



THE COURT OF APPEAL

Neutral Citation Number: [2022] IECA 120

Court of Appeal Record Nos. 2017/00191

2017/00490

2017/00491

Edwards J.

Kennedy J.

Binchy J.

BETWEEN/

ARNAUD GAULTIER

APPELLANT/

- AND -

THE REVENUE COMMISSIONERS, THE MINISTER FOR FINANCE, THE

COURTS SERVICE, THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgement of the Court delivered on the 27th day of April 2022 by Mr Justice Edwards.

Introduction

1. This judgment is in respect of three appeals by the appellant against various Orders of the High Court made on foot of motions brought and heard in these proceedings. The three appeals were sensibly heard together for the convenience of the court, the parties and to minimise legal costs. Later in this judgment we will identify each of the motions leading to the Orders under appeal in chronological order, and address the issues raised in the appeals.

However, before doing so we consider that it will be helpful to gain an understanding of the context in which these motions were brought and heard, to set out the background to the proceedings, and (to the extent relevant) the procedural history of this and some related litigation.

Background and relevant procedural history

2. Between them, the submissions of the parties set out a reasonably comprehensive account of the background and procedural history and we draw on those submissions and previous court judgments, for the purposes of the following summary.

3. At the outset, however, it should be identified that central to many of the controversies in this and related litigation is a longstanding rule of law, traceable back to 1843 at least, in the English case of *Foss v. Harbottle* (1843) 2 Hare 461, that the proper plaintiff for a wrong done to a company, is the company itself; and the related rule, established in so far as this jurisdiction is concerned in *Battle v. Irish Art Promotion Centre Limited* [1968] I.R. 252, that a limited company cannot be represented in court proceedings by its managing director or other officer or servant. It is no longer possible to express what lawyers had come to refer to as the “rule in *Battle*” in such absolute terms following a recent nuancing of it by the Supreme Court in *Allied Irish Bank Plc v. Aqua Fresh Fish Ltd* [2019] ILRM 19. Nevertheless, the general rule (to which it is now, post the *Aqua Fresh Fish* case, accepted that exceptions may be permitted on a discretionary basis in exceptional circumstances) remains to the effect that a company cannot sue as a self-represented litigant (i.e., unrepresented by a lawyer), or be represented by a shareholder or director, or other interested party.

4. The appellant was a director and sole member of a company, now dissolved, called Loire Valley Limited, (hereinafter "the Company"), incorporated in the State on the 15th of June 2005. The Company's business was the importation of wine into the State. In the course

of 2006, the Company appears to have imported wine, which was lodged in a bonded warehouse. On the closure of that warehouse, the Revenue Commissioners (i.e., the first named respondent) detained the Company's wine on the 25th of August 2006, and served a notice of seizure on the Company.

5. The Company maintained that the detention and seizure had been effected unlawfully. Arising from this, the first named respondent, on a without prejudice basis, made a payment of €25,000 to the Company. After further discussions a further cheque payable to the Company in the amount of €80,000 was tendered, again on a without prejudice basis, to the appellant in his capacity as an officer of the Company, but it was never cashed. A subsequent offer to pay the Company the sum of €85,000 in full and final settlement of any liability in the matter was not accepted by the Company.

6. Notwithstanding that there had been unsuccessful efforts to negotiate a settlement, it remained open to the Company to attempt to sue the party (or parties) that it considered to have been guilty of unlawful action(s), and to have caused it loss or damage in consequence thereof, in civil litigation.

7. It appears to be common case, and accepted by all concerned, that if the Company had a potentially good claim arising from unlawful action taken by the Revenue Commissioners, the applicable limitation period would have been six years from the accrual of the cause of action. As the alleged unlawful action by the Revenue Commissioners had occurred on a date in August 2006 (the precise date in August is unclear on the paperwork before us), the six-year limitation period would therefore have elapsed on the corresponding date in August 2012.

8. However, on the 6th of April 2012, the Company was dissolved, by virtue of being struck off the Register of Companies for failing to file returns. This occurred in circumstances where no legal action against anybody arising out of the events of August 2006

had been commenced by the Company up to that point in time. This was not necessarily a fatal development in terms of any potential claim. Although the time available within which to do so was tight *qua* the impending expiration of the limitation period, it was open to the appellant, as the sole member, to seek to have the Company restored to the register by invoking a well-established statutory procedure. Regrettably from his perspective, he did not opt to do so.

9. Instead, the appellant first sought to issue High Court proceedings against the Revenue in the name of the Company notwithstanding that it stood dissolved and, according to the appellant, the Central Office refused to accept them (we infer this was because the Company was not legally represented). The appellant then applied to the High Court for leave to issue his intended proceedings on behalf of the Company. This application was heard by Laffoy J. on the 18th of June 2012, and the application was refused on *Battle* grounds.

10. Next, the appellant brought proceedings by way of judicial review seeking to quash the Order of the Registrar striking off the Company. He was granted leave to apply on the 5th of July, 2012. Pending the hearing of the substantive application in due course, the appellant then brought a motion, dated the 18th of July 2012, in those proceedings which, although the appellant later claimed he was only seeking to amend his Statement of Grounds to include a claim for interim or interlocutory injunctive relief, was interpreted by the High Court (Murphy J.) as actually seeking an interim or interlocutory injunction to compel the restoration of the Company to the Register on an interim basis. That motion was refused on the 19th of July 2012.

11. The appellant subsequently appealed to the Supreme Court against the refusal of his said motion (Supreme Court Appeal No 353/2012), but the Supreme Court took the view that the issues were moot on the basis that if the intention had been to seek an injunction pending the hearing of the substantive action, that point in the proceedings had been passed and

interim/interlocutory injunctive relief could no longer benefit Mr Gaultier; and if the intention had been to seek to amend the Statement of Grounds in the manner suggested, such an amendment had been entirely unnecessary as Mr Gaultier had already been granted leave to seek such relief. See the judgment of the Supreme Court in *Gaultier v. Registrar of Companies; The Revenue Commissioners, The Minister for Finance and Loire Valley Limited, Notice Parties* (O'Donnell J.) [2019] IESC 89 paras 6 to 28 inclusive.

[Note: this was the first matter dealt with in a conjoined judgment in respect of three separate but related appeals.]

12. The appellant's immediate response to the High Court's refusal on the 19th of July 2012 of his motion for interim/interlocutory injunctive relief in the judicial review proceedings was to change tack and again seek to be allowed to issue his intended Plenary Summons proceedings on a different legal premise. To that end, he applied *ex parte* to the High Court on the 31st of July 2012 in a matter entitled *In the matter of Arnaud D Gaultier and the Companies Acts 1963 – 2009*, seeking that the court would vest in him the powers under s.231(1) of the Companies Acts 1963 – 2009, including the power “*with the sanction of the court or of the committee of inspection – (a) to bring or defend any action or other legal proceeding in the name and on behalf of*” the Company. The High Court (Laffoy J.) refused to do so, essentially on the basis that the circumstances of his case did not engage s.231(1) in circumstances where the Company was not being wound up by the court, and where there was no official liquidator in place, and again applying the *Battle* jurisprudence.

13. The appellant subsequently appealed to the Supreme Court against Laffoy J.'s decision of the 31st of July 2012 refusing to grant his said *ex-parte* application (Supreme Court Appeal No 449/2012). In doing so he argued, *inter alia*, that s.231(1) was engaged in the circumstances of his case as he was entitled to rely on Directive 2009/102/EC. The Supreme Court viewed his claim as “*entirely misconceived*” and O'Donnell J., in giving

judgment for that court, opined that the decision of Laffoy J. “*was impeccable as a matter of law.*” See the judgment of the Supreme Court entitled *In the Matter of Loire Valley Limited and The Companies Acts 1963-2009* (O’Donnell J.) [2019] IESC 89 paras 29 to 40 inclusive.

[Note: this was the second matter dealt with in the previously mentioned conjoined judgment in respect of three separate but related appeals.]

14. A further detail in the background that requires to be appreciated is that, in circumstances collateral to the Company’s dispute with the Revenue Commissioners, a bank guarantee that had earlier been provided by Allied Irish Banks Plc (“the bank”) to the Revenue Commissioners on behalf of the Company was withdrawn by the bank on the 10th of August 2006, with the bank also exercising its contractual right to close the Company’s account at the relevant branch of the bank from close of business on the 29th of August 2006. Further, a direct debit in favour of the Revenue Commissioners pursuant to a pre-existing deferred payment arrangement entered into between the Company and the Revenue Commissioners was also cancelled by the bank. Arising from all of this, the appellant sought on the 9th of August 2012 (one day before the expiry of the ostensibly applicable limitation period in respect of any possible cause of action that the Company might have against the bank) to issue proceedings by Plenary Summons against the bank, both in his own name and in the name of the Company, claiming damages for breach of contract, negligence and breach of duty. Once again, the Central Office refused to accept his proceedings because one of the proposed plaintiffs was a limited company which was not represented by a lawyer, applying, in this respect, the *Battle* jurisprudence.

15. The appellant’s next move was to then apply *ex parte* to the High Court, at a vacation sitting also on the 9th of August 2012, for leave to be allowed to issue the said Plenary Summons. The matter was dealt with by De Valera J. who ultimately made no order, opting instead to explain the legal difficulty arising to the appellant and to urge upon him that he

should retain the services of a solicitor for the purpose of filing the intended proceedings. The appellant then appealed the High Court's decision to make no order (in terms of its practical effect it was a refusal of the *ex parte* application) to the Supreme Court (Supreme Court Appeal No 450/2012). In doing so, he asked the Supreme Court to reverse the decision in *Battle*, notwithstanding that the Supreme Court had recently considered it in *Allied Irish Bank Plc v Aqua Fresh Fish Ltd* [2019] ILRM 19 and had said that the rule in *Battle* continued, in general, to apply. He also contended that even if *Battle* was good law he should have been allowed to issue his Plenary Summons in circumstances where the *Aqua Fresh Fish* decision had indicated that, while the general rule remained, there was an inherent jurisdiction to permit an individual to appear on behalf of a company which could be availed of in exceptional circumstances.

16. It is unnecessary for the purposes of this sketch of the background to the present proceedings to review in any more detail the arguments canvassed before, and considered by the Supreme Court. They are to be found in the judgment of the Supreme Court in *Gaultier and Loire Valley Limited v Allied Irish Banks Plc* (O'Donnell J.) [2019] IESC 89 from paras 41 to 76 inclusive.

[Note: this was the third matter dealt with in the previously mentioned conjoined judgment in respect of three separate but related appeals.]

17. It is sufficient to state that the Supreme Court allowed the appellant's appeal against the order of De Valera J. of the 9th of August 2012 refusing him leave to issue proceedings and set aside the High Court's order. It did so on the basis that, once it was accepted that there is a jurisdiction to permit an individual to appear and represent a company, even in exceptional circumstances, it must follow that the practice of a blanket refusal to permit the issuance of proceedings, or indeed the entry of appearance to such proceedings, by or on behalf of a company was too rigid. Even though it was felt necessary to allow the appeal and

to set aside the order of the court below on the basis that the law should be scrupulously applied, O'Donnell J. went on to observe [at para 71], that "*for... the reasons already touched on, that can have no practical or beneficial consequence, and if Mr Gaultier were now to issue the proceedings they would appear doomed to failure on multiple grounds.*"

18. It is necessary at this point to step back again in the chronology and to state that following the High Court's refusal of the appellant's motion for interim/interlocutory injunctive relief in the judicial review proceedings seeking to quash the Order of the Registrar of Companies striking off the Company for failure to file returns (and there being no stay on the substantive proceedings pending the previously mentioned appeal to the Supreme Court in respect of the refusal of the motion) the substantive judicial review action proceeded in due course before the High Court. In the course of applying for the substantive relief he was seeking the appellant alleged, *inter alia*, that the reason for the striking off of the Company was to obstruct the Company in the (Plenary Summons) proceedings it contemplated against the Revenue Commissioners. The application was refused. See *Gaultier v. The Registrar of Companies* [2013] IEHC 111. The High Court judge (Dunne J.) in her written judgment delivered on the 8th of March 2013, found:

"There is simply no evidence to support this allegation made by the applicant. It is a disgraceful and scurrilous allegation and one that should not have been made."

19. The appellant then appealed the High Court's said decision and judgment to this Court. That appeal was dismissed as unmeritorious and lacking in substance, with the Court of Appeal placing considerable emphasis on the availability to the appellant of another remedy, namely the normal legislative procedure for restoration of a company to the Register - see the judgment of McGovern J. in *Gaultier v. Registrar of Companies* [2019] IECA 210.

The present proceedings

20. The present proceedings, which bear record no 2012/2487P, were commenced by Plenary Summons dated the 22nd of August 2012, with the appellant as plaintiff and naming the six respondents to this appeal herein as defendants; while also naming the Comptroller and Auditor General as a first named Notice Party, and further purporting to name the Company as a second named Notice Party. It bears observation that the purported naming of the Company as a Notice Party would have had no legal effect as the Company had been struck off the Register by that stage and was therefore a non-existent legal entity.

21. The appellant claims that he had attempted earlier on the 22nd of August 2012 to issue a Plenary Summons with both himself and the Company named as co-plaintiffs, and further, naming the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General as defendants, and with the Comptroller and Auditor General as (the sole) Notice Party, but that the Central Office had refused to accept it (again, we infer, on *Battle* grounds), thus necessitating a reframing of the intended proceedings, and their issuance in the present form. This claim is apparent from paragraph 31 of the affidavit sworn by the appellant on the 22nd of August 2012 in verification of the Plenary Summons actually issued on that date in the present proceedings. It is against that background that the Courts Services and the Minister for Justice came to be named as the third and fourth named defendants in the present (re-framed) proceedings.

