

THE HIGH COURT

[2017 No. 252 S.P.]

BETWEEN

DAVID DULLY

PLAINTIFF

AND

ATHLONE TOWN STADIUM LIMITED, DECLAN MOLLOY, KEIRAN TEMPLE AND PADDY
MCCAUL

DEFENDANTS

AND

THE FOOTBALL ASSOCIATION OF IRELAND

NOTICE PARTY

(NO. 8)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 6th day of December, 2019

1. This case was ostensibly settled on 23rd May, 2019. However, the first and second-named defendants are now seeking to unravel the settlement. That attempt has involved a number of unhappy features, perhaps too many to enumerate; but the more striking ones are as follows:
 - (i). The undesirable spectacle of unfounded aspersions being cast against a wide range of persons. The high point of that process was making a submission as to fraud by two of the directors without having put that to the director who gave evidence. Shortly after that allegation was launched, as soon as it was queried by the court it was rapidly withdrawn.
 - (ii). Aspersions were cast against a wide range of professionals without any expert or other evidence to support them.
 - (iii). The principal application with which we are now concerned was originally based on two short grounds set out in a notice of motion, which set out two reasons as to why the company was allegedly not bound by the settlement, but as it was put by counsel for the fourth-named defendant, "*day by day the case has grown*". We have now reached an unendingly elaborate series of points being initiated, one more meritless than the next. In a probably futile attempt to bring some comprehensibility to the case, I will set out later in this judgment the 21 separate headings under which one can classify the submissions that were made on behalf of the first-named defendant.
 - (iv). Materials provided by the first-named defendant were in considerable disarray and were subjected to a process of almost continuous revision. Perhaps the low point was that, after counsel for that defendant finished his oral submission, and after the second named defendant had made submissions, we had got to at about 4.40 pm on Day 4 of the hearing, at which point counsel for the first named defendant said that he was in the process of putting in yet another slightly adjusted written submission for which permission had not been sought let alone granted.

- (v). More generally, the first-named defendant has engaged in a campaign of procedural obfuscation, bringing evolving and mutating applications together with virtually continuous applications for adjournments, sometimes several times a day. Many of those applications were made on the tendentious basis of demanding "fairness", a process that seems to be entirely one-way as far as the first-named defendant is concerned. The impression generated at the time (an impression that somehow persists in retrospect) seemed to be that 21 points of law were not enough for the first-named defendant; and that, in addition, appeal points had to be generated on an ongoing basis as a kind of insurance policy.
- (vi). Finally, but importantly from a practical point of view, the first-named defendant has conducted the case in a manner utterly oblivious to the other demands on the court. The only time estimate given in advance on behalf of the first-named defendant was that the application was unsuitable for a Monday. The application was then listed for a full day. But, once it eventually got going, it has run for a full week. Had I not afforded the parties the benefit of early starts, shortened lunch adjournments and late sittings, the matter would have comfortably drifted into a second week, and maybe the momentum thereby generated would have propelled it even further.

2. I have received assistance from the parties as follows:

- (i). on behalf of the plaintiff from Mr. Kieran Collins B.L.; and without taking away from other counsel in any way I would commend Mr. Collins on his admirably surgical and focused cross-examinations and submissions;
- (ii). on behalf of the first-named defendant and moving party in the motions by Mr. Michael Forde S.C. (with Mr. Laurence Masterson B.L.);
- (iii). by Mr. Molloy, the second-named defendant, in person; I am also grateful for Mr. Molloy in his contribution to the present motion for being commendably succinct;
- (iv). there was no appearance by the third-named defendant;
- (v). on behalf of the fourth-named defendant by Mr. Cormac Ó Dúlacháin S.C.;
- (vi). the notice party has not appeared at any stage.

First-named defendant's medley of applications

3. A profusion of applications emanated from the first-named defendant. This legal cornucopia can be summarised as follows:

- (i). Relief 1 in a motion of September, 2019: This sought an order vacating the order purportedly requiring the first-named defendant to withdraw the appeals. That was an error in the order because that outcome was not in fact ordered by the court, so that has already been dealt with on 15th October, 2019 and that part of the order has already been deleted. Nothing further arises under that heading.

- (ii). Relief 2 in motion of September, 2019: This seeks a "*declaration*" that the first-named defendant is not bound by the undertakings on the second page of the agreed statement to the court. A declaration sought by a defendant is not normally the procedurally correct approach in this context because the proceedings were instituted by special summons. However, at the outset I decided to entertain the application here because it seemed the only convenient way to address the real issues in the proceedings. As noted below, I subsequently allowed Mr. Forde to amend the relief to encompass the undertakings on the first page as well.
- (iii). Relief 1, canvassed in an affidavit of October, 2019: That relates to an amendment which has already been dealt with.
- (iv). Relief 2 in affidavit of October, 2019: The second paragraph of Mr. McNelis' affidavit seeks to direct the plaintiff's solicitors to promptly repay the monies previously lodged in court, or if they have been distributed, to lodge €50,000 to the credit of the appeal. No point was made by Mr. Ó Dúlacháin about this relief being sought in an affidavit rather than a formal notice of motion but in any event it was not pursued as will be seen below.
- (v). Motion of November, 2019: This sought relief for the plaintiff and/or fourth-named defendant to provide a full explanation as to the payment out of the monies lodged. That was not pursued either, as detailed further below.
- (vi). Oral applications in the course of the hearing: During the hearing, Mr. Forde, in opening the motion, asked for costs of the hearing of 4th November, 2019. Given the belated nature of that application, that was left over until the finalisation of his other applications. He also asked for permission to withdraw his legal submissions. I was reluctant to allow that unless any replacement submission was being proffered in their stead, and also left that over. Amended legal submissions were finally produced on Day 4 of the hearing, just as Mr. Forde was concluding his submissions. As noted above, as a final afterthought he said that he wanted to put in yet a further revised version but I saw no necessity for or benefit in that. Mr. Forde also sought to have witnesses cross-examined in two separate tranches, first on the issue of withdrawal of the monies and secondly, on the merits of the dispute. I rejected that application as it would lead only to procedural complication and yet further waste of time. As the hearing continued Mr. Forde made a number of other applications, which I will refer to below as they arise.

Oral evidence

- 4. Four witnesses were tendered for cross-examination. Firstly, the witnesses who had put in affidavits for the first-named defendant, Mr. Neil McNelis, solicitor, and Mr. Declan Molloy, who also swore an affidavit on his own behalf. There was then cross-examination of the fourth-named defendant's witnesses, Mr. Paddy McCaul and Mr. Colm MacGeehin. For clarity, when addressing their evidence below I have set out the various points made by the witnesses in roughly chronological order rather than in the order in which they made those points in the course of their evidence.

Evidence of Neil McNelis

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

Email of 15th May, 2019

6. On 15th May, 2019, prior to the settlement, Mr. McNelis sent an email to Mr. MacGeehin which assumed some importance in the course of the hearing. He said that he had been given to understand that very little contact had taken place between Mr. MacGeehin's counsel, Mr. Ó Dúlacháin, and his counsel Mr. Forde. That was the background to the email. Its purpose, he said, was to put on record his concerns. The email said that the company consisted of the three directors and whatever the three agreed upon would result in them giving their instructions from their own point of view and for the company, so that unless there was something that impacted exclusively on him as solicitor for the company, it was safe for Mr. MacGeehin to assume that instructions the directors give concerning the case against them will apply with equal merit to the instructions relating to the company. In evidence he said it was "*perverse and ridiculous*" to say that that means that as long as his office is in the clear the directors can agree to what they like. He said that he had not as yet received a copy of the instructions provided to Mr. MacGeehin by the three directors concerning the proposed settlement meeting and what they were looking for from that meeting. He said he would need to see those instructions, nor did he get those instructions later. His interpretation of the email was that it was a warning to Mr. MacGeehin to in turn warn the three individuals that they should get advice from the company's legal advisers, which did not happen. The email records that it was Mr. Forde's view that there was no need for the company to be separately represented since the three directors would be providing their instructions and such instructions would apply equally to the company. Mr. MacGeehin could simply relay whatever has been decided.
7. Mr. McNelis said that was referencing back to discussions he had had with Mr. Forde. He said that he himself appeared in court on one or two occasions as a courtesy in circumstances where the plaintiff's latest motion did not seek relief against the company. He was informed by the court that there was no need to be present, he was superfluous at that point. Mr. Forde's view was he did not need to be present because there was nothing concerning the company.

8. He was asked if the company was not a party, why send the email at all. His reply was that the letter was not an authorisation to Mr. MacGeehin. He claimed that that was clear from the wording. He said it was not on his horizon that something like the settlement would happen. Unfortunately, that answer is not convincing. The problem is that the email clearly envisages that there was going to be some development that could bind the company.
9. When asked why not send a one-liner that the company would not be bound, he said that his position was that the company would not be bound and was not in the frame. I appreciate that Mr. McNelis is doing his best to recall the position but I reject his evidence in this regard as a misrecollection. It is not consistent with the terms of the letter sent at the time, which very much puts the company potentially in the frame. My conclusion is that his recollections are unconsciously significantly coloured in retrospect by later developments.
10. The email refers to a settlement meeting on the following Friday and says "*there is little point in me being there on Friday*". That can only be construed as him being happy with the settlement going ahead without his involvement.

Settlement of 23rd May, 2019

11. While his affidavit stated that at the outset of the hearing on 21st May, 2019, Mr. McNelis asked to be excused from attending the hearing, and was so excused, he now informs me that that turns out to be a misunderstanding. His asking to be excused happened the previous December and not on 21st May, 2019. He now says he did not appear or address the court at the May hearing at all except by being at the back of the court helping Mr. MacGeehin by providing papers. Again, I totally accept that that inaccuracy in the affidavit can purely be put down to human error and was not in any way intended to be unhelpful to the court.
12. It was put to Mr. McNelis that Mr. McCaul said at para. 9 of his affidavit that no resolution of the company at an EGM was previously sought to defend the plaintiff's action or to launch the appeal to the Court of Appeal. His response to that was that unless it impacts on the company in a fairly fundamental way, the ordinary instructions were applicable. It was put to him that Mr. McCaul had said that he was not advised that there needed to be an EGM or that he needed Mr. McNelis's agreement. His answer was that there was never any doubt about the directors' instructions to Mr. McNelis regarding appealing the substantive matter and damages. It was put to him that there was a benefit for the company in the settlement. His answer was that it was of no benefit to the company because it was rendering itself completely insolvent. He said that the company had the benefit of an asset - two appeals. I will deal with this further below, but the problem with that view is the one expressed by Mr. McCaul in the witness box, which was basically that the appeal was a risk. On the totality of the evidence, I conclude that the company was insolvent at all material times so it cannot be said that the settlement "*rendered*" it insolvent. Mr. McNelis's view was that the settlement was so irresponsible and so reckless that the directors could have exposed themselves to personal liability and legal costs. In his view it was "*ridiculous*".

