order requiring the striking out of the Company’s appeal, the Judge concluded that albeit not bound by a court Order in this regard, the Company was bound contractually by the agreed statement. The Judge

found as a fact that the intent was that the agreed statement would bind the Company (at para. 73).

83. He rejected the Company's argument that the email of 15 May 2019 from Mr. McNelis to Prospect Law Solicitors did not give authority to Messrs Molloy, Temple and McCaul to enter into the settlement agreement, finding that the email, properly construed in the light of the totality of the evidence, did amount to an authority to Mr. MacGeehin of Prospect Law to take instructions from the directors on behalf of the Company as well as their own behalf. He also found (at para. 84) that Mr. McNelis' email of 15 May 2019 had expressly quoted the advice that counsel for the Company had apparently conveyed to Mr. McNelis prior to the latter sending the email of 15 May 2019.
84. The Judge proceeded to find that there was no ambiguity in the email which required clarification and that Mr. McNelis' interpretation of the email had been "*unconsciously coloured retrospectively by subsequent events*" (at para. 76).
85. With regard to the argument that there was no evidence that the Company had authorised Mr. McNelis as agent of the Company to delegate his authority to Mr. MacGeehin, the Judge expressed the view that even if the principle that an agent cannot delegate his or her authority without the authority of the principal was relevant, it had not been infringed in circumstances where during the negotiations on 23 May 2019 the directors of the Company "*were by definition aware that Mr. MacGeehin was dealing with a proposed settlement on behalf of the company as well as on their own behalf*" and where "*the directors themselves agreed to the settlement by a majority*"(at para. 79).

- 86.** In those circumstances, there was in fact no delegation because Mr. MacGeehin had specific instructions from the directors. Humphreys J. said, moreover, that even if the delegation point had been relevant, which he said it was not, there had been “*huge acquiescence*” by Mr. McNelis after the event as he did not protest to Mr. MacGeehin until September 2019.
- 87.** The Judge also dismissed the argument that the authorisation of Mr. MacGeehin by Mr. McNelis to act in the settlement without, at a minimum, Mr. McNelis having an involvement in the settlement before it concluded would be treated by the Law Society as a failure on the part of Mr. McNelis to safeguard the interests of his client. Humphreys J. was of the view that the contents of the 15 May 2019 email on its face negated such an argument. He was further satisfied that even if there had been misconduct, that would not be a ground to hold that the Company was not bound by the contract (at para. 80).
- 88.** Another of the arguments advanced by counsel was the absence of any *inter partes* negotiations, or any prior request from Mr. MacGeehin seeking authority to act for the Company. The Judge found this not to be decisive and that the dispute “*only flared up retrospectively when Mr. Molloy tried to unravel the settlement*”(at para. 83).
- 89.** The Court rejected the argument that the court on 23 May 2019 had no seisin of the proceedings against the Company since Mr. Dully’s claim against the Company was by then in the Court of Appeal. The Judge found that not to be a true picture of the situation

given that the costs of the High Court proceedings had yet to be adjudicated or taxed so the court still had a role or a potential role and, secondly, the order setting aside the previous costs order of the High Court had been made by consent (at para. 85).

90. The Judge did not accept that insofar as it was argued that for Prospect Law to have authority to act for the Company they should have come on record for the Company. He considered that Prospect Law coming on record “*could lead to an irrational chopping and changing of representation in a fluid situation*” (at para. 86). Even if there was an obligation to come on record, it did not make the settlement agreement non-binding. He further rejected any suggestion that counsel instructed by Mr. MacGeehin on the day had acted unprofessionally *vis-à-vis* the Company (at para. 88).
91. It had been argued on behalf of the Company that because what was involved on 23 May 2019 concerned the disposal of all the Company’s assets (where in practical terms the Company was liquidating itself), that could not be done by any informal meeting of the directors that may have taken place on 23 May 2019. In aid of this argument, the Company relied on section 166 of the Companies Act 2014, which mandates the recording of minutes of meetings of a company’s directors.
92. The Judge did not find the reliance on section 166, or the case law cited by counsel for the Company to be persuasive, finding that in the present case, all three directors were involved and that they had met during the settlement negotiations and discussed the approach to be adopted. While that was not a formal board meeting, the matter had been discussed among them. There was thus no substance to the Company’s argument. The

Judge said that even if a formal board meeting was required, it was “*an indoor management point*” (at para. 92).

93. The Judge also considered what he noted had been described as the “*existential*” threat to the Company to be devoid of merit on the basis that the Company was “*defunct and insolvent at all material times*”. He stated (at paras 93 to 94):

“The only way to determine whether the settlement was in the company's interest is to compare the company's position without the settlement as against the position with the settlement. The company initially claimed to be the legal and equitable owner of the stadium, but that was a complete non-starter because it had signed a deed of trust recognising that its position was only that of trustee and that it would relinquish that position on demand. It conducted High Court and Court of Appeal litigation while insolvent. It is a matter for Dr. Forde as the moving party, to prove that the settlement was not in the company's interest. That is a mixed question of fact and law that would require adequate evidence. Dr. Forde has not established in evidence that the settlement was contrary to the company's interests, so I have to reject his submission in that regard.

If I am wrong about that, and if I can determine myself on the material before the court whether the settlement is in the company's interest, I would conclude that it was, for the reason essentially given by Mr. McCaul in the witness box, namely that the appeal was a risk. [Counsel] said that the appeal was an asset but in my view it was very likely to fail”.

94. Humphreys J. noted that without the settlement, the Company's assets were essentially worthless. He valued the appeal then pending at nil (for the reasons set out earlier in his judgment). Similarly, he attached a nil value to the sum lodged by way of security for costs as same would be forfeit in the event the Company lost its appeal. Furthermore, the Company's claim to indemnification had already been rejected in the judgment delivered on 12 April 2018 and he did not think it in any way plausible that the Court of Appeal would have allowed the Company to re-run its argument in that regard. He further noted that in the absence of the settlement agreement, the Company was faced with the costs awarded by the High Court and the costs of the appeal, both of which were likely to be significant. Moreover, the Company was faced with the damages that had been awarded to Mr. Dully. Furthermore, he did not believe that it had been established on the evidence that the Company had any other creditors (at para. 95).

95. Looking next at the Company's position with the benefit of the settlement agreement, the Judge found that its costs obligation in the High Court had abated in circumstances where the agreement provided that the €50,000 which Mr. Molloy had put up by way of security for costs was to be paid to Mr. Dully as part of the €100,000 payable under the settlement agreement, with the balance of that sum to be made up by equal contributions from Mr. Temple and Mr. McCaul. Furthermore, there would be no costs liability in the Court of Appeal as the appeals were to be struck out with no order. While the Judge noted that the damages award of €160,673.05 had not been specifically addressed in the settlement agreement, he had been reassured by counsel for Mr. Dully that the €100,000 payment provided for in the settlement agreement was an "*all in*" payment. He

concluded that the settlement “*was massively in the Company’s interests*” (at paras. 96 to 97).

- 96.** The Judge next addressed the argument that the settlement agreement should be impugned on the basis of the conflict of interest of Mr. Temple and Mr. McCaul which had never been declared, contrary to the requirements of section 231 of the Companies Act 2014. He found that if there was an obligation to make a declaration, that could be done at the next board meeting of the Company albeit he opined that s.231 was not really apposite to address the situation. But, even if it were, it was an “*indoor management point*” and, moreover, there was also the acquiescence of Mr. McNelis in this regard (at para. 98).
- 97.** The argument that in deploying the assets of the Company to settle proceedings brought against themselves personally the directors were in breach of the Companies Act and their fiduciary duties was then addressed. While finding that the directors had an interest themselves in the settlement, as opposed to a situation of a third party getting an order against a company and then seeking to enforce it against the directors personally, the Judge did not consider this coincidence of interests to be necessarily equivalent to a conflict. This was in circumstances where the settlement agreement was in the interest of both the directors and the Company. He found that there was no suggestion that the settlement had favoured the directors to the detriment of the Company. Moreover, albeit that Mr. Molloy had not signed up to the settlement agreement, it had favoured him in equal measure to Mr. Temple and Mr. McCaul. Accordingly, he rejected the Company’s argument on that basis, and furthermore stated that even if the agreement

had favoured the directors over the Company, that was “*an indoor management point*” and there had also been acquiescence by Mr. McNelis (at para. 99).

- 98.** Reliance had also been placed by the Company on section 228(1)(d) of the Companies Act 2014 which restricts the use of a company’s property for the benefit of the directors. The Judge found that provision of limited relevance but insofar as it applied, the onus of proof (which was on the Company) had not been discharged, and that the matter was, in any event, again, “*an indoor management*” issue. There was also the issue of acquiescence on the part of the Company. For similar reasons, he found no substance in the reliance placed by the Company on the *ultra vires* principle (at paras. 100 to 101).
- 99.** The Judge rejected as a *jus tertii* the Company’s argument that since it was insolvent there was an obligation to consider the interests of the creditors before concluding the settlement. He found that argument to be “*unreal*” as it had not been established that there were any creditors of the Company. He further expressed the view that even if there were creditors, there would be nothing for them to complain about given the Company’s insolvency. Moreover, he considered it to be an “*indoor management point*” and “*more fundamentally still, the settlement was in the Company’s interests so therefore, insofar as it is meaningful to talk about the interests of creditors in the Company which had no assets to begin with, it is therefore also in the creditors’ interests*” (at para. 102).
- 100.** Humphreys J. proceeded to reject the argument that an EGM was required before the settlement agreement could be entered into, again expressing the view that even if this

were required, it was an indoor management point and there had been acquiescence on the part of Mr. McNelis. He also rejected the argument that the settlement agreement constituted the distribution of the Company's assets for the benefit of Mr. Temple and Mr. McCaul, noting that this was a repeat of an argument which he had earlier rejected (at para. 103).

101. Latterly, he noted that insofar as it had been mooted in the Company's written submissions that the distribution of the Company's assets was "*arguably*" a fraudulent distribution and/or a fraudulent trade, that submission had been withdrawn after having been queried by the court in circumstances where no allegation of fraud had been put to any of the witnesses (at para. 104). As we have earlier noticed, the claim re-appeared in the submissions delivered for the purposes of this appeal.

102. The Judge duly dismissed the Company's amended September 2019 motion paper in its entirety (at para. 105).

The trial Judge's treatment of the costs

103. Having dismissed the Company's application to vacate the settlement agreement, the Judge proceeded to deal with Mr. Dully's application for costs against Mr. Molloy, Mr. Temple and Mr. McNelis. Counsel sought costs against the three on a solicitor and client basis. It was also confirmed that Mr. Dully was seeking costs against the Company as a formality.

104. Counsel for Mr. McCaul then made an application for costs against the Company and Mr. Molloy and, again, following a question from the trial Judge, confirmed that he was seeking same on a solicitor and client basis. He further advised that he was awaiting instructions in respect of seeking a wasted costs order pursuant to O.99, r.7 RSC. Mr. McCaul did not seek any costs against Mr. Temple as Mr. Temple had not appeared at the hearing.

105. Following submissions made by counsel for the Company and the submissions of Mr. Molloy, and after calling Mr. Temple, the Judge then dealt with the costs applications by indicating that the following orders would be made:

- (i) An order for costs on a solicitor and client basis against the Company, Mr. Molloy and Mr. Temple jointly and severally, in favour of Mr. Dully.
- (ii) An order for costs on a solicitor and client basis against the Company, and from the date on which Prospect Law Solicitors came off record, Mr. Molloy, jointly and severally, in favour of Mr. McCaul.
- (iii) An order recording the fact that while he appeared in a formal sense as a respondent to the motions, Mr. Molloy had supported and adopted the applications, and

(iv) An order adjourning the question of costs under O. 99, R. 7 against Mr. McNelis, Solicitor, to a date to be fixed.

106. As already indicated, the Judge duly granted a stay of execution on the costs orders against the Company and Mr. Molloy for 28 days in the event of an appeal. Mr. Temple not being present or represented at the hearing, the Judge did not stay the execution of the order against him. On 19 December 2019, Mr. Temple was served with a bill of costs and outlay by Mr. Dully's solicitors in the amount of €276,397.55. By way of motion to this Court (Costello J.) returnable to 13 March 2020, Mr. Temple applied successfully to stay the execution of the costs order pending the determination of the within appeal.

107. We should finally note that the papers furnished to this Court include an affidavit of Mr. Molloy sworn on the 14 January 2020. This affidavit is not associated with any motion furnished to the Court. It contains a point by point refutation of the deponent's understanding of the reasoning of the trial Judge, and asserts that Mr. MacGeehin's affidavit of November 7 was '*rubbished*' under cross-examination on December 4. It concludes as follows:

'I was informed by our Company's Counsel on December 4th that Mr. MacGeehin is 'a close personal friend' of Judge Humphreys. With that in mind, I am requesting that Judge Humphreys withdraw his Eight [sic.] judgment and recuse himself from the remainder of the case'

108. We note that the 4 December was the fourth day of the last of many hearings in this case. No application was made to the Judge to recuse himself, and the objection intimated in this averment did not feature in this appeal.

IV THE APPEALS AGAINST THE DISMISSAL OF THE MOTIONS

The Notices of Appeal

109. The Company's notice of appeal asserts that the Judge erred procedurally, in fact and/or in law on the following bases:

- The adjudication by the Judge was an abuse of process in that, in particular, in the early paragraphs of the judgment, there is published unparticularised, unfounded, egregious and damaging allegations against one of the Company's counsel who was not afforded the opportunity to address and refute them before they were published. (Ground 1).
- The conduct of the proceedings was so fundamentally at variance with long-established elementary norms of adjudication as to constitute a denial of justice by, *inter alia*:
 - the nature and extent of the interrogation by the Judge of the Company's counsel during his submissions;
 - the refusal of the Judge to accept revised (in light of how the hearing had run) submissions upon which counsel for the Company intended to rely, and

then determining the issue, thereby depriving counsel for the opposing sides the opportunity to answer the Company's case which counsel for the Company might then refute, all of which constituted an unprecedented and unconstitutional departure from how the Superior Courts conducted adjudications (Ground 2(a) and (b));

- failing to hear from counsel for the opposing sides, thereby depriving counsel for the Company the opportunity to address, in particular, the arguments raised in the written submissions furnished on behalf of Mr. McCaul (Ground 2(c));

- the Judge making numerous findings of fact and/or of law of which counsel for the Company never had fair notice or opportunity to refute and doing so in a tone and tenor that went beyond the boundaries of legitimate censure (Ground 2(d));

- The hearing and judgment were also profoundly unfair by virtue of the trial Judge:

– permitting Mr. MacGeehin to file an affidavit that exhibited critical relevant documentation, much of which the Company's solicitor (Mr. McNelis) had no knowledge of prior to the commencement of the trial and refusing the Company's application for an adjournment to enable the filing of replying affidavits that would have enabled several inferences subsequently drawn by the Judge to be refuted (Ground 3(a));

- failing to cite and/or address in the judgment several of the principal oral and written submissions on behalf of the Company including that the terms of the proposed settlement agreement should have been sent to Mr. McNelis

for his consideration and that Mr. McNelis or his counsel should have been contacted by Prospect Law Solicitors in that regard (Ground 3(b)(i));

- concluding that the Company's existing appeals were doomed to failure without giving consideration to its critical objection concerning the capacity/locus of Mr. Dully to sue the Company in his own name on behalf of an unincorporated association and when no representative order had been obtained as required by law (Ground 3(b)(ii)).