22. The appellant's claim, as pleaded in the General Indorsement of Claim to his Plenary Summons, has twice been amended. The circumstances giving rise to the need perceived by the appellant to amend are not relevant to the issues arising on this appeal. However, in its final amended form (filed on the 3rd of December 2013, which post-dated the earlier delivery of a Statement of Claim to the first named respondents on the 22nd of October 2012) the appellant's General Indorsement of Claim variously alleges causes of action against the first and second named defendants comprising claims in negligence, breach of duty (including

statutory duty), malfeasance, nuisance, detainee, and fraud, with accompanying particulars arising, *inter alia*, out of the seizure, detention and storage of stock belonging to the Company by the first and second named defendants and their alleged refusal “*to redress*” the Company “*in a timely, fair and diligent manner.*”

23. In a table prepared by reference to each heading, he refers on several occasions to the wrongful seizure of the stock of the second named notice party i.e., the Company. So, for example, under the heading of breach of statutory duty he states: “*By unlawfully seizing the stock of the second named notice party in total mala fides....*” and under the heading of “*malfeasance*” he claims: “*by wrongfully detaining the stock of the second named notice party....*”

24. However, under the heading of “*damages for depriving of goods*” he states, “*wrongfully depriving the plaintiff of goods after requesting the plaintiff to transfer the ownership of such goods from the second named notice party onto himself.*”

25. The amended General Indorsement of Claim further pleads that by reason of these matters “*the plaintiff and his company, the second named notice party, have been caused to suffer loss, damage, inconvenience and expense together with economic loss and damage on the plaintiff and his company’s reputation.*”

26. It then goes on to allege, in paragraph 2A, causes of action against the third, fourth, fifth and sixth named defendants, comprising claims of breach of statutory duty and denial of justice, which are particularised as “*unlawfully refusing the filing of Plenary Summons and Grounding Affidavit*”, “*failing to have in place relevant structure for allowing proper access and administration of justice*” and “*by making access to justice conditional to funding, seemingly against the bare notion of justice.*”

27. It is pleaded in paragraph 2B that by reason of these matters, “*the plaintiff has suffered excessive stress and was statute-barred against the wrongdoing of the first named defendant made against the second named notice party in July and August 2006.*”

28. The reliefs claimed in common against all defendants include general damages of €450,000, interest pursuant to statute, and costs. However, there is also a claim against the first named defendant specifically for an injunction to compel the payment of the further specified sum of €250,000 “*for ending the increased of its liability (sic) towards the plaintiff and second named notice party, allowing immediate redress and objective valuation of their respective losses.*” In addition, various orders of *mandamus* (notwithstanding that these are not judicial review proceedings) are purportedly claimed against the third, fourth, fifth and sixth named defendants. It is unnecessary to specify every one of the many orders of *mandamus* claimed as relief. However, amongst them, *mandamus* is sought directing the hiring of an independent loss adjuster to value the cost of compensating the plaintiff. Further, orders in that respect were sought against the first, second, third, fourth and fifth defendants [i.e., the Revenue Commissioners, the Minister for Finance, The Courts Service, the Minister for Justice and Ireland] seeking (*inter alia*) to compel each of them to issue a public apology for their actions, to be published in French and English, in two national newspapers in France and in Ireland respectively.

29. The prayer for relief then goes on, at paragraph 4, to claim yet further relief (both in the form of payment of sums by way of damages, and pursuant to orders of *mandamus*) specifically for the benefit of the second named Notice Party, i.e., the Company.

30. The appellant (i.e., as plaintiff) served a Statement of Claim on the first named respondents (i.e., the first named defendant) on the 22nd of October 2012. It will be noted that this pre-dated the amended Plenary Summons filed on the 3rd of December 2013. However, the Statement of Claim served on the first named respondent was never amended or adjusted

notwithstanding that substantial changes had been made to the General Indorsement of Claim in the final iteration of the Plenary Summons. No Statement of Claim was delivered to, or served upon, the second to sixth named defendants [i.e., the second to sixth named respondents].

31. What is clear, however, from the final iteration of the General Indorsement of Claim to the plaintiff's Plenary Summons, and from the Statement of Claim served on the first named respondent only, is that the plaintiff's claims against the first named respondent arise directly out of that party's seizure of the Company's wine on the 26th of August 2006, while his claims against the remaining respondents appear to relate to his inability to have the Company named as a co-plaintiff with him in the proceedings, in circumstances where it was not being legally represented. The further metaphorical "elephant in the room", namely that by the time the present proceedings were issued the Company was a non-existent legal entity by virtue of being struck off the Register of Companies, is simply not alluded to or in any way addressed in either the plaintiff's (i.e., the appellant's) pleadings or in his verifying affidavit.

32. Be that as it may, the next event of relevance is that by a Notice of Motion dated the 24th of July 2013, the second to sixth named respondents applied to strike out the appellant's proceedings against them for failure to serve a Statement of Claim on them. The Master of the High Court granted an extension of time in which to do so, with costs to the moving parties. However, as already stated, no Statement of Claim was ever served on them. A subsequent appeal from the Master in respect of the award of costs was dismissed by the High Court (Cross J.) on the 24th of February 2014.

33. There then followed a period of inactivity in the proceedings until 2016. However, activity was renewed by the appellant by his issuance of a motion on the 9th of February

2016, being the first in time of the three motions the outcomes of which are the subject matter of this appeal. I will come back to this.

34. Before doing so, however, it is appropriate to further record that in the late autumn of that same year the appellant, prompted by some form of revenue enforcement action that was threatened, or possibly attempted, by the first named respondents (i.e., the Revenue Commissioners), issued a further Notice of Motion in these proceedings, dated the 6th of October 2016, and initially returnable for the 14th of November 2016, claiming (*inter alia*) what amounted to an interlocutory injunction to restrain the first named respondents, their servants or agents, from entering his home and property. As we understand it, although initially returnable for the 14th of November 2016, this motion did not proceed on that date. Rather, it was adjourned from time to time but was ultimately listed for hearing on the 6th of July 2017, the same date upon which were listed the second and third motions in time the outcomes of which are the subject matter of the present appeal. As will be explained in more detail later in this judgment those were motions brought by the respondents seeking to have the appellant's proceedings dismissed or struck out on various legal grounds. Our understanding is that the High Court opted to deal first with those motions to dismiss in the following circumstances, as recorded on the transcript of the proceedings:

MR JUSTICE NOONAN: I suppose take them in the order in which they were issued unless anybody says anything to the contrary. Mr Gaultier, is your motion the first?

MR GAULTIER: I would prefer my motion to be heard last.

MR JUSTICE NOONAN: That is fine. I will hear the others first then.

Taking the motions to dismiss first meant that if they were successful the appellant's motion for injunctive relief would simply fall away. This was a procedural decision which the judge was entitled to make. Moreover, it accorded with the appellant's expressed wish in regard to the order in which the motions should be heard. Given that the appellant agreed to the

proposed order in which the motions should be heard, it is difficult to understand how he can now hold a grievance in respect of the judge's decision in that respect. In circumstances where both motions to dismiss were in fact successful, resulting in the dismissal of the underlying proceedings, the inevitable consequence was that the plaintiff's motion for injunctive relief would fall away (once judgment on the motions was given) and that being the case, no hearing in respect of it was embarked upon. Moreover, as we shall see, the High Court was of the view in any event that the appellant's motion had no connection at all to the subject matter of the proceedings, and accordingly was misconceived and would have to be dismissed irrespective as to the outcome of the motions to dismiss/strike out the substantive proceedings.

35. Returning to the legal and procedural events central to, and of paramount interest in, the present appeals, what we are concerned with are three motions, issued on various dates in 2016 and 2017, the outcomes of which are the subject matter of this appeal. We will now proceed to identify and particularise each of them in chronological order, and later in the judgment we will examine how each one was dealt with respectively before going on to address the issues raised in each respective appeal.

The Motions leading to the Orders under Appeal.

Motion dated 09/02/2016 resulting in the Order of 03/04/2017

and giving rise to the first appeal – record no: 2017/00191

36. The first appeal is against the Order of the High Court (O'Connor J.) made on the 3rd of April 2017 (appeal record no 2017/00191) refusing the appellant's application on foot of a Notice of Motion dated the 9th of February 2016 for the following relief:

“1. An Order pursuant to Rule 1 (15) of Order 63 of the Rules of the Superior Courts to change the name of the Affidavit of Arnaud D Gaultier setting ground of

Plenary Summons filed on the 22nd day of August 2012 to Statement of Claim in Order to reflect its true nature and content.

2. *An Order pursuant to Rule 1 (14) of Order 63 of the Rules of the Superior Courts to change the name of the Affidavit of Arnaud D Gaultier setting ground of Plenary Summons filed on the 22nd day of August 2012 to Statement of Claim in order to reflect its true nature and content.*

3. *Such further or other Order as this Honourable Court deems fit.*

4. *An Order providing for the costs of this application and the proceedings to date.”*

37. The costs of the unsuccessful motion were further awarded to the respondents, and the appeal is also against that award of costs.

38. This was a somewhat unorthodox motion, indeed it was characterised by the High Court judge who heard it as “*a curious application*”, the ostensible purpose of which seems to have been to persuade the Court to deem the affidavit which the appellant had sworn on the 22nd of August 2012 in verification of his Plenary Summons, to be a Statement of Claim. Quite what might have been the thinking behind this attempted procedural step is far from clear, although in circumstances where the appellant was in default in delivering a Statement of Claim to the second to sixth named respondents, notwithstanding having had time extended already within which to do so, and the extended period having run out, he may have been reasonably anticipating that he would have difficulty in obtaining either consent to, or a further extension of time permitting the late filing of a Statement of Claim at that stage, and had believed that what he was attempting to do would enable him to effectively sidestep that difficulty.

39. This motion, which was opposed both by counsel for the first named respondent and by counsel representing the second to sixth named respondents, came on for hearing on the 3rd of April 2017. The High Court judge (O'Connor, J.) refused the application stating:

“This Court is not an adviser, it has to be seen to be independent of both parties. If a party comes to court as a lay litigant and is faced with somebody who has legal representation, well the party who has legal representation is not disadvantaged as a result of the plaintiff saying, ‘I’m a lay litigant and I don’t understand the procedures.’ Mr Gaultier has, in this Court’s view, adopted an incorrect procedure to try and circumvent the necessity to deliver a statement of claim. Other than commenting that there may be ways around this, I don’t know, but the matter is listed, I note, for a motion to strike out on foot of the statement of claim delivered as against the Revenue Commissioners [this was a reference to the second in time of the three motions the outcomes of which are the subject matter of this appeal], and Ms McGovern, for the other defendants, has a motion to strike out the plaintiff’s claim for failure to deliver a statement of claim [this was a reference to the third in time of the three motions the outcomes of which are the subject matter of this appeal]. I repeat this Court is not in a position to advise Mr Gaultier and the procedure which he has adopted to try and seek the orders in this particular case are inappropriate and I will refuse the order sought.”

40. The costs of defending the unsuccessful motion were awarded to the first named respondent, and to the second to sixth respondents, respectively, against the appellant.

41. The appellant has now appealed to this court against the refusal of his motion and the award of costs against him.

Motion dated 21/12/2016 resulting in the Order of 06/07/2017

and giving rise to the second appeal – record no: 2017/00490

42. This was the second in time of the three motions, the outcome of which is the subject matter of this appeal. The moving party in this instance was the first named respondent who by a Notice of Motion dated the 21st of December 2016, sought an Order pursuant to Order 19, Rule 28 of the Rules of the Superior Courts that the appellant's action against the moving party be dismissed on the grounds that it disclosed no reasonable cause of action and/or that the claim was unnecessary, misconceived in law, frivolous or vexatious, and/or stood no reasonable prospect of success.

The Affidavit Evidence

43. The motion was grounded upon an affidavit of one David Callinan sworn on 16th of December 2016 and filed on the 21st of December 2016 which affidavit was replied to by an affidavit of the appellant sworn on the 20th of June 2017 and filed on the 21st of June 2017.

44. In his said grounding affidavit, Mr. David Callinan, solicitor for the first respondent concisely summarised the pleadings and the nature of the claim made by the appellant. He then proceeded to submit that even if every one of the allegations of fact contained in the General Indorsement Of Claim and Statement of Claim were true, they could not ground a cause of action by the appellant. This is because, he submitted, the proceedings clearly state that the wine seized by the first named respondents was the property of the Company. He then proceeded to make further submissions as to the principle of law that no cause of action vests in a shareholder for damage to a company of which he is a shareholder. He further submitted that it is also well established that no cause of action vests in a shareholder for diminution in the value of his or her shareholding in a company due to damage to the company. He submits that on an analysis of the pleadings in these proceedings, the claim of the appellant is an attempt by an individual to bring proceedings on behalf of a company and is bound to fail.

45. In his said replying affidavit, the appellant submitted that the affidavit of Mr. Callinan did not comply with O.40, r. 4 of the Rules of the Superior Courts because paras. 4, 13 and 24 thereof are based upon the beliefs of Mr. Callinan. He also submitted that Mr. Callinan had referred to the originally issued Plenary Summons in error, instead of referring to the amended Plenary Summons.

46. The appellant averred that at the time of seizure of the wine by the first named respondents, it was “*commercially owned by Loire Valley Limited, second named notice party in these proceedings, but half of it was legally owned by Loire Valley Limited’s suppliers, as invoices showed a retention of title clause.*” He avers as to the dissolution of the Company which he claimed was dissolved by the companies’ registration office “*for the benefit of the first and second named defendants.*”

47. The appellant averred that the proceedings had been issued both on his own behalf and on behalf of the Company. He averred that on his own behalf he was seeking reliefs identified at paras. 3 (ii), (iv) and (v) of the amended General Indorsement of Claim and on behalf of the Company, reliefs are sought in paras. 4 (vii), (viii) and (ix) of the amended General Indorsement of Claim. He acknowledges in the next paragraph that the Statement of Claim served on the first named respondents “*is due to be amended*”. (We note that this was never done.)

48. The appellant avers that the suppliers of the company gave him authority to negotiate with the first named respondents and he exhibits in this regard an email from a director of Cave Saint VERNY authorising the appellant to represent that entity in negotiations. He also exhibits a letter from another enterprise, namely Gitton Père & Fils dated the 2nd of June 2008, in which it is stated both in French and in English: “*following our earlier phone conversation, we confirm the transfer of the ownership of all wine collected by you before 31st August 2006 and invoiced to Loire Valley Limited. This ownership is transferred to*

LoEire Développement – 152, Avenue Patton – 49100 Angers – France. This transfer does not affect any debt due by Loire Valley Limited for the same wine.” He does not, however, exhibit any retention of title clause from either Cave Saint VERNY or Gitton Père et Fils.