13. When asked was he aware that Mr. Molloy was the mastermind of the events of 23rd May, 2019 and had come up with the idea of using the €50,000 lodged in court as security for costs to settle the matter, he said that he knew that Mr. Molloy had provided the €50,000 in the first place but did not know that using it to settle the case was Mr. Molloy's idea. It was put to him that he had said at para. 5 of his affidavit of 11th September, 2019 that the company was an entire stranger as to what occurred on 23rd May, 2019 and never consented to the order made. He said he was not consulted about the terms of settlement and if he had been consulted he would have requested advice from counsel. He first learned that the settlement had been concluded by means of a phone call from Mr. MacGeehin. He was not asked prior to the settlement for his *imprimatur*. He said that there was no communication between the directors' legal team and the company's legal team between the previous letter and the settlement, and he did not seem to know why.
14. An order was perfected on foot of the settlement that contained errors. The reference to an order that the appeals be discontinued was erroneous and the court later amended the order to delete that. The gist of the settlement was that the claim personally against the directors was withdrawn with no order. The company would discontinue the appeals lodged with the Court of Appeal with no order, all costs orders would be vacated, and the €50,000 lodged as security for costs would be paid to the plaintiff along with a further €50,000. A new entity would be set up to hold Athlone Town Stadium "*on trust for the benefit of the club or any successor club*", the club to occupy the lands "*pursuant to licence to the use of the lands for the purposes of soccer and for the benefit of the community at large*".

Letter of 28th May, 2019

15. Mr. McNelis got a letter dated 28th May, 2019 from Mr. MacGeehin informing him of the settlement. The letter states that Mr. Molloy wanted to fight on but the other two directors did not. It says that Mr. MacGeehin presumed that the directors would have to contact Mr. McNelis directly to release the funds in court. Asked whether he assisted in the release of funds he said purely from a procedural point of view. If he had received instructions to carry out the order from the company, the three directors, he would have assisted but given that Mr. Molloy did not consent, the company was in conflict with itself so the matter is not clear at all. He only took preparatory steps but did not want to be in a situation where at the eleventh hour he would be expected to do something and be outside the time. He wrote to the three members to inform them he had no hand, act or part in the settlement and was completely perplexed. He did not feel it was for Mr. MacGeehin to speak for the company, it was for him to ascertain from the company what instructions they wished to provide. He wrote to the directors several times. First he made clear his non-involvement in the settlement and secondly, to find out what they wanted him to do. It was clear there was disagreement, and also he wanted to "*cover himself*" regarding what had to be done, given that an order of the court had been made. He seemed to be saying that he advised the directors they were bound by the court order, although not necessarily by the settlement.

16. He understood that the majority of the directors had agreed to the settlement but that was not the position in the lead up to the court case. He was of the view that it had to be unanimous. It was "*completely wrong*" to suggest that Mr. MacGeehin was entitled to act for the company. He explicitly said to Mr. MacGeehin that he should not do anything unless Mr. Molloy was in agreement. His evidence was that he said in his email to Mr. MacGeehin that the directors could give instructions, provided that they all agree. I should note at this juncture that his email does not specifically say that the agreement has to be unanimous.
17. Mr. McNelis said that a show of hands to vote for the extinction of the company would be ridiculous. It was put to him that he never replied to Mr. MacGeehin's letter in order to indicate his astonishment. He explained that by saying that he had no instructions and was largely in the dark, and he felt it was not his place to start raising issues.

Letter of 24th June, 2019 from Mr. McNelis to the directors, copied to Mr. MacGeehin

18. On 24th June, 2019, Mr. McNelis wrote to the directors and Mr. MacGeehin discussing the implementation of the order. It was put to him that that letter expressed no alarm or concern about the settlement. He said he was urging the company to do what needed to be done. It was put to him that both he and Mr. MacGeehin were proactive in implementing the settlement. Mr. McNelis denied this and said that that was a misinterpretation. He was alerting the directors to the order and ensuring he would not be at fault or caught out by a deadline and be unable to meet it. The idea that Mr. McNelis was not proactive in implementing the settlement is, in my view, not convincing and not compatible with contemporaneous materials.

Meeting on 27th June, 2019

19. An EGM of the company occurred on 27th June, 2019. Acceptance of the settlement was proposed. Messrs. McCaul and Temple voted yes, Mr. Molloy voted no. While not accepted by the shareholders, the settlement was accepted by a majority of the directors, who Mr. McNelis says are instructing him. Mr. Temple then wrote to Mr. MacGeehin on company letter-headed paper stating that a majority of directors agreed to comply with the order and "*we now request that this order is complied with*". That was forwarded to Mr. MacGeehin on 2nd July, 2019. Mr. McNelis says he may have seen that but cannot be certain about it.

Correspondence regarding release of funds, July, 2019

20. On 3rd July, 2019, Mr. MacGeehin wrote to Mr. McNelis saying that he was engaging with the Accountant General for the release of funds. Asked whether he replied, Mr. McNelis said "*in a manner of speaking*". He had a sequence of letters to the directors seeking instructions and recalled a conversation with Mr. MacGeehin to the effect that the solicitor for the company would have to take the steps necessary to deal with the company's affairs, although he could not put that into a time frame. I might note here that clearly he did not write back protesting.
21. Also on 3rd July, 2019, Mr. MacGeehin wrote to the Courts Service in his capacity as solicitors for the directors of the company to consent to payment out of sums lodged pursuant to the order of the Court of Appeal of 8th February, 2018. Mr. McNelis's

evidence was that it was "*totally inappropriate*" for Mr. MacGeehin to describe himself thus as that would give the impression that he was acting for the company. I do not accept that criticism. Mr. MacGeehin's description of himself was entirely accurate.

22. Again on 3rd July, 2019, Mr. McNelis wrote to Mr. MacGeehin, enclosing the order of Irvine J. with the schedule for lodgement, and my own order, and stated that the registrar "*may be prepared to issue a schedule directing payment out by the accountant's office to Richard Stapleton [solicitor for the plaintiff] of the €50,000*". He explained this by saying he was giving Mr. MacGeehin information, but he understood that nothing could happen without a payment schedule. He knew there was no payment schedule and he thought the matter would have to come back to court. It was put to him that Mr. MacGeehin asked for details to help draw down the money and that he provided that. He said he was dealing with an officer of the court who would not do anything inappropriate. He denied that this was cooperation. He said counsel was "*putting a spin on this*" and that he was "*simply giving information*". The directors were capable of giving Mr. McNelis instructions themselves. He was not giving Mr. MacGeehin *carte blanche* and he was convinced nothing could happen without the matter going back to court. On the totality of the evidence, I find that Mr. McNelis was co-operating with the implementation of the settlement and it can certainly be said in particular that there were no massive concerns about the settlement expressed in his email relating to its implementation.
23. It was put to him that he came to court making serious allegations against Mr. MacGeehin without having exhibited documents that he himself possessed. He swore four affidavits without exhibiting the most pertinent documents, which I note would have put his allegations against Mr. MacGeehin in quite a different light. His explanation was that the letter that he exhibited was one where he notified the Accountant's office of a conversation with an official in that office and as a follow up a letter was sent to copper-fasten the position. That of course is not an explanation for why he did not exhibit the other documentation.
24. The position as it appeared following cross-examination contrasts starkly with the averment of Mr. McNelis at para. 4 of his third affidavit where he said it was misleading to suggest that the defendants had made arrangements to release the money and that "*no such arrangements were made by me ... the release of that money took me entirely by surprise*". It also contrasts with para. 5 of Mr. McNelis's fourth affidavit that "*I was never notified of the application for the payment schedule ... it would seem that some material misrepresentation was made to enable that schedule to be issued or else an inexcusable error was made on the part of this honourable court*". The reference to "inexcusable" error seems strange. Mr. McNelis was unable to give any explanation, coherent or otherwise, as to why an error on the part of the court would be inexcusable. It is an unhappy situation that the incomplete picture presented in Mr. McNelis's affidavits takes on a very different complexion when all of the correspondence was put before the court. I do not think there was any positive intention on the part of Mr. McNelis to mislead the court, but it is a symptom of the polarisation that the case has generated that, in his own

mind, Mr. McNelis seems to have unconsciously retrospectively downgraded the significance and importance of much of this correspondence.