- The failure on the part of the trial Judge, in circumstances where there were considerable disputes as to facts, to adjourn the issue of the legality of the settlement agreement to plenary hearing despite the several requests made by counsel for the Company (Ground 4).
- The Judge erred in law by, *inter alia*:
 - holding that the 15 May 2019 email from Mr. McNelis to Mr. MacGeehin was unconditional, unqualified and continuing authority to Mr. MacGeehin to conclude the settlement agreement (Ground 5(a)).
 - holding that the purported delegation of Mr. McNelis' authority was effective in circumstances where there was no prior authority to Mr. McNelis from the Company, and where Mr. MacGeehin had never sought clarification from Mr. McNelis following receipt of the latter's email and where Prospect Law Solicitors, who were not on record for the Company, instructed their counsel to apply for an order which, if lawful, would require the withdrawal of the Company's appeals (Grounds 5(b)).
 - holding that Mr. MacGeehin was not obliged to seek clarification from Mr. McNelis before acting in relation to the settlement agreement (Ground 5(c)).

- holding that it was lawful for Mr. Temple and Mr. McCaul to agree to deploy the Company's entire undertaking (to wit the €50,000 security for costs) in part satisfaction of the damages claim against them personally in circumstances where this deployment was agreed to over the objection of Mr. Molloy (the 97% majority shareholder) and without recourse to the Company's legal advisors, and/or failing to take into account that the said deployment was contrary to various provisions of the Companies Act 2014 and/or in breach of the Company's constitution, where no consideration was given to the interests of the majority shareholder and where the deployment rendered the Company insolvent (Ground 5(d)).
- holding that the decision of Mr. Temple and Mr. McCaul had not been undermined by the Company's refusal at an EGM some weeks later to ratify the settlement agreement (Ground 5(e))
- holding that the €50,000 lodged as security for costs could be lawfully paid out without the Company having been given prior notice and in the absence of a court order to that effect (Ground 5(f));
- failing to take into consideration Mr. MacGeehin's admission that he had not sought recourse to Mr. McNelis or sought his consent prior to the payment out of the funds (Ground 5(g));
- failing to find that Mr. Temple and Mr. McCaul operated under a mistake of fact and/or law in believing they were authorised to settle Mr. Dully's claim against the Company (Ground 5(h)).
- Without prejudice to the claim that the unfairness of the trial renders the findings of fact nugatory, the Judge erred in fact in holding that:

- Mr. McNelis' actions after 23 May 2019 were confirmation by him of his purported authority to Mr. MacGeehin to settle and rule the proceedings;
- no conflict of interest arose as between the directors and the Company and
- the Company had no undertaking of value. (Ground 6(a)-(d)

110. Mr. Molloy's notice of appeal adopts the grounds advanced by the Company. Both appeals are opposed in their entirety by Mr. Dully and Mr. McCaul. It is to be noted that while initially the Company and Mr. Molloy delivered separate legal submissions (although signed by the same counsel), subsequent legal submissions delivered on their behalf to this Court were tendered on a joint basis. Mr. Molloy throughout has adopted the Company's submissions, and it is upon those that we shall focus. Both parties were represented by the same counsel at the hearing of the appeal.

The issues

111. The Company's first set of written submissions identify what they describe as the '*underlying net issue*' presented by the appeal. They define this as being whether a purported settlement of the Company's proceedings on 23 May concluded through solicitors who were not on record for it, and who had the settlement ruled by the High Court binds the Company. In the course of his oral submissions on this appeal, counsel for the Company (who did not appear in the Court below and did not sign the principal written submissions delivered in this appeal) distilled the appeals to two broad issues: firstly, the alleged unfairness of the High Court hearing and adjudication, and, secondly,

errors of fact and/or law made by the Judge in arriving at the conclusions he did - errors which, in part, were said to have derived from the unfair nature of the hearing and adjudication process. The two limbs of the appeal, he made clear, were thus related.

- 112.** Not every issue referenced in the Notice of Appeal or original submissions was pursued in oral argument, and a suggested argument based upon fraudulent trading and fraudulent disposition was disavowed. Here, we address the issues by reference to the principal grounds identified in the Company's notice of appeal. Insofar as that notice contains two parts identified as '*errors of law*' and '*errors of fact*' (grounds 4 and 5) these are, insofar we as believe them to be relevant to the issues in the appeal, addressed as they arise in the context of those grounds.

V THE ISSUES OF PROCESS

The comments in the judgment about counsel and solicitor and interruptions of counsel (Grounds 1(a) and (d)).

- 113.** The allegation made on behalf of the Company under the heading of '*abuse of process*' is grave and is, as the Company puts the matter in its written submissions '*unprecedented in this and any comparable jurisdiction*'. It describes it in its written submissions as '*abuse of process by the trial Judge*'. In oral submissions, counsel for the Company and Mr. Molloy explained that, with the one exception, his objection was not to the conduct of the trial *per se* but instead as to what he termed '*the adjudicative aspect*' and how the Court dealt with the submissions of the parties.

114. To digress briefly, the exception arose from an intervention by the Judge in the course of the examination of one witness, Mr. McCaul. Here (Day 4 p. 66 to 67) the Judge took the witness through the sequence of events around interactions between the directors of the Company on the 23 May. That intervention, it was stated in oral submissions, cleared up what was described as the '*nebulous*' evidence that had been given by the witness regarding these matters. Insofar as this objection was pursued, we reject it. This was a single incident (indeed it was described by counsel as '*an isolated example*') of an intervention by the Judge in the evidence of one witness lasting a little more than a page of the transcript. It does not demonstrate any partiality and is simply an example of the entirely permissible process where a Judge seeks to obtain from a witness a clear sequence of the critical events in issue between the parties.

115. The real complaints as explained in oral argument were addressed to the manner in which the Court interacted with counsel during legal submissions and in the judgment as ultimately delivered. It is convenient to deal with these in reverse order.

116. The complaint as regards the judgment arises from criticisms of counsel and solicitors for the Company made by the Judge in the course of his decision. Those comments are combined with the claim that the behaviour of Mr. McCaul's representatives in '*ambushing*' the company's solicitor and in (as it is claimed occurred) misleading the Court into making a consent order where there was no such consent, was condoned by the Court leading to what is termed '*an inexplicable duality of standards*'. On this basis, the following is said:

'The making and publishing in a permanently recorded and internationally accessible official document of these remarks, compounded by the striking double standards adopted by the Court establishes the requisite perception of bias that defies explanation.'

117. In one part of its submissions the Company refers to the judgment of the Judge as demonstrating sufficient grounds for '*the requisite perception of bias*', the Judge is in the same breath accused of '*abuse of process and a flagrant denial of justice*'. It appears that the Company makes a case of both actual and objective bias. It adds to this what appears to be, at least in this jurisdiction, an unprecedented claim – that the manner in which the Judge expressed himself in the judgment itself when combined with a number of identified features of the trial constitute a '*judicial breach of fair procedures*' of such kind as to be fatal to the adjudication.

118. The comments of the Judge referable to the Company's counsel and solicitor can be grouped under seven headings, as follows:

- (i) He was critical of the fact that what he described as '*unfounded aspersions*' were cast at a wide range of persons, including an allegation of fraud by two of the directors, and aspersions on professionals without any supporting or expert evidence (at paras. 1(i), (ii), 104). In a related vein, the Judge was highly critical of the fact that '*[a]llegations against the directors' solicitor were launched on affidavit without exhibiting much of the relevant documentation, which would have shown those allegations to be unfounded,*

such documentation being in the possession of the first-named defendant's legal advisors at the time' (at para. 64(xxv)). He was critical of the fact that counsel for the Company had questioned in submissions what responsible lawyer could advise a client that the appeal had only 5% prospects of success, while failing to offer any expert evidence that the advice was incorrect, observing '*[i]t is not the correct procedure for a litigant to impugn the professionalism of legal practitioners without some form of expert evidence'* (at para. 69). The Judge rejected in similar terms the claim that counsel instructed by Mr. MacGeehin would have been in breach of the Code of Conduct of the Bar of Ireland in negotiating a settlement on behalf of the company in the absence of expert evidence to that effect (at para. 88). He said this (at para. 89):

'The unhappy situation that has been arrived at is that few people are left untouched by the sweeping allegations made by the first-named defendant. Mr. MacGeehin was accused of misleading a court office on affidavit and was impugned in cross-examination. He and his counsel were accused of being in breach of professional responsibilities. Dr. Forde even made the submission that if his own solicitor, Mr. McNelis, did what I have found him to have done, this would have been 'unethical and utterly reckless'. Ultimately, Dr. Forde was driven to say that, if by saying that Mr. MacGeehin's client's instruction would apply equally to the company and Mr. MacGeehin could simply relay whatever had been decided meant that Dr. Forde condoned a situation where the case was being settled by Mr.

MacGeehin on behalf of the company, which is exactly what I find he did do, he himself would be open to a negligence action and in peril of being reported to professional bodies. Again, the argument here is that I couldn't have done what I did because it would have been unethical, therefore, I didn't do it.'

- (ii) The Judge commented adversely upon the manner in which the case had developed from two short grounds to a large number of meritless points (at para. 1(iii)), describing (as we have noted above) the various arguments advanced as to why the Company was not bound by the settlement agreement as '*a forensic Mandelbrot set*' (at para. 68).
- (iii) He was critical of the disarray in which material was provided and of the fact that materials were being updated and revised (at para. 1(iv)), 34).
- (iv) He said that the Company had engaged in '*a campaign of procedural obfuscation*', which he characterised as involving '*evolving and mutating applications*' and constant applications for adjournments, (at para. 1(v), 34). He referred to the Company's legal advisors as being engaged in '*a delaying and obfuscatory tactic*' (at para. 45).
- (v) He said that the Company had conducted the proceedings '*in a manner utterly oblivious to the other demands on the Court* (at para. 1(vi)), of making applications that were '*frivolous and vexatious*' (at para. 47), of being

involved in ‘*a series of frivolous applications and delaying tactics*’ (at para. 49(iii))

- (vi) The Judge was less than complimentary of the evidence given by the Company’s solicitor whose recollections he described more than once as ‘*unconsciously significantly coloured in retrospect*’ (at paras. 9, 26, 64(iv), 64(viii), 64(xxii), 64(xxvi), 64(xxvii), 76). At para. 80 of his judgment the Judge commented that a statement of Nietzsche had anticipated the case ‘*I have done that*’ says my memory. ‘*I cannot have done that*’ – says my pride, and remains adamant. At last – memory yields’. He described the evidence of the solicitor for the Company that he was not proactive in implementing the settlement as ‘*not convincing and not compatible with contemporaneous materials*’ (at para. 18). While the Judge was at pains to stress that he was not finding that Mr. McNelis had sought to deliberately mislead the court, the term ‘*unconvincing*’ is used on a number of occasions to describe his evidence (at para. 27). The Judge described as ‘*an unhappy situation that the incomplete picture presented in Mr. McNelis’s affidavits takes on a very different complexion when all of the correspondence was put before the court*’ (at para. 24) saying that he ‘*unconsciously retrospectively downgraded the significance and importance*’ of much of the correspondence he had not exhibited (at para. 24).
- (vii) Various other miscellaneous criticisms are made of the Company’s legal advisors, including their submission of a document as an exhibit to an affidavit which was not properly sworn to (at para. 32) and failing to

acknowledge significant aspects of that problem (at para. 32). Counsel was described as making '*his daily application for an adjournment*' (at para. 34), one of his objections to the delivery of Mr. MacGeehin's affidavit was described as '*spurious*' (*id.*), an application that a Court registrar be directed to attend to give evidence was described with the conclusion '*[a]n hour of court time was merrily spent on that pointless application alone*' (*id.*). Referring to counsel's original advices that there was no need for the Company to be separately represented since the three directors would be providing their instructions and such instructions would apply equally to the Company, Humphreys J. observed that '*[t]he only possible inference in the light of the company's current position is that [counsel] has now simply changed his mind after his advices have been acted upon*' (at para. 64(iv)). The assertion that counsel had changed his mind was repeated at a number of points in the judgment (at paras. 80, 84, 90). The Company's solicitors and counsel had, he found, both '*condoned a situation where the case was being settled by Mr. MacGeehin on behalf of the company contrary to their current protestations*' (at para. 64(v)).

- 119.** As is apparent from the foregoing, many of these criticisms were couched in terms that were as uncompromising as they were unflattering. The Judge referred to adjournment applications being made on a '*tendentious*' basis (at para. 1(v)), accused the Company of generating appeal points '*on an ongoing basis as a kind of insurance policy*' (*id.*), and referred to a '*profusion of applications*' emanating from the Company (at para. 3). At one point he suggested that the Company was operating on the basis that '*every*

affidavit deserved a reply' saying that '*litigation would continue ad infinitum on that basis*' adding '*maybe that vista contains an element of insight into [counsel's] strategy in this case*' (at para. 47). Having commented on his concern that acceding to an application made by the Company to deliver an affidavit at a late stage might result in further delay, he added that '*[t]hat might not be of much concern to the insolvent company represented by [counsel] but it certainly is of concern to the other parties to the proceedings*' (at para. 49(ii)).

- 120.** In examining this complaint, it is necessary to distinguish between grievances that counsel may entertain as to the comments made about them by the trial Judge, and the proposition that those complaints translate into a basis on which the Company can now seek to set aside the judgment of the Court. The former does not inevitably lead to the latter.
- 121.** The Supreme Court has certainly made clear the responsibility of a Judge in delivering a judgment which is critical of counsel. In *Seredych v. The Minister for Justice and Equality* [2020] IESC 62 Baker J. put it as follows (at para. 98 to 99):

'The relationship between counsel and court must be one of mutual respect. The judge is in a particular position of power and can damage or destroy a career with a remark made in court or in a written judgment. Equally a judge can cause personal distress, not just because the judge holds a position of power, but also because he or she is held in high esteem by the profession and generally by members of society.'

It is no part of the judge's role to be personally insulting to the lawyers who appear before him or her. While there may be occasions when a judge may in a written judgment expressly doubt the integrity of counsel or his or her professional competence, that is not something to be done lightly and certainly not without giving an opportunity to the lawyer to respond and defend his or her reputation and professional competence.'

122. However, it is not sufficient for the Company to complain that their counsel was the subject of adverse comment and from there to assert that the judgment must be set aside. The Company can only succeed on this aspect of its appeal if it can establish that the remarks made by the Judge whether alone or in combination with other features of his or her judgment and/or the conduct of the trial itself either (a) present in themselves a fundamental procedural failure that operates to vitiate the judgment, or (b) constitute a case of actual bias or (c) afford a basis on which a reasonable bystander might reasonably apprehend bias. While counsel in the course of this oral submissions said he was not making a claim of bias, the Company's written submissions appear, in form or another, to make all of these cases.

123. However, the arguments are legally distinct and, at least insofar as the first and third are concerned, involve different tests. The claim of an unfair trial requires objective judicial assessment, while that of an apprehension of bias falls to be judged through the eyes of the fair minded and informed observer (*M&P Enterprises (London) Ltd. v. Norfolk Square (Northern Section) Ltd.* [2018] EWHC 2665 at paras. 32 to 42 per Hildyard J.

cited with approval in *Serafin v. Malkiewicz and ors.* [2020] UKSC 23 at para. 38 per Lord Wilson).