49. The appellant averred that as a result of the letter received from Gitton Père et Fils half of the wine seized became the property of LoEire Development, which is a business name of the appellant himself and accordingly he avers that he is the legal owner of half of the wine that was seized. He further averred that the first named respondents have been aware of this since the affidavit that he swore at the time of the issuing of his proceedings, on 22nd August 2012.

50. The appellant averred that the reason that he filed the proceedings in his name is because the third named respondent “refused to allow me to file such in the name of a company”. This is the reference to his claim that the Courts Service refused to allow him to issue a summons in the name of the Company on the basis that such a summons could only be issued by a solicitor acting on behalf of the company.

51. The appellant further averred that the Company is a single member company of which he is the full owner. He averred that the Companies Acts are in contravention of Article 1 of the 1952 protocol of the European Convention on Human Rights unless the dissolution (of the Company) entitled any member of the Company to defend the interests of the Company during its dissolution. He submitted that the principle of law that no cause of action vests in a shareholder for diminution of one’s shareholding in a company or damage to a company of which he is a shareholder does not apply to a single member company.

The Hearing of the Motion

52. The motion came on for hearing before the High Court (Noonan J.) on the 6th of July 2017, (when it was heard in parallel with a motion brought by the second to sixth named

respondents i.e., the third in time of the three motions the outcomes of which are the subject matter of this appeal), and the motion was granted.

53. Predictably, the first named respondents relied heavily, although not exclusively, on the rule in *Foss v. Harbottle*, in support of their motion, contending that any potential cause of action against them would have been that of the Company and not the appellant.

54. A single judgment, running to eleven pages, was delivered by the High Court judge on the 6th of July 2017 dealing with both motions. See *Gaultier v. The Revenue Commissioners, The Minister for Finance, The Courts Service, The Minister for Justice, Ireland and The Attorney General* [2017] IEHC 439.

55. In so far as the said judgment of the 6th of July 2017 dealt specifically with this motion, the High Court judge stated (*inter alia*):

“14. By any objective analysis of both the original and amended plenary summons and the statement of claim, the claim being maintained by the plaintiff in these proceedings is clearly a claim that could only have been maintained by the Company if it existed, but of course it had ceased to exist before these proceedings were ever instituted as the plaintiff must have known....

15. It is of course settled law since the middle of 19th century that a member or director of a company cannot maintain a claim on behalf of the company. This is the rule in Foss v. Harbottle (1843) 2 Hare 461. Its application has never since been doubted and it continues to be applied in our courts – see for example McAteer v. Burke [2015] IECA 215. The rationale for the rule is straightforward. A party cannot bring proceedings in respect of a wrong suffered by another party.

16. Even if the pleadings could be interpreted as a claim by the plaintiff for losses suffered personally by him as a result of the damage to the company, such as a diminution in the value of his interest therein, such a derivative claim is equally one

that cannot be maintained in law and is bound to fail – see O’Neill v. Ryan [1993] ILRM 557 and Flanagan v. Kelly [1999] IEHC 116.

17. In the course of his submissions both oral and written to the court, the plaintiff sought to argue that in 2008, after the events the subject matter of the proceedings, he became the owner of the wine in question and this was an answer to the defendant’s motions. As I understand his argument, the wine was originally supplied subject to a retention of title clause in favour of the French supplier. The wine was not paid for by the Company and thus title to it continued to vest in the supplier. The plaintiff alleges that the supplier transferred title to part or all of the wine to the plaintiff in 2008.

18. If that were so, it is surprising to say the least that the plaintiff issued proceedings four years later in which he pleaded, and indeed swore on affidavit, that the wine belonged to the Company. It also fails to explain how the Company accepted a payment from the Revenue in respect of the wine. However this allegation is immaterial to the issue with which I am concerned which is whether the case as pleaded discloses a cause of action against any of the defendants. Insofar as a claim in respect of the seizure of the wine is concerned, I am satisfied that no sustainable cause of action has been made out on the pleadings. Insofar as this is the only claim extant against the Revenue, it is clearly frivolous and vexatious and bound to fail.”

56. The first named respondents, having been successful in having the action dismissed as against them, were awarded the costs of the action to include the costs of the motion.

57. The appellant has now appealed to this court against the dismissal of his action against the first named respondents and the award of costs against him.

Motion dated 09/01/2017 resulting in further Order of 06/07/2017

and giving rise to the third appeal – record no: 2017/00491

58. This was the third in time of the three motions, the outcome of which is the subject matter of this appeal. The moving parties in this instance were the second to sixth named respondents who by a Notice of Motion dated the 9th of January 2017 sought to have the appellant's proceedings against them struck out/dismissed on various grounds. It sought:

“2. An Order pursuant to Order 19, Rule 28 of the Superior Court Rules striking out the Plaintiff's claim on the grounds that it discloses no reasonable cause of action and is frivolous or vexatious.

3. An Order striking out the Plaintiff's action for the reasons set out in the above paragraphs pursuant to the inherent jurisdiction of this Honourable Court.

4. An Order striking out the Plaintiff's proceedings against [the moving parties] by reason of the failure on the part of the Plaintiff to deliver a Statement of Claim to these parties.

5. An Order pursuant to the inherent jurisdiction of this Honourable Court striking out the proceedings herein on the grounds that the Plaintiff has failed to comply with [the court's previous order to deliver a Statement of Claim by a specified date].

6. Further or in the alternative, an Order pursuant to Order 122, Rule 11, striking out an/or dismissing the proceedings herein for want of prosecution.

7. Further or in the alternative, an Order pursuant to the inherent jurisdiction of this Honourable Court dismissing the proceedings herein on the grounds of inordinate or inexcusable delay on the part of the Plaintiff.

8. Further or other orders.

9. Costs.”

(We would observe that the relief claimed at point “7” was pleaded in erroneous terms, in as much as the jurisprudence based on *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459

makes clear that an applicant for a dismissal needs to establish (*inter alia*) that the delay being relied upon was *both* inordinate and inexcusable. In other words, these are conjunctive requirements rather than alternatives. However, they are referred to as though they were alternatives in point “7” of the Notice of Motion. However, notwithstanding this pleading error, nothing ultimately turned on it because, as we shall see, the High Court judge was in any case satisfied that the evidence before him established that the delay was both inordinate and inexcusable.)

The Affidavit Evidence

59. The motion was grounded upon an affidavit of one Miriam Glynn sworn on the 5th of January 2017 and filed on the 9th of January 2017, which affidavit was replied to by an affidavit of the appellant both sworn and filed on the 21st of June 2017.

60. In her said affidavit, Ms Glynn, a Solicitor in the office of the Chief State Solicitor, referred to the appellant’s failure to deliver a Statement of Claim to the second to sixth named respondents notwithstanding numerous requests to him to do so in correspondence, which was exhibited. She further referred to the earlier motion in 2013 in which the appellant had been granted an extension of time until the 20th of January 2014 within which to file the outstanding Statement of Claim and confirmed that he had failed to do so notwithstanding having been granted the said extension. She alluded to the negotiations between the Revenue Commissioners and the Company in relation to the seizure of wine in 2006 and to the fact that €25,000 had already been paid to the Company for any loss sustained by it, and two further offers of compensation in respect of detention of the wine which had been rejected. The Company had refused those offers in 2008 but had not initiated proceedings. In the circumstances the delay was fatal in Ms Glynn’s contention.

61. Ms Glynn went on to depose to the fact that the Company had subsequently, and before issuing any proceedings, been struck off for failing to file returns. She referred to the

judicial review proceedings taken by the plaintiff seeking to have the Order of the Registrar of Companies quashed and she exhibited the judgment of the High Court (Dunne J.) of the 8th of March 2013. She asserted that the appellant had only commenced his proceedings three days before the sixth anniversary of the alleged wrongful acts by the first named respondents. Moreover, the appellant's delay in the commencement and prosecution of his proceedings would highly prejudice the second to sixth named respondents because they could not seek security for costs in the circumstances of the case.

62. Ms Glynn further averred that the appellant's action was frivolous and vexatious in circumstances where the appellant as an individual has no cause of action relating to the alleged unlawful seizure of wine in the ownership of the Company, and in circumstances where his judicial review proceedings had been unsuccessful. The same was true she maintained with respect to the case in so far as it concerned the Courts Service and the Minister for Justice, contending that in any case it would not have been possible for a dissolved company to issue proceedings. She contended that the appellant had no *bona fides* cause of action against the second to sixth named respondents in the circumstances. She concluded by contending that the matter was also statute barred.

63. In his replying affidavit Mr Gaultier again asserted that the moving parties deponent, Ms Glynn, had asserted beliefs without stating the basis for them thereby, in his belief, contravening Order 40 Rule 4 of the Rules of the Superior Courts.

64. In terms of substantive engagement with Ms Glynn's averments the appellant disputed that he had been guilty of delay in the delivery of a Statement of Claim, asserting and understanding on his part that a Statement of Claim was equivalent to a Grounding Affidavit (which he had filed). His stated basis for that understanding was that counsel for the first named respondents had told him that that was so outside the courtroom on the 23rd of January 2017.

65. In terms of the claim being made more generally with respect to delay he pointed to reasons set out in a document exhibited, as exhibit F to his affidavit, entitled Synopsis of Litigation and Personal Life. He took issue with the contention that his proceedings were frivolous and vexatious. He asserted that the fact that the Company remained dissolved “did not make it right” and pointed out that his unsuccessful judicial review proceedings against the Registrar of Companies were under appeal. He disputed that he had no cause(s) of action against the third and fourth named respondents, pointing to the celebrated passage from the judgement of O’Dalaigh J. in *The State (Quinn) v Ryan* [1965] I.R. 70 where that learned judge had said (*inter alia*) that it was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. He maintained he had a case against all of the respondents and that the motion should be refused.

66. In his concluding paragraphs he advanced a number of legal points, namely that the Company was a single member company and that he was the rightful owner of that company. Further, the fact that it was dissolved should not prevent a member, officer or creditor from bringing litigation in the name of the company. Further, he maintained that according to the law as it presently stands, when the Company was dissolved all of the assets of the company were vested in the second named respondent pursuant to the State Property Act 1954 and all of the Company’s liabilities vested in him. He contended that this was “wrong” and that the relevant provisions of the Companies Acts amounted to an infringement of article 1 of the 1952 protocol to the European Convention on Human Rights.

The Motion Hearing

67. The motion came on for hearing before the High Court (Noonan J.) on the 6th of July 2017, when it was heard in parallel with the previously mentioned motion brought by the first named respondents, and the motion was granted.

68. Dealing with this motion in the aforementioned judgment of the 6th of July 2017, the High Court judge commenced by observing that:

“20. The only outstanding claim is one apparently against the second to sixth defendants arising from the plaintiff’s alleged inability to institute proceedings on behalf of the company. In this regard, it is well settled since the decision of the Supreme Court in Battle v. Irish Art Promotion Centre Ltd [1968] I.R. 252 that a member or director of a company cannot purport to act on the company’s behalf in relation to proceedings in court.”

69. He continued:

“21. That this still represents the law is clear from the recent judgment of the Court of Appeal delivered by McKechnie J. in Allied Irish Banks Plc v. Aqua Fresh Fish Ltd [2017] IECA 77.

22. Of course even if there were any substance in the plaintiff’s complaint concerning his inability to issue proceedings on behalf of the company, it immediately falls away when it becomes evident that the company was dissolved and thus did not exist at the time the plaintiff complains he was not permitted to represent it.

23. In the case of the second to the sixth defendants, an additional ground of relief is claimed by them on the basis of failure to serve a statement of claim. ...”

70. The High Court judge then reviewed procedural history of the action in so far as it concerned the second to sixth named respondents, and the evidence before him on the issue of delay, and concluded that there had been both inordinate and inexcusable delay. He then continued:

25. Given that I have found that the delay was both inordinate and inexcusable, I must consider whether the balance of justice favours dismissal of the proceedings. There are many authorities for the proposition that delays of considerably less than those

that have occurred in this case can be assumed to give rise to prejudice by the mere passage of time. Even if this case were now to proceed to trial, it would be at least twelve years from the events complained of before that trial could take place.

26. Further, the manner in which the plaintiff has sought to litigate this matter without the involvement of the company, which would have been a proper party had it existed, has prevented these defendants from being in a position to seek security for their costs against the company. That is an additional potential prejudice that the court is entitled to take into account. Therefore, even apart from the reasons I have already explained why these proceedings should be dismissed, I am satisfied that the balance of justice would in any event require such dismissal as against the second to sixth defendants.”

71. The second to sixth named respondents, having been successful in having the action dismissed as against them, were awarded the costs of the action to include the costs of their motion to dismiss.

72. The appellant has now appealed to this court against the dismissal of his action against the second to sixth named respondents and the award of costs against him in favour of those parties.

Motion by the appellant seeking injunctive relief which was not dealt with

73. We have previously mentioned that the appellant harbours a grievance that his motion seeking injunctive relief was not heard in circumstances where he claims that the court was minded to accede to the motions to dismiss/strike out the appellants claims against the respondents. This is not in fact what happened and we deal with this later on. There is no appeal in being relating to the appellant’s said motion because, in circumstances where a hearing of his motion was never in fact embarked upon, and it simply fell away in

consequence of the dismissal of the underlying proceedings, there was nothing to appeal against.

74. For completeness, however, we feel it is appropriate to record certain *obiter* remarks made with respect to the appellant's motion by the High Court Judge in his judgment of the 6th of July 2017. He stated:

“27. For all the reasons identified above, I am of the view that these proceedings must be dismissed. This results in the plaintiff's injunction application falling also. However were it necessary to do so, I propose to consider briefly that application. It is an application by which the plaintiff seeks to injunct the Revenue sheriff from collecting unpaid taxes from the plaintiff. It has no connection whatsoever to the subject matter of these proceedings. There is no suggestion that the taxes due by the plaintiff are in any way related to the events described in the pleadings. Accordingly the application is entirely misconceived and would have to be dismissed even in the absence of the findings I have already arrived at in relation to the proceedings as a whole.”

The case management of the present appeals

75. Following the filing of the three appeals with which we are concerned the court, as is usual, endeavoured to case manage them in the normal way. In that respect they were listed from time to time in Court of Appeal case management lists and various orders were made and directions were given including directions as to the filing of submissions by specified dates.