25. His overall complaint of surprise is hollow given that he had been in explicit correspondence with Mr. MacGeehin about the issue of the payment schedule. In re-examination he was asked what led him to think that a payment schedule could be issued without a court order and he said in discussions with the registrar that he understood the matter would have to go back to court. He said the registrar might have sought advice and he may have been under the impression that if all parties were in agreement it might be a simple formality of going to court and asking the court for an order. He said that he did not want to read too much into his email; but the only rational explanation why he said that was that the email contradicts the thrust of his recollections and his evidence.
26. On 4th July, 2019, submissions in the appeals to the Court of Appeal were drafted by counsel. When asked who gave instructions for those submissions he said that was done *"on the basis of long standing instructions"*. He said the instructions came from the three company directors and nobody ever gave him any instructions to the contrary. Things became confused as a result of the settlement but he was working on the instructions he had all along. When it was put to him that a majority of directors had supported the settlement, he said that he had had very little contact with the company and had no instructions withdrawing the previous instructions. He wanted to fulfil the deadline imposed by Irvine J. and there was no contact apart from a phone call from Mr. McCaul a few days after 23rd May, 2019. Mr. McNelis did not make inquiries with the directors. His preference in more recent times had been to deal with matters by email. In the context of his evidence on that point, I should record that much of what he said in the witness box was not backed up by emails. That again reflects the extent to which his evidence, I conclude, was unconsciously coloured by the way the matter had developed at an earlier stage.
27. On 10th July, 2019, Mr. MacGeehin wrote to Mr. McNelis indicating that funds had not been released by the Accountant General's office to the plaintiff's solicitor. He was advised it was with the company's solicitors and directors to ensure the release of funds and asked Mr. McNelis to telephone him to discuss. When asked why the letter of 10th July, 2019 had not been disclosed by Mr. McNelis he said he was not sure why that was but he did not think there was anything sinister in it. That is an unconvincing explanation in a context where serious allegations had been made against Mr. MacGeehin. Mr. McNelis had sworn an affidavit raising the prospect of the court office having been misled, inferentially by Mr. MacGeehin being the only other person dealing with that office.
28. Mr. McNelis said there was no reference in documentation to discussions between him and Mr. MacGeehin after 10th July, 2019 but that such discussions had happened. He may have phoned Mr. MacGeehin but he does not recall. As to why there was no correspondence, he said he was absolutely satisfied that it was a matter for Mr. MacGeehin to deal with the order he had negotiated and it was of no concern to the company. On 22nd July, 2019, Mr. McNelis advised the Accountant's office by phone of

an irregularity in the settlement agreement. He wanted to be notified and was assured no payment could be made by the office without a payment schedule, which would require an order of the court. He emailed a letter to the Accountant's office on the same date. The letter said he hadn't any instructions to withdraw the appeal, that distribution of the lodgement would jeopardise the appeal but the company had no involvement in the settlement, that he was advised by counsel that it appears to involve a breach of company law but the majority shareholders did not agree or were not given sufficient information, and that if there was a request to pay out the €50,000 he would appreciate advance notice. He said the purpose of the letter was to act as a warning not to pay out, it was not based on positive instructions. The letter made the point that he had not received instructions to withdraw the appeal.

29. On 30th July, 2019, an EGM instructed Mr. McNelis to do what needed to be done to secure the company's case in the Court of Appeal. Mr. McNelis interpreted that as superseding any decision on 27th June, 2019. Mr. Molloy emailed Mr. McNelis on 31st July, 2019 to say in effect, we voted to instruct you to do whatever needs to be done to set aside the settlement and secure the appeal to the Court of Appeal.
30. It was put to him that Mr. McCaul says in para. 5 of his affidavit of 30th September, 2019 that there was no meeting of the board of directors instructing Mr. McNelis to proceed or authorising him to swear an affidavit on behalf of the company, that his affidavit had not been approved or verified by the company and that Mr. McCaul had not been contacted to establish the truth or accuracy of any averment made by him. His reply was that he saw no reason to disbelieve Mr. Molloy and he was getting his instructions from Mr. Molloy's email of 31st July, 2019.
31. He said that the release of the money took him entirely by surprise. When put to him that he had been previously written to by Mr. MacGeehin he did not resolve that contradiction. It is clear from the contemporaneous materials that Mr. McNelis was aware of the intention to seek the release of the money. He referred in evidence to the lack of a meeting of shareholders and to the dissent of Mr. Molloy. He said it was not a huge surprise to him that he was not getting proper instructions from the company and said "*I was aware of nothing*".

Meeting of 8th September, 2019

32. Another EGM took place on 8th September, 2019 and passed a resolution instructing Mr. McNelis to apply to seek to extend time to appeal the order of 23rd May, 2019. That emerges in a so-called set of exhibits to Mr. Molloy's affidavit of 15th October, 2019, but which "exhibit" was never sworn to. It was initially presented to the court as if it had been properly exhibited. Mr. McNelis has now sworn an affidavit of 2nd December, 2019 explaining that the original "exhibit" was not sworn to, but he does not seem to have fully (or at all) understood the problem that the "exhibit" should not have been presented to the court as an exhibit when it was never sworn to. That rather important point is just not engaged with. Again, I absolve Mr. McNelis of any intention to mislead the court, but it is strange when such a volume of procedural failings is being launched against Mr. MacGeehin by Mr. McNelis's side that Mr. McNelis himself has been involved in a very

unhappy situation where an unsworn “exhibit” was presented to the court as if it had been sworn, where it took some days for the court to be in fact told that this “exhibit” was never sworn to, and I might add where, when this was ultimately done, it was done in a kind of “happy to clear that up” manner, without acknowledgement of the more significant aspects of the problem.

Evidence of Mr. Molloy

33. Mr. Molloy is in the peculiar position of having sworn an affidavit not only on behalf of the company but also on his own behalf. That raises the interesting procedural question as to how to deal with that for the purposes of cross-examination. It is not a situation that happens particularly often, so in the absence of anybody having drawn my attention to any specific jurisprudence in that regard, I decided to take the most generous possible interpretation from Mr. Forde’s point of view, namely to have Mr. Forde tender Mr. Molloy for cross-examination on the affidavit sworn for the first-named defendant, and also to allow Mr. Forde to re-examine him on the affidavit sworn from Mr. Forde’s client and to cross-examine him on the affidavit sworn on his own behalf. Mr. Forde, Mr. Collins and Mr. Molloy himself agreed to that procedure and Mr. Ó Dúlacháin seemed to acquiesce, subject to reserving his position regarding relevance. Mr. Molloy was then cross-examined by Mr. Collins and Mr. Ó Dúlacháin.
34. I should note at this point in the narrative that midway through the cross-examination of Mr. Molloy by Mr. Ó Dúlacháin, Mr. Forde made a somewhat unusual (indeed Mr. Ó Dúlacháin called it “*utterly extraordinary*”), application. Firstly, he applied to adjourn the case to a plenary hearing and secondly, he also made his daily application for an adjournment, this time to allow Mr. McNelis to reply on affidavit to the affidavit of Mr. MacGeehin and also, he said, perhaps to allow the question of discovery to be considered and the question of calling the registrar to give oral evidence to be considered. As regards the plenary hearing, I previously decided not to adjourn the matter to a plenary hearing when ordering cross-examination prior to the trial of the motions. There was no reason to revisit that. No unfairness to anybody was demonstrated, given that cross-examination of all relevant deponents was also ordered. Mr. Forde also submitted that “*at a minimum*” Mr. McNelis, and by way of *jus tertii*, Mr. Molloy, were entitled to time to reply to Mr. MacGeehin’s affidavit exhibiting various documents. That was a spurious objection because many of these documents, and certainly most of the important ones, were in Mr. McNelis’ possession all along. As noted above, he gave sworn evidence that he gave the documents on file to counsel, so clearly there was some disarray on the first-named defendant’s side of the house. That impression was reinforced by a number of factors, including the fairly consistent disorganisation in the first-named defendant’s papers, pleadings, authorities and submissions. A situation where a party had papers but failed to disclose them or to consider them properly does not give rise to injustice or unfairness. Raising the question of further discovery at that point added nothing to the motion which Mr. Forde had already brought and which I had yet to deal with at that stage and which I wouldn’t be dealing with until the end of cross-examination, a motion which in any event Mr. Forde later withdrew, as I will deal with below. The notion of asking the registrar to attend to give oral evidence was well outside the ground-rules for

the hearing and was never canvassed in advance. There was no suggestion that Mr. Forde had done anything whatsoever to ask the registrar for an affidavit or even to establish that her evidence was particularly relevant, still less necessary. An hour of court time was merrily spent on that pointless application alone.

35. Turning then to Mr. Molloy's evidence, he was asked if a majority of the directors were instructing Mr. McNelis. He said that that was not the case. He would assume that a majority of the shareholders were instructing Mr. McNelis. Effectively he himself was instructing Mr. McNelis for the first year or so, and Mr. McCaul and Mr. Temple were barely involved. He agreed with Mr. McCaul that the latter had not been consulted on affidavits filed on behalf of the company and that there hadn't been any meetings of the directors. He said that the company was in charge of directing the proceedings but seemed strangely reluctant to acknowledge the fact that he was the person directing the proceedings. However, I have to conclude that if Messrs. McCaul and Temple are taken out of the picture, as they were, he is the only person left standing to be giving instructions; and it is not clear why he was reluctant to admit that other than inferentially (which is the inference I draw) because he did not think doing so would be of benefit to his case.
36. He accepted that in advance of the settlement he had an active part. He was part of the settlement meeting on 17th May, 2019 and 21st May, 2019, at which a draft settlement agreement was prepared. Mr. Molloy had paid Mr. MacGeehin €50,000 for the costs of the hearing in May, 2019 against the three directors. He also paid €50,000 for the Court of Appeal's security for costs. He said that he had volunteered or agreed to release the money lodged for the Court of Appeal for the purposes of a settlement. At para. 9 of his own affidavit he said that *"the deciding factor in my accepting terms of settlement was that I was certain that the opposition would never agree to them and making them look unreasonable might play well tactically"*. In cross-examination he accepted that he was agreeing to settle the matter, although I should explain here that the context was in terms of the draft of 21st May, 2019, which was not agreed to ultimately because the settlement ultimately arrived at took a different form. On 22nd May, 2019, the case continued. He texted his legal team referring to the settlement the day before to the effect that they should *"run it past the other two"*. It was put to him that his instructions were to run it past the two co-directors and he agreed with that. At para. 17 of his second affidavit he said *"ye can outvote me if you want"*, although he did not think that they would. He agreed that he was operating on the basis of a majority of the directors.
37. It had been mentioned to him before that they could outvote him although he said that his junior counsel had a different view. No other EGMs were held in respect of decisions of the company, such as the decision to appeal. The advice from counsel was that there was no need. The EGM post-settlement was on his own initiative. When put to him that at that meeting the majority of the directors accepted the settlement he replied that there was no vote of directors at that meeting, but accepted that a majority of the directors did in fact support it. In a second affidavit, at para. 15, he said that their counsel had given them a five percent chance of winning the appeal. He said that there was no meeting of

directors on 23rd May, 2019 to discuss and vote on the settlement. It was put to him that the proceedings were compromised and he took it on himself to try to pull down the agreement. His reply was that he only wanted everything to be legal and that there was no legal settlement. Asked what was illegal about the settlement he said there was no meeting of the company and that the shareholders were not involved.