- 124.** Each ground of objection falls to be examined having regard to the fact that a Judge must be given a wide power to exercise discipline over the conduct of proceedings before him or her, to intervene to prevent time wasting and otherwise to take such steps as are necessary to enable the efficient disposition of the proceedings before the Court. A Judge must not only be free to assert that authority, but as part of that same exercise must be free to express during the proceedings or in his or her judgment criticism of parties, of their counsel, of their solicitors or of their witnesses where this is believed by the Judge to be merited.
- 125.** Of course (as O'Malley J. has recently explained in addressing comments by a Judge during the course of a trial) unnecessarily trenchant or insulting criticisms should be avoided, the Court must take account of the fact that carelessness with language may lead to unintended affront and upset and '*judges should avoid using opprobrious words about a party, or his or her professional representatives, unless the situation appears to call for it*' (*Murphy v. DPP* [2021] IESC 75 at para. 68; emphasis added).
- 126.** However (as the highlighted words from the judgment of O'Malley J. and the decision in *Seredych* both make clear) none of this prevents the delivery of a judgment which expresses, forcefully if believed necessary, the judge's assessment of the manner in which the case has been conducted before the Court and, it follows, the making of such criticisms – even if found to be overly severe or ultimately unjustified on the facts – will

not in themselves constitute a ground on which a judgment is set aside. To make out a case of the kind suggested by these grounds of appeal, the comments must, whether alone or in conjunction with other features of the judgment or conduct of the hearing, themselves present clear unfairness such as to undermine the findings reached in the judgment, or to demonstrate animus, or be such that a reasonable bystander would reasonably apprehend such bias. That reasonable bystander must, obviously, be fully informed and aware of what happened during the trial itself.

- 127.** In this case, a consideration of the transcripts shows that, whatever about the manner in which they were expressed, there were ample grounds for the Judge to level the criticisms to which objection is taken. It is a fact that a case originally said to be unsuitable for hearing on a Monday lasted five hearing days, on some of which the sitting was extended beyond normal court hours. It is a fact that serious allegations were made against a wide range of persons - including solicitors, counsel and the parties - without any supporting expert evidence. It is a fact that these aspersions included the making of allegations of fraud against the other directors, and it is clear from the judgment that the Judge found and was entitled to find that those aspersions were unfounded. It is a fact that the two short grounds set out in the 20 September 2019 notice of motion had grown, it is a fact that the materials were presented in disarray and were constantly revised and that the Company's solicitor did not exhibit relevant documents in his affidavit, and it is a fact that applications evolved and changed, that frequent applications were made for adjournments.² The Judge was entitled to take the

² Adjournment applications were made on a number of the sitting days, sometimes more than once (Day 2 pp. 1, 28 to 31; Day 3 pp. 1 to 16, 73 to 75). On Day 1 the Court was asked to deal just with the issue of the repayment of the €50,000 with the issue of whether the settlement was being enforced to be dealt with later.

view that all this was done without regard to the necessary efficiency in the presentation by counsel of their cases having regard to other demands on the Court. A reasonable observer could only conclude that the criticisms had a legitimate factual basis, whether or not that observer agreed with them. The complaint that the respondent's counsel in some sense escaped similar censure when (as is claimed by the Company) this was justified assumes at least to some extent the correctness of the Company's position on the merits (to which we return).

128. In these circumstances, we can see no basis for the suggestion that the terms of the Judge's judgment afford any basis for a claim of actual or perceived bias. Nor can we see any legal or factual ground for the claim that the judgment presented an unfairness which requires that the case be remitted for re-hearing. While we have reservations about some of the language used by the Judge, he was entitled to reach the conclusions he did.

129. Moreover, insofar as many of the complaints made in the context of claims regarding unfair procedures and arising from the Judge's comments regarding the Company's legal representatives are concerned, it is clear that that these were put to counsel by the

On Day 2, an application was made to stop the cross-examination at a point where an e-mail from Mr. McNelis to Mr. MacGeehin was being put to the former (at p. 17). The first application on Day 3 was to adjourn to plenary hearing arising from the delivery the previous day of an affidavit of Mr. MacGeehin exhibiting certain documents, and the second arose from the application by Mr. Dully's counsel for liberty to file the affidavit exhibiting those documents. The discussion around this affidavit, its filing or non-filing and the application to adjourn because of it and/or for liberty for Mr. McNelis to file a replying affidavit occupies nine pages of the transcript (at pp. 69 to 75).

Judge in the course of the final day of the hearing. Indeed, the first point made in the Notice of Appeal is as follows:

'The nature and extent of the interrogation the judge made of the Appellant's counsel during his submissions, inter alia constant interruption of them, often not simply to clarify them but to suggest various reasons why they may not be sustainable, at times misdescribing what was being argued, as if laying traps to be seized on later, was in substance performing the functions of counsel for the Respondents'

130. In point of fact, counsel on a number of occasions made it clear to the Court that he welcomed such interventions. Shortly before lunch on day 4 the Judge expressed concern that counsel's argument was a variation of the argument '*if I had done what I did it would have been unethical and therefore I didn't do it*'. After lunch counsel expressed concern that what he described as '*misunderstandings*' on the part of the Judge would be put to him as he did not want to read them for the first time in the judgment. Then, the following exchange occurred:

'COUNSEL: And if there are misunderstandings I would like to have them clarified.'

JUDGE: Sure. Well, look, that's what I try to do ... but when I do that people either accuse me of (a) interrupting them or (b) diverting from the adversarial system.

COUNSEL No, some people may do that, Judge, I certainly don't. And put like this, I'm actually inviting you to interrupt'

- 131.** Before and after that invitation the Judge put to counsel his concerns as to the absence of evidence that the advices given to the directors was negligent, and that there was (as he put it) '*some rule about impugning the professional conduct of professionals*' (at p.19). This was the subject of some discussion before the Court. The Judge expressed his concern that he had not been told the length of the case (at p. 31) referring to difficulties counsel had with providing submissions as '*self-inflicted*' (at p. 50) having regard to the failure to advise the Court of the length of the case and consequent late sittings. The Judge specifically put to counsel that he was saying '*I can't have done what I did because if I did do it would be misconduct therefore I didn't do it*' (at p. 39), he asked counsel to comment on the construction of the e-mail of May 15 which was ultimately reflected in the judgment (at pp. 43 to 44), and he expressed his concerns in relation to the failure to produce the final version of the written submissions (at p. 50). The expanding and mutating nature of the case was the subject of a specific submission by counsel for Mr. McCaul (at p. 61). We do not think it can be said that counsel was neither on notice of, nor given the opportunity to address, the substance of the principal concerns of the Court as ultimately reflected in its judgment.

- 132.** This leads to the objection insofar as based upon the Judge's interruptions of counsel. These were, without doubt, frequent. However, there is nothing necessarily objectionable about that. While a Judge must exercise some restraint in the interruption of *the evidence*, and most in particular avoid assuming the role of cross-examiner, this

is because by so doing the Judge not merely risks generating an appearance of bias, but because '*the very gist of cross-examination lies in the unbroken sequence of question and answer*' (*Jones v. National Coal Board* [1957] 2 QB 55 at p. 65 (per Denning LJ.)), and see *O'Connor and anor. v. O'Donoghue and anor.* [2017] IEHC 830 at paras. 76-77). The position is quite different – at least where a party is represented by professional lawyers, as the Company was – when the Court enters the phase of submissions. At this stage it has embarked upon the adjudicative stage of the proceedings, and it is clearly established that the expression by a Judge of opinions in the form of questions, statements or arguments in the course of a hearing is entirely permissible precisely because these are intended to enable the parties to address doubts or difficulties entertained and raised by the Judge (*O'Callaghan v. Mahon* [2017] IESC 17, [2008] 2 IR 514 at p. 671 per Fennelly J.).

133. Here, the complaint is that the Judge in this connection '*entered the arena*' but did not '*engage*' with the arguments raised. All the Judge did, it was said, was to use the bulk of counsel's submissions to '*tie the case down*' in terms of what arguments were being advanced. There might be no mischief to this, it was contended in oral argument, if the other parties had been subjected to the same process but, given that they were not required to make submissions, the Judge's interventions were unfair.

134. We do not believe that these criticisms are well placed. We have already noted that mid-way through the hearing the counsel had made it clear that he had no objection to the Judge intervening in his submissions and indeed invited him to continue to make

them. This was mirrored in an exchange at the very start of the submissions, when the following was said:

'JUDGE Okay. Listen, I know, ... you're very resistant to the Court intervening to tell you what would be helpful to it, but would it be terribly inconvenient if I told you what would help me at this point ?

COUNSEL it wouldn't be inconvenient in the slightest, Judge, if I knew what would help you.'

135. From there the Court asked for the headings of the Company's argument. While, certainly, the Judge intervened as counsel provided this summary, this was self-evidently with a view to ensuring that counsel stuck to giving that list. Then, the Judge proceeded to ask questions around the specific points so identified. Counsel was not restricted in his development and explanation of those points as they were identified, and he did so referring to authorities as appropriate. In relation to some of the points the transcript shows him advancing the arguments at some length, and at the conclusion of his submission there is no hint from counsel that he had anything further to say. It was he, and not the Judge, who determined when the submissions had concluded.

136. We can see no reason in principle – and none has been identified in the course of submissions in this case – why a Judge who is already familiar with the facts of the case generally, who has just heard four days of evidence on the specific issues under consideration, who clearly wants to ensure that the application is disposed of efficiently and who evidently was concerned to ensure that counsel kept his argument structured

and on track, cannot require at the outset a clear identification of the points relied upon by counsel and from there intervene as each is further explained. That is particularly the case when the Court had a set of written legal submissions from the party in question.³ Here, the transcript does not disclose counsel for the Company being in any way limited in the number of points he made, in the amount of time he spent dealing with each point, or in the authorities he opened or referred to in doing so.

137. Finally, we should state that there is no warrant for the suggestion made in the course of the Company's submissions that counsel are entitled to be provided in advance with drafts of a judgment which is critical of them as was suggested in the Company's legal submissions. Baker J. has certainly said that counsel should be given an opportunity to respond to concerns entertained by the Court about their conduct, but this must be interpreted as requiring that, where not otherwise obvious from the run of the hearing, the Judge should indicate the concerns he or she entertains about the manner in which counsel have conducted themselves and afford counsel an opportunity to address those concerns. Bodies such as Companies Act inspectors, or Tribunals of Inquiry are not under a general common law obligation to provide those the subject of adverse comment

³ There was a certain confusion around the question of which submissions were before the High Court Judge during the hearing of this appeal, resulting from a combination of the fact that counsel for the Company had not appeared in the Court below and that his solicitors had encountered certain (unspecified) difficulties in obtaining a full record of the papers before the High Court. It appears that the Judge had a set of submissions at the start of the hearing, and that these were amended at least once and furnished to him. As explained in the text of the judgment it was sought to deliver a further version of these submissions on the final day, but this was refused. This Court was furnished with a version of submissions which, we were informed, junior counsel in the High Court proceedings believed were those actually before that Court. It is clear from the text of those submissions that they were prepared on or after December 4 and, that being so, must have been provided to the High Court Judge on that day.

in a report with drafts of that report before publication (see De Smith *Judicial Review of Administrative Action* 5th Ed. at para. 8-059 ; *O'Callaghan v. Mahon* [2012] IEHC 603 at para. 16). There is no reason why Courts of law should be treated differently when issuing their judgments, and many reasons of both principle and practicality why they should not. It appears to us that counsel ought to have been fully aware of what the Court's concerns were as ultimately reflected in the judgment. But, irrespective of whether or not this is so, nothing in this part of the Company's appeal discloses a basis on which the decision of the Court should be vacated as alleged.

The failure to seek submissions from the respondents (Grounds 1(b) and (c))

138. Particular objection is taken to the fact that the Judge delivered his eighth judgment after the evidence had concluded but when he had heard only the submissions of counsel for the appellants. This, it is said, is not consistent with the adversarial process, and involved the Judge in assuming an inquisitorial role in the matter. Moreover, it is said, to conduct the hearing as the Judge did was to undermine the appellants' rights to fair procedure. The duty to act fairly, it was said, entails an obligation to hear each party, both sides having the entitlement to both put their own cases and to address that of their opponent. In support of these propositions reference was made to a range of international materials observing the obligation of a Judge to allow counsel one after the other to advance their cases, to enable each party to respond to the material put before the Court by the other party, to allow each party to comment on any points of law introduced by the Judge of his own initiative, and to ensure that the case is thoroughly

argued. The suggestion is that by not adhering to the usual process whereby the moving party presents its case, the respondents give their response and the moving party provide a reply, the Judge deprived the appellants of the opportunity to meet the case against them.

139. In our view, it would have been preferable if, in this case, the Judge had observed the usual procedure of allowing the appellants to make their case and of enabling them to reply to the response tendered by the other parties. It is the usual procedure for good reason. However, it must be understood that this was in many different respects, a singular situation, and it is impossible not to have some sympathy with the evident frustration felt by the Judge at the manner in which the case had been presented and had run. The judgment was the eighth given by Humphreys J. in this matter, many of the issues (in particular those relating to the strength of the appeal) had been the subject of earlier hearings before and rulings by, the same Judge and it is quite clear that the Court felt (and whether correctly or not, certainly not without some basis) that the matter had already occupied enough of the Court's time. There can be no doubt but that the power of the Court in the management of a trial (including its obligation to ensure the efficient use of court resources in the course of such a trial (*Talbot v. Hermitage Golf Club* [2014] IESC 57)) embraces the jurisdiction to determine a matter where it is satisfied that the plaintiff, applicant or moving party has had a full opportunity to make submissions and without hearing the other parties.

140. The various authorities deployed by the Company and Mr. Molloy establish the hardly controversial principle that a judge or arbitrator is under a strict and immutable legal

obligation to hear the parties and (although having regard to the necessary boundaries fixed by the obligation of the Court to preclude time wasting to impose a discipline on the parties to the end of ensuring an efficient disposition of the case) and to allow each to present his her or its case in full. None of them establish that a Judge is under an invariable obligation to a party whose case he or she ultimately dismisses to permit the *other* party to make their case so that the first party can then respond to it. It is absolutely the case that it is the norm that this will be done, and a party who can establish an identified and specific unfairness in the decision of a court or arbitrator reached in this way may well be in a position to mount a substantial challenge to the decision of the Court on that ground.

141. However, a Judge obviously has the power to regulate proceedings before him or her. Of course, as indeed was stated by Lord Dyson in one of the authorities relied upon by the Company (*Al Rawi v. Security Service and ors.* [2011] UKSC 34, [2012] 1 AC 531 at para. 22) that power is not unbounded, and a court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental right to participate in the proceedings in accordance with the principles of natural justice.

142. There is some distance between that general proposition, and the contention that a judge is *ipso facto* precluded from conducting a hearing in which, having managed proceedings to the extent of delivering seven judgments in those proceedings over the course of one and a half years, having heard already one substantive trial in the matter, having heard four (in some cases, elongated) days in the case at hand, having received written submissions from the Company and Mr. McCaul, and having heard counsel for the moving party, he or she decides that the outcome is so clear that he does not have to

hear counsel for the opposing parties. Apart from everything else, the court having regard to its obligation in the allocation of court time to other parties must retain that power to address cases in which he or she feels that the moving party to an application has exhausted more judicial time and resources than their case ought reasonably to have required, and where he or she reasonably concludes that no unfairness will result from the adoption of that course of action.