76. In the course of the case management process the appellant brought a motion seeking the DAR of the hearing in the High Court before Noonan J. On 26th of July 2018, Irvine J. gave directions on the appeals and her Order as drawn and perfected reveals that she directed that “a CD of the audio of the hearing in the High Court before Noonan J. on 22 and 23 days

of June 2017 recorded on the Digital Audio Recording System be released to the parties.”

The CD in question was produced and was ultimately furnished to the appellant who was not satisfied with it because, although it covers the hearing of the motion under appeal, it does not cover the earlier call-over of the Non-Jury list in the course of which the case was assigned to Noonan J. The appellant maintained (and as we shall see continues to maintain) that the Order of Irvine J. as drawn did not accurately reflect his understanding of her direction with respect to the provision of the DAR, because it referred to “*a CD of the audio of the hearing*”, which *prima facie* excludes the call-over of the non-jury list. The appellant was, and remains adamant, that Irvine J. had in effect ordered that he be provided with any DAR from the date in question concerning dealings with his cases in any way. (As it later transpired, the DAR had not in fact been recording during the call-over). At any rate, the appellant’s interest in seeking the DAR of the call-over was because he has at various times sought to suggest that Noonan J. had wrongly assigned the case to himself and that this was evidence of judicial bias on the part of the judge against the appellant, an allegation that has since been demonstrated as being groundless. As alluded to by Costello J. in a judgment delivered by her on the 7th of April 2020 (we will refer to this in more detail later in this judgment) it was subsequently confirmed in correspondence that a High Court Registrar had sat for the call-over in the absence of the judge, and that it was the Registrar who informed the parties that Noonan J. had become free and would be able to take up the matter. The judge himself had had no hand, act or part in the case being assigned to him. Be that as it may, the appellant, being dissatisfied with Irvine J.’s Order as drawn in respect of the DAR, and other directions given by her, then sought leave to appeal her Order to the Supreme Court. The appellant was refused leave to appeal to the Supreme Court – see the Supreme Court’s determination in that respect, viz, *Gaultier v. The Revenue Commissioner, The Minister for Finance, The Courts Service, the Minister for Justice, Ireland and the Attorney General*

[2019] IESC DET 6. We have alluded to this controversy in respect of the DAR because awareness of it is necessary to appreciate the significance of yet further developments arising later in the chronology.

77. Continuing with our review of controversies arising during case management of these appeals and forming part of the contextual background to issues the court must now deal with, we have alluded already to the fact that during the Court of Appeal case management process, time limits were set in the normal way, for the filing by the parties of their legal submissions in connection with the three appeals. The appellant failed to file his submissions in accordance with the Court's directions, prompting the first named respondents to issue a motion, returnable for the Directions List on the 6th of March 2020, seeking to have the appeals in which they were involved (i.e., 2017/191 and 2017/491) struck out for failure on the part of the appellant to file submissions in accordance with earlier directions given by the Court. McGovern J., who was presiding in the Directions List on the 6th of March 2020, made an "unless Order" on that date to the effect that if the appellant's written submissions were not lodged by close of business on the 20th of March 2020 the appeals would stand dismissed. We understand that the outstanding submissions were in fact filed by that date.

78. However, the appellant's initial reaction to the issuance of the first named respondents' said motion had been to issue a motion of his own, dated the 3rd of March 2020 and returnable for the 13th of March 2020, seeking a variety of reliefs, namely:

“(1) An order or direction for the High Court Registrar, the Principal Registrar or the former deputy Master & current CEO of the High Court (sic), to comply with the order of Irvine J. dated 26th July 2018 which released the CD of the audio of the hearing in the High Court before Mr. J. Noonan (sic) on 22nd and 23rd June 2017;
(2) Or, in the alternative, an order for attachment and committal for the relevant party(ies) refusing to provide for the Order of the Court (sic);

(3) An order for the adjournment of the hearing listed for 3rd April 2020 until such time as judges in Ireland can be held accountable before an independent and impartial body as required by the preamble of the Bangalore Principles of Judicial Conduct, upheld by the Supreme Court in O’Driscoll v. Hurley [2016] IESC 32 where Ms. Justice Dunne says: ‘[the Bangalore Principles] encapsulates at an international level norms of universal application’;

(4) An order for the adjournment of the hearing listed for the 3rd April 2020 as long as Ms Justice Whelan and Mr Justice Noonan are members of this honourable Court pursuant to article 2.5.2 and 2.5.3 of the Bangalore Principles of Judicial Conduct 2002 and the objective test of impartiality upheld by the European Court of Human Rights;

(5) Or, in the alternative: -

- a. A declaration of incompatibility of section 42(1) of the Judicial Council Act 2019, with the European Convention on Human Rights and Fundamental Freedom, pursuant to section 5.1 of the European Convention on Human Rights Act 2003;*
- b. In addition, a declaration of unconstitutionality of section 42(1) of the Judicial Council Act 2019 pursuant to section (sic) 60.1 of the Rules of the Superior Courts;*
- c. In addition, a reference to the European Court of Justice pursuant to Article 267 TFEU for a preliminary ruling on the following question:*

“Has the Irish judiciary been complying (sic) with Article 47 of the Charter of Fundamental (sic) before the commencement of Part 5 of the Judicial Council Act 2019 in relation to matters concerning a single-member company defined by E.U.

Directive 2009/102/EC-Company Law on Single-Member Private Limited Liability Companies replacing Directive 89/667/EEC Single-Member Private Limited Companies and at large?”

79. This motion was dealt with by Costello J., presiding alone as the Court of Appeal’s Directions List judge, who refused the reliefs sought in a comprehensive written judgment delivered on the 7th of April 2020 – see *Gaultier v. The Revenue Commissioner, The Minister for Finance, The Courts Service, the Minister for Justice, Ireland and the Attorney General* [2020] IECA 88.

80. In relation to items 1 and 2 in the Notice of Motion, Costello J. held that:

“I do not accept that the appellant requires the audio of the call-over of the list and the subsequent assignment of the case to Noonan J. in order to prepare his written submissions on the appeals. The appellant said that he sought the recording on the basis that the judge had apparently wrongfully assigned the case to himself for hearing. It was subsequently clarified in correspondence that, in fact, it was the registrar who informed the parties that Noonan J. had become free and would be able to take the matter up at 2pm on 22 June 2017. As the registrar was sitting in the absence of the judge, the DAR was not recording and so it is simply not possible to get a recording of the DAR of the assignment of the case to Noonan J. Furthermore, Noonan J. did not assign the case to himself, so the basis upon which the appellant sought the recording falls away.”

81. In relation to items 3 and 4 on the Notice of Motion, seeking an adjournment of the appeals (a) because Part 5 of the Judicial Council Act 2019 has not yet been commenced, and (b) because the appellant believed that two named members of the Court of Appeal who

might potentially be assigned to hear the case could not do so impartially, Costello J. refused to do so on either basis. In relation to the first basis advanced she held:

“8. ... The appellant’s case is that unless and until Part 5 of the Act of 2019 is commenced, no court may validly decide any cases in Ireland and accordingly his appeals should be adjourned pending the commencement of the crucial statutory provisions. He went so far as to argue that, because the provisions of Article 35.4 of the Constitution, regarding the impeachment of judges, had never been applied, that the Article itself was unconstitutional.

9. In my judgment, this argument is without merit. It is predicated on an untenable premise: that there may be no valid decisions of a court unless there exists a formal complaints procedure to an independent and impartial body in respect of alleged judicial misconduct.”

82. In so far as the second basis was concerned, Costello J. said:

“17. There is also no basis to adjourn the appeals on the grounds that two judges, validly appointed under the Constitution, are members of the Court of Appeal. The President of the court will assign cases in the usual way. In the case of one of the judges, he could not sit on the appeals, as one of the appeals is against an order of that judge, when he was a judge of the High Court. In relation to the second judge named in the notice of motion, it is a matter for the President whether she is assigned to hear the appeals. If she is not, then her presence on the court can have no relevance to the appeals. If she is, then her duty is to hear the cases listed before her unless there is a bona fide reason why she should recuse herself. That is a matter which will be considered by the court assigned to hear the appeals. I cannot adjourn the appeals on the basis that the court will misconduct itself at some future date,

which is the essence of this argument of the appellant. It is not a reason to adjourn the hearing.”

83. Costello J. added with respect to the appellant seeking to call in aid the Bangalore Principles, that:

“13. The appellant approached this international code of judicial conduct as if it were part of our domestic law. It is not. While the courts may have regard to the principles enshrined in the code, the absence of any specific provision governing complaints in respect of allegations of judicial misconduct does not deprive the courts of jurisdiction. The code does not require Ireland to establish any institution to maintain judicial standards. Further, the code does not deprive the courts in Ireland of jurisdiction in the alleged absence of any such institution.

14. In addition, the appellant adduced no evidence nor advanced any argument of any possible engagement of any of the Bangalore Principles in his appeal. The courts do not decide cases on a hypothetical basis. This is fatal to his argument.

15. Fundamentally, the courts are established under Article 34 of the Constitution and derive their authority therefrom. The absence of a formal complaints process or disciplinary procedures cannot alter this, nor deprive the courts of jurisdiction generally or in any particular case. The appellant’s arguments are misconceived.”

84. Costello J. also refused to grant any of the reliefs requested at item 5 on the Notice of Motion, stating:

“4. In the Directions List, which is presided over by a single judge sitting alone, the court does not have jurisdiction to deal with the matters raised in para. 5 of the notice of motion and accordingly, these matters were not dealt with at the hearing and are not further discussed in this judgment.”

85. We have alluded to this judgment in some detail because many of the issues raised by the appellant in this motion, and dealt with by Costello J. were again ventilated by the appellant in the context of subsequent motions brought by him, and both in written submissions and in oral submissions made by the appellant at the appeal hearing. We should record that in addition to the written submissions initially filed by the appellant in response to the previously mentioned “unless Order”, supplemental submissions were tendered by the appellant on the day of the appeal hearing (which the Court agreed, albeit with some reluctance, to receive *de bene esse* notwithstanding that leave to file supplemental submissions had neither been sought nor granted.)

86. It may be observed in passing that the next step taken by the appellant was to seek leave to appeal the judgment of Costello J. to the Supreme Court, but the Supreme Court refused to accept his appeal. See in that regard, *Gaultier v. The Revenue Commissioner, The Minister for Finance, The Courts Service, the Minister for Justice, Ireland and the Attorney General* [2021] IESC DET 75.

87. A hearing date for these appeals, i.e., the 28th of October, 2021, was set by Costello J. on the 9th of April 2020 (an earlier listing of the 3rd of April 2020 having been vacated due to the Covid 19 pandemic). The matters subsequently received a “for mention” listing at a call-over to be held on the 30th of July 2021, the intended purpose of which was merely to seek confirmation from the parties that the appeals would in fact be proceeding on the 28th of October 2021. However, on the 30th of July 2021 the appellant issued yet another motion, returnable for the 15th of October 2021, seeking a variety of reliefs, including a claim as relief No 1 to an Order pursuant to Order 28, Rule 11 of the Rules of the Superior Courts amending the earlier order of Irvine J. dated the 26th of July 2018 to read:

“IT IS ORDERED that a CD of the audio of the hearing in the High Court before Mr Justice Noonan on the 22nd and 23rd days of June 2017 recorded on The Digital Audio

Recording system be released to the parties. This CD is to include the audio of the call over in the morning of the 22nd day of June 2017 before Mr Justice Noonan.

(emphasis in original).

88. The Notice of Motion went on to seek the subpoenaing of a named staff member, and a former staff member, of the Court of Appeal (Civil Office). It further sought a number of other reliefs, five of which were copied verbatim from the appellant's earlier motion dated the 3rd of March 2020 and which had been refused by Costello J.. Further, the Notice of Motion requested an adjournment, on a variety of different grounds, of the hearing of the scheduled appeals on the 28th of October 2021, including that the appellant had only recently received DAR transcripts, and that such was the number and complexity of the issues that he would have to address at the impending appeal hearings that he simply did not have enough time to prepare.

89. The appellant's said motion was listed and heard before Edwards J. who was presiding in a Court of Appeal Directions List, on the 15th of October 2021, and the motion was, in all respects, vehemently opposed by the respondents. The requested adjournments were refused by Edwards J. who considered that the appellant had had ample time up to that point to prepare and indeed still had some further time; and he further refused relief in respect of matters previously dealt with by Costello J.. Included amongst the latter were claims for a declaration of incompatibility of s.42(1) of the Judicial Council Act 2019 with the European Convention on Human Rights, and also a declaration of unconstitutionality in respect of the same statutory provision. It was emphasised to the appellant by Edwards J., as indeed Costello J. had similarly done, that the Court of Appeal has appellate jurisdiction only and that such matters could not be raised in the context of an appeal if they had not been the subject of the proceedings at first instance. The presiding judge further indicated that certain of the other reliefs sought by the appellant (whatever their merits) were such as could in any

event never be justiciable before a judge sitting alone for the purposes of a Court of Appeal Case Management /Directions hearing (for example, a request by the appellant that the Court of Appeal should make a preliminary reference to the Court of Justice of the European Union concerning an issue of EU law said to arise in the context of the appeals). That being so, he was prepared to adjourn, and did adjourn, those aspects of the motion so that they might be heard with the substantive appeals on the 28th of October 2021, at which time they could be ventilated and dealt with before a full Court of Appeal comprised of three judges.

90. However, unbeknownst to Edwards J., when hearing and subsequently ruling upon the motion dated the 30th of July 2021 on the 15th of October 2021, the appellant had only the previous day, i.e., on the 14th of October 2021, issued yet another Notice of Motion, returnable for the 22nd of October 2021. Edwards J. was subsequently assigned to deal with this motion also. It will be informative to set out in full the reliefs claimed in that latest Notice of Motion. The appellant sought:

“1. *An injunctive relief setting aside section 42 of the Judicial Council Act 2019 as being contrary to EU laws, especially Article 19§1 TEU and Article 47 of the Charter of Fundamental Rights, pursuant to ECJ decisions in the matter of LM – C216/18 and in Factortame I – C-213/89;*

2. *In addition, a reference to the European Court of Justice pursuant to article 267 TFEU for a preliminary ruling on the following question:*

“Does Part V of the Judicial Council Act 2019 complies (sic) with the requirements of Article 19§1 TEU and Article 47 of the Charter of Fundamental Rights especially in relation to matters concerning a single member company defined by EU Directive 2009/102/EC - Company Law on Single-Member Private Limited Liability Companies replacing Directive

89/667/EEC Single-Member Private Limited Liability Companies and in the domain of competency of the EU at large?”