38. I should note that at para. 8 of his first affidavit he said that if he had been advised that the settlement was legally barred "*I would have put up a more firm resistance*". That implies that he did not put up much of a resistance to the settlement.
39. On 7th November, 2019, Mr. MacGeehin's affidavit was filed referring to the fact that the directors had met outside court and their majority decision was communicated to him and counsel. It was put to him he had not denied that or said that he was shocked to read that and Mr. McCaul's version. He said that he gave all the details in his second affidavit and he would have mentioned such a meeting if there was a meeting "*so in a roundabout way I denied it*". I should add that there was quite a semantic debate throughout the evidence about when-is-a-meeting-not-a-meeting but I deal with this further below.

Evidence of Mr. McCaul

40. Mr. McCaul was cross-examined by Mr. Collins, Mr. Forde and Mr. Molloy. Mr. McCaul said he was not asked his opinion as to the truth or accuracy of averments on behalf of the company or Mr. Molloy. When asked was an EGM ever held prior to 27th June, 2019 to give instructions relating to the proceedings he didn't remember any such EGM. His evidence was that prior to the settlement meeting his solicitors contacted Mr. McNelis to advise that the settlement would in all likelihood involve the compromise of all matters including the appeal to the Court of Appeal.
41. The directors were in a position to make a decision on all matters. His affidavit stated that Mr. McNelis was advised to attend but said that the matter of an overall compromise could be left to the decision of the directors and that formal engagement of the company's legal team was not required for the settlement of the action.
42. He himself attended on 17th May, 2019. It was put to him that a member of his legal team, which seems to have been their junior counsel, had said that all directors had to agree. He said he heard this person say it would be better if all directors agreed. He might be wrong about that. He was engaged fully in what was on offer and was trying to reach a conclusion. When asked why the barrister's views were disregarded, he said that he went ahead and continued negotiations and there was a lot of toing and froing trying to find something that was agreeable to all parties. They were a long time outside court. His main focus was how the stadium would be set up going forward. Mr. Molloy was there at the early stages, he subsequently left and came back. He cannot say that Mr. Molloy agreed but Mr. McCaul's opinion was that what was in the settlement was such that in time all parties would have been happy with it.
43. He thought perhaps mistakenly that the fact that they were all still together in court when the other two directors reached agreement that Mr. Molloy was letting them do so and

would come on board. There had been a meeting in the corridor outside court between John Hayden and Michael O'Connor who were acting on behalf of the plaintiff and himself and Kieran Temple. Legal people were also involved. They reached an agreement which was typed up and then put to the court. The directors did not meet in the short time between that being typed up and being presented to the court. However he was aware from the various meetings and discussions between the directors earlier that himself and Mr. Temple were in favour of the settlement and Mr. Molloy was against it. He said in his affidavit that the directors understood that they were entitled to make decisions for the company and that Mr. Molloy did not, as a director, object to the matter being decided by the directors. The company, by a majority of the directors, agreed to the terms as informed to the court. They said he believed he was doing it on behalf of the company and that he acted in the interests of the company and the stadium itself.

44. By forming a trust it would be secured forever. It was at risk within the company seeing as the company had lost the case. He had borrowed €25,000 to pay his contribution to the settlement. Stapleton's, solicitors for the plaintiff, also got the €50,000 that was lodged as a security for costs and Mr. Temple was to pay the other €25,000. Mr. Temple wrote a cheque for €10,000 but then cancelled it, so Stapletons are currently €25,000 short on the settlement agreement. He was disagreeing with the majority shareholder because he believed in the settlement. He said he was not against the appeal originally but was against it since the settlement. It was put to him that he did not carry out his duty as a director because his duty was to prosecute the appeal. He said he was against the appeal on foot of the settlement. It was put to him that Mr. McNelis gave highly favourable advice on the significant prospect of success in the appeal. He agreed that such advice was given but said that he had been advised that they had a "*huge chance of succeeding*" in the proceedings in the first place. The appeal was a "*gamble*". He was sceptical about the appeal because of the heavy defeat in the first place. It was put to him that he did not have any confidence in the court system. He said going to appeal is a risk, like in every case. He had confidence in the system but not in their appeal.

Evidence of Mr. Colm MacGeehin

45. Mr. MacGeehin was cross-examined by Mr. Forde and Mr. Molloy. At the outset Mr. Forde objected to Mr. MacGeehin's affidavit of 3rd December, 2019 being filed. He said it was unprecedented and a "*denial of fundamental fair procedures*" to require him to cross-examine Mr. MacGeehin without allowing Mr. McNelis to "*reply*" in advance; so he applied for an adjournment. In fact, that was his second adjournment application that day. It was a somewhat odd application given that his previous similar adjournment application on the same day had been refused. Much of the same grounds applied. Many of these documents were in Mr. McNelis's possession and certainly most of the more pertinent ones, so there was no unfairness there. Mr. Forde had had since 1 pm on 3rd December, 2019 until 2.25 pm on 4th December, 2019, more than a full day, to take instructions from Mr. McNelis and had yet at that point to exercise his opportunity to cross-examine Mr. MacGeehin or to make submissions in relation to his motion, an opportunity that he did not avail of because that motion was withdrawn. I held that the application and the

constant demands for adjournments were wholly without merit and seemed to be a delaying and obfuscatory tactic.

46. Mr. Forde then applied for liberty to have Mr. McNelis put in a further affidavit to reply to what he called Mr. MacGeehin's "*evidence in chief*", claiming yet again that this would avoid unfairness. Leaving aside the obvious fact that there was no evidence in chief and that Mr. MacGeehin was simply being tendered for cross-examination, I held that no unfairness arose for a number of reasons:
- (i). There was no indication that Mr. McNelis had anything to say that was different to any matters of legal submission.
 - (ii). Even if Mr. McNelis has something of evidential value to say, his case was that he knew nothing about the drawing down of the monies, whereas it was clear from correspondence not disclosed by Mr. McNelis that he did know something about it. The application to now put in an affidavit was really an application seeking an opportunity to say something that he could have said initially in his original four affidavits.
 - (iii). The application for an adjournment for this purpose had already been refused and to that extent it was inappropriate to simply make the same application repeatedly.
 - (iv). Mr. McNelis had much of this material anyway at all material times, and most of the pertinent material, and also gave oral evidence that he had given the papers and file to counsel, yet these papers were never drawn to the attention of the court until Mr. MacGeehin did so. That situation was never explained.
 - (v). Material that Mr. McNelis never had does not appear to be material that he has anything of evidential value to contribute to, so consequently pretty much all the documents were either documents that he knew about at all material times and could have given to the court long before or material that he had no involvement in and had nothing to say on.
 - (vi). Mr. McNelis in any event had had time to consult with Mr. Forde even before his own re-examination.
 - (vii). He had further time to consult with Mr. Forde before the cross-examination of Mr. MacGeehin.
 - (viii). That cross-examination had, at that point, yet to take place.
 - (ix). The hearing of Mr. Forde's motion looking for further documents also remained outstanding at that particular point.
47. There was therefore nothing particularly unfair about the situation except, as submitted by Mr. Ó Dúlacháin, the totally abstract position that every affidavit deserved a reply. Clearly litigation would continue *ad infinitum* on that basis and maybe that vista contains

an element of insight into Mr. Forde's strategy in this case. Unfortunately, this has to be regarded as a frivolous and vexatious application and a delaying tactic, especially where a very similar application had already been refused. I made the point in turning down that application that parties need to be economical in the conduct of litigation and that it is well-established that failure to do so may have significant consequences in costs, irrespective of the outcome.

48. In the middle of his cross-examination of Mr. MacGeehin, Mr. Forde then applied for liberty to file a further affidavit of Mr. McNelis which he had drafted in October, 2019. Mr. McNelis said that he was not familiar with this affidavit so it did not appear to have been sworn, let alone filed. Mr. Forde's explanation for why this matter was emerging at the last minute was that he did not get the pleadings from his solicitor, Mr. McNelis, until "*the very last minute*" on the morning of the hearing, so he had prepared his own book the night before. When synchronising the two books on the first day of the hearing, Mr. Forde endeavoured to co-ordinate the pagination but could not find the affidavit drafted in October, 2019 in Mr. McNelis's book. He "*thought there might be some error somewhere*" but he did not do anything effective about it for a number of days.
49. Mr. Ó Dúlacháin objected to the notion of a further affidavit because it would "*make the process unmanageable*". I rejected the application to put in a further last-minute affidavit essentially for three reasons:
- (i). Firstly, the first-named defendant was totally in default on this matter. Mr. McNelis failed to even swear the affidavit. The first-named defendant's side failed to notice that the affidavit had not been sworn, failed to follow it up and then failed to check the contents of the books of pleadings properly. The book of pleadings was only delivered to counsel at the last minute on the morning of the hearing and when Mr. Forde noticed a discrepancy on the morning of the first day of the hearing, he did not do anything effective about it until Mr. McNelis was long gone from the witness box.
 - (ii). Secondly, to allow a further substantive affidavit of Mr. McNelis midway through the trial of the motion, especially after Mr. McNelis had left the witness box, would be hugely unfair to the other parties where it would raise the prospect of replying affidavits, reopening of cross-examination and would involve significant additional delay and expense. That may not be of much concern to the insolvent company represented by Mr. Forde but it certainly is of concern to the other parties to the proceedings.
 - (iii). Thirdly, where the first-named defendant had been involved in a series of frivolous applications and delaying tactics, which had taken up a considerable amount of court time, and where the first-named defendant had made repeated meritless applications for adjournment, sometimes several times a day, it was doubly precluded from seeking to derail the case in order to remedy its own default, particularly where much mystery surrounded various aspects of that default.