- 143.** For an advocate who has presented an application to Court to hear the Judge announce that he does not need to hear the opposing side is always dispiriting, and sometimes the source of personal grievance, but it is neither unprecedented nor unlawful in itself. We would hazard to suggest that it is an occasional experience shared by many barristers. Where a Judge determines to embark upon that course of action a party seeking to appeal the consequent decision must do more than point to the fact that the court heard only their case. They must establish particular facts or circumstances in which that course of action caused an identified injustice affecting the outcome of the case, or they must identify an appealable error in the resulting judgment.
- 144.** Here, it was suggested in oral argument that the Judge's judgment was ultimately based on some matters that could not have been anticipated. Although this was stated in the course of oral submissions, it was substantiated by reference to but one particular example, it being said that the indoor management point was not argued or flagged.
- 145.** In fact this point was not only raised by the Judge with counsel for the Company (a point acknowledged by counsel who stressed the brevity of the reference) but had (as explained earlier) been clearly flagged by counsel for Mr. Dully on October 15 as

forming an important part of his defence. In any event, for any barrister who is expert in company law (and the Company was represented by a leading expert in that field) the potential relevance of the indoor management defence was obvious to the point of inevitability. Overall, we can see nothing in the run of the application made on behalf of the Company that suggests to us that there was any point made by the Judge in his decision that was neither foreseen or foreseeable. A review of the transcripts of the hearing on October 15 and of the four days of evidence heard in the context of the Company's motion discloses to us no point agitated in the judgment that was not known to and addressed by the Company's counsel. None was identified in the course of argument. We can see no prejudice, no unfairness and no illegality attending the decision of the Judge to dispense, in the particular circumstances that presented themselves, with the necessity to hear submissions from the respondents. In this regard the fact that the Judge received and that counsel for the Company was free to address in submissions the affidavit evidence from Mr. Dully, Mr. MacGeehin and Mr. McCaul as well as the benefit of the cross-examination of those deponents merits repetition.

Mr. MacGeehin's affidavit (Ground 2(a)).

- 146.** Mr. McNelis' cross-examination began on the first day of the hearing (November 29), resuming on the second (December 3). In the course of the morning of the second day he was cross-examined by counsel for Mr. McCaul (who, it will be recalled, supported the settlement agreement). During the cross-examination a booklet of correspondence was produced by Mr. McCaul's counsel. On the same day Mr. MacGeehin swore a further affidavit. It purports to have been filed on 5 December. The affidavit comprised

two paragraphs – the first identifying the deponent and his means of knowledge, and the second recording the purpose of the affidavit as the exhibiting of that booklet of correspondence, which was described in the affidavit as touching upon or concerning the payment of the funds that had been lodged by way of security to Stapleton Solicitors (the firm acting for Mr. Dully). The exhibit is duly referred to. While the exhibit was available from the second day of the hearing, the affidavit itself was not given to counsel for the Company until shortly after lunch and just before the cross-examination of Mr. MacGeehin was about to commence.

147. The Company in its submissions says that it had sought to request and thereafter to compel an affidavit from Mr. MacGeehin addressing the implementation of the settlement, that in the course of the cross-examination of Mr. McNelis he was given a book of documents which was said to be exhibited in an affidavit of Mr. MacGeehin, but that no such affidavit had been served nor exhibit sheet produced for the booklet. Those submissions recite that the adjournment was sought because the booklet contained '*several numerous critical documents [Mr. McNelis] had not previously been aware of*'. They say that the affidavit was filed in the Central Office on 5 December, and that the first time Mr. McNelis saw the affidavit was in January when he sought a copy in the Central Office. It is alleged that the documents were '*deliberately withheld*' so that Mr. McNelis would not have a fair opportunity to deal with them.

148. Humphreys J. explained the context, his decision and the reason for it, as follows (at para. 5):

'Mr. McNelis was cross-examined by Mr. Collins, Mr. Molloy and Mr. Ó Dúlacháin. At the end of cross-examination, Dr. Forde asked for an adjournment to consider correspondence put to Mr. McNelis in that cross-examination. However, much of this was documentation that was on Mr. McNelis' file but that was not exhibited by Mr. McNelis. In the course of cross-examination Mr. McNelis had said that he presumed he gave all his documents to counsel but Dr. Forde said that the material was news to him. That rather striking contradiction was never explained. I held that the adjournment application was totally without merit because Mr. McNelis had had much of the documentation at all material times, and indeed had said in evidence that he given [sic.] the papers to counsel. Even if, counterfactually, there was any merit to the application, I was persuaded by Mr. Ó Dúlacháin's submission that the first-named defendant had imposed 'incredible cost and expense' on his client, expense that should not be increased further, especially where the application was being brought by an insolvent company'.

149. The attempt to appeal the decision of the Judge to admit this affidavit and his refusal to grant an adjournment to the Company as a consequence of these matters presented the Company with a significant challenge. The decision whether to adjourn a hearing is a matter for the trial judge. While (absent statutory provision to the contrary) there is no exercise by a Judge of his or her discretion which is not capable of being appealed and therefore of being reversed on appeal, matters of management in general and adjournments in particular occupy the core of that discretion. A Judge has a wide margin of appreciation in deciding whether to accede to an adjournment application and this

Court on appeal will be slow to interfere with the manner in which that discretion is exercised doing only where a clear error is manifest. In making that decision the Court must have regard not only to the interests of the party seeking the adjournment but those of all parties to the suit (*Kildare County Council v. Reid* [2018] IECA 370 at para. 38; *Geary v. Property Registration Authority* [2020] IECA 132 at para. 21; *Promontoria (Oyster) DAC v Greene* [2021] IECA 93, at para 63).

150. The complaint here arises from the documents exhibited in the affidavit – the affidavit itself says nothing and was sworn only for the purpose of exhibiting the documents in question. Heavy emphasis is placed by the Company upon the fact that the documents in issue were presented to Mr. McNelis for the first time in the course of his cross examination. Normally, in a trial on affidavit with cross-examination that would be an objection of some substance. However, we can find nowhere in the papers any convincing refutation of the central point made by the trial Judge, which was that the documents were documents that Mr. McNelis already had and ought himself to have exhibited, or documents which were of no importance or upon which he could not give any meaningful evidence. He expressed it thus (at para. 46 (iv) and (v)):

'Mr. McNelis had much of this material anyway at all material times, and most of the pertinent material, and also gave oral evidence that he had given the papers and file to counsel, yet these papers were never drawn to the attention of the court until Mr. MacGeehin did so. That situation was never explained.'

Material that Mr. McNelis never had does not appear to be material that he has anything of evidential value to contribute to, so consequently pretty much all the documents were either documents that he knew about at all material times and could have given to the court long before or material that he had no involvement in and had nothing to say on.'

- 151.** The point made here is not properly engaged with by the Company in its submissions to this Court. If it is the case that the material documents were not in Mr. McNelis' possession that has not – with one exception - been said. If it is the case that they were in his possession, the reason he needed an adjournment to say something about those documents or otherwise to deal with them is not convincingly identified.

- 152.** The exhibits to Mr. MacGeehin's affidavit of December 5 (as they are described in the booklets provided to this Court) comprise no more than 62 pages. The documents are simple, and for the greater part extremely short. Included in the bundle are the Order of 23 May, the Agreed Statement to the Court and a number of letters and e-mails to and from Mr. McNelis. The latter showed that Mr. MacGeehin on 3 July wrote to Mr. McNelis seeking references for the release of funds by the Accountant General, to which (on the same day) Mr. McNelis responded by furnishing the Order of Irvine J. and schedule for lodgement. The Judge clearly – and understandably – adopted the view that the situation disclosed by these documents was important, as they appeared to show Mr. McNelis co-operating in the implementation of the settlement six weeks after it was entered into. The Judge was correct to express surprise that these documents had not been exhibited by Mr. McNelis himself. Mr. McNelis had the opportunity to address

these documents in the course of his cross-examination. The suggestion that he was prejudiced because he did not have advance notice that these documents were to be put to him lacks any reality. They were his own documents.

153. Reference is made by the Company in its written submissions to one document which was neither authored nor addressed to Mr. McNelis (*'the most critical one'*) the introduction of which it suggests caused Mr. McNelis prejudice. This was a letter dated 27 June from Mr. Temple to Mr. MacGeehin. The letter comprises a single sentence, as follows:

'At a specially convened Emergency General Meeting of Athlone Town Stadium Ltd held on 27th June 2019, the majority of Directors agreed to comply with the court order, which directs that the €50,000 held in trust for the appeal would be paid over the Stapleton & Company Solicitors within the agreed timeframe.'

154. The letter is described in the Company's submissions as materially misrepresenting '*the relevant occurrence*'.⁴ It is unclear what Mr. McNelis could have had to say about the matter by way of evidence (as opposed to comment or argument) that could not have been addressed in submissions by reference to the other evidence in the case (those submissions being made by counsel two days after the documents were furnished).

⁴ In its submissions the Company says that the meeting was not one of the directors but of the shareholders, and that they agreed 97/3 not to accept the settlement. The other parties say that no poll was called and that therefore acceptance by a majority of the members present and voting was sufficient.

There is no basis on which it can be said that the letter generates a ground on which the case should have been adjourned.

- 155.** In none of the other documents can we identify anything that might reasonably be taken to have surprised Mr. McNelis in any relevant way. Those circumstances do not present a ground on which this Court should exercise its exceptional jurisdiction to find in error a decision by a Judge not to adjourn proceedings then in full train. This is not least of all the case in a context in which counsel for the Company had the opportunity to (and did) re-examine Mr. McNelis in relation to the documents, to cross-examine Mr. MacGeehin on them and indeed to make such reference to them as he saw fit in the course of his submissions to the Court.

The failure to adjourn to plenary hearing and refusing the application to allow Mr. McNelis reply to the affidavit of Mr. MacGeehin (Ground 3)

- 156.** The complaint arising from the application to adjourn to plenary hearing, or in the alternative to permit Mr. McNelis to reply to Mr. MacGeehin's affidavit is related to the point we have just considered. Thus, at the start of the hearing on December 4, and in the course of the cross-examination of Mr. Molloy by counsel for Mr. McCaul, counsel for the Company applied to have the case adjourned to plenary hearing. He stressed that proceedings by way of special summons were not appropriate where there were significant disputes of fact, and that the procedure was predicated upon all relevant affidavits being in before the hearing starts. He referred to Mr. McNelis having been

cross-examined on the basis of material that was supposed to be on affidavit but in circumstances where he had not yet seen the relevant affidavit. As an alternative to an order remitting to plenary hearing he sought an order permitting Mr. McNelis to file an affidavit responding to Mr. MacGeehin's affidavit.

157. Humphreys J. refused the application, stating that he would give his reasons later. He did so in his judgment delivered at the end of that week. As to the remittal for plenary hearing, he observed that he had previously refused such an application and saw no reason to revisit it. He said (at para. 34) '*no unfairness to anybody was demonstrated, given that cross-examination of all relevant deponents was also ordered*'. In relation to the affidavit from Mr. McNelis he explained that many of the documents in question were already in Mr. McNelis' possession.

158. No basis has been disclosed for interfering with these decisions. It was the Company's choice to decide to agitate its attempt to unravel the settlement by notice of motion and affidavit rather than to proceed to issue a plenary summons seeking the setting aside of the agreement. In circumstances where all parties had a full opportunity to cross-examine on affidavits delivered the Judge was correct – there was no evident unfairness. This is, of course, aside from the disruption such an alteration in the format of the proceedings would have entailed. Insofar as Mr. MacGeehin's affidavit was concerned, there was in truth nothing to reply to. The affidavit merely exhibited the documents. As we have explained earlier, it was a matter for Mr. McNelis to have exhibited and to have been aware of the contents of, his own documents. As also explained in the preceding section, he has provided no ground on which the Court could conclude it was

unjust that he did not have the further opportunity to record in affidavit his comments on documents which, in fact, he had neither authored nor received.

VI THE SUBSTANTIVE ISSUES

The legality of the settlement (Grounds 2(b)(ii), 4(d), 4(e), 4(h), 5(b), 5 (c))

- 159.** The essential point made by the Company on the merits was in one sense simple, and can be summarised shortly. The settlement had the effect that the Company had divested itself of its only assets – the appeal, the fruits thereof and the monies lodged by way of security for the costs of that appeal. This occurred in a context where the approval of the settlement depended on the decision of two directors holding between them 3% of the Company's share capital, and above the objection of one director holding the remaining 97%. The Company says that the settlement was not duly and properly authorised by it, and even if it had been so authorised, it could not be lawfully effected by a simple majority of the directors or for that matter (if it was necessary for it to so contend) by all of the shareholders. This was *a fortiori* the case given that the Company was insolvent at the time of the transactions, and where the directors themselves obtained a benefit from the settlement. The other parties to the agreement knew or must have known this. It followed that the agreement could not be enforced by them.

- 160.** Certainly, the law has long struggled with the proposition that the assets of a trading corporation can be lawfully transferred for no, or for no adequate, consideration. Sometimes such dispositions have been characterised as being *ultra vires* (*Hutton v.*

West Cork Railway (1883) 23 Ch. D. 654; *Re Greendale Developments Ltd (In Liquidation)* (No. 2) [1998] 1 IR 8), sometimes as a breach of the directors duties to the company (*Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation* [1986] Ch. 246), on occasion and at least in circumstances of actual or near insolvency as a breach of their duties to creditors (*Re Frederick Inns Ltd (In Liquidation)* [1994] 1 ILRM 387) and in some cases in breach of the rules of capital maintenance (*Re Aveling Barford Ltd. v. Perion Ltd.* [1989] BCLC 626). As the statutory regulation of limited companies has become more developed, legal objections to such dispositions have presented themselves as comprising fraudulent or reckless trading, or a breach of provisions of the Companies Code directed to precluding the improper transfer of company assets (see s. 608 Companies Act 2014). Over time different aspects of the application of these various provisions has come in and out of focus: the *ultra vires* doctrine, in particular, was originally abated by provisions affording protection to third parties dealing with the company in certain circumstances, and the doctrine has now been very significantly restricted in its operation by a number of provisions of the present Companies Code (sections 38, 973, 1012 and 1183, Companies Act 2014).

161. Most, if not all, of these theories or provisions were invoked or mooted in the course of the application brought by the Company. However, each – obviously – assumes that in one way or another the Company had actually disposed of an asset that was of real value and/or that what it obtained as part of the settlement was, when compared with that value, of such little worth that the transaction was not in fact in its interests and/or that it represented a disposition of its only assets for no return. In seeking to advance that case, the Company faced a series of critical difficulties.

162. To begin with, it is difficult to see how the argument can be sustained without the benefit of some expert evidence. The valuation to be put on the settlement of a legal claim is a product of the strength of the cases of the respective parties, the consequent risk faced by one, other or both parties, the advantages to each if they prevail in their claim and the downside if they lose. The economic value of these is – as with the valuation of any asset – a matter properly determined by expert evidence. As the party asserting that the settlement was of *no* value, it was a matter for the Company to establish this. Because it failed to call any such evidence the Judge was entitled to conclude that it had failed to discharge that onus. If it failed to discharge that onus the centrepiece of its claim based upon the illegality of the settlement agreement – no matter which of the theories was invoked to establish this - fell away.

163. Moreover, and even if this is wrong and if the view ought properly to be taken that the Court is in as good a position to determine the objective strengths and weaknesses of the appeal as any expert, we cannot fault the conclusion of the Judge that the difficulties facing the appeal when viewed in the light of the consequences for the Company if it lost the case, and opportunity to avoid that loss at relatively little cost if it accepted the settlement proposed, were such that it could not be said that the appeal had a value that outweighed the benefits it obtained from the agreement.