3. *An order for the CD of the audio recording of the full morning of the 22.06.2017 in Court 6 including the call-over list before the Deputy Master and Mr Justice Noonan pursuant to the principles of Open Justice and Equality of Arms to assess how the judge assigned the case to himself.*
4. *An order, in the absence of consent of the parties, for the point of law presented in the appellant’s two motions (part V of the motion dated 03.03.2020, part V to 8 of the motion dated 30.07.2021 and the relevant part of this motion) and the preliminary part of the appellant’s submission regarding the possible partiality by design of the Irish Courts, to be set down for hearing on the 28 October 2021 pursuant to Order 25, rule 1, RSC;*
5. *An order adding Loire Valley Ltd as co-plaintiff/appellant pursuant to Order 15 rule 1 RSC and to the Supreme Court’s decision in Gaultier & anor v AIB [2019] IESC 89;*
6. *A declaration that a judge who, in the course of his/her duty, infringes someone’s for fundamental rights, as protected by the Constitution, is not to be held in contempt of the Court despite the decision of O’Dálaigh C.J. in the State Quinn v Ryan p. 122;*
7. *An order for the recusal of Ms Justice Whelan & Mr Justice Binchy in relation to the herein proceedings;*
8. *An order suspending Ms Justice Costello, Ms Justice Ní Raifeartaigh, Ms Justice Donnelly and Mr Justice Noonan from hearing any matter;*

9. *In the alternative, an order for the recusal of Ms Justice Costello, Ms Justice Ní Raifeartaigh, Ms Justice Donnelly, and Mr Justice Noonan, in relation to the herein proceedings;*

10. *A declaration that the Court of Appeal (Civil) Office and its counterpart in the other Irish courts, are only to deal with the plaintiff/appellant with a view to fulfil their obligations toward the plaintiff/appellant and never to act as a party to the herein proceedings.*

11. *Such further or other order as this Honourable Court deems fit*

12. *An order for the costs of this application.”*

91. At the hearing of this motion the appellant sought from the outset to have Edwards J. revisit his rulings and orders of the 15th of October 2021. The appellant contended that he was not being argumentative in making this request but submitted rather that it was open to him to ask the Court to do so in circumstances where the Court’s previous order had not yet been perfected. In support of this submission the Court was referred to Delaney and McGrath on *Civil Procedure*, 4th Ed., at para 25.53. Notwithstanding this submission Edwards J. was not disposed to revisit his earlier rulings.

92. Further, as it was manifest to the Court that many of the items in the appellant’s Notice of Motion would not be justiciable before the Court of Appeal on any basis, and that there were others that would only be justiciable before a full Court of Appeal comprised of three judges, the Court sought to identify these for the appellant at the outset, while at the same time indicating that the Court was prepared to hear his submissions with respect to any matters that could potentially be justiciable on any basis before a Court comprised of a single Court of Appeal judge sitting alone. Further, the Court would be disposed to adjourn any matters that might potentially be justiciable before a court of three judges to the hearing date on the 28th of October 2021 when the substantive appeals were in any case scheduled to be

heard before a court of three. Ultimately, having gone through each item listed in the Notice of Motion with the appellant, Edwards J. refused items 1, 3, 5, 6, 7, 8, 9, 10, and 11; allowed item 4, and adjourned items 2 and 12, respectively, to the substantive hearing on the 28th of October, 2021.

The Substantive Appeals

93. We will now address the legal issues raised on each of the appeals. In that regard, some of the appellant's complaints are relied upon in all three appeals, and where that is so we will acknowledge and take account of this in addressing the point or points at issue. Other complaints are specific to individual appeals and will be addressed on that basis.

The First Appeal

94. The appellant appeals the order of the High Court (O'Connor J.) of the 3rd of April 2017, wherein the judge refused the appellant's application to change the name on a pleading, specifically from 'affidavit' to 'Statement of Claim'. The appellant's affidavit was filed on the 22nd of August 2012 and avers to events before and after the seizure of the appellant's wine by the first-named respondent.

95. In so far as the appellant's Notice of Motion seeks relief pursuant to Order 63, Rule 1 (14) and (15) of the Rules of the Superior Courts it may be helpful to set out those sub-rules.

Accordingly, the relevant provisions of O. 63, r.1 of the Rules of the Superior Courts (hereafter "the RSC") are as follows:

1. "In addition to any orders which the Master may make under any other of these Rules the Master may make any of the following orders:

...

(14) An order for the amendment of pleadings on consent

(15) An order for the correction of clerical errors or errors in the names of parties in any proceeding, whether on consent or not, but subject to re-service when not on consent.”

96. The background to the motion has already been set out. However, certain points bear brief reiteration. On the 22nd of October 2012, a Statement of Claim was served on the first-named respondent seeking (*inter alia*) €450,000 in damages and an order of *mandamus* commanding the first named defendant to issue a public apology to the appellant.

97. Further, by motion dated the 24th of July 2013, the second to sixth named respondents sought to strike out the proceedings by reason of the failure to deliver a Statement of Claim on them. On the 7th of November 2013, an extension of time was granted to the appellant by the Master of the High Court within which to serve the Statement of Claim on the second to sixth named respondents. This was never served.

The Motion

98. The motion the subject of this appeal came before the High Court on 3rd April 2017. In his oral submissions on that day, Mr. Gaultier submitted that he was unaware that a Statement of Claim was required. Moreover, he informed the court that counsel for the first-named respondent had told him ‘that basically a Statement of Claim is ... basically a grounding affidavit’. He sought to have his Grounding Affidavit renamed as a Statement of Claim. The appellant indicated to the court below that, as a lay litigant, he only had experience of judicial review and therefore filed a Plenary Summons and Grounding Affidavit. He claimed he only became aware of the requirement for a Statement of Claim sometime after June 2016 (this claim was made notwithstanding that he had served a Statement of Claim on the first named respondents in 2012 and had sought and received an

extension of time in November 2013 to enable him to serve a Statement of Claim on the remaining respondents (the second to sixth named defendants). He contended that he should not have been requested to provide a Statement of Claim by the second to sixth named defendants. Mr Gaultier maintained that he felt at a disadvantage as a lay litigant.

99. As set out earlier in this judgment, at the hearing of this motion, the court was informed by counsel for the defendants of the various other motions in train at that time, being the appellant's own motion seeking interlocutory injunctive relief as against the first named respondent, and the motions brought by the first named respondent, and by the second to sixth named respondents, respectively, seeking to have the proceedings dismissed/struck out on various grounds.

100. It was submitted on behalf of the second to sixth named respondents that there could not be two Statements of Claim in the proceedings. If the appellant was granted the relief he was seeking there would two Statements of Claim certainly in the case of the first named respondent. Moreover, it was emphasised that in November 2013 an extension of time had been given to the appellant to deliver a Statement of Claim to the second to sixth named respondents until a date in January 2014. In the circumstances counsel for the first and second to sixth named respondents asked for the motion to be struck out by the Court.

101. As previously indicated, the motion was refused and we have already set out the curial part of the judge's ruling at paragraph 34 of this judgment.

The Appeal

102. The appellant contends that the judge was not impartial, specifically that he refused to review the aforementioned affidavit and based his decision on the submissions of counsel, whom he says are 'former peers' of the trial judge, thus contravening Article 40 of the Constitution and Article 6 of the ECHR and Article 13 of the ECHR and Article 47 of the Charter of Fundamental Rights. In effect, the appellant contends that the judge was biased in

the manner he came to his decision. Moreover, at the appeal hearing, when Mr Gaultier was pressed by this Court to say where, in terms of the actual decision he is appealing against, he contends that the trial judge was in error, he stated that the judge had failed to provide reasons for his decision.

103. The respondents say there is no identifiable error on the part of the judge. The first-named respondent opposes this appeal in full. It was submitted that there was no evidence of subjective or objective bias in the decision made by the trial judge.

104. The second to sixth-named respondents say that O.63, r.1 of the RSC did not permit the type of alteration to the pleadings sought by the appellant. Moreover, they say that the appellant failed to comply with the Order made by the Master of the High Court in granting him an extension of time for the delivery of a Statement of Claim. It was reiterated that it is not possible to have a second Statement of Claim in these proceedings. The suggestion that the judge concerned had not been impartial was rejected.

Discussion

105. It seems to us that O. 63, r. 1 of the RSC does not envisage an application of the kind brought by the appellant. It is noteworthy that the second to sixth named respondents requested the delivery of the Statement of Claim on several occasions, but to no avail. The appellant did not avail of an extension of time which was granted in this respect. His contention before the Court below that he did not know that a Statement of Claim was required rings hollow in circumstances where he had previously delivered a Statement of Claim to the first named respondents and had sought and been granted an extension of time within which to serve a Statement of Claim on the second to sixth named respondents.

106. The appellant now contends that the judge erred in failing to give a reasoned decision. This is patently not so. In coming to his decision, the judge expressly found that the

appellant had adopted an incorrect procedure to try and circumvent the necessity to serve a Statement of Claim.

107. Insofar as the allegations of the absence of impartiality and bias are concerned, these are entirely without any evidential foundation. Mr. Gaultier only alleged bias on the part of the judge once the judge ruled against him and it must be noted that Mr. Gaultier immediately adopted the same stance before this Court when an application by him for an adjournment towards the latter stages of this appeal hearing was refused. Moreover, the High Court judge was entitled to hear of the various other motions which were in being in order to inform himself of the overall context in which the appellant's motion was being brought. The fact that he was so informed by counsel, and was prepared to accept the information, does not amount to bias or display an absence of impartiality. The information with which he was provided was accurate and the respondent's other motions proceeded in due course before Noonan J. and are also the subject of this appeal.

108. Mr. Gaultier sought, in aid of his application, to rely on his status as a lay litigant. Whilst the courts afford a degree of latitude to a litigant who chooses to appear on his or her own behalf, this does not mean that the rules of practice and procedure are to be ignored. It is important to note that the appellant was repeatedly asked for delivery of a Statement of Claim by the second to sixth named respondents. This was in circumstances where he had already delivered a Statement of Claim to the first named respondent. Moreover, faced with a motion to strike out his proceedings in 2013 for failure to deliver a Statement of Claim to the second to sixth named respondents, he had sought and had been granted an extension of time within which to do so until a date in early 2014. However, he still failed to deliver the outstanding Statement of Claim. In the circumstances just outlined, his contention that by virtue of his lay litigant status he was unaware that delivery of a Statement of Claim was required, or indeed as to what a Statement of Claim was, is utterly untenable.

109. Mr Gaultier contended in the court below that the first named defendant's counsel had informed him that an affidavit and Statement of Claim were in effect the same. They are manifestly not the same. A Statement of Claim sets out a litigant's claim (in terms of the core facts alleged and the legal principles that he/she intends to rely upon) and specifies the reliefs which are being sought, whereas an affidavit is a sworn document as to evidence.

110. O. 63, r. 1(15) permits a correction of 'clerical errors in the **names of the parties** in any proceedings' (our emphasis). This was not the relief sought by the appellant. O. 63, r. 1(14) provides for the amendment of pleadings **on consent** (our emphasis). There was no consent here. Rather, what the appellant was ostensibly attempting to do was, understandably, vehemently opposed. He was ostensibly seeking by means of this unorthodox application to circumvent a serious procedural difficulty faced by him, and of his own making, that was likely to result, imminently (as indeed turned out to be the case), in a renewed application to strike out his proceedings for failure to deliver a Statement of Claim to the second to sixth named respondents. Accordingly, neither rule has application in the present case. Where it is said by the appellant that the judge failed to provide reasons for his decision, again this assertion does not withstand even the most cursory scrutiny. The judge specifically stated that the appellant had adopted an incorrect procedure to try to circumvent the delivery of a Statement of Claim, and that it was inappropriate.

111. We are entirely satisfied that the appellant has failed to demonstrate an error on the part of the trial judge. The first appeal is therefore dismissed.

The Second and Third Appeals

112. These appeals are against the decision of the High Court (Noonan J.) to dismiss/strike out the appellant's proceedings as against the first named respondents, and against the second to sixth named respondents, respectively, and awarding the costs of the proceedings in both

instances, including the costs of the successful motions, in favour of the moving parties and against the appellant.

The Notice of Appeal

Appellant's Notice of Appeal

113. The Grounds of Appeal are laid out as Part A, entitled “Unfair treatment of the Plaintiff’s motion”; Part B entitled “Plaintiff’s submissions’ preliminary issues not addressed”; Part C entitled “Demonstrated Partiality of the learnt (sic) judge in favour of the Defendants”, and Part D entitled “Failing all Bangalore Principles of Judicial Conduct arising from Functional Elements”. Then within each part there are variously entitled sub-parts. The following is a summary of the appellant’s main grounds of appeal as regards the decisions of the trial judge to dismiss/strike out the proceedings against the respondents:

1. The trial judge denied the appellant the opportunity to move his own motion. Moreover, the trial judge mentions this motion only twice in his judgment, and in doing so fails to present it correctly, describing it as an application for interlocutory relief whereby the appellant seeks to injunct the revenue sheriff from collecting unpaid taxes, whereas the appellant describes it as being a motion to prevent “a defendant to enter some privileged premises”.
2. The trial judge erred in his conclusions on the submissions of the appellant as regards the impartiality of the court. The appellant maintains that the court lacked jurisdiction in circumstances where court impartiality had not been determined. He maintains that “a determination of court impartiality” was required, firstly because judges of the Superior Courts in Ireland are former solicitors or barristers, who have practised as such for over 20 years, and who as such “*have created and maintain ties with their former peers and peerage*”; secondly because of the unwillingness of the judge in the court below to swear a special

oath of the appellant's devising; thirdly, because the appellant claimed to have a reasonable concern about potential impartiality in circumstances where, in his perception, other Irish judges who had dealt with litigation concerning him had exhibited bias against him.