50. Turning then to Mr. MacGeehin's evidence, he said that additional affidavits put in in March, 2019 strengthened the case hugely in his opinion, and softened the cough of the opposition, but that they were still dealing with huge legal bills. It was a very sharply contested matter and there had been blazing rows in the court room. He understood and was advised by counsel that Mr. McNelis's email to him was unconditional authority to settle the proceedings on behalf of the company.
51. In his oral evidence, Mr. McNelis had said that the unanimous agreement of the directors was required but that his letter, that is the letter of 24th June, 2019, wholeheartedly endorses the settlement and encouraged the directors to carry out the terms of the settlement. Mr. McNelis did not at that time by telephone, email or letter advise Mr. MacGeehin that he had reservations about what happened.
52. Their view was that it was important to have the company on board because a settlement would affect the company. Mr. Forde had advised that the directors' instructions would apply equally to the company.
53. Mr. McNelis' original email of 15th May, 2019 did not refer to unanimous agreement, it referred to what the three directors instructed. That meant what they decided after conferring with each other, not necessarily what they decided 3-0. Unanimity would be best but a majority decision, in Mr. MacGeehin's view, and in the view of both counsel with them, was a lawful decision. It was suggested that junior counsel had advised that it had to be unanimous. Mr. MacGeehin replied that the junior counsel was there throughout, including when the settlement was arrived at, which I may say is the obvious point. No opposite opinion came up when the matter came to court and when the settlement was announced there was no dissent within the ranks of the legal team.
54. Messrs. McCaul and Temple were not prepared to risk it all. It was the kind of decision that was often made in most cases, civil litigation normally ends in settlement. The best settlements are sometimes the ones where both sides are a little bit dissatisfied. Asked why he went to such lengths to accommodate Athlone Town Club, he said his clients had the final say and his view was that a majority could make the decision. He had brought them down from a situation that was fairly disastrous from the point of view of the three directors to something that was far more manageable. If the stadium went into public ownership it would be protected forever. The previous Friday there were references to half a million euros in legal costs, which came down to an all-inclusive settlement of €100,000 for everything and that is all the club got. Mr. MacGeehin said if you won, fine, but if you lost it would be a disaster.
55. He did not decide the settlement. If the directors had so instructed him, he would have gone back in to continue the fight. The directors completed their instructions and discussions first, and then the agreement was typed up. His recollection was that he got the terms typed. He was not present when the decision was made by the directors to agree the terms. It is not disputed that the two of them were for it and one against and his information was that a meeting of the directors took place and he got instructions from that meeting. He had no vested interest in the outcome of the case and indeed it

would be easy if lawyers were cynical enough to sit in court for ten days and soak up money.

56. His obligation was to advise clients of offers and potentially the parameters begin to narrow. The settlement in his view retrieved the situation. Anybody would say that if you lose in one court you are not guaranteed any success in another court. Even after the Court of Appeal there was no guarantee that another court would not follow. There had been a huge number of days in court and in his practice he had not experienced any case like it. He could not see anything very different now from what he saw on 23rd May, 2019. If the settlement had not been arrived at there would have been an awful lot of litigation.
57. Asked where there was an order of the court for payment out of the money referred to in the settlement of 23rd May, 2019 he said that he understood that the directors had the power to enter into the settlement by majority; that was the view of counsel. He understood very clearly in his own mind that Mr. McNelis was *ad idem* with him on that very issue. He said the order of 23rd May, 2019 had the agreed statement attached to it and that was what they acted upon. It was suggested that there was no order for payment out and that the court merely noted the undertakings. He said that he got assistance from Mr. McNelis in implementing the settlement. Mr. McNelis urged very strongly that it be implemented.
58. Asked why there was no narrative in his affidavit of 3rd December, 2019, he said that his dealings in relation to releasing the moneys were in correspondence so he had nothing to add. He said that the directors were entitled to make a global settlement and that is the end of the entire proceedings and that he understood that to have the full backing of Mr. McNelis.
59. It was put to him that no reliefs were sought against the company on the specific motion being heard on 23rd May, 2019 but he said the directors availed of the opportunity to settle all matters. When asked what authority he had to settle the case, he said that was from the co-directors with the blessing of the company solicitor. When asked what instructions he had from the company to implement the settlement he said he was doing it all with the full knowledge of Mr. McNelis. Mr. McNelis did assist him and reverted to his letter of 3rd July, 2019 on the very same day, with copies of the orders. Mr. Molloy did not instruct him to implement the settlement but Mr. MacGeehin was aware of Mr. Molloy's objections from the outset. Mr. Molloy wrote to Mr. MacGeehin on 4th July, 2019, querying the settlement. Mr. MacGeehin replied on 5th July, 2019 stating that the settlement was within the powers of the directors and did not require a vote from the company at the EGM. The terms of the settlement were consistent with the main objective of the company: that is, securing a sports stadium for the people of Athlone. Having settled the proceedings, the directors were obliged to comply with the order. He did not feel bound by the EGM because of his conviction, knowledge and advice from junior and senior counsel that the directors had the power to make the settlement that they made.

60. He was concerned about payment out because Mr. Stapleton was threatening to sue. The payment out had become very bureaucratic, there was a lot of correspondence between him and Mr. Stapleton on this issue. Mr. McNelis averred that he had been advised by counsel in mid-July that the settlement was unlawful, but he did not contact Mr. MacGeehin to convey those concerns at that time and waited to do so until the motion papers were received in the latter part of September.
61. When Mr. McNelis started corresponding with the accountant's office on 22nd July, 2019, Mr. MacGeehin was not copied with that and was completely unaware of it at that time. Mr. MacGeehin wrote to the registrar regarding the need for a repayment schedule. She wrote back saying she could draft the payment schedule subsequent to taking up a certificate of funds on the accountant's office. Mr. MacGeehin then requested the certificate of funds and sent a copy of the order amending the title of the proceedings. He obtained the certificate of funds and sent it to the registrar. She sent a payment schedule. It is notable that despite the fact that the affidavit of Mr. McNelis raises allegations of misrepresentations made by Mr. MacGeehin to obtain the payment out, it was never put to Mr. MacGeehin by Mr. Forde that he engaged in any such misrepresentations and I find as a fact that he did not.
62. On 16th September, 2019, Mr. MacGeehin wrote to Mr. Stapleton setting out the process to release the money. Mr. Stapleton signed a document stating acceptance of the sum paid into court on 19th September, 2019. Mr. MacGeehin signed it on 24th September, 2019. It was not put to Mr. McNelis to sign it. Mr. MacGeehin said the Accountant's office must have considered that unnecessary. The money was paid out on 27th September, 2019 and Mr. MacGeehin learned about that on 30th September, 2019. He did not contact Mr. McNelis but contacted counsel. He himself did not disburse the monies, the documentation was already in the Accountant's office by that stage. He did not seek further advice from the day he began implementing the order. Mr. McNelis allowed him to conduct the settlement and Mr. McNelis took the role of assisting Mr. MacGeehin. Only on receipt of the letter of 20th September enclosing a notice of motion did he become aware of Mr. McNelis agitating about the settlement. He is not sure when he got that letter. Mr. MacGeehin was not contacted by Mr. McNelis in the run up to the service of the motion. He was not told there was a misunderstanding and that he was only to act on the unanimous agreement of the directors. Mr. McNelis had not commented in any way in response to his letter of 28th May, 2019. He replied to any queries raised by Mr. Molloy. He did not say specifically it was for facilitating the release of the money, but he was implementing the settlement.
63. Mr. Temple contacted Mr. MacGeehin by phone but did not write to him. He contacted Mr. MacGeehin after he had come off record asking him to act for him but it was too late by that stage. The other directors were not notified specifically of the process any more than Mr. Molloy was, but the letter of 13th June, 2019 to each of his clients specifically stated that the sum of €50,000 lodged in court would be paid out.

Findings of fact

64. Without taking from any specific findings recorded above in the course of the discussion of the oral evidence, I find the most pertinent facts to be as follows. These findings of fact are made after having the benefit of seeing and hearing each of the witnesses and on the totality of the evidence, having taken into account all material, whether evidential or legal, submitted to me, including in particular Mr. Forde's submissions regarding the inferences that he invited me to draw from the evidence. For clarity, I will leave over until later in this judgment a detailed discussion of those submissions but I have taken them into account for the purposes of the findings of fact, which are as follows.

- (i). There was no practice within the company of legal proceedings being conducted with the agreement of EGMs until Mr. Molloy sought to unravel the settlement.
- (ii). Prior to the settlement, Mr. MacGeehin advised Mr. McNelis that any settlement would in all likelihood involve settlement of all matters, including matters involving the company, such as the appeals to the Court of Appeal. Mr. McNelis was thus aware at all material times of the likelihood that the company would be bound by any agreement.
- (iii). Mr. McNelis wrote to Mr. MacGeehin on 15th May, 2019 indicating that the directors could give instructions on behalf of the company and that there was no need for the company to be represented at the hearing, which was the context in which the settlement was going to be attempted. That clearly envisages any potential settlement as binding the company. The letter does not refer to the agreement of the directors being unanimous. The email can only be construed as authority being given by Mr. McNelis to Mr. MacGeehin to settle the proceedings on behalf of the company. It amounted to tacit agreement to the directors compromising all matters, including the appeals to the Court of Appeal on behalf of the company.
- (iv). The email records that Mr. Forde advised that *"there is no need for the company to be separately represented since the three directors will be providing their instructions and such instructions would apply equally to the company. You can simply relay whatever has been decided on."* The only possible inference in the light of the company's current position is that Mr. Forde has now simply changed his mind after his advices have been acted upon. In my view, Mr. McNelis' evidence has subconsciously been retrospectively coloured accordingly.
- (v). Mr. Forde stating to Mr. McNelis, who in turn passed this on to Mr. MacGeehin, that Mr. MacGeehin's clients' instructions would apply equally to the company and that Mr. MacGeehin could simply relay whatever had been decided, meant that Mr. Forde and Mr. McNelis condoned a situation where the case was being settled by Mr. MacGeehin on behalf of the company, contrary to their current protestations.
- (vi). The email of 15th May, 2019, properly construed, did amount to an authority to Mr. MacGeehin to take instructions from the directors on behalf of the company as well as on their own behalf.