164. The High Court in its first judgment determined on the facts and following a hearing with oral evidence, that there was a declaration of trust binding on the Company, that there had been multiple breaches of trust and that it was in the interests of the

beneficiaries that the Company be removed as a trustee. The conclusions insofar as based upon Mr. Molloy's indemnity were firmly located in the Court's appraisal of his oral evidence. While there may or may not have been valid grounds of appeal to be advanced based on the trial Judge's interpretation of that evidence, nothing that has been said in the course of this appeal suggests that an appeal against these findings enjoyed any particularly strong prospect of success.

165. What was forcefully contended, however, was that the fact that Mr. Dully brought the proceedings on behalf of all other club members without either the joinder of those persons or the obtaining of a representative order presented a '*knock out blow*' which was very likely to succeed on appeal. As we have noted above, this contention was rejected by Humphreys J. in his first judgment. The first point he made was this (at para. 26):

'Dr. Forde's submission assumes that one cannot have a representative capacity without a specific representative order under O. 15 r. 9. That is not so. Where an unincorporated body sues by its trustees or management committee it is not necessary for there to be a representative order under O. 15 r. 9. The entitlement to bring the proceedings arises from the club constitution and rules which have legal status of a contract between the members'.

166. In point of fact, the authorities suggest that an officer of a club may not sue on behalf of all members of the club, even if the rules purport to give him or her authority so to do (Vol. 48 Halsbury's Laws of England 5th Ed. at para. 564) . However, it is equally clear – as Humphreys J. suggested here – that the trustees of a club may sue in respect of club

property vested in them, and that in any such action they are considered to represent the members beneficially interested therein (Order 15 r. 8 RSC). The judgment of the Judge records the plaintiff being appointed as trustee of the club, although the deed was not furnished to this Court and the terms of the trusteeship are not explained in any of the evidence before the Court. Even if Mr. Dully did not enjoy that status, it is clear that he was as a member of the Club a beneficiary of the trust and as such, at the very least, entitled to seek orders for the removal of the trustee. And if that is wrong, we have some difficulty in understanding why the plaintiff could not sue to enforce the agreement which he himself had entered into : certainly if the only objection to this was that there were other parties to the contract who had not been joined to the action, there was no impediment to joining them.

- 167.** But most importantly, even if there was no adequate trust and if he was not a beneficiary entitled to sue it seems to us that the Company and Mr. Molloy have placed a weight on this argument which it simply does not bear. Order 15 r. 9 provides as follows:

'Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court to defend, in such cause or matter, on behalf, or for the benefit of, all persons so interested.'

- 168.** The history and purpose of the provision is extensively canvassed in the judgment of Kennedy CJ. in *Moore v. Attorney General* [1930] IR 471. There an issue arose in an appeal against a decision of the High Court granting the plaintiffs declarations that they had an entitlement to a several fishery in a portion of the River Erne, and granting

perpetual injunctions against persons alleged to have trespassed on that fishery. The Attorney General, the defendant sued as representing the State, did not appeal that decision (but he did appeal a costs order), while the other defendants – who had been sued because it was alleged they had trespassed on the fishery – did appeal against the order declaring the entitlement asserted by the plaintiff. The former Supreme Court determined a preliminary issue as to the entitlement of those defendants to appeal that order, deciding that it was the Attorney General who enjoyed the right to defend (and therefore to appeal) such a claim. The other defendants, as members of the public, did not have a right to represent the public and (the Court – controversially – held) the procedure by way of representative action was not available in a claim for tort (the correctness of that conclusion has been questioned by O'Donnell J. in *Hickey v. McGowan* [2017] IESC 6, [2017] 2 IR 196 at para. 58).

169. *Moore v. Attorney General* was heavily relied upon by the Company in its submissions to the High Court and in its written submissions to this Court as supporting the proposition that without a representative order made at the initiation of the proceedings, Mr. Dully's claim was, because it was brought on behalf of others, doomed to fail. In point of fact, the decision establishes no such proposition. The *ratio* of *Moore* is that persons in the position of the special defendants (as they were called) could *never* defend for the benefit of the public a claim of a right of several fishery, not that they needed a representative order made at the outset of the action so to do. That was a function exclusively vested in the Attorney General (at p. 497-498). It was for this reason that the Court noted that while the special defendants could, in an action for trespass, have set up a defence founded on the existence of a public right by which they could justify

the alleged acts of trespass against them, they could not in so doing establish a right that bound the public in any way (at p.490).

170. That said, the judgment of Kennedy CJ. provides a valuable history of the procedure by way of representative action. He explained the origin of the representative action then reflected in the provisions of Order XVI r. 9 of the 1905 Rules of the Supreme Court (Irl.). Conscious that persons who were not before the Court could not be bound by orders in actions to which they had not been joined, the Courts of Equity had developed the representative action to enable a party sharing an interest with others to bring forward an action on behalf of those with the same interest. Following the Judicature Acts, the facility was extended to all courts, it being as of then regulated by the rule (which is identical in terms to Order 15 r. 9 RSC). Kennedy CJ. explained the position following that rule (at p. 489):

'... the position is that some of a number of persons claiming a general right may represent all such persons for the purpose of deciding the question of the existence of a general right, if the Court is satisfied that they have been selected so as to, and do, fairly and honestly litigate the matter'

171. Rules to this effect - like the principles applied by the Courts of Equity in relation to representative actions from which they developed - are to be treated not as a rigid matter of principle, but a flexible tool of convenience in the administration of justice (*Duke of Bedford v. Ellis* [1901] AC 1, at p. 8; *John v. Rees* [1970] Ch. 354, at p. 369). While Megarry J. in *John v. Rees* was addressing a differently worded provision, when he said

that he would be slow to apply it in ‘*any strict or rigorous sense*’ it is our view that precisely the same conclusions should apply to the similar provision in force in this jurisdiction. The facility for a representative action is particularly appropriate in actions by or against unincorporated associations where brought or defended by authorised committee members (see *Fermoy Gas Co. v. Sheehan* (1895) 29 ILT 597). There is no reason whatsoever why a court in an appropriate case might not make a representative order at any stage of proceedings including on an appeal, and it would be particularly appropriate to consider making such an order in an action brought by an authorised committee member on behalf of members of a club. We note that in *Greene v. Minister for Agriculture* [1990] 2 IR 17, at p. 29, the Court (which adopted a similarly flexible view of the entitlement of the plaintiffs so sue on behalf of a list of named persons) appeared to envisage the possibility of making such an order during the trial.

172. It is neither necessary or appropriate for this Court to determine if it would have acceded to such an application on appeal or, if it did, what the consequences in terms of costs would have been. What is relevant is that there was a strong argument that this could, at least in principle, have been done. If it believed itself to be faced with a strong case on the merits, an appellate Court may well have been strongly inclined to make such an order or otherwise take such steps as were required to ensure that all relevant parties were before the Court and bound by the outcome, thus avoiding the need for a rehearing on what was an essentially technical and procedural point. Once that is recognised, it becomes apparent that the suggestion that the Company in some sense had a sure-fire appeal is wholly mistaken. It did not. There was – at a minimum – a very real risk it could have lost the appeal. Therefore, it did not have an asset that was simply disposed

of for an undervalue. It certainly had a right of appeal which had *some* value. However, that value has to be determined in the light of the consequences of losing the appeal when matched against what was on offer. Had it lost the appeal, the security would have been forfeited and it would have faced further costs. The settlement avoided those additional costs and, more significantly, extinguished the damages award made, and cost orders that had already been made.

173. There is an overwhelming sense as one reviews the general approach adopted by the Company in submissions before the High Court and this Court of the facts not being allowed to get in the way of a good legal argument. The analysis of this aspect of the appeal is an example. There may indeed have been interesting legal debate to be had around the legality of the transfer of a company's assets for no, or for little, consideration. The problem was that on the facts that argument was only as good as the value of the asset given up by the settlement agreement. A piece of litigation does not always have an obvious value, and there was no evidence before the Court on the basis of which it could have concluded that the appeal had *any* value. Even if that is wrong, and the Court should proceed to value the appeal itself, we have no difficulty in concluding that the risks attending the Company's position were such that it had no *certain* value, and that the advantages it obtained from the settlement, objectively viewed, overwhelmingly outweighed the benefits of proceeding with the case having regard to the risks attending the appeal. Therefore, the assets were not for this reason disposed of unlawfully or in breach of the duties of the directors of the company.

The formalities attending the settlement (Grounds 4(e), (h), 5(b))

174. It is striking that although the Company's case involved claims of *ultra vires*, and of an abuse of the directors' powers, at no point were the constitutional documents of the company put before the High Court. They were not furnished to this Court either. However, the Company's counsel have asserted that – as is very common - its Articles of Association incorporated Article 80 of Part 1 of Table A to the Companies Act 1963, and this has not been disputed. That Article (which is now broadly reflected in section 158 of the Companies Act 2014) provides:

'The business of the company shall be managed by the directors, who ... may exercise all such powers of the Company as are not by [the Companies Acts] or by these regulations required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such directions, being not inconsistent with the aforesaid regulations or provisions as may be given by the company in general meeting; but no such directions given by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that direction had not been given.'

175. It is generally understood that the effect of this provision is to vest in the directors the power to determine whether the company should embark upon litigation (*John Shaw and Sons (Salford) v. Shaw* [1935] 2 KB 113). Logically, it follows that the decision whether to discontinue litigation that has been commenced (*Breckland Group Holdings*

Ltd. v. London and Suffolk Properties Ltd and ors [1989] BCLC 100) and therefore the terms upon which this might be done, are similarly vested in the Board of Directors. It is possible that the provision envisages a facility for the shareholders in general meeting to direct the Board in the exercise of their powers of management (see Ussher ‘*Company Law in Ireland*’ (1985) at p. 88), but this has never been so held in a Court in this jurisdiction, and the decision in *Ryanair Ltd. v. Aer Lingus Group plc* [2011] IEHC 170 suggests otherwise.

176. Here, there is no question but that a majority of the Board of the Company determined to settle the proceedings on the terms embodied in the statement furnished to the Court on May 28, and there was obviously neither a resolution of the general meeting purporting to direct otherwise nor an attempt to convene a meeting of the shareholders for that purpose, prior to the agreement. On its face, the agreement was thus effective.

177. In its appeal (as it did before the High Court) the Company presents a range of reasons why it says in fact an agreement was not properly authorised by the Board. Some of these overlap with the point we have just addressed: it said that the transaction was not in the Company’s interests and that Mr. Dully was on notice of this. This argument fails for the reasons we have just given: the directors were fully entitled to conclude that the transaction was in the Company’s interests, and there is no basis before this Court on which it could conclude otherwise. It was also suggested by reference to the decision in *Re SM Barker Ltd.* [1950] IR 123 that an Extraordinary General Meeting was required to validate the transactions, but this again assumes that the appeal had a significant value and that the directors acted in breach of duty in entering into the settlement agreement.

178. However, a number of narrower issues were also presented. The Company said that no proper meeting of the directors had been convened, that no minutes of such a meeting had been maintained as required by section 166 of the Companies Act 2014, and that the directors of the Company in ratifying the settlement had acted when they were in a position of conflict of interest given the fact that they obtained a personal benefit from the fact the proceedings against them were being withdrawn. In its notice of appeal the Company refers to a number of provisions of the Companies Act 2014: section 223(1) (which records the obligation of each director to ensure that the Act is complied with by the company), section 227 (recording in general terms the scope of the duties owed by directors and the consequence of the breach thereof), section 228 (iterating the content of those duties), section 231 (the duty on a director to disclose his interests in contracts with the company) and section 238 (prohibiting the entering into by a director of arrangements involving the acquisition by the director from the company or vice versa of '*non cash assets*' of identified value).

179. In the absence of any evidence of value of the settlement section 238 does not arise. There was no transfer of any asset from the Company to its directors or *vice versa* and if there was, there was no basis on which it could be said to have been of any specific value. Actually, incidentally and contrary to a suggestion made in one of the Company's submissions, the fact that the amount of the sum lodged by way of security for costs itself exceeded the net asset value is not relevant: what was relevant was the value of the transaction as a whole when matched against the benefit received by the Company.

As to the other provisions, we cannot see how these afford a basis for invalidating the settlement *vis-à-vis* Mr. Dully.

180. As evident from our earlier summary of his judgment, the Judge concluded that the various objections raised by the Company to the power of the directors to enter into the settlement agreement were defeated by the '*Indoor Management Rule*'. The classic statement of the rule appears in the speech of Lord Simonds in *Morris v. Kanssen* [1946] AC 459, at p. 474:

'persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.'

181. It has been explained by Hogan J. as follows (*ACC Bank plc v. McCann and Griffin* [2012] IEHC 236 at para. 21):

'The rule in Turquand reflects the principle that, generally speaking, a third party is entitled to rely as against the company on the validity of acts done or resolutions passed or documents executed by or on behalf of the company without the necessity of inquiring whether the company complied with its own memorandum and articles of association or other associated procedural rules, such as the presence of a quorum or the appointment of officers'.

182. The common law rule is – unusually – acknowledged by express reference to the case generally associated with it in section 40(11) of the Companies Act 2014. However, the principle it establishes is qualified and in particular, is inoperative where the party seeking to rely upon it is on notice of an irregularity in the transaction he seeks to enforce. Much of the Company’s argument focussed on that limitation, which was addressed by reference to the decision of the English Court of Appeal in *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation* [1986] 1 Ch. 246.

183. There, the plaintiff company guaranteed the debts of a second company (SSS Ltd.) in which S (a director and 51% shareholder in plaintiff) had an interest, and in such a way that the guarantee was partly gratuitous. The 51% shareholder/director personally benefitted from the transaction because it limited his exposure on foot of a guarantee he had given of debts of SSS Ltd. The Judge found – and the Court of Appeal agreed – that provision of the guarantee was a gratuitous disposition on the part of the plaintiff which could not be justified as something done for the purposes of or in the interests of the plaintiff, and that it had been approved at a meeting at which S had not declared his interest in the manner required by the plaintiff’s articles of association. This occurred in a context in which it was not established that the fact giving rise to that interest – S’s guarantee of the debts owed by SSS to the defendant – was known by the other director. The Court found that the transaction was a breach of the director’s duties to the plaintiff because it was in furtherance of purposes that were not authorised by its Memorandum of Association and, to that extent, was beyond their authority. The Court determined that the defendant knew that the plaintiff was gratuitously disposing of its assets, and that for that reason the plaintiff could disclaim as much of the guarantee as was thus

other than in its best interests. However, because the transaction had, in addition, not been properly approved by the directors in accordance with the plaintiff's Articles of Association, the plaintiff could disclaim the *entire* of that security, and the appointment of a receiver on foot thereof.