3. The trial judge erred in failing to respect the rules of essay writing. In a sub-part of Part C, namely Part C, 1, (b) (iii) entitled "Judgement review of its different sections" the appellant provides examples of what he claims to be the High Court judge's alleged failings in that regard.
4. The trial judge erred in admitting and placing reliance upon the grounding affidavit of the first named respondents. He had submitted that that affidavit should not be admissible, because the affidavit grounds an application for a final order (dismissing the proceedings) and it may not therefore be expressed in terms of the belief of a deponent, being inadmissible hearsay. Moreover, the affidavit referred to the original Plenary Summons and not the amended Plenary Summons.
5. The trial judge demonstrated partiality in favour of the respondents. In that regard the grounds assert that the appellant has both subjective and objective reasons for perceiving demonstrated partiality. Amongst the subjective reasons are the alleged conduct of the judge, including that the judge, in the appellant's belief, assigned the motions to himself. Further, the judge's response to the appellant's presentation of his first preliminary issue about impartiality of judges amounted, the appellant claims, to a display of hostility or ill-will against the appellant. *Kypianou v Cyprus* [2005] ECHR 873 is cited in the Grounds of Appeal as identifying that displays by a judge of hostility or ill-will towards a party, or the assigning by a judge of a case to him/herself, can provide "*the type of proof*

required to demonstrate partiality of a judge". He further references the High Court judge's "*numerous overly critical comments about litigants in person.*" He further postulates a possible linkage between prejudice perceived by him on the part of the judge and the appointment of a solicitor to be a High Court judge who had, until recently, been acting for the second to sixth named respondents. He further points to the judge's response, which the appellant regards as having been indicative of bias, to an objection raised by him when counsel for one of his opponents had (so he claims) referred to him as "*a Tax Fraudster or Evader*".

6. In so far as claiming to have objective reasons for believing that the judge was partial is concerned, he again refers to the fact that judges are former barristers or solicitors who "*have created and maintain ties with their former peers and peerage.*"
7. The system of administration of justice in this country does not comply with the Bangalore principles insofar as there was not at the time of the hearing a system for holding judges accountable for their conduct.

First Named Respondent's Notice

114. In their Respondent's Notice delivered on the 20th of November 2017, the first named respondents responded to the appellant's Notice of Appeal as follows:

- "1. The trial judge did not err at hearing in leaving the appellant's motion for interlocutory relief to be considered after the first respondent's applications to strike out the proceedings. Nor did the trial judge err in finding that the interlocutory application of the appellant fell away upon the dismissal of the substantive proceedings.

2. The trial judge was correct in refusing to make any preliminary determination on the appellant's preliminary submission that the trial judge should take an oath of impartiality.
3. The trial judge displayed no subjective or objective bias at the appeal hearing or in his judgment.
4. The trial judge was entitled to rely upon the grounding affidavits of the respondents in considering the applications to strike out the proceedings. The motions are properly characterised as interlocutory motions, even though they "*terminated the proceedings*". Without prejudice to that contention, the court is in any case entitled to have regard to evidence presented in the affidavits, even if grounded upon statements as to beliefs.
5. The trial judge had regard to all of the evidence of the appellant, including evidence inconsistent with the allegation of a transfer of title for the wine. Moreover, the conclusion of the trial judge is that the case as pleaded concerns only the wine of the Company, and that is a claim that is bound to fail. Accordingly, the trial judge did not err in fact or in law in so concluding.
6. The trial judge did not err in failing to consider amending the proceedings pursuant to O.15, r.39 of the Rules of the Superior Courts, so as to permit commencement of a derivative action. There was no application before the trial judge in this regard, and in any case the rule only applies where a minority shareholder claims oppression by the majority. The trial judge was entitled to conclude that the proceedings were bound to fail on the basis of the rule in *Foss v. Harbottle* and further was entitled to conclude that any claim by the appellant for losses personally suffered by him as a result of damage to the company was also bound to fail as per *O'Neill v. Ryan* and *Flanagan v. Kelly*.

The Second to Sixth Named Respondents' Notice

115. In their Respondents' Notice delivered on the 17th of November 2017, the second to sixth named respondents responded to the appellant's Notice of Appeal. Following a series of general traverses, they plead (*inter alia*) that:

8. "Arising out of Part B of the Grounds of Appeal ... any reference to the proceedings entitled "*The High Court, Record No 20/2/612JR between Arnaud D Gaultier, Plaintiff and The Registrar of Companies, Defendant*" in the appellants Notice of Appeal are not relevant to the within appeal and should not be canvassed herein. The appellant has appealed the decision of Ms Justice Dunne in those proceedings by way of a separate appeal to this Honourable Court.
9. The trial judge did not hold the appellant in contempt of court therefore any reference to *Kyprianou v. Cyprus* [2005] ECHR 873 is not relevant. The appellant requested the trial judge to recite an oath of impartiality drafted by the appellant himself which the trial judge refused to do on the basis that he has sworn an oath pursuant to the Constitution of Ireland to hear cases fairly and impartially. There is no evidence to support the allegations that the trial judge was partial. The trial judge afforded the appellant every opportunity to present his application in full. The decision of the trial judge delivered on the 6th day of July 2017 adequately reflects the relevant matters of fact and law that the trial judge was required to make a decision on. Insofar as it is suggested that the trial judge failed to consider all of the appellant's submissions the trial judge was correct in not addressing submissions which were of no, or very limited, materiality to the resolution of the issues before the Court.

10. Arising out of Part C of the Grounds of Appeal ...[t]here can be no suggestion of either objective bias or subjective bias by the trial judge towards the appellant and no sustainable ground of appeal has been pleaded by the appellant in this regard. The appellant raised issues concerning the partiality of the entirety of the Irish Judiciary to the trial judge. The appellant expressly stated that he did not wish to make an application to the trial judge to recuse himself therefore accepted the jurisdiction of the Court to hear the matter.
11. The case was assigned for hearing by the trial judge in the normal course and there is no evidence of prejudice towards the appellant arising out of his "first address" to the Court which could in any way amount to bias on the part of the trial judge.
12. At no stage during the hearing was the appellant described as "a Tax Fraudster or Evader" by any party present therefore any allegation of prejudice in this regard is unsustainable.
13. The trial judge delivered a written decision on the 6th day of July 2017 that adequately reflects the material arguments put before the Court by the parties during the course of the hearing. The trial judge correctly identified the legal and factual points at issue and came to a reasoned conclusion. As set out hereinabove the decision of the trial judge adequately reflects the relevant matters of fact and law that the trial judge was required to make a decision on. Insofar as it is suggested that the trial judge failed to consider all of the appellant's submissions the trial judge was correct in not addressing submissions which were of no, or very limited, materiality to the resolution of the issues before the Court.

14. Insofar as any relevant ground of appeal exists [in Part C, 1, (b) (iii) of the Grounds of Appeal] under the heading "Judgment- Review of its different sections" the second to sixth named respondents oppose any such grounds of appeal in full.
 15. The trial judge correctly applied the principles in *Battle v. Irish Art Promotion Limited [1968] IR 252* which represents the law on a director or member issuing court proceedings on a company's behalf. The trial judge correctly stated that this still represents the law which is clear from the judgement of the Court of Appeal in *Allied Irish Banks Plc. v. Aqua Fresh Fish Limited [2017] IECA 77*.
 16. The trial judge did not describe the appellant as being in contempt of an Order of the Master of the High Court but stated that the appellant had not complied with an Order of The Master of the High Court which is factually correct.
 17. Under the heading [in Part] D [of the Grounds of Appeal] entitled "Failing all Bangalore Principles of Judicial Conduct arising from Functional elements" the trial judge was correct in not addressing submissions which were of no materiality to the issue before the Court. Further, the decision of *Beades v. Ireland [2016] IEHC 302* has no relevance to the issues that arose in the within proceedings."
116. The second to sixth named respondents further state that:
- a) "The appellant has failed to submit a stateable ground of appeal to the Order of Mr Justice Noonan striking out the appellant's proceedings as against the second to sixth named respondents.
 - b) The trial judge properly considered all the documentation and properly considered all oral submissions before making his decision. The trial judge

gave proper consideration and regard to the rules of evidence. Further, the trial judge gave proper consideration to the submissions of the appellant and the respondents.

- c) In relation to the reliefs sought by the appellant under the heading "Orders Sought", the relief [for a declaration that to comply with various provisions of the Constitution, the ECHR and the Charter of Fundamental Rights judges hearing cases involving a lay litigant should have to take an oath in the form proposed by the appellant, or disclose any connection to other parties] is beyond the jurisdiction of this Honourable Court and is therefore not a stateable relief in the within appeal.
- d) Further, the following matters raised in the Notice of Appeal by the Appellant are un-stateable reliefs;
- A declaration of unconstitutionality of the Constitution itself;
 - That the Constitution and the Courts (Establishment and Constitution) Act 1961 are incompatible with the European Convention on Human Rights, no particulars of which have been pleaded in the Notice of Appeal;
 - That the Appellant is entitled to seek a reference to the Court of Justice of the European Union in the within proceedings; no particulars of which have been pleaded in the Notice of Appeal;
 - That the Appellant is entitled to a priority hearing for the reasons set out in the Notice of Appeal.”

Legal Submissions

117. The appellant has provided the Court with two sets of written legal submissions. He filed outline legal submissions on the 19th of March 2020, and then provided supplemental

legal submissions at the opening of the appeal hearing. Both the first named respondent and the second to sixth named respondents have also filed written legal submissions. We have read and taken account of all of the submissions and will refer to them to the extent considered necessary for the purposes of this judgment.

118. The appellant's outline legal submissions are in six Parts, being Parts I to VI inclusive. In Parts I, II and III, the appellant sets out a prologue, an introduction and the background and history to the proceedings from his perspective.

119. Then in Part IV he addresses what he describes as "Preliminary issues in relation to the fundamental rights of the appellant. He divides Part IV into four subparts, A, B, C and D respectively. In Part IV, A he seeks to remind us of Articles 6(1) and 13 of the European Convention on Human Rights ("the ECHR"), concerning the right to a fair trial and the right to an effective remedy, respectively, and how they must apply. Similarly, in Part IV, B we are reminded of Article 47 of the Charter of Fundamental Rights on the right to an effective remedy and a fair trial; and are further reminded that, by virtue of Article 51.1, the provisions of the Charter are addressed to Member States when they are implementing Union law. He asserts it as being his view that implementation of Union law arises in the context of the appeals because, in his contention, Directive 2009/102 EC in the area of company law on single-member private limited liability companies, consolidating EEC Directive 1989/667 on single-member private limited liability companies, is engaged by his proceedings. In Part IV D we are reminded of the dimension to Article 6 ECHR which guarantees access to a court in the form of the right to institute proceedings before courts in civil matters, and the judgment of the E.Ct.H.R in *Golder v. UK* [(1976) I EHRR 524] at para 36 cited in support.

120. In Part V of the appellant's submissions, entitled "Consideration of this Honourable Court's Jurisdiction in hearing the within proceedings", the appellant's complaints are addressed in five sub-parts, A, B, C, D & E.

121. In Part V, A he makes the uncontroversial contention that the right to a fair trial as guaranteed in Article 6.1 ECHR applies to the hearings of these appeals. In Part V, B (1) he reiterates by means of a lengthy verbatim quotation from his earlier written submissions to the Court below, that he is entitled to have a determination of court impartiality. He argues for this by purporting to provide examples of instances in which, in his perception, other Irish judges who have dealt with proceedings that have involved him, have exhibited bias against him/partiality in favour of his opponent(s).

122. In so far as it is understood from a reading of the grounds of appeal in conjunction with this section of the appellant's written submissions, his core complaint here appears to be that only a truly impartial court would have jurisdiction to determine the motions before it. He makes the case, reiterated again during the appeals, that as a litigant in person he could have no confidence, based upon his own previous experience of the courts in Ireland, and other circumstances such as the fact that all judges are former barristers and solicitors whom he claims "*have created and kept ties with their former peers and peerage*", and as such that the motions in his case would not be dealt with by a truly impartial judge as a matter of course. He was entitled, he maintains, to "*a determination of court impartiality*". He contends, again if we understand him correctly, that as the Court below did not engage to his satisfaction with his arguments in respect of that, the decision of Noonan J. is fundamentally flawed.

123. The appellant's outline written submissions then go on in Part V, B (2) to yet again suggest that as judges of the Superior Courts in Ireland will have been former solicitors or former barristers they will have created and kept ties with "*their former peers and peerage*". He maintains that in those circumstances, and in order to create conditions of impartiality, such judges should take the following oath:

“I, as former member of the bar or the law society, swears (sic) having no former connections with neither the barrister nor the solicitor representing the ‘other party’.

This includes:

- *Having never met casually;*
- *Having never met professionally;*
- *Having not attended the same school at the same time.”*

124. His submissions go on to offer an alternative formulation to be deposed to where a litigant in person becomes aware of an existing connection between the judge and a lawyer, and he is not inclined to seek the judge’s recusal. He suggests that the judge in question should swear that:

“I take oath not to favour any of the submission[s] and/or evidence[s] brought by the said barrister / [solicitor] and to take in equal considerations any submission and evidence brought in by the [party] litigant in person and to comply with the Rules of Essay writing in the delivery of any judgment, either written or ex tempore.”

125. The transcript reveals that, consistent with and reflecting the contents of Part V, B (2) of his outline written submissions, he had asked for Mr Justice Noonan to swear an oath that he had no formal connection with either the barrister or solicitor representing the other parties. The High Court judge responded to this stating:

“Mr JUSTICE NOONAN: Every judge, Mr Gaultier, is required to take an oath under the Constitution to hear every case fairly and without fear or favour to either party. I am satisfied that covers that.”

126. Later, towards the end of his judgement of the 6th July 2017, the High Court judge observed:

“28. Finally, I wish to comment briefly on the plaintiff’s submissions to this court both in writing and orally. Before dealing in any way with the substance of these

applications, the plaintiff made a lengthy submission concerning the impartiality of the Irish judiciary towards litigants in person in general and towards him in particular. He purported to analyse four previous orders of this court made by different judges and suggested some or all of them had been made for improper reasons and partially by those judges.

29. He even went so far as to suggest that all judges in this jurisdiction dealing with his cases should be required to take an oath in terms drafted by him and included in his written submission. All of these submissions by the plaintiff were in my view scandalous, gratuitously offensive to the judiciary of the State and constituted a contempt of court. It became necessary during the course of the plaintiff's submissions for me to warn him that his behaviour was contemptuous and I would have to hold him in contempt if he did not desist.