- (vii). Mr. MacGeehin acted within that authority by taking instructions from the directors, albeit that the directors acted by majority.
- (viii). The email of 15th May, 2019 clearly envisages the possibility of a settlement, the possibility that it would also be on behalf of the company, and that Mr. McNelis would not be involved because the directors were there in any event. Mr. McNelis' claims that the company would not be involved in the settlement simply do not square with the contemporaneous materials and I conclude that his recollections and evidence have been unconsciously coloured by subsequent developments.
- (ix). Mr. Molloy had previously told his fellow directors that they could outvote him if they wanted to.
- (x). Mr. McNelis voluntarily absented himself from the settlement meetings and the hearing itself which reinforces the interpretation that he was leaving the affairs of the company in the hands of Mr. MacGeehin acting on the instructions of the directors.
- (xi). The fluid and ongoing nature of the settlement process explains why there were such differing views in evidence on whether a meeting or a vote of the directors had taken place to agree the settlement. I conclude that there was no intention to mislead the court on this particular point from anyone who gave differing views in evidence on the question. In the light of the totality of that evidence, I consider that there was no formal meeting of directors and no formal resolution or therefore formal vote as such on 23rd May, 2019, and nor was there a meeting of the directors in the very short interval between the agreed terms being typed up and those terms being presented to the court. However, prior to the terms being typed up, the directors did have discussions between themselves, which all of them attended, and in which a majority of the directors decided to enter into the agreement on the terms that were subsequently contained in the typed-up settlement document. Whether one chooses to call that a meeting or a vote or both is only semantic for this purpose.
- (xii). Settlement of the proceedings was carried out with the agreement of the third and fourth-named defendants who constituted a majority of the directors of the first-named defendant company. The other director, the second-named defendant, did indicate disagreement but not in a forceful way, so it was not unreasonable for Mr. McCaul to have construed that as involving a degree of acquiescence.
- (xiii). The intention of the majority of the directors was that the company would be bound by the terms of the settlement, both those included in the court order and the contractual steps set out in the agreed statement to the court.
- (xiv). The intention of the agreed statement was that it was to be an agreement between the plaintiff, the first-named defendant company on the authority of the majority of the directors, and two of the three directors in their own capacity. Mr. Molloy in his

own capacity got a benefit from the agreement in the sense of having the motion against him in his personal capacity struck out.

- (xv). The directors were involved at all times themselves. By being there during the negotiations they were by definition aware that Mr. MacGeehin was dealing with the matter on behalf of the company as well as on behalf of the directors. In addition, the directors themselves agreed to the settlement on behalf of the company by a majority. The settlement was not entered into by Mr. MacGeehin on his own authority or on the basis merely of sub-agency from Mr. McNelis which was, in any event, given with the tacit consent of the directors. He had specific instructions.
- (xvi). I accept Mr. MacGeehin's evidence that there was no dissent within the ranks of the directors' legal advisers when it came to announcing the settlement to the court. On that basis I infer that neither of his counsel had any legal objection to the settlement. While there was some reference in evidence to junior counsel having said at some point that the agreement between the directors should be unanimous, that inferentially must have been a counsel of perfection and cannot have been a legal view as to the validity of the agreement because otherwise that objection would have been articulated when it actually became an issue.
- (xvii). I accept Mr. McCaul's evidence that his motivation was not self-interest.
- (xviii). I also accept his evidence that it was not in the company's interest to pursue the alternative to the settlement, which was the appeal, given the risks involved.
- (xix). A majority of the directors also subsequently decided that the consent order should be implemented.
- (xx). The company solicitor, Mr. McNelis, was kept informed by the directors' solicitor, Mr. MacGeehin, of the implementation of the agreement and cooperated with that implementation at least to some extent. No protest was made on behalf of the company by Mr. McNelis in relation to any of these developments at that time and not until a very late stage in September, 2019.
- (xxi). Mr. McNelis wrote to the directors on 24th June, 2019, indicating that if the consent order was not complied with by the company and the directors there would be very serious consequences. That can only be construed as seeking implementation of the agreement and certainly not as expressing the concerns now being articulated by Mr. McNelis.
- (xxii). Mr. McNelis' claims of being taken by surprise are not properly reconcilable with the thrust of the contemporaneous documentation and I find them to have been unconsciously retrospectively coloured by subsequent developments.
- (xxiii). Contrary to the allegation made on affidavit by Mr. McNelis, no misrepresentations whatsoever were made by Mr. MacGeehin in seeking payment out of the funds lodged in court.

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

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

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

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

Motion of 25th November, 2019 seeking further information

65. Mr. Forde submitted that this motion was otiose in the light of my decision that I was going to deal with his application for a declaration and said that under those circumstances whether the money was properly taken out or not becomes irrelevant. He stated that he had no intention of pursuing it but did not want it struck out, for some unarticulated reason, at that stage. Mr. Collins and Mr. Ó Dúlacháin asked for it to be struck out and said there was no reason to hold it in abeyance, and Mr. Forde had not a great deal to say in reply to that. Mr. Molloy sensibly considered that he was not informed enough to get involved. I therefore dismissed this motion.

Application of October, 2019 to repay the money

66. Again, Mr. Forde said that he was not pursuing that application and said he was taking that line because the court was going to deal with his declaration application. Under those circumstances that application also has to be dismissed.

Application of September, 2019 for a declaration that the company is not bound by the agreement

67. At the outset of this motion, Mr. Forde asked to amend the motion to state that the company was not bound by the first page of the agreement either, as opposed to just the second page, which is what the motion as issued states. That application, made at the outset of submissions, was of course introduced at a fairly late stage of the proceedings overall because it was after the end of all of the oral evidence. The only explanation initially offered was that the motion had been drafted before I had dealt with the first part

of the motion regarding amending the order. That of course is not an explanation that stands up to consideration. Mr. Forde then changed tack slightly to call it an "*oversight*". The critical consideration for me at that stage of the proceedings was whether it would require reopening of the oral evidence, and Mr. Forde and Mr. Collins thought that it would not. Mr. Ó Dúlacháin had at some previous stage during the proceedings mentioned during the hearing that Mr. Forde's motion was limited to the second page, but seemingly that was not sufficient to alert anybody to address the issue. Having considered the matter, Mr. Ó Dúlacháin also thought there was no evidential prejudice. In the circumstances, therefore, I allowed Mr. Forde to delete the words "*the second page of*" in his motion and I waived the requirement to file an amended motion paper so that the existing motion paper would be treated simply as the amended motion.

Is the company bound by the agreed statement read out to the court?

68. Mr. Forde offered a range of reasons as to why the company was not so bound. That turned out to be something of a forensic Mandelbrot set. Each point spawned a proliferation of sub-points, many of which in turn had sub-points and so on recursively, almost ad *infinitum*. I have endeavoured to rationalise the points made below under 21 headings, but to do so is not necessarily a simple task. Again, I repeat for clarity that insofar as these submissions amounted to arguments as to what facts I should find, I have taken all of them fully into account prior to making the findings of fact which are listed above, so what follows could be seen as further explanation and not something that I only considered subsequent to the findings of fact. I set them out below more for clarity of exposition but could just as well have discussed them earlier in the judgment.

Claim that there is significant substance to the merits of the appeal and legal advice given to the directors to the contrary was so incorrect that such a state of affairs should be taken into account in deciding that the company is not bound by the agreed statement

69. Mr. Forde said that the appeal was "*extremely strong*" and as regards the advice given to the directors that the appeal had only a five percent chance of success asked "*what responsible lawyer would advise a client of that*". Rather deflatingly for that submission, when Mr. Forde sat down, Mr. Molloy said that he was adopting Mr. Forde's submissions subject to one qualification and very fairly said that the five percent figure might have been the honest professional opinion of the legal people involved. No expert evidence was offered that the advice was incorrect, either at all or to an unacceptable extent. It is not the correct procedure for a litigant to impugn the professionalism of legal practitioners without some form of expert evidence.

70. My view is that the company had no hope whatsoever of winning the appeal on the trustee issue. It signed an explicit deed of trust, agreeing to step aside as a trustee if called upon to do so. It was so called upon, but failed to step aside. It also acknowledged that it held the property in trust rather than by way of legal ownership. That appeal to my mind has a nil chance of success, even bearing in mind fully the inevitability that I would say that.

71. Conceivably, the company might on one counterfactual view have reduced the damages somewhat if it had put up a different suite of evidence in the High Court but as the case

ran there were huge evidential gaps in its defence and counter-claim. Assuming for the sake of argument that evidence to fill those gaps existed, I cannot see how those gaps could properly be filled on appeal without huge unfairness to the plaintiff, for the simple reason that the evidence was there from the outset and was not newly discovered. The system of oral hearing and appeal on the basis of *Hay v. O'Grady* [1992] 1 I.R. 210 would collapse if, having lost after an oral hearing, a party could say "Ah, now I see where our strategy went wrong. Let's have another crack at it by reconfiguring our evidence for the appeal". The appeal on this issue had no chance either unless appellate courts were to diverge unexpectedly from very firmly established legal principles, which seems unlikely. Under those circumstances I am again taking fully into account that I would say that.

72. In any event, Mr. Forde was unable to explain, and indeed did not attempt to explain, why incorrect advice, even if it was incorrect, meant that he was not bound by the agreed statement.

Argument that there is no order requiring the money to be paid to Mr. Dully and no order requiring the striking out of the appeal

73. *Merinson v. Yukos International UK* [2019] EWCA Civ 830 illustrates the point that a settlement agreement is generally contractual in nature rather than enforceable as a court order, unless embodied in an order. That seems a legitimate interpretation here. The "agreed statement" was contractual and not a court order by and large, but that in itself is not a reason to contend that the company is not bound by the agreed statement. It may not be bound by a formal order but it is bound contractually.

Argument that there is no contract with the company

74. Mr. Forde says that the agreed statement is not signed and that there is no indication on the face of it that the company is a party to the contract. It does not say who agreed the statement. That argument is a misconception. On its face, it clearly binds the company, as noted above. I find as a fact that the intention was that the company would be bound.

Argument that there is no authority to have entered into the agreement by virtue of the email of 15th May, 2019 because the literal meaning of the email does not support the authority

75. Mr. Forde submits that if Prospect Law Solicitors had been authorised in the manner contended for, the email would have been worded more clearly, but that does not get him anywhere. In any dispute, one could look back and say the documents could have been worded more clearly in a manner that would have avoided the dispute altogether. It is a matter for the court to construe the email in the light of the totality of evidence. As noted above, I find that the email properly construed did amount to an authority to Mr. MacGeehin to take instructions from the directors on behalf of the company as well as on their own behalf.