184. The general significance of the decision of the Court of Appeal in *Rolled Steel* lay in its formulation of the distinction between acts *ultra vires* the constitution of a company (which were – subject to statutory protection for company outsiders – void and could never be approved by the entire of the shareholders) and acts in breach of the duties of the directors (which were not void and could usually be so approved), and in the court's conclusion that the fact that a transaction was gratuitous did not for that reason alone render it *ultra vires* in the former sense (at least where it did not constitute a fraud on the company's creditors). Essentially, the decision thus operated to consign arguments around gratuitous dispositions insofar as based upon the proposition that they were not in the interests of the company, to the rules governing directors' duties rather than the *ultra vires* principle properly so called. Insofar as the Court addressed the indoor management rule (and it was that consideration that was relied upon in this appeal), it is easily forgotten that it did so only for the purposes of explaining why the rule in *Turquand* required to be pleaded by the defendant and why the Judge had erred in permitting a late amendment to the defendant's defence to assert it. The defendant could not, accordingly, rely upon the rule in *Turquand* and this was why the failure of the directors to comply with the Articles of Association in purportedly approving the transaction was fatal to its validity. Deprived of the benefit of the rule in *Turquand* it

must be remembered, a third party is fixed with constructive knowledge of the requirements imposed by the company's Articles of Association.

185. The indoor management rule, it is clear, may not be relied upon by those who know of an irregularity in a transaction or where the circumstances are such that they are put on an inquiry which they failed to duly make. Slade LJ, explained that '*the very nature of a proposed transaction may put a person upon inquiry as to the authority of the directors of a company to effect it, even if he has no special relationship with the company*' (per Slade LJ at p. 285).

186. In the course of his oral submissions counsel for the Company identified a number of '*red flags*' which, he said, should have put Mr. Dully on inquiry to the extent that he could not, having regard to this qualification on the operation of the rule, invoke it. It was said that the case was solely against the three directors and the Company was not intended to be present in Court. Mr. Dully was aware that the Company had been represented throughout by Mr. McNelis and by counsel. It must thus have been obvious (it was argued) that because those legal advisors were absent the normal representatives of the Company were not there on the day the settlement negotiations took place. It was also stated at one point that insofar as Mr. Dully was concerned Mr. Molloy was, effectively, the Company and that he was aware that ultimately he refused to settle the case. He therefore knew that the 97% shareholder was not agreeable to the settlement and the fact that the terms of settlement provided that the payments undertaken were against the directors other than Mr. Molloy and were not recoverable against him. Because of the bitter history, it was a '*big deal*' to get a settlement across the line. The

nature of the dispute and its background was itself an unusual circumstance requiring a degree of inquiry by Mr. Dully.

- 187.** In determining whether a person is entitled to rely upon the indoor management rule to enforce a particular transaction affected by a legal frailty or whether the circumstances are such that they were under an obligation of inquiry, the first task of the Court must be to identify the alleged illegality in question. This is both critical, and obvious. The rule does not apply where a person has notice '*of the relevant irregularity*' (per Slade LJ. at p.284), and thus the question of whether the circumstances are such as to put a third party on notice that a transaction is in excess of the directors' powers depends on what the excess in question actually was.
- 188.** When stripped of the claim that the settlement agreement was in breach of the directors duties because the company was trading its only asset for a settlement that did not equate to its value, what is left is a series of arguments based upon the conduct of the meetings of the directors, the extent to which they were properly minuted and formalised, and the degree to which disclosure was made by the directors of interests they had in the transactions (which interests, it might be observed were evident to each and therefore to the shareholders as a whole). In the course of oral argument, counsel for the Company and Mr. Molloy contended that because the transaction was unusual, for that reason alone, Mr. Dully was under an obligation of inquiry, and therefore a duty to satisfy himself that the directors had conducted a formal meeting, recorded the details thereof in minutes and made any necessary disclosures of personal interests they may have had in the transactions in question.

189. In this regard, some reliance was placed on the following statement in Courtney ‘*The Law of Companies*’ (4th Ed. 2016) at para. 7.048:

‘... where the contract is of an exceptional nature, the outsider may be on notice that there may be an irregularity and so under a duty to satisfy himself that any requirements of the company’s constitution were indeed complied with.’

190. As the authorities cited in support of this proposition (*Underwood Ltd. v. Bank of Liverpool & Martins* [1924] 1 KB 775, *Houghton & Co. v. Nothard Lowe and Wills Ltd.* [1927] 1 KB 246) make clear, the point being made is that where the nature of a transaction is such that an outsider should question whether the Board of Directors as a whole did or acting properly would have approved it, there is a heightened obligation of inquiry. *Underwood Ltd. v. Bank of Liverpool & Martins* involved the endorsement of cheques by a director made payable by the company into his own bank account. *Houghton & Co. v. Nothard Lowe and Wills Ltd.* concerned an agreement entered into by a director which enabled a third party to sell goods owned by the company and keep the proceeds. Each arose from the actions of an individual director involving at least the suggestion of a misapplication of its assets, and neither was concerned with an agreement with a company represented by its entire board. For the reasons explained earlier, a case of this kind cannot be made out on the facts here. There is no question on the evidence but that the transaction was in the Company’s interests, there can be no doubt but that such interest as the directors of the company may have had in the transaction was one that both coincided with and derived from the obligations of the

Company itself, there is no question but that Mr. Dully was entitled to believe that the transaction was approved by the board of directors and in fact, as we explain shortly, the undisputed affidavit evidence was that Mr. Dully believed that the transaction had been approved by *all* of the company's shareholders.

191. In circumstances where the issue is whether the alleged deficiencies in issue here invalidate the settlement *vis-à-vis* Mr. Dully, the critical question is whether there were facts that had come to his attention indicating that the authority in question might not have been perfected on the grounds alleged (Ussher *op cit.* at p. 153). Here, there was no evidence that Mr. Dully was aware of any infirmities of the kind alleged and set out earlier, and there was nothing in the evidence to suggest that he ought to have been alerted to them. He was presented with an agreement purportedly made on behalf of the Company by a majority of the persons comprising the organ with the authority to settle the litigation. The fact that the agreement was important, or significant, did not impose a duty on him to interrogate each internal procedural step undertaken prior to its adoption. This, it appears to us, would have been the case irrespective of whether Mr. Dully knew that Mr. Molloy was not agreeing to the terms. However, the evidence did not even go that far. Mr. Dully averred in his affidavit (in respect of which it must be repeated he was never cross-examined), the following:

"3. When the compromise agreement was agreed between all the parties to the proceedings herein"

6. I ... say that the agreement was freely entered into by the Plaintiff and all the Defendants ...'

(Emphasis added)

192. That evidence did more than merely establish Mr. Dully's belief that the transaction was agreed to by each director: it also – unless and until contradicted – meant that the evidence before the Court was that *all* shareholders in the Company acceded to the transaction and, of course, that each knew that the others obtained a personal benefit as a result. While the authorities disclose a debate as to where the onus of proof in asserting the indoor management rule lies,⁵ it appears to us – if it is to be said that the onus was on Mr. Dully – that this uncontradicted testimony discharged it. While in the course of argument before this Court counsel for Mr. McCaul suggested that Mr. Dully's advisors may have known that Mr. Molloy was not (as he put it) '*a happy camper*', it was a matter for the Company and Mr. Molloy to displace this sworn evidence. That, they never sought to do. The consequence was to put Mr. Dully in a position where having acted *bona fide*, and dealing with persons acting as directors, without any reason to believe they were unauthorised so to act, he was entitled to rely upon their agreement (see *Mahony v. East Holyford Mining Company* (1875) LR 7 HL 869, at p. 892 per Lord Chelmsford).

⁵ The issue was debated, but not resolved, in *Rolled Steel* (see at p. 285). It seems to us that the correct analysis is that the indoor management rule establishes a presumption of regularity which may be rebutted when facts suggesting an obligation of inquiry are shown (see *B. Liggett (Liverpool) Ltd. v. Barclays Bank* [1926] 1 KB 48, 57). It follows that it is a matter for the party seeking to avoid the transaction to establish those facts.

193. It follows from the foregoing that even if the irregularities alleged by the Company were established, these would not vitiate the agreement *vis-à-vis* Mr. Dully. However, to be clear, we do not see – in particular – that there was any breach disclosed of those provisions of the Companies Act 2014 as claimed. Section 228(1)(d) precludes the use of company property, information or opportunity by a director for his own benefit in the absence of express provision in the Company’s constitution allowing this to be done, or a resolution in general meeting. Section 228(1)(f) requires the avoidance of a conflict of interest between director and shareholder. We do not see that the former precludes a director from causing the Company to enter into a settlement agreement from which it benefits and which is in its interests, even if it could be said that this also entails a collateral benefit for the director. The property is being ‘*used*’ for the company’s own purposes. The latter provision precludes a conflict of interests, but it has not been explained how there is any conflict in circumstances where the Company’s interest in settlement and that of its directors coincide. It is important in this context to remember that, insofar as the settlement agreement addressed the alleged liability of the directors to Mr. Dully, that liability was at all times a derivative or secondary liability to the primary liability of the Company. At no stage was any different or independent liability asserted against the directors. Moreover, the fact is that *each* director was aware of the benefit obtained by the others as a result of the settlement.

The 15 May E-mail, and the delegation of authority (Grounds 2(b)(i), 4(a), 4(b), 4(c), 5(a))

- 194.** The e-mail from Mr. McNelis of 15 May is quoted in full above. A great deal of the trial was occupied by a consideration of its context and meaning. In the course of his oral submissions to this Court, counsel acting on behalf of Mr. McCaul described the issues around this e-mail as being '*somewhat of a sideshow*'. We agree. As Mr. McCaul observed in the written submissions delivered on his behalf in the High Court, it is not a requirement for the lawfulness of a decision to compromise proceedings that the solicitor on record for the Company either approve of the decision or be consulted regarding it. It is the solicitor that must act with the authority of the client, not the other way around. The question – and the only question – was whether the organ having authority to do so, had agreed to compromise the proceedings.
- 195.** That said, and as explained earlier, the Judge found that the mail could only be construed as authority being given by Mr. McNelis to Mr. MacGeehin to settle the proceedings on behalf of the Company, and that it amounted to a tacit agreement to the directors compromising all matters. In its submissions, the Company says that the interpretation of the mail should take account of two matters. First, that it would be a breach of Mr. McNelis' obligations to his client for him without having any prior authority so to do, to delegate to a different firm that did not come on record, authority to entirely dispose of the case without any reference back to him. It should, it is said be presumed that Mr. McNelis would do no such thing. Second, and in the light of this, it is said that there

was an obligation on Prospect Law to clarify whether this was indeed Mr. McNelis' intention.

196. From there it is argued that the Court erred in the conclusions reached regarding the e-mail of May 15. The communication, it says, cannot reasonably be construed as an authorisation of the purported settlement without any reference back to Mr. McNelis or to counsel. A specific point is made arising from one statement in the mail where Mr. McNelis stated:

'I would need to see ... the instructions provided to you by the three directors concerning the proposed settlement meeting and what they ... are looking for from that meeting.'

197. This, to say the least, requires a very narrow view of the e-mail. On three separate occasions in the course of that communication Mr. McNelis said, in one way or another, that any instructions given by the directors were given both from their own point of view and would equally apply to the Company (at paras. 1 and 5), and he stressed in his mail that it was a matter for the Company and the directors to decide what they were prepared to offer (at para. 2) and that there was no need for the Company to be separately represented for these reasons (at para. 5). At no point did he state that it was his view or that of counsel that an agreement should only be entered into on behalf of the Company if all the directors were in agreement.

198. In considering the effect of the e-mail it is important to note that two separate issues arose. One was what its author intended it to mean. The other was what it would

objectively be construed as meaning. The first was properly determined by reference to the evidence of Mr. McNelis. The second was a matter for objective ascertainment having regard to the language used and the context in which it fell to be construed. That included the facts (as found by the Judge) that Mr. McNelis knew that there was going to be some development that might bind the Company, that Mr. MacGeehin had advised Mr. McNelis that any settlement would involve settlement of all matters including matters involving the Company, and indeed that Mr. McNelis (again as found by the Judge) assisted in implementation of the settlement without raising any objections to it. We do not see that we should, or indeed can, interfere with these findings of fact. It follows from them that the Judge was fully entitled to conclude that the e-mail of May 15 gave due authority, insofar as this was necessary at all, to Prospect Law to settle the proceedings.

The legality of the payment out of the security (Ground 4(f), 4(g))

199. Once the Court had determined that the Company was bound to the agreement, the question of how the payment out of the security had occurred was, it appears to us, *nihil ad rem*. This was all the more so given that the application to repay the monies was withdrawn. We do not believe that the Judge erred in not addressing the issue further than he did.

Mr. Molloy's objection to the settlement

200. In the second set of submissions delivered on behalf of the Company and of Mr. Molloy a distinct point is made. The settlement agreement, he says, is not signed by any person nor is it signed on behalf of any person. He says that there were four legal persons involved in the agreement – the Company and its three directors (Messrs. Molloy, McCaul and Temple). However, it is said, even if the Company agreed to the settlement Mr. Molloy did not agree to it. The trial Judge, it is said, erred in focussing his attention upon the issue of whether Messrs. Temple and McCaul could by their agreement accept the settlement on behalf of the Company, without paying any due attention to the issue of whether and if so how, Mr. Molloy was bound to the agreement. The following is then said:

'... the first Appellant Company could not be involved in the settlement of the proceedings unless the Second Appellant was also a party to the settlement as in the absence of agreement by all three directors to compromise the litigation against each of them individually such litigation must continue'.

201. There is no doubt but that it is puzzling that the agreement was presented to the Court in a manner that suggested that all parties to the action had consented to it. This is one of a number of peculiar features of the events around the agreement. It is odd that Mr. MacGeehin, when aware that Mr. Molloy was not agreeable to the settlement, did not take the precaution of contacting Mr. McNelis to advise him of the proposed settlement. It is difficult to understand why Mr. Molloy did not himself make contact with Mr. McNelis with a view to obtaining advice as to what he could do to prevent the Company being bound to the agreement with which he disagreed. It is hard to see why he did not

articulate some objection to the Court when the agreement was presented to it. However, we do not see that Mr. Molloy's objection to the agreement affects any issue with which this Court is concerned. He was not required to do anything under the agreement, except to suffer the withdrawal of the proceedings that had been brought against him (and he never raised any objection to that). In the course of oral argument counsel for the Company and Mr. Molloy observed that there may be outstanding costs issues arising from the withdrawal of the case against Mr. Molloy. If that is so, this was not an issue before this Court nor, insofar as we can see, is it an issue raised before the High Court.

VII THE APPEALS AGAINST THE ORDERS FOR COSTS

The appeals of the Company and of Mr. Molloy

- 202.** As we have already noted, the Judge made an order for costs on a solicitor and client basis against the Company and Mr. Molloy in favour of Mr. Dully. He also made an order for costs, on the same basis, against the Company and (from the date on which Prospect Law Solicitors came off record) against Mr. Molloy in favour of Mr. McCaul.

- 203.** There was little debate about these orders before the High Court or before us on appeal. Costs were dealt with on 6 December 2019, immediately after the Judge finished giving his judgment, though the costs orders were formally made only on 9 December 2019. Counsel for Mr. Dully and for Mr. McCaul indicated that they were seeking costs on a

solicitor and client basis. In response, counsel for the Company accepted that costs followed the event but suggested that any order for costs should be limited to 50% of the costs of the proceedings on the basis that the hearing would have been much shorter if Mr. MacGeehin's affidavit of 3 December 2019 and the exhibits to it had been produced earlier. Counsel for the Company made no submission on the issue of whether costs should be awarded on a solicitor client basis. Mr. Molloy (who by then was representing himself) made no submissions on costs though he was given an opportunity to do so.