30. Only then did the plaintiff cease this behaviour and because he offered an apology to the court, I determined to take no further action. This should not be interpreted by the plaintiff as an unwillingness on the court's part to respond appropriately if the behaviour identified is repeated in the future."

127. In Part V. C of his outline written submissions entitled "Courts jurisdiction to hear this appeal with due regard to the Bangalore Principles of Judicial Conduct", he refers us to the Bangalore Principles which emphasise the need for an independent and impartial institution, to which judges would be made accountable for their conduct. The appellant's point is that in circumstances where at the time of the hearing before the court below the judicial conduct provisions of the Judicial Council Act 2019 (the Act of 2019) had not been commenced in full, the Irish judiciary was not in compliance with the Bangalore principles and accordingly the High Court had no jurisdiction to hear the motions to dismiss and make orders against him.

128. As his perception is that the Court of Appeal is also non-compliant with the Bangalore principles, he maintains the Court of Appeal has no jurisdiction to determine these appeals. There is, of course, a fundamental inconsistency in his adoption of this position. It was he who invoked the jurisdiction of the Court of Appeal by lodging Notices of Appeal against the judgment and Orders of the court below. He appears now to be saying that this court has no jurisdiction to determine those appeals, notwithstanding that he is the one who has invoked this Court's jurisdiction. In truth, however, we think that the appellant's position may be more nuanced, and that he does in fact want this Court to determine his appeals but just "not yet".

129. In Part V. D of his outline submissions the appellant seeks to make the point that he was disadvantaged by being a lay litigant without the benefit of free legal aid, or the possibility of benefitting from the Attorney General's scheme. He points out that he had to present his case in person with only the assistance of a 16 year old transition year student as a McKenzie Friend, when he was being opposed by two senior counsel, two junior counsel and two solicitors.

130. In Part V. E the appellant asserts that he has an objectively justified fear that this court will not afford him an impartial hearing because of the presence of two particular judges on the court, who he names. In the case of one of them, he alleges that the judge in question showed bias towards him in the past, and in the case of the other, that the judge was "politically nominated". As it has transpired, neither of the judges that the appellant seeks to so impugn was assigned to hear his appeals. That would be the end of the matter but for a further claim asserted in the appellant's outline written submissions, namely that because of "*the high possibility of communication between judges outside of open court*" he has a "*justifiable fear regarding the partiality of this Honourable Court as long as the above-mentioned judges are on its panel.*" We were referred to *De Cubber v. Belgium*, Applic. No.

9186/80, 26th October 1984, at para 26, and to *Piersack v. Belgium*, Applic. No. 8692/79, 1st October 1982, in support of this submission.

131. In Part VI the appellant submits with respect to the present provisions of the Companies Acts which determine what happened to the assets and liabilities of the Company upon its dissolution, that they are “wrong” and that the Companies Act infringes Article 1 of the 1952 Protocol to the ECHR.

132. The supplemental submissions tendered seek to elaborate further on issues addressed in the earlier outline written submissions and advance some new arguments/submissions. We are reminded that a truly impartial court welcomes fair, decent, candid and vigorous criticism of its conduct. The applicant, having been advised in a case management hearing that the Court of Appeal’s jurisdiction is an appellate jurisdiction only and that it is not open to him to seek to ventilate issues on appeal that were not raised in the court below, states that he has recently issued a further plenary summons seeking various injunctions relevant to what might be characterised as the single-member private limited company issues that he has also sought to raise, inappropriately say the respondents, in the present and in previous litigation. The supplemental submissions also assert a conflict-of-interest on the part of the Courts Service in circumstances where on the one hand it is providing administrative services for this court and on the other hand it is a party to these proceedings.

133. The supplemental submissions further contend that the orders of Noonan J. are void *ab initio*.

134. Part D of the supplemental submissions alleges a form of supposedly prohibited collusion between the legal teams for the first named respondent and the second to sixth named respondents respectively. There is a complaint that this was drawn to the High Court judge’s attention and that he failed to send a file to the DPP. There are further submissions on the alleged assignment by the High Court judge of the case to himself. The appellant puts

forward certain views of his McKenzie Friend, following that person's reading of the judgment and transcript, as representing an "independent review of the judgment and transcript."

135. Certain passages of the transcript are quoted by them with respect to the issue of transfer of ownership of the wine, so as to highlight them for our benefit. The appellant argues that there is a distinct difference between legal and commercial ownership, and says that while this was acknowledged by the trial judge in the transcript the distinction was not addressed in the judgment.

136. The appellant makes much of the remark made by Noonan J. at paragraph 24 of his judgement that "*no excuse of any colour has been offered by the plaintiff for not serving a statement of claim.*" The appellant asserts that this is "completely false", and indeed went so far as to contend at the oral hearing that the High Court judge had "lied" in that respect. He alluded to the fact that he had put a number of personal circumstances before the court, including that he and his partner had had the tragedy of a stillborn baby in late February 2014, that he had had to take time out for himself and his family and that he had lost his income.

137. The supplemental submissions reiterate the claim that bias was demonstrated by the High Court judge's conduct, and the contempt he exhibited towards the appellant. There is a complaint of persistently interrupting the appellant and of not allowing him to have his fair say and of destabilising him as he tried to present his arguments.

138. The supplemental submissions further assert that the appellant has discrete causes of action against all of the named respondents and that the ECJ decision in *Factortame III*, Case C-48/93 "*makes the fifth named respondent liable for the entirety of the claim of the plaintiff's company against the first named defendant.*"

139. Finally, the appellant's grievance with respect to not having been allowed to argue his motion for an injunction is re-ventilated and is presented as yet further evidence of the High Court judge's bias against the appellant.

140. The thrust of the respondents' respective submissions are to the effect that there has been no meaningful engagement by the appellant with the legal basis on which, in each case, the High Court judge dismissed/struck out the appellant's claims against the respondents. Moreover, it is said that much of his submissions relate to issues that are not covered by his pleadings, that were not raised in the court below, that have in some instances previously been litigated such that it is not open to him to seek to reventilate them, and concern attempts to assert claims on behalf of the Company which are not legally permissible. Moreover, they point to the fundamental difficulty which the appellant faces by virtue of the Company having been dissolved, namely that it is a non-existent legal entity.

Submissions of first named respondents

141. It is fair to say that the major focus in the appellant's present proceedings is with respect to his claims against the first named respondents. To suggest that, is not to discount his claims against the second to sixth named respondents. However, we think it appropriate given the focus to which we have alluded, to offer some further elaboration on the submissions of the first named respondents beyond the summary provided above.

142. It is clear from the pleadings, both the plenary summons in its original form and its amended form, as well as the Statement of Claim, that the appellant's claim against the first named respondents arises from the seizure of wine belonging to the Company, and only from that seizure. The central point of the first named respondents is that the appellant has no right to litigate on behalf of the Company and has no right to litigate on the basis of loss or damage to the Company or loss of value to his shareholding in the Company. Accordingly, the appellant's claim is bound to fail, and the trial judge was correct in so holding.

143. In their written submissions, the first named respondents argue that the amended Plenary Summons advances the claim on the basis that the first respondents detained “*the stock of the second named Notice Party*” and that the first named respondents unlawfully seized “*the stock of the second named Notice Party*” and that they refused to provide redress to the “*second named Notice Party*”. All of these references to the “*second named Notice Party*” are references to the Company.

144. The appellants are therefore prohibited by the rule in *Foss v. Harbottle*, which remains good law in this jurisdiction, having recently been applied in *McAteer v. Burke* [2015] IECA 215.

145. The first named respondents further submit that it is not possible to recast the proceedings or to remedy this problem by way of amendment to the pleadings owing to the fact that the entire proceedings relate solely to losses allegedly suffered by the Company.

146. Furthermore, it is not open to the appellant to claim any losses that he has personally sustained, consequent on the losses allegedly sustained by the Company. The first named respondents rely on *O’Neill v. Ryan* and the recent decision of the High Court in *Alico Life International Limited v. Thema International Fund plc & Another* [2016] IEHC 363 in which Costello J. stated:

“111. ...there are sound policy reasons for the rule against the recovery of a reflective loss. The rule is not simply designed to prevent double recovery and to ensure that the interests of creditors are protected. That being so, demonstrating that there will be no double recovery or prejudice to creditors is not an answer to the application of the rule, as was argued by the plaintiffs.

112. The rule recognises the fact that the losses are those of the company and so it is for the company to sue to recover the loss. It is important from the perspective of corporate autonomy.”

147. The first named respondents also rely on *Flanagan v. Kelly* in which the High Court struck out a claim for failing to disclose a reasonable cause of action, on the basis that the losses claimed by the plaintiff in that case were all losses of the company and not personal losses of the plaintiff. In these proceedings, the claim of the appellant, being losses caused to the Company, were doomed to fail. Since this is apparent on the face of the pleadings, it is an appropriate case for the court to exercise its jurisdiction under O.19, r. 28.

148. The first named respondents further submit that the trial judge was correct in dismissing the appellant's motion, since inevitably it could not survive the dismissal of the substantive proceedings. Moreover, it was in any case doomed to fail owing to the absence of any connection between the reliefs sought in the motion and the reliefs sought in the plenary action.

149. As to the appellant's claim of bias, the first named respondents submit that the appellant has failed to demonstrate any bias, either subjective or objective on the part of the trial judge. There is simply no evidence to justify such an allegation.

150. As to the submission of the appellant that the trial judge was not entitled to rely upon the affidavit evidence of the first named respondents, the first named respondents submit that this objection was not made to the trial judge. In any case it is submitted that the trial judge was entitled to receive hearsay evidence because the application under O.19, r.28 is in the nature of an interlocutory application, in respect of which hearsay evidence is permitted under the rules.

151. Moreover, the grounding affidavit of the first named respondents did not raise any issues of fact that required determination for the purposes of the application. The task of the trial judge was to ascertain whether the claim as set out in the pleadings was sustainable at law.

152. As to the allegations of bias made by the appellant against the trial judge, the first named respondents submit that nowhere in the Notice of Appeal or in his submissions, does the appellant identify any evidential basis for his allegations of bias or lack of impartiality on the part of the trial judge.

153. As to the appellant's argument that the trial judge failed to comply with the rules of essay writing, the first named respondents submit that there is no obligation on a High Court judge to comply with any particular form or rules when writing a judgment.

154. Finally, in relation to the appellant's argument that the judgment of the trial judge is in some way biased or partial because, at the time of its delivery, the Judicial Council and Judicial Conduct Tribunal had not been established, the first named respondents make the point that this argument is not pleaded by the appellant. Furthermore, the fact that these bodies had not been established at the time that the trial judge determined the proceedings has nothing at all to do with the conduct of the proceedings by the trial judge and has no bearing at all upon the issues of bias and/impartiality raised by the appellant.

Discussion and Decision on the Second and Third Appeals

155. By far the bulk of the appellant's submissions were devoted to allegations of bias, subjective and objective, on the part of the trial judge.

156. The claim of subjective bias appears to be based solely on the proposition that since judges in this country were once legal practitioners, they are acquainted with legal representatives who appear in front of them, and this familiarity is potentially unfair to a lay litigant faced with opponents who have legal representation.

157. This submission does not even come close to reaching the threshold required to establish subjective bias. The test is well-established, and it is:

“Whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test – it invokes the apprehension of the reasonable person.” (per Denham J., as she then was] in *Bula Limited v. Tara Mines Limited (No.6)* [2000] 4 IR 412, at p.441.)

158. We are satisfied that no reasonable person could have such a reasonable apprehension merely because a judge, in his or her previous working life as a practicing lawyer, had an acquaintance with practitioners now appearing before him/her in court. Such an acquaintance is fundamentally different from a judge having an acquaintance with a party to proceedings which might well give rise to such concerns (though not necessarily in every case). It is a feature of all common law jurisdictions. As far as this jurisdiction is concerned, on taking office, judges take an oath under Article 34 of the Constitution to execute their office without fear or favour, affection or ill will towards any man, and to uphold the Constitution and the laws of the State, and indeed the trial judge referred to that obligation in the course of his exchanges with the appellant.

159. The appellant advanced no evidence at all as to objective bias. The suggestion that the trial judge, in assigning the case to himself (if he had done so, which he did not in fact do) was acting in some way that was contrary to the interests of the appellant is nothing short of preposterous. It is clear that the trial judge took responsibility for the case in accordance with the routine distribution of cases in the High Court (the case was sent to him by the relevant Registrar) and the appellant advanced no reason at all as to why the trial judge would have had any particular interest in this case. The appellant’s persistence in maintaining this allegation is an example (amongst others) of him seeking to re-ventilate an issue that was

previously considered and determined against him (in this instance by Costello J.). That he should persist in doing so represents in our view an abuse of the process of the Court.

160. While the appellant refers to Articles of both the European Convention on Human Rights (Articles 6 and 13) and the Charter of Fundamental Rights of the European Union (Article 47), he fails to identify any basis upon which the trial in the High Court contravened those Articles or indeed any other Articles of those Instruments.

161. The appellant's argument as regards the Bangalore Principles are entirely misconceived. While those principles have always been accepted in this jurisdiction, it does not follow that the fact that there was no formalised system for addressing issues of judicial conduct meant that the administration of justice in this country came to a halt. Again, this point has been made to him by Costello J. in this Court. It is the Constitution and the laws of the State that govern the administration of justice in the State.

162. Turning then to the substantive issues raised in the proceedings and the decision of the trial judge on the application of the first named respondents, we are satisfied that the trial judge was correct in his conclusion that the claim being maintained by the appellant in these proceedings is a claim that could only be maintained by the Company. The plenary summons, both in its original and amended form, refers repeatedly to the "*stock of the Company*". The Statement of Claim served on the first named respondents states at para. 3 thereof that, "*By letter dated 4 April 2007, the second named Notice Party made the first named Defendant aware that the illegal detention and seizure of wine respectively in August and September 2006 'had an important knock on effect on our business'.*" The pleadings (i.e. the original Plenary Summons, the amended Plenary Summons and the Statement of Claim) do not identify any interest at all of the appellant in the wine seized by the first respondent. It is true that the affidavit sworn by the appellant contemporaneous to the issue of the proceedings claims, at para. 30 thereof, that the first named respondents "*infringed [the*

appellant's] "right to property" (in this instance, the second named notice party and the goods put in my name) ...", and the appellant relies on this to demonstrate that from the outset of the proceedings he made it clear that the ownership of the wine seized had been transferred to him. This is a somewhat vague way to assert an interest in goods that are otherwise throughout the same affidavit referred to as being the wine or stock of the Company at the time of their seizure.