Argument that, assuming that there is an ambiguity in the email, Mr. McNelis's evidence determines what it means

76. Mr. Forde asked me to take into account Mr. McNelis' "so emphatic" evidence as to what the email meant, but I reject that evidence. Mr. Forde said that Mr. McNelis "nearly exploded with indignation" when the email was first raised in court and that "there can be no insincerity in his evidence". I am not saying that there is insincerity in Mr. McNelis'

evidence, but I am saying that his attitude to the interpretation of the email has been unconsciously coloured retrospectively by subsequent events.

Argument that Prospect Law had an obligation to clarify any ambiguity

77. Without explaining how such an alleged obligation arises, Mr. Forde asserts that there was an obligation to seek clarification of the email, that this was not done, and reads from that to say that the company is not bound by the settlement. That is totally illogical at every level.

Argument that due to the presumption of legality, Mr. McNelis would not authorise anything unlawful

78. I deal with that issue below because it logically depends on the argument that the settlement was illegal, which was best discussed under subsequent headings.

Argument that there is a general principle that an agent cannot delegate his or her authority without the authority of a principal and that there is no evidence that the company authorised Mr. McNelis in advance to so delegate

79. Mr. Forde submits that this principle is reflected in art. 34 in *Bowstead & Reynolds on Agency*, 21st ed. (London, 2019) p. 171. He said that such a principle was infringed here if Mr. MacGeehin's interpretation was correct. But even if the principle was relevant, it was not infringed here because the principals were involved at all times themselves. By being there during negotiations the directors were by definition aware that Mr. MacGeehin was dealing with a proposed settlement on behalf of the company as well as on their own behalf. In addition, the directors themselves agreed to the settlement by a majority. So in fact there was no delegation, because the settlement was not entered into by Mr. MacGeehin on the basis merely of sub-agency; he had specific instructions. Even if this point was relevant, which it is not, there was huge acquiescence by Mr. McNelis after the event. He did not protest to Mr. MacGeehin at any stage until late September, 2019. That acquiescence would be an answer to this and to Mr. Forde's other points even if those points have substance, which they don't.

Argument that to authorise another solicitor and his legal team to settle proceedings would be treated by the Law Society as professional misconduct, therefore there is a presumption that there was no delegation

80. Mr. Forde submits that it would be treated by the Law Society as a failure to safeguard the interests of his client for Mr. McNelis to have authorised Mr. MacGeehin to act in the manner concerned, and that at a minimum, Mr. McNelis would have had to have had an involvement in the settlement before it was concluded. Mr. Forde's submission was that such a situation would make the alleged authority unlawful and thus what was done was *ultra vires*. I do not accept that there was any misconduct in entrusting the settlement to Mr. MacGeehin under the particular circumstances of this case, pretty much for the reasons articulated by Mr. Forde himself in May, 2019 and as conveyed to Mr. MacGeehin by Mr. McNelis in the email of 15th May, 2019. Mr. Forde seems to have changed his mind since then, but that does not mean that the settlement is not binding.

81. Even assuming, counterfactually, that there was misconduct, that is not a ground to hold that the company is not bound by the contract. That which is unprofessional is not automatically unlawful. Mr. Forde's argument was that it cannot be implied that there was authority because that would amount to professional misconduct. That essentially is

the argument that I can't have done what I did because it would have been misconduct, therefore I didn't do it.

82. That is not an argument that takes him over the line. He submits that it was almost inconceivable that Mr. McNelis would delegate to a completely different legal team the authority to act for the company. However, it is not inconceivable, because I find that is in fact what he did. It's worth adding that, with his uncanny insight that penetrates through the centuries, Friedrich Nietzsche anticipated the Dully case when he wrote in 1886: "*I have done that' says my memory. 'I cannot have done that' – says my pride, and remains adamant. At last – memory yields*" (*Beyond Good and Evil* (Leipzig, 1886), Part 4, s. 68 (London, Penguin, 2003, tr. by R.J. Hollingdale, p. 91).

Argument that the absence of any prior negotiations between the two solicitors or a request by Mr. MacGeehin for authority reinforces the interpretation that there was no delegation

83. Mr. Forde submits that, if there is a dispute about the meaning of an agreement, one can look at the previous *inter partes* negotiations, and that there were no such negotiations, nor was there a request by Mr. MacGeehin for authority prior to this agreement. That is not particularly decisive in the circumstances. There was no dispute at the time. The dispute only flared up retrospectively when Mr. Molloy tried to unravel the settlement.

Argument that proceedings on the day were against the three directors only, so the inference is that the authority given could not have been as extravagant as claimed

84. Mr. Forde submitted that there was no evidence that Mr. McNelis was "*an utterly reckless solicitor that would allow others to settle his case without him having some involvement*". That is a strange way of putting it. Mr. McNelis' email did amount to an authorisation for Mr. MacGeehin to settle the case on behalf of the company having taken instructions from the directors, and it expressly quotes Mr. Forde's advice to the same effect at that time. If Mr. Forde has now changed his mind, as he seems to have done, that does not mean that Mr. McNelis was reckless to have acted on the original advice, either utterly or at all.
85. Mr. Forde argued that the court had no seisin of the proceedings against the company. Mr. Dully's claim against the company was in the Court of Appeal and the High Court had no seisin of that dispute. That is not a full picture of the situation for two reasons. Firstly, in any event, the costs of the High Court proceedings had yet to be adjudicated or taxed, so the court still had a role or at least potential role, and secondly, the order setting aside the previous costs order in the High Court was made by consent.

Argument that had Prospect Law the kind of authority claimed then they should have come on record for the company

86. Mr. Forde submitted that Mr. MacGeehin would have had an obligation to come on record if his evidence was to be correct. I do not accept that at all, as that could lead to an irrational chopping and changing of representation in a fluid situation. Even if, counterfactually, this non-existent obligation did exist, it does not make the agreement non-binding; nor does it support the argument that the authority given by Mr. McNelis could not mean what it means.

87. Mr. Forde also submitted that counsel negotiating the settlement for the company could only take instructions from the solicitor on record and that Prospect Law were not that solicitor. Of course it is worth pointing out that the order as amended under the slip rule makes clear that the company was not formally represented at the hearing and nobody was purporting to represent it in terms of formal appearances. The company was, however, party to the contractual agreement, which was noted.
88. Mr. Forde raised the question of the Code of Conduct for the Bar and said that barristers instructed by Mr. MacGeehin would have been in breach of the Code of Conduct in negotiating an agreement on behalf of the company unless there was "*unequivocal authority*". That was an unfortunate submission, which by a side wind cast aspersions on counsel on the other side on day four of the hearing. No expert evidence was introduced as to a breach professional responsibilities. There was no basis whatsoever to say that counsel instructed by Mr. MacGeehin acted unprofessionally. The argument provides no support to any inference that the email of May, 2019 does not mean what it means.
89. The unhappy situation that has been arrived at is that few people are left untouched by the sweeping allegations made by the first-named defendant. Mr. MacGeehin was accused of misleading a court officer on affidavit and was impugned in cross-examination. He and his counsel were accused of being in breach of professional responsibilities. Mr. Forde even made the submission that if his own solicitor, Mr. McNelis, did what I have found him to have done, this would have been "*unethical and utterly reckless*". Ultimately, Mr. Forde was driven to say that, if by saying that Mr. MacGeehin's clients' instructions would apply equally to the company, and Mr. MacGeehin could simply relay whatever had been decided meant, that Mr. Forde condoned a situation where the case was being settled by Mr. MacGeehin on behalf of the company, which is exactly what I find he did do, he himself would be open to a negligence action and in peril of being reported to professional bodies. Again, the argument here is that I couldn't have done what I did because it would have been unethical, therefore I didn't do it.
90. In case anyone contrives to misunderstand what I am saying here, I find that there was no intention on the part of any of the lay or professional witnesses to mislead the court in relation to their evidence in the present application, or on behalf of any of the solicitors or counsel on any side to fail in their professional and ethical obligations in relation to the authorisation to Mr. MacGeehin in May, 2019 to settle the case on behalf of the company. Contrary to the logic of Mr. Forde's submissions, I don't think his stance in May, 2019 was unethical in any way. On the contrary, I think his initial approach was sensible, but that he has simply changed his mind.

Argument that the presence of directors and shareholders in court is not an authority

91. Mr. Forde submits that the company can only be in court through its solicitor on record and that nobody had a right of audience because the solicitor on record was not there. It consequently cannot be held against the company that Mr. Molloy did not stand up and openly protest. Certainly it can be said that the mere presence of the directors or shareholders in court does not in itself mean anything. However, that does not get Mr. Forde anywhere, because Mr. MacGeehin's position does not depend on that.

Argument that the director's decision of 23rd May, 2019 was unlawful because there was no properly constituted director's meeting

92. Mr. Forde says that, because what was involved here was the company disposing of all its assets and in practical terms liquidating itself, that is something that an informal meeting or discussion cannot do. He relies on the requirement for minutes of meetings of the directors set out in s. 166 of the Companies Act 2014. By definition that is irrelevant to decisions of directors taken outside the context of board meetings. Mr. Forde submits that a company director can only make a decision on behalf of the company at a properly convened board meeting. That is clearly an unworkable proposition. He relies on *Aston Colour Print Ltd* [2005] 3 I.R. 609 *per* Kelly J., as he then was. But that was a totally different situation. In that case there were two directors, who were equally divided on the question of the appointment of an examiner, but one director was in effect outnumbered by other members of a management board meeting that was being retrospectively recharacterised as a board meeting. Here, all three directors were involved, met during the settlement negotiations and discussed the approach to be adopted. Sure, that was not a formal board meeting; but all of them, and only them, were involved when they discussed the matter between themselves. Litigation involving corporate entities could hardly be progressed or settled if a formal board meeting had to be convened every time a decision had to be made. Thus, there was no substance to the point, but even if there was it is an indoor management point.
93. As regards Mr. Forde's argument that the threat to the company was "*existential*" in the debased modish sense of that word as a life-or-death issue, the problem for that argument is that the company was defunct and insolvent at all material times. The only way to determine whether the settlement was in the company's interest is to compare the company's position without the settlement as against the position with the settlement. The company initially claimed to be the legal and equitable owner of the stadium, but that was a complete non-starter because it had signed a deed of trust recognising that its position was only that of trustee and that it would relinquish that position on demand. It conducted High Court and Court of Appeal litigation while insolvent. It is a matter for Mr. Forde, as the moving party, to prove that the settlement was not in the company's interest. That is a mixed question of fact and law that would require adequate evidence. Mr. Forde has not established in evidence that the settlement was contrary to the company's interests, so I have to reject his submission in that regard.
94. If I am wrong about that, and if I can determine myself on the material before the court whether the settlement is in the company's interest, I would conclude that it was, for the reason essentially given by Mr. McCaul in the witness box, namely that the appeal was a risk. Mr. Forde said that the appeal was an asset but in my view it was very likely to fail.
95. Without the settlement, the company's assets and liabilities were as follows:
- (i). The appeal, which I would value at nil (for reasons set out earlier).