204. In light of the conclusions he had reached, the Judge was clearly entitled to order the Company to pay the costs of Mr. Dully. He obviously was not impressed by the argument that those costs should be reduced by reference to the timing of Mr McGeehin's affidavit and, if that argument had been revived on appeal, we would also have rejected it as without any reasonable factual foundation. As regards Mr. Molloy, he had actively participated in the hearing in support of the applications brought by the Company. He gave evidence and cross-examined Mr. McCaul and Mr. MacGeehin to that end. He adopted the submissions that had been made by counsel for the Company. While formally Mr. Molloy was a respondent to the applications brought by the Company, in substance and in reality he was a co-applicant. In circumstances where one of the applications brought by the Company had not been pursued and the other had failed, the Judge was entitled to make an order for Mr. Dully's costs against Mr. Molloy and no grounds for interfering with that order have been identified in the written or oral submissions made on Mr. Molloy's behalf.

205. Similarly, the Judge was entitled to make an order for costs in favour of Mr. McCaul. No submission to the contrary was advanced to us. As the Judge observed in Judgment (No. 7), at para 4, Mr. McCaul had a legitimate interest in standing over the settlement and resisting the applications brought by the Company's and, in light of the outcome of those applications, it was within the reasonable discretion of the Judge to award costs to him against both the Company and Mr. Molloy.

206. This leaves the issue of the basis on which costs were awarded by the trial Judge. There is no doubt that the Judge had power to award costs on a solicitor and client basis. Such a power was expressly conferred by Order 99, Rule 10(3) RSC, which provided that the “*Court ... may in any case in which it thinks fit to do so, order or direct that the costs shall be taxed on the solicitor and client basis*”. The recast Order 99 (which came into force a few days prior to the costs hearing in the High Court) contains a materially identical provision in Rule 10(3), though now expressed in terms of adjudication “*on a legal practitioner and client basis*”.

207. The circumstances in which it may be appropriate to award costs against a party on a solicitor and client/legal practitioner and client basis do not appear to have been the subject of comprehensive analysis in this jurisdiction. However, it is clear that the discretion may be exercised where the court considers that the conduct of the paying party is such as to warrant disapproval: *Shell E & P Limited v McGrath* [2007] IEHC 144, [2007] 4 IR 277, per Laffoy J at para 55, citing *Geaney v Elan Corporation plc* [2005] IEHC 111. *Geaney* was also cited in *Dunnes Stores v An Bord Pleanála* [2016] IEHC 697 where Barrett J suggested that “*the court will order costs on a solicitor and*

client basis when the court wishes to mark its especial disapproval and/or displeasure at how proceedings have been conducted and/or the basis on which proceedings have been brought” (at para 15). Barrett J also observed that such an order represents a departure from the normal measure of costs and, that being so, there has to be a reason for making that order.

- 208.** The discretion conferred on courts by Order 99, Rule 10(3) is broad and its exercise will be fact sensitive. In cases governed by the new costs regime introduced by Part 10 of the Legal Services Regulation Act 2015 (which came into operation on 7 October 2019) and the recast Order 99 (which came into operation on 3 December 2019), the court concerned must have regard to the matters set out in section 169(1) of the 2015 Act before making *any* order for costs. These matters include conduct before and during the proceedings and the manner in which the parties conducted their case, as well as the reasonableness of raising, pursuing or contesting one or more issues in the proceedings. Whether an offer of settlement was made and whether parties were invited to engage a settlement or mediation process are further factors identified in section 169(1). These factors are relevant to the making of any order under Order 99, Rule 10(3) also.

- 209.** As Barrett J observed in *Dunnes Stores v An Bord Pleanála*, such an order is a departure from the normal form of costs order and there must be some justification for it. Where proceedings constitute an abuse of process – as was found to be the case *Dunnes Stores v An Bord Pleanála* – or where a party is otherwise guilty of deliberate misconduct (including any form of deception or dishonesty) in proceedings, such an order may

readily be justified. But Order 99, Rule 10(3) is not limited to cases of deliberate misconduct. Even in the absence of any such misconduct, the unreasonable conduct of litigation by a party (whether plaintiff or defendant) may be such as to justify an order under Order 99, Rule 10(3). The unreasonable pursuit of a groundless claim, or the unreasonable reliance on an unmeritorious defence, may result in the successful party incurring additional legal costs above and beyond what may be recoverable on a party and party basis, leaving them out of pocket, perhaps to a significant extent: see in this context the discussion in *Godsil v Ireland* [2015] IESC 103, [2015] 4 IR 535, per McKechnie J at paras. 19 to 22. In *Geaney*, that was a factor expressly taken into account by the High Court in making an order for costs on a solicitor and client basis in favour of the plaintiff in respect of a motion for further and better discovery brought as a result of shortcomings in the discovery made by the defendant.

- 210.** In any event, the precise circumstances in which such an order should be made cannot be prescribed *a priori* and will involve close factual inquiry on a case by case basis.
- 211.** Here, the Judge was severely critical of the basis on which the Company had brought the applications that it had, how the applications had been presented to the Court and the evidence which had been adduced on behalf of the Company. These criticisms have been set out in detail above and it is not necessary to repeat them. It has not been suggested – nor, in our opinion, could it plausibly be suggested – that, in light of those criticisms, it was not open to the Judge to exercise the discretion conferred by Order 99, Rule 10(3). As this Court suggested in *Flynn v Breccia* [2017] IECA 163, the Judge was in the best position to determine how that discretion should be exercised, having heard

evidence and argument over 6 days and having determined the issues that arose in the judgment he had delivered and this Court ought, accordingly, be reluctant to intervene (per Peart J at para 60). No basis for intervention has been identified here.

212. The Judge did not expressly state his reasons for exercising his discretion under Order 99, Rule 10(3). As a general rule, reasons ought to be given where such an order is being made. In the circumstances here, however, there could not have been any doubt as to the basis for the Judge's decision and his failure to articulate his reasoning does not warrant that decision being set aside.

213. Accordingly, the appeals of the Company and of Mr. Molloy against the costs orders made against them fail.

Mr. Temple's appeal

214. Mr. Temple's appeal relates to the two costs orders made by the Judge against him in favour of Mr. Dully (Mr. McCaul did not seek any order for costs against Mr. Temple). The first order related to costs of the 20 September 2019 motion (which proceeded to determination). The second order related to the costs of the 25 November 2019 motion (which counsel for the Company told the Judge on 5 December 2019 was not being pursued and which was dismissed on that date). In each case, costs were awarded on a solicitor and client basis. The orders against Mr. Temple were made jointly and severally with the orders made against the Company and Mr. Molloy.

215. The stated basis on which orders for costs were sought by Mr. Dully against Mr. Temple was that he had not “*come up to the mark in terms of honouring the settlement*”. That was, of course, a reference to the fact that Mr. Temple had failed to make his agreed contribution of €25,000 to the settlement amount payable to Mr. Dully (as explained earlier, he had furnished a cheque for €10,000 but this was subsequently countermanded by him). The Judge did not give reasons for making the cost orders he did against Mr. Temple or identify the basis on which the orders were made. Nor did he explain why he considered it appropriate to order costs on a solicitor and client basis against Mr. Temple.

216. On 19 December 2019 Mr. Temple received a letter from Mr. Dully’s solicitors enclosing a *Bill of Costs and Outlays* totalling €276,397.55 (inc VAT). That amount was said to be “*Strictly without prejudice to taxation.*” Mr. Temple instructed solicitors (who also acted for him in his appeal) and on 8 January 2020 they wrote to the solicitors for Mr. Dully indicating that an appeal was in preparation and asking for an undertaking that no steps would be taken to enforce the costs orders pending the determination of that appeal. An undertaking was offered in response but only on condition that an immediate payment of €85,000 (comprising the balance said to be due on foot of the settlement and a payment on account of costs) be made by Mr. Temple. That was not acceptable to Mr. Temple and he then brought an application to this Court for a stay on the costs orders. That application came before Costello J. in this Court on 13 March 2020 and notwithstanding the opposition of Mr. Dully she granted the stays sought.

217. A number of grounds of appeal are set out in Mr. Temple's Notice of Appeal. They may be summarised as follows:

- (1) The costs orders were made in breach of natural justice and fair procedures because Mr. Temple was not on notice of any intended application for costs against him and was not afforded any opportunity to be heard in opposition to such application.
- (2) There was no proper basis for the costs orders in any event, having regard to the jurisprudence governing the making of costs orders against non-parties and in particular the decision in *Moorview Development Ltd v First Active* [2011] IEHC 117, [2011] 3 IR 615; [2018] IESC 33, [2019] 1 IR 417.
- (3) The orders made were procedurally inappropriate in any event given that Mr. Dully was at all times said to be suing in a representative capacity (albeit in the absence of a representative order under Order 15 Rule 9 RSC) on behalf of the Club and/or its members (which included Mr. Temple). This ground was not pressed at the hearing of this appeal and, for reasons which will become apparent, it will not be necessary to consider it further.

Ground (1) – Fair Procedures

218. That Mr. Temple was not present in the High Court on 6 or 9 December 2019 is not in dispute. Neither is the fact that he was not represented by solicitor or counsel at that

stage. While Prospect Law had previously represented him in the proceedings, on 4 November 2019 Humphreys J. had made an order formally declaring that they had ceased to act on his behalf. Mr. Temple had not played any role in the hearing that took place between 29 November and 5 December 2019. No intimation was given to him that, in the event that the Company's applications were unsuccessful, Mr. Dully (or any other party) might seek their costs against him, still less that costs might be sought against him on a solicitor and client basis.

219. As we have said, none of this is in any dispute. Nevertheless, counsel for Mr. Dully steadfastly resisted Mr. Temple's contention that the costs orders had been made in breach of fair procedures. He made a number of arguments. First, it was said that Mr. Temple *ought* to have been present as the Judge had directed his attendance in the order made by him on 15 October 2019. The High Court's order of that date does indeed include a direction that Mr. Temple and Mr. McCaul attend in person on 21 October in the event that they no longer wished Prospect Law to continue to act on their behalf. The Judge explained that order as necessary "*to resolve any uncertainty about the position*" of those defendants (Judgment (No. 6), at para 12). As already explained, the Judge subsequently made an order permitting Prospect Law to come off record for Mr. Temple. In his judgment given on the same date as that order (Judgment (No. 7) of 4 November 2019) the Judge fixed a time for the filing of any affidavit of Mr. Temple "*if he wants to get involved*". No order was made directing the attendance of Mr. Temple at the hearing and it is not obvious on what basis such an order might have been made. When the hearing commenced, no-one appears to have suggested that Mr. Temple was required to be present or that his absence involved a breach of any order previously

made by the Judge. As a matter of fact, therefore, the argument that Mr. Temple's absence from the hearing was in breach of a direction to attend given by the Judge is not well-founded. Even if the position was otherwise, however, it would not excuse the making of costs orders against Mr. Temple in favour of Mr. Dully in his absence, in circumstances where Mr. Temple was not on notice of the possibility of such orders being sought against him.

220. We do not consider that there is any meaningful parallel with the position in *PC v Minister for Health* [2020] IECA 28, which was relied on by counsel for Mr. Dully in this context. In *PC*, Mr. C had failed to attend in the High Court on the day that his motion for interlocutory reliefs had been fixed for hearing. He was aware that the motion had been fixed for hearing on that date but said that he had not found it in the Legal Diary. In his absence, the motion was dismissed. His appeal against that order was unsuccessful. Given Mr. C's acceptance that he was aware that the motion had been fixed for hearing on the date in question, that conclusion is entirely unsurprising. As Noonan J. observed, a conscious decision to abstain from appearing in a matter, perhaps in anticipation of an unsuccessful outcome, and then seeking to appeal when that anticipation is realised, is a manipulation of litigation and an abuse of process (at para 31). Had Mr. Temple had been put on notice of Mr. Dully's intention to seek costs orders against him on 6 December 2019, and had consciously abstained from attending in court, the decision in *PC* would have relevance. However, the fact is that Mr. Temple was not on notice that any such application was to be made against him.

221. The second argument made by counsel was to the effect that Mr. Temple ought to have anticipated that Mr. Dully would seek his costs against him in circumstances where Mr. Dully had previously procured the joinder of Mr. Temple, along with Mr. Molloy and Mr. McCaul, as co-defendants for the very purpose of fixing them personally with damages and costs. Such an order was indeed made in December 2018 but any potential liability of the co-defendants or any of them (which was never the subject of adjudication) was brought to an end by the settlement of the proceedings in May 2019. Mr. Temple (and the other directors) had obviously been on notice that Mr. Dully was seeking to make him liable for the damages and costs he had been awarded against the Company. In no sense, however, did that put Mr. Temple on notice that, in the event that the Company's subsequent applications in relation to the settlement were unsuccessful, Mr. Dully would seek orders for costs against him personally.

222. *WL Construction Limited v Chawke* [2017] IEHC 319, [2018] IECA 113, [2019] IESC 74 does not assist Mr. Dully either. There a non-party, a Mr. Loughnane, had been joined and an order for costs made against him by the High Court (Noonan J.) in exercise of the *Moorview* jurisdiction. The issue in *WL Construction Limited v Chawke* was whether the failure to give Mr. Loughnane notice of the possibility that such an order might be made against him prior to the conclusion of the proceedings precluded the subsequent making of such order. Such notice, he argued, was a pre-condition to the exercise of the *Moorview* jurisdiction or, at least, a factor of such significance that the absence of such notice warranted the refusal of the application. The High Court rejected that argument but it found favour with this Court on appeal. However, on further appeal the Supreme Court allowed the appeal and restored the order made by the High Court.

223. The issue of notice in *WL Construction Limited v Chawke* was not at all the issue here.

In *WL Construction Limited v Chawke* the application to join Mr. Loughnane for the purpose of making a costs order against him was made on notice to him and he was heard on that application and on the application for costs. As O’ Malley J. observed on her judgment (with which Clarke CJ. and O’ Donnell, McKechnie and Charleton JJ. agreed) Mr. Loughnane “*was informed of the case to be made against him personally .. when the defendants decided to seek an order against him*” (at para. 62). In the circumstances (and the Court emphasised that the basis on which costs might be ordered against Mr Loughnane had only become evident in the course of the High Court hearing) that was sufficient and no prior indication that Mr. Loughnane might be liable to such an order was required.

224. The factual position here was stark. Mr. Temple was not the applicant for relief. Unlike

Mr. Molloy, he did not support the application or participate in any way in the hearing. He was a respondent to the applications but no relief was granted against him. In contrast to the position in *WL Construction Limited v Chawke* Mr. Temple was never “*informed of the case to be made against him personally*” because the application for costs made against him was made in his absence, without any prior notice or warning whatever, formal or informal. In the Court’s view, this involved a clear and substantial departure from elementary principles of fair procedures. As the Supreme Court (per McMenamin J) stated in *Kilty v Dunne* [2015] IESC 88, as “*a matter of first principle , a court should not make an adverse order against an absent or unrepresented party, or one who is not*

on notice of the application, Such a course of action breaches the principle of audi alteram partem” (at para 20).