163. Even if, however, the appellant did acquire an interest in the wine from the suppliers after its seizure, this would not give rise to the claim made in these proceedings, which is a claim made in respect of damages allegedly caused as a consequence of the seizure of the wine. Those damages can only have been suffered by the Company, as importer of the wine. At the time of seizure, the appellant, even on his own case, had no interest at all in the wine. Moreover, any claim that the Company may have as a result of the seizure of the wine is very different from any claim that the supplier may have had pursuant to a retention of title clause, which is as much as the appellant could have acquired from the supplier. Typically the owner of goods, acting on foot of a retention of title clause, will seek the return of goods on grounds of non-payment for same. That is not what is at issue here. So therefore, even if the appellant did acquire the supplier's interest in the wine, the proceedings could not be saved by an amendment to the pleadings, because the proceedings would be altogether different in character to the proceedings actually advanced by the appellant.

164. Moreover, while the appellant produced a number of documents in support of this element of his claim, he did not exhibit the retention of title clause itself. Furthermore, the document relied upon makes clear that the transfer of ownership does not affect any debt due by the Company to the supplier for the same wine. So, in effect, the supplier appears to say that ownership of the wine is transferred to the appellant, but the liabilities associated with the same wine remain with the Company.

165. Other documents exhibited by the appellant himself include a document entitled “*Redress Details*” dated the 28th of May 2008, which is stated to relate to the claims of the Company (not the appellant) against the Office of the Revenue Commissioners.

166. More than 5 years later, after the issue of the proceedings, the appellant wrote, on the 30th of September 2013, to the first named respondents a letter entitled:

“Object: Stopping the ongoing increase of liability from your office towards my company, Loire Valley Limited, and to my French business, LO Eire Development.”

167. In the body of this letter, the appellant refers to the loss of business of Loire Valley Limited as a consequence of the “*irregular detention and unlawful seizure of wine in August and September 2006.*”

168. He then goes on to refer to the dissolution of Loire Valley Limited, as a result of which he says that any payments would have to be made by foreign bank draft to LoEire Development. The latter, the court was informed, is a trade name of the appellant, and not a corporate entity. What is clear however is that the appellant was requiring that any payments would have to be paid to LoEire Development/the appellant not because of any entitlement to the same, but because of the dissolution of Loire Valley Limited.

169. Finally, under this heading, the trial judge observed that it was difficult to reconcile the claim that the appellant had any personal interests in the wine, having regard to the acceptance by the Company of an interim payment from the first respondent of €25,000, in respect of the wine.

170. For all of these reasons, we consider that the trial judge was fully correct in his conclusions that the claim being maintained by the appellant in the proceedings is clearly a claim that could only have been maintained by the Company. That such claims have been prohibited in this country by the rule in *Foss v. Harbottle* in 1843 is beyond any doubt. As the trial judge noted:

“The rationale for the rule is straightforward. A party cannot bring proceedings in respect of a wrong suffered by another party.”

171. While at the hearing of this appeal the appellant contended that there is authority (under English law) establishing that claims of “*reflective loss*” may be advanced by shareholders of a company, the authority he referred to the Court on this issue, namely *Sevilleja v. Marex Financial Limited* [2020] UKSC 31, was not, to our knowledge, opened to the High Court. Nor is it referred to in the appellant’s notice of appeal or in his written submissions. The case itself is a complex one, not involving a claim by shareholders, but one brought by creditors of an insolvent company against the controlling shareholder of that company in respect of actions that he took that had the effect of stripping the company of assets that would otherwise have been available to the plaintiff to meet liabilities of the company to the plaintiff. Those liabilities were the subject of an earlier court decree in favour of the plaintiff against the company. The facts also established that the liquidator of the company was not independent of the controlling shareholder, and that he took no steps to recover the funds allegedly moved out of the company by its controlling shareholder. While the case does indeed appear to establish that claims for reflective loss are not always prohibited, its conclusions must be seen against the background of those facts in which the plaintiff was a creditor and not a shareholder of the wronged company, and was able to identify a definite loss caused by the unlawful actions of its controlling shareholder, which were specifically intended to avoid the consequences of a decree previously obtained by the plaintiff against the company when it was solvent.

172. Those facts could not be further removed from the facts of this case, in which it is difficult to identify *any* claim of the appellant that is independent of the damage allegedly caused to the Company by the first named respondents as a consequence of the seizure of the wine.

173. Moreover, as far as reflective losses are concerned, the law in this jurisdiction was most recently considered by Costello J. in *Alico Life International Ltd. v. Thema International Fund plc and another* [2016] IEHC 363, wherein she stated at para. 98:

"Where a company suffers loss as a result of a wrong by a third party, a shareholder in the company may also suffer loss personally as a result: for example the value of his shares may be reduced as a result of the losses suffered by the company. If the loss would be made good if the company were to pursue and enforce its rights of recovery against the wrong doer, the loss is referred to as reflective loss. However, a wrongdoer may owe a duty not only to the company but also to the shareholder. In an action for breach of the duty owed to him, the shareholder can recover (sic) damages for his personal losses but not for loss which is reflective of the company's losses. The rule applies when a duty is owed both to a company and a shareholder in the company and both suffer loss as a result of wrongdoing by a third party. The issue is whether the loss is that of the company and whether the shareholder's loss is merely reflective of the loss of the company. If the shareholder's loss is merely reflective of the company's loss, the rule applies and the company's cause of action bars the shareholder's cause of action. If not, then the shareholder is free to maintain his own cause of action."

At para. 101 Costello J. continued:

"The rule does not require that the causes of action be the same: merely that recovery sought (or which could be sought) must be the same. The test for determining whether the loss is reflective in nature is whether a full recovery by the company of its loss in an action against the wrong doer would provide a full redress for the loss suffered by the shareholder."

174. The Court held that the claimed loss was identical to the loss of the Company, therefore the rule on reflective loss applied in this case, barring the claims. It was also held that any claims dependant on the principal claim, such as loss of opportunity, are not maintainable on the basis that the principal claims are disallowed so dependent claims likewise cannot be maintained.

175. At para.16 of his judgement the trial judge stated:

“Even if the pleadings could be interpreted as a claim by the plaintiff for losses suffered personally by him as a result of damage to the Company, such as a diminution in the value of his interest therein, such a derivative claim is equally one that cannot be maintained in law and is bound to fail - see O’Neill v. Ryan [1993] ILRM 557 and Flanagan v. Kelly [1999] IEHC 116.”

We agree.

176. It follows from all of the above that we can find no fault with the conclusion of the trial judge that the case as pleaded by the appellant disclosed no cause of action against any of the defendants, including the first named respondents.

177. Finally, the appellant claims that the trial judge refused to allow him to open his own motion (relating to the warrant issued by the first named respondents to the Sherriff) and that in doing so the trial judge was subjectively biased. The appellant acknowledges that he had agreed that his own motion should be dealt with last but submits that the trial judge precluded him from opening his motion, and that this in itself indicates that the trial judge had formed a view as to his decision on that motion, without actually hearing the appellant.

178. The transcript of the proceedings in the High Court indicates that the appellant expressed a preference that his motion should be dealt with last. When the appellant was concluding his submissions in reply to counsel for the respondents on their motions, he mentioned that he had not yet opened his motion. The trial judge indicated that he had read

the papers relating to that motion, and it did not appear to him that it had anything to do with the substantive proceedings. He suggested to the appellant that if he wanted to restrain the Revenue from executing the warrant, he would have to bring a new claim. There were some discussions about this between the trial judge and the appellant, with the appellant himself concluding "*I think that is enough*" and he went on to make some other observations. When the appellant had finished his submissions, counsel for the respondents replied to the submissions of the appellant, and he then had a further opportunity to address the court. He did not attempt to open his own motion at this point, as he would have been entitled to do. He addressed the court on different issues relating to the substantive proceedings. On no reasonable reading of the transcript could it be suggested that the trial judge precluded the appellant from opening his own motion, although it is fair to say, as we have indicated above, he did express the view that the motion appeared to relate to an entirely separate matter.

179. We are satisfied that there is nothing in the transcript that would indicate any subjective bias on the part of the trial judge in his treatment of the appellant's motion. Moreover, the conclusion that the trial judge reached – to dismiss the motion – followed inevitably once he reached the decision to dismiss the substantive proceedings. Furthermore, there really is no doubt that the subject matter of the appellant's motion was entirely different to the matter raised by the substantive proceedings, and the reliefs sought necessitated the issue of different proceedings. In fact, the appellant did not really quibble with the views of the trial judge when discussing this issue with him i.e., that the relief sought did not arise from the substantive proceedings. It follows that we can find no fault at all with the decision of the trial judge to dismiss the appellant's motion, and we would dismiss this appeal also.

180. In so far as the dismissal/striking out of the claims against the second to sixth named respondents are concerned we would also dismiss his appeals in that respect. Detailed consideration has been given to the pleadings, such as they are, against those parties, to the

evidence adduced on both sides, to the parties' respective submissions and to the judgment of the High Court judge. There was hardly any meaningful engagement on the part of the appellant with the legal basis for the Orders which the High Court judge made against him. He does not contend, for example, that any aspect of the extensive jurisprudence that now exists concerning the jurisdiction to dismiss proceedings under Order 19, Rule 28 suggests that such an Order should not have been made. Neither does he engage with the *Primor* test with respect to the jurisdiction to strike out for inordinate and inexcusable delay. He does not mention the *Primor* jurisprudence once.

181. In our view there was a clear evidential and legal basis for the High Court judge to make the orders which he made. Indeed, the only respect in which the appellant raises any significant challenge to the evidential findings of the High Court judge is his disputation of the sentence in paragraph 24 of the judgment of the 6th of July 2017 where the judge stated, "*no excuse of any colour has been offered by the plaintiff for not serving a statement of claim.*" That statement considered in isolation may not have been wholly justified, and somewhat hyperbolic, in as much as the appellant had pointed to a personal tragedy shared with his partner in late February 2014, involving their baby being still born, and the fact that coping with that and supporting his partner had been the dominant focus of his life for at least some time afterwards. However, be that as it may, the overall evidence remained such as to have justified the High Court in arriving at the view that there had been both inordinate and inexcusable delay, and that the balance of justice favoured the striking out of the claims at issue. It was an undisputed fact that the appellant was already in significant default even before the personal issues to which he alluded arose. He had only issued his proceedings at the 11th hour, just before the limitation period was due to run out. He had also previously had the time extended for service of a Statement of Claim and the extended period had already run out. Moreover, the second to sixth named respondents did not seek to move against him

during the aftermath of his personal tragedy. It was only in early 2017 that they issued their motion, and only then after extensive correspondence alerting the appellant to his obligation to file a Statement of Claim and calling on him to do so, which he took no steps to attempt to do.

182. Moreover, the appellant clearly knew he was in default and his attitude was to try to get around the problem by means of the motion brought before O'Connor J. to deem his affidavit to be a Statement of Claim instead of facing up to the difficulty and seeking a further extension, either on consent (which we would accept was unlikely to be forthcoming) or from the High Court. His contentions that because he is a lay litigant he didn't understand what a Statement of Claim was, ring hollow in circumstances where he is a very experienced personal litigant who is able to quote the Rules of the Superior Courts, chapter and verse when it suits him, and in circumstances where he had already served a Statement of Claim on the first named respondents. We are therefore in no doubt that there was a sufficient evidential basis for the High Court judge's findings that the delay on the part of appellant in prosecuting his claims had been both inordinate and inexcusable, and that the balance of justice had favoured striking out the claims against the second to sixth named respondents pursuant to the inherent jurisdiction of the court, alternatively dismissing them under Order 19, Rule 28.

A possible reference to the CJEU

183. For the avoidance of doubt, we are completely satisfied that no issue of EU law arises that would justify us in making a reference to the Court of Justice of the European Union (CJEU) pursuant to article 267. Insofar as the appellant has sought to invoke EU law, and in particular Directive 2009/102/EC, in support of his claims against the second to sixth named respondents that he was denied access to justice by virtue of his inability to have the Company named as a co-plaintiff with him in the action, he has not sought to make the case

in his pleadings, i.e., his amended Plenary Summons, that the Directive in question is directly effective and that the second to sixth named respondents, were obliged to disregard Irish statute law and apply directly effective European law. This is quite apart altogether from the fact that he has previously sought to invoke this Directive in his litigation with Allied Irish Banks plc to suggest that the provisions of Companies Acts which permit the dissolution of a single member company for failing to make statutory returns is disproportionate, and the Supreme Court has said that his argument in that respect is “entirely misconceived”. See paragraphs 37 and 38 of the previously referred to judgement of O’Donnell J.

184. Finally, although it should go without saying, we must again emphasise that this Court has no jurisdiction to condemn provisions of Irish statute law as being either unconstitutional, or contrary to some provision of EU law, in circumstances where no claim in that respect is made in the pleadings and where the matter has not been the subject of a decision at first instance. It is necessary to make this observation in light of various reliefs prayed for in motions brought by the appellant in these proceedings which were simply non-justiciable. Insofar as that was pointed out to Mr Gaultier during the case management process, we reiterate it now as a court of three for the avoidance of any doubt on his part.

Conclusion

185. As we have not been disposed to uphold any of the appellant’s grounds of appeal, all three appeals are dismissed.

186. As the appellant has been wholly unsuccessful in his appeal, our indicative order as to costs is that the appellant should be ordered to pay the costs of the respondents incurred in connection with this appeal, the amount of which shall be determined by adjudication in default of agreement. If the appellant wishes to contend that a different order as to costs should be made, he may, within fourteen days of the delivery of this judgment, contact the Office of the Court of Appeal and request a short oral hearing at which submissions will be

made by the parties in relation to the appropriate order for costs. The appellant should note that in the event that he is unsuccessful in altering the provisional order for costs which we have indicated, he may be required to pay the costs of the additional hearing.