- (ii). The sum lodged as security for costs, which I would also value at nil because that security would be forfeited to pay the costs of the other side in the event of losing the appeal.
- (iii). The claim for indemnification, which is wrapped up in the appeal and which by virtue of *Henderson v. Henderson* (1843) 3 Hare 100 could not be pursued in any hypothetical separate proceedings. In these proceedings I rejected that claim and given the totality of the evidence I do not think it is in any way plausible to think the Court of Appeal would have allowed Mr. Forde to rerun the oral hearing simply because, having lost, he got further ideas about what additional evidence might have assisted. Therefore, this can also be valued at nil.
- (iv). The costs of the High Court, which would run to several hundred thousand euros.
- (v). The costs of the Court of Appeal, which would also be likely to be significant.
- (vi). The further liability of damages, which had been decreed in favour of the plaintiff for €160,673.05.
- (vii). As regards the alleged creditors that the company has, there was no properly admissible evidence on this. Mr. McNelis gave evidence that there were creditors, but that was hearsay and indeed qualified by some possibilities. I do not think it has actually been established by admissible evidence for the purposes of this motion that there were any creditors. A passing reference in the draft settlement agreement of 21st May, 2019 which was not adopted to a debt to Westmeath County Council does not constitute admissible evidence that such a debt exists.

96. With the settlement, the company's assets and liabilities are as follows:

- (i). Costs in the High Court: There is no further liability to the company for costs because those costs were to be paid by the directors, Mr. Molloy having put up the security for costs and the other two directors to provide the other €50,000.
- (ii). Costs of the Court of Appeal which were nil because the appeals were being struck out with no orders.
- (iii). The damages decree was not specifically addressed in the settlement agreement but reassuringly, Mr. Collins tells me that the intention was that the €100,000 sum was regarded as "*all in*" so the damages figure would become nil also.
- (iv). Alleged creditors: As noted above, these have not been proven for the purposes of this motion, so that heading must also be valued at nil.

97. On any view, therefore, the settlement was massively in the company's interests. Without it, the company was hopelessly insolvent, and with it, for the purposes of the evidence before the court on this motion, the company was in balance, although admittedly with no assets.

Argument that the two directors had a conflict of interest which was never declared and that this invalidates the decision

98. Section 231 of the 2014 Act requires a declaration by the directors who are interested in a contract to be made at the following board meeting. There is no evidence that there have been any board meetings since the settlement process began and inferentially there do not seem to have been any. Presumably, if there is any obligation to make a declaration, that will be done at the next board meeting, but that seems doubtful because s. 231 is not really apposite to address the situation affecting all of the directors equally where an order for a decree is attained against a company and was then sought to be enforced against all of the directors. In any event, this is an indoor management point and there is also acquiescence by Mr. McNelis.

Argument that in deploying company assets to, *inter alia*, settle proceedings against themselves, the directors were in breach of the Companies Act 2014 and their fiduciary duties

99. Under this heading, Mr. Forde relies on s. 228(1)(f) of the 2014 Act. Yes, in one sense the directors have an interest in the settlement, but that is automatic if a third party gets an order against a company and then seeks to enforce it against the directors personally. The fact that the directors had an interest themselves is a coincidence of interests, but that is not necessarily equivalent to a conflict. If the settlement was in the interests of both the directors and the company then that would not be a conflict, and that is the situation here. If, counterfactually, it had favoured the directors at the expense of the company, then that would have been a conflict. Further, the coincidence of interests applies to all the directors equally. There was nobody else that could have taken the decision to settle the proceedings. It is worth noting in this context that the settlement agreement involved an agreement by the plaintiff to drop his claim against Mr. Molloy personally even though Mr. Molloy had not signed on to the agreement, so all of the directors benefitted equally to that extent. This point has no substance, but even if, counterfactually, it had, it is an indoor management point and there is also acquiescence by Mr. McNelis.

Argument that the directors used the company property for their own benefit, contrary to the Companies Act

100. Mr. Forde relies on s. 228(1)(d) of the 2014 Act which restricts the use of the company's property for the benefit of the directors. Mr. Forde obviously carries the onus of proof and has not proved that this provision was breached. Anyway, it has limited relevance to a situation where an order was obtained against the company and is sought to be enforced against his directors. Things would be different if the directors were using the company property in a manner not in the company's interest, but this settlement was in the company's interests. In any event, the same points arise about this being a matter of indoor management as well as there having been acquiescence. I might add that as noted above I don't regard the appeals as an asset in any event.

Argument that at general common law, using the company's assets in this manner is *ultra vires*

101. There is no substance to this argument either for similar reasons.

Argument that, particularly if the company is insolvent, there was an obligation to consider the interests of the creditors before deciding on the settlement

102. This argument is a *jus tertii* but more fundamentally is totally unreal on these facts. It has not been proven that there were any creditors by proper admissible evidence. Even assuming that there were creditors, there was nothing for the creditors before the settlement, so the fact that there was nothing for them afterwards does not worsen their position or mean that they have any interest worth considering. In any event, it is an indoor management point and more fundamentally still, the settlement was in the company's interests so therefore, insofar as it is meaningful to talk about the interests of creditors in a company which had no assets to begin with, it is also in the creditors' interests.

Argument that an EGM of the company was required and there was no such EGM and indeed there was an EGM repudiating the agreement

103. An EGM was not required here, but even if it was, this was an indoor management point and there was subsequent acquiescence on behalf of Mr. McNelis.

Argument that even if there was a unanimous decision of the shareholders here the agreement would be unlawful because the company was insolvent, so what happened was a distribution of the company's assets, *inter alia* for the benefit of two of its members

104. That is a mischaracterisation of what happened and a repeat of arguments already rejected above. It is notable that under this heading, Mr. Forde argued not just that there was a prohibited and *ultra vires* disposition but the final submission in his written submissions was that it was "*arguably*" a fraudulent distribution and/or a fraudulent trade. That is not an appropriate allegation because no allegation of fraud was put to any of the witnesses. That was withdrawn after having been queried by the court.

Order

105. The order therefore is as follows:

- (i). as noted above, during the hearing I allowed the first-named defendant to amend its motion to delete the words "the 2nd page of" so as to cover the undertakings on both pages of the agreed statement, and I dispensed with the requirement to serve an amended motion paper;
- (ii). I dismiss the first-named defendant's applications including the motion as so amended in their entirety.

106. At an earlier stage, Mr. Stapleton did indicate to the court that he was not going to dispose of the €50,000 in his possession for the time being. There was no undertaking given or injunction granted, so for the avoidance of doubt, I shall clarify that he can now feel free to deal with the €50,000 in whatever manner he considers appropriate.

First Postscript – Costs and position of second named defendant

107. By way of postscript as to costs of the two notices of motion, having heard from all the parties present, there being no appearance by Mr. Temple, the costs will be dealt with by orders as follows. There was also an application to record in the order the fact that the second-named defendant supported and adopted the applications of the first-named defendant. The order will be:

- (i). an order for costs on a solicitor and client basis against the first, second and third-named defendants, jointly and severally in favour of the plaintiff;
- (ii). an order for costs on a solicitor and client basis against the first defendant, and from the date on which Prospect Law Solicitors came off record, the second defendant, jointly and severally, in favour of the fourth-named defendant;
- (iii). an order recording the fact that, while he appeared in a formal sense as a respondent to the motions, the second-named defendant supported and adopted the applications;
- (iv). an order adjourning the question of costs under O. 99 r. 7 against Mr. McNelis personally as the first-named defendant's solicitor.

Second Postscript – Stays

108. Mr. Forde has now applied for a stay on the order for costs against the first-named defendant. That is formally opposed but not particularly vigorously, and indeed it is suggested by Mr. Ó Dúlacháin that the stay could be granted for a period of 28 days from perfection of the order and if notice of appeal to the Court of Appeal is lodged within that period then the stay would continue until the first mention date. Mr. Forde says that is acceptable and that seems to be the appropriate order here for the simple reason that a stay until the determination of the appeal does not seem to automatically follow because the first-named defendant is insolvent, and the last time it appealed to the Court of Appeal it was made the subject of an order for security for costs by that court.
109. I can also add that Mr. Molloy later adopted Mr. Forde's application for a stay as far as he was concerned.
110. Mr. Forde suggested that I should stay the costs against Mr. Temple but since he did not see fit to appear, either at the hearing or subsequently, that would be an improvident departure from the adversarial system, which I do not propose to embark on.
111. So the order regarding a stay will be that:
- (i). the order for costs in favour of the plaintiff and the fourth-named defendant as against the first and second named defendants will be stayed for a period of 28 days and if a notice of appeal to the Court of Appeal is lodged within that period, for a further period up to the first mention date in the Court of Appeal;
 - (ii). the question of costs against Mr. McNelis personally is to be adjourned to 20th January, 2020.

Third Postscript – slip rule

112. For completeness I should record that the orders (there being two, one for each of Mr. Forde's motions) as perfected stayed "*execution on foot of this Order insofar as costs are concerned*". That can be put down to judicial fallibility because unusually in this case I reviewed the draft orders before perfection. That should have referred to execution against the first and second named defendants only, and Mr. Collins applied for the

appropriate amendment under the slip rule, which I granted. Thus, in case clarification is required elsewhere, the present judgment has given rise to four orders, one substantive order dismissing each of Mr. Forde's two motions with costs, and a further amending order for each of the substantive orders.