- 225.** That would be so in respect of any order for costs. Where – as was the position here – the order was (as counsel for Mr. Dully accepted) a “*Moorview type order*” and one which directed taxation on a solicitor and client basis the position is *a fortiori*. Such an order is unusual: in fact none of the members of the Court has ever come across an order in such terms. According to Mr. Dully and his advisers, the effect of the order was to impose a liability on Mr. Temple of in excess of €250,000 (inc VAT). No such order could properly have been made without first ensuring that Mr. Temple was put on notice of the application against him and the basis on which it was being made and without affording him a reasonable opportunity to prepare and present a defence to it.
- 226.** It follows that the costs orders against Mr. Temple must be set aside.
- 227.** In the circumstances it is not necessary to address the Judge’s failure to give any reasons for the costs orders made against Mr Temple. However, we would observe that it is difficult to conceive of any circumstances where a Moorview Order could properly be made by a court with the court giving detailed reasons for it. Where – as here – the order directs payments of costs on a solicitor and client basis, the need to give reasons is clearer still. .
- 228.** It might seem to follow that the issue of whether any order for costs should be made against him should be remitted to the High Court. However, counsel for Mr. Temple

pressed the Court not to remit and instead to decide the issue itself. Counsel for Mr. Dully accepted that the Court could do so and that it had sufficient information before it to enable it to do so fairly.

229. It appears to the Court that it is highly desirable that all aspect of these proceedings should reach finality. In our view, it would not be in the interests of either Mr. Dully or Mr. Temple, or in the public interest in the administration of justice, to remit the costs issue for further hearing by the High Court, with the further delay and expense that would inevitably involve and the possibility of a further appeal or appeals. Accordingly, the Court will proceed to consider Mr. Temple's second ground of appeal.

Ground (2) - Was there a proper basis for a Moorview Order here?

230. Counsel for Mr. Dully accepted that the costs orders made against Mr. Temple were “*Moorview-type orders*”, albeit that did not “*fit neatly*” into that category given that Mr. Temple was already a party to the proceedings when costs were sought against him. In our view, he was correct to do so. In the ordinary way, costs orders are made as between opposing parties to an application or action. The outcome of the application or action constitutes the “*event*” by reference to which the successful and unsuccessful parties are identifiable and costs allocated. Here, as counsel for Mr. Dully agreed, the primary “*event*” was the failure of the 20 September 2019 motion (and, secondly, the withdrawal/dismissal of the 25 November 2019 motion). Those motions were issued by the Company, not by Mr. Temple. He was not the moving party nor did he support the applications or participate in the hearing. No relief was granted against him. Orthodox

principles did not support the making of costs orders against Mr. Temple in those circumstances.

231. Of course, *Moorview* recognises a broader jurisdiction to make orders for costs. The circumstances in which that jurisdiction is properly exercisable are comprehensively discussed by Clarke J. in the High Court in *Moorview* and by McKechnie J. (with whose judgment McMenamin and Dunne JJ. agreed) in the Supreme Court on appeal. At para. 125 of his judgment, McKechnie J helpfully identifies a total of 8 factors which ought to be taken into account when considering whether to make an order for costs against a non-party. That is not intended as an exhaustive list, as McKechnie J makes clear in the following paragraph and he also emphasises that the jurisdiction should not be burdened by an overly complex or unduly rigid set of principles from which no departure is permitted. Ultimately, while the court's discretion is wide, "*it must be exercised judicially and, in all the circumstances, must give rise to a just result*" (at para. 125(h)).
232. The only basis identified before the High Court for seeking costs orders against Mr. Temple was that he had not "*come up to the mark in terms of honouring the settlement.*" Whether that was the basis on which the Judge made the orders sought is unclear, given that the Judge did not explain his reasons for doing so. In any event, Mr. Temple's failure to honour the settlement was an entirely extraneous factor which could not conceivably provide a basis for making the orders at issue. That appears to be recognised in Mr. Dully's written submissions to this Court (at para. 88). Mr Dully's remedy for any alleged breach by Mr Temple of obligations under the settlement was to bring appropriate enforcement proceedings against him (as in fact he has done).

233. Before this Court, counsel for Mr. Dully advanced additional arguments in support of the orders made, emphasising Mr. Temple's crucial role in the EGM that took place on 30 July 2019 which, counsel said, led directly to the issuing of the 20 September motion by the Company. Mr. Temple had provided "*the essential controlling vote*" that allowed the litigation attempting to unravel the settlement agreement to be launched. In doing so, it was said, Mr. Temple had acted in breach of his fiduciary duties and in breach of section 158(2) of the 2014 Act. While accepting that Mr. Molloy may have been the main instigator and funder of the litigation, he was not the only "*real party*": the litigation was, counsel suggested, "*a joint enterprise*" between Mr. Temple and Mr. Molloy.

234. In the course of argument, we pressed counsel on whether, on his argument, a *Moorview* order might be made solely on the basis that a director and/or shareholder of a company had voted in favour of instituting litigation by that company that was ultimately unsuccessful or whether some additional factor or factors were required. In reply, counsel made it clear that he was not contending that merely voting in favour of litigation was sufficient. Something more was necessary.

235. As of 2019, Mr. Temple (who was then 79 or 80 years of age) was one of three directors of the Company, along with Mr. Molloy and Mr. McCaul. Mr. Molloy held 97% of the shares in the Company. The remaining 3% of the shares were held by Mr. Temple and Mr. McCaul between them. Mr. Temple's involvement in the Club and the circumstances that led to him becoming a director and shareholder of the Company are

explained in the affidavit sworn by him for the purposes of his stay application to this Court. That affidavit was, without objection, relied on before this Court in Mr. Temple's appeal. It is abundantly clear from it that Mr. Temple's involvement (and his involvement in the stadium project dates back to 2003) has not been motivated by financial or other selfish considerations. Mr. Temple has also given a detailed explanation of why he took the position he did at the July 2018 EGM, referring to legal advice provided to the Company "*which emphatically challenged the validity of the purported agreement entered into on 23 May 2019 on the basis that the Company had not properly entered into the agreement.*"

236. As noted, counsel for Mr. Dully accepted that something more than the fact that Mr. Temple voted in favour of litigation that failed had to be demonstrated if the orders made by the High Court are to be upheld. In truth, however, it was to Mr. Temple's vote at the July 2019 EGM that counsel repeatedly returned in his submissions and no additional considerations were identified by him.

237. The facts in this appeal are remote from the facts in *Moorview and WL Construction Limited v Chawke*. Mr. Temple was not the initiator, funder or controller of the Company's unsuccessful applications. It would be a misuse of language to characterise him as the "*real party*" in the applications that had been brought by the Company. Furthermore, Mr. Temple bore no responsibility for the manner in which the applications had been presented in court. Moreover, it is not the case that, absent an order against Mr. Temple, Mr. Dully would have been left only with an order for costs against an

insolvent Company – Mr. Dully had and has the benefit of costs orders against Mr. Molloy.

238. As is clear from *Moorview*, the discretion must be exercised in a way which gives rise to a “*just result*.” In our view, it would not be just to make any order for costs against Mr. Temple; on the contrary, it would be a serious injustice to do so. We refuse Mr. Dully’s application accordingly.

239. In light of this conclusion, it is not necessary to address Mr. Temple’s third ground of appeal.

VIII CONCLUSIONS AND ORDERS

240. For the reasons set out in detail above, the Court has concluded that none of the grounds advanced by the Company and/or Mr. Molloy in respect of the Judge’s substantive judgment have been made out and their appeals are dismissed.

241. The Court also dismisses the appeals of the Company and of Mr. Molloy from the costs orders made against them in favour of Mr. Dully and Mr. McCaul.

242. The costs orders made against Mr. Temple will be set aside. Those orders were made in breach of fair procedures and, in any event, there is no basis on which such orders could properly have been made against Mr. Temple. Mr. Temple’s appeal is allowed.

243. The Court's provisional view is that, their appeals having been entirely unsuccessful, the Company and Mr. Molloy should be directed to pay the costs of Mr. Dully and Mr. McCaul. If the Company or Mr. Molloy wishes to contend for any different order, they will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms we have suggested, the party who requested the hearing may be liable for the additional costs of such hearing: In default of receipt of such application, an order in the terms proposed will be made.

244. As Mr. Temple has been entirely successful in his appeal, the Court's provisional view is that he should recover his costs from Mr. Dully. If Mr. Dully wishes to contend for a different order, he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If Mr. Dully requests such hearing and it results in an order in the terms we have suggested, he may be liable for the additional costs of such hearing: Again, in default of receipt of such application, an order in the terms proposed will be made.

APPENDIX

"(i). There was no practice within the company of legal proceedings being conducted with the agreement of EGMs until Mr. Molloy sought to unravel the settlement.

(ii). Prior to the settlement, Mr. MacGeehin advised Mr. McNelis that any settlement would in all likelihood involve settlement of all matters, including matters involving the company, such as the appeals to the Court of Appeal. Mr. McNelis was thus aware at all material times of the likelihood that the company would be bound by any agreement.

(iii). Mr. McNelis wrote to Mr. MacGeehin on 15th May, 2019 indicating that the directors could give instructions on behalf of the company and that there was no need for the company to be represented at the hearing, which was the context in which the settlement was going to be attempted. That clearly envisages any potential settlement as binding the company. The letter does not refer to the agreement of the directors being unanimous. The email can only be construed as authority being given by Mr. McNelis to Mr. MacGeehin to settle the proceedings on behalf of the company. It amounted to tacit agreement to the directors compromising all matters, including the appeals to the Court of Appeal on behalf of the company.

(iv). The email records that Dr. Forde advised that "there is no need for the company to be separately represented since the three directors will be providing their instructions and such instructions would apply equally to the company. You can simply relay whatever

has been decided on." The only possible inference in the light of the company's current position is that Dr. Forde has now simply changed his mind after his advices have been acted upon. In my view, Mr. McNelis' evidence has subconsciously been retrospectively coloured accordingly.

(v). Dr. Forde stating to Mr. McNelis, who in turn passed this on to Mr. MacGeehin, that Mr. MacGeehin's clients' instructions would apply equally to the company and that Mr. MacGeehin could simply relay whatever had been decided, meant that Dr. Forde and Mr. McNelis condoned a situation where the case was being settled by Mr. MacGeehin on behalf of the company, contrary to their current protestations.

(vi). The email of 15th May, 2019, properly construed, did amount to an authority to Mr. MacGeehin to take instructions from the directors on behalf of the company as well as on their own behalf.

(vii). Mr. MacGeehin acted within that authority by taking instructions from the directors, albeit that the directors acted by majority.

(viii). The email of 15th May, 2019 clearly envisages the possibility of a settlement, the possibility that it would also be on behalf of the company, and that Mr. McNelis would not be involved because the directors were there in any event. Mr. McNelis' claims that the company would not be involved in the settlement simply do not square with the contemporaneous materials and I conclude that his recollections and evidence have been unconsciously coloured by subsequent developments.

(ix). Mr. Molloy had previously told his fellow directors that they could outvote him if they wanted to.

(x). Mr. McNelis voluntarily absented himself from the settlement meetings and the hearing itself which reinforces the interpretation that he was leaving the affairs of the company in the hands of Mr. MacGeehin acting on the instructions of the directors.

(xi). The fluid and ongoing nature of the settlement process explains why there were such differing views in evidence on whether a meeting or a vote of the directors had taken place to agree the settlement. I conclude that there was no intention to mislead the court on this particular point from anyone who gave differing views in evidence on the question.

In the light of the totality of that evidence, I consider that there was no formal meeting of directors and no formal resolution or therefore formal vote as such on 23rd May, 2019, and nor was there a meeting of the directors in the very short interval between the agreed terms being typed up and those terms being presented to the court. However, prior to the terms being typed up, the directors did have discussions between themselves, which all of them attended, and in which a majority of the directors decided to enter into the agreement on the terms that were subsequently contained in the typed-up settlement document. Whether one chooses to call that a meeting or a vote or both is only semantic for this purpose.

(xii). Settlement of the proceedings was carried out with the agreement of the third and fourth-named defendants who constituted a majority of the directors of the first-named defendant company. The other director, the second-named defendant, did indicate

disagreement but not in a forceful way, so it was not unreasonable for Mr. McCaul to have construed that as involving a degree of acquiescence.

(xiii). The intention of the majority of the directors was that the company would be bound by the terms of the settlement, both those included in the court order and the contractual steps set out in the agreed statement to the court.

(xiv). The intention of the agreed statement was that it was to be an agreement between the plaintiff, the first-named defendant company on the authority of the majority of the directors, and two of the three directors in their own capacity. Mr. Molloy in his own capacity got a benefit from the agreement in the sense of having the motion against him in his personal capacity struck out.

(xv). The directors were involved at all times themselves. By being there during the negotiations they were by definition aware that Mr. MacGeehin was dealing with the matter on behalf of the company as well as on behalf of the directors. In addition, the directors themselves agreed to the settlement on behalf of the company by a majority. The settlement was not entered into by Mr. MacGeehin on his own authority or on the basis merely of sub-agency from Mr. McNelis which was, in any event, given with the tacit consent of the directors. He had specific instructions.

(xvi). I accept Mr. MacGeehin's evidence that there was no dissent within the ranks of the directors' legal advisers when it came to announcing the settlement to the court. On that basis I infer that neither of his counsel had any legal objection to the settlement. While

there was some reference in evidence to junior counsel having said at some point that the agreement between the directors should be unanimous, that inferentially must have been a counsel of perfection and cannot have been a legal view as to the validity of the agreement because otherwise that objection would have been articulated when it actually became an issue.

(xvii). I accept Mr. McCaul's evidence that his motivation was not self-interest.

(xviii). I also accept his evidence that it was not in the company's interest to pursue the alternative to the settlement, which was the appeal, given the risks involved.

(xix). A majority of the directors also subsequently decided that the consent order should be implemented.

(xx). The company solicitor, Mr. McNelis, was kept informed by the directors' solicitor, Mr. MacGeehin, of the implementation of the agreement and cooperated with that implementation at least to some extent. No protest was made on behalf of the company by Mr. McNelis in relation to any of these developments at that time and not until a very late stage in September, 2019.

(xxi). Mr. McNelis wrote to the directors on 24th June, 2019, indicating that if the consent order was not complied with by the company and the directors there would be very serious consequences. That can only be construed as seeking implementation of the agreement and certainly not as expressing the concerns now being articulated by Mr. McNelis.

(xxii). Mr. McNelis' claims of being taken by surprise are not properly reconcilable with the thrust of the contemporaneous documentation and I find them to have been unconsciously retrospectively coloured by subsequent developments.

(xxiii). Contrary to the allegation made on affidavit by Mr. McNelis, no misrepresentations whatsoever were made by Mr. MacGeehin in seeking payment out of the funds lodged in court.

(xxiv). Since the time when Mr. Molloy decided to seek to unravel the settlement, Mr. McNelis has been acting on the instructions of one director alone, without reference to the board of directors, and without any apparent consultation with the other directors. Draft affidavits and motions filed on behalf of the company were not shown to the other directors, nor was there any consultation with those other directors on legal strategy.

(xxv). Allegations against the directors' solicitor were launched on affidavit without exhibiting much of the relevant documentation, which would have shown those allegations to be unfounded, such documentation being in the possession of the first-named defendant's legal advisers at the time.

(xxvi). The affidavits of both Mr. Molloy and Mr. McNelis omitted much important material. I don't believe that there was any intention to mislead the court but this situation further illustrates how the trenchant views now being expressed are significantly coloured by what has happened since the original events.

(xxvii). I generally accept the evidence of Mr. MacGeehin and of Mr. McCaul and reject the evidence of Mr. Molloy and of Mr. McNelis where it differs. I do not cast doubt on the bona fides of the evidence of Mr. Molloy or Mr. McNelis, but as noted in a number of instances above, I consider that their recollections have unconsciously or inadvertently been coloured by the unravelling of the settlement and the general rancour that has emerged in this case."