

APPROVED



THE COURT OF APPEAL

Neutral Citation Number [2024] IECA 29

BARNIVILLE P.

MURRAY J.

COLLINS J.

APPEAL NUMBER: 2021/171

BETWEEN

DECLAN CROWE AND MARIAN CROWE

PLAINTIFFS/APPELLANTS

AND

DANSKE BANK

DEFENDANT/RESPONDENT

AND

KBG CHARTERED ACCOUNTANTS, KIERAN BRADY, PATRICK KEAVENEY

AND MARK REILLY

CO-DEFENDANTS

**JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on
the 7th day of February 2024**

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Introduction

1. This is my judgment on an appeal by the plaintiffs/appellants, Declan Crowe and Marian Crowe, (referred to together in this judgment as the “appellants” or the “Crowes” and individually as Mr. Crowe and Mrs. Crowe, where appropriate) from the *ex-tempore* judgment of the High Court (Hyland J.) delivered on 15 April 2021, and from the order of the High Court made on 22 April 2021 (and perfected on 4 June 2021). In its judgment and order, the High Court ordered that the Crowes’ proceedings as against the first named defendant/respondent, Danske Bank, (referred to as the “respondent” or the “Bank”) be dismissed on foot of an application pursuant to O. 19 r. 28 RSC brought by the Bank and that the Crowes pay the Bank’s costs of the application.

Factual Background

2. The matters underlying the Crowes’ purported claim against the Bank and against the other defendants in the proceedings date back to March 2006 and arise out of certain loan facilities made available to the Crowes by the Bank’s predecessor, National Irish Bank Limited (“NIB”) in June 2006, March 2007 and December 2007.

3. Kearns P. granted summary judgment to the Bank against the Crowes in the sum of approximately €1.2m on 9 October 2015 for reasons which he set out in a detailed judgment delivered on 9 September 2015 ([2015] IEHC 567). The Court of Appeal refused to extend the time for the Crowes to appeal from that judgment in an order made on 11 April 2016.

4. Thereafter, the Crowes commenced new proceedings in the High Court on 20 March 2017, initially as against the Bank and KBG Chartered Accountants (“KBG”), the second named defendant. They subsequently joined three further defendants, Kieran Brady, Patrick Keaveney and Mark Reilly, the remaining defendants, apparently on the basis that they are members of KBG.

5. It was necessary for the Bank to bring several motions against the Crowes, initially to obtain a statement of claim and, thereafter, the applications giving rise to this appeal to strike out or dismiss the Crowes’ claim against it on various different grounds.

6. The Crowes initially represented themselves in the proceedings but were represented by solicitors and counsel with effect from February 2020. They delivered four different versions of a statement of claim, following court orders, in the period between May 2018 and January 2021. The most recent two versions of the statement of claim were delivered at a time when the Crowes were represented by solicitors and counsel.

7. The most recent statement of claim was delivered more than ten months outside the time period directed for its delivery by the High Court and only after a further motion was brought by the Bank. That version of the statement of claim was patently defective in several different respects.

8. On 13 April 2021, the High Court (Hyland J.) heard the Bank’s application to strike out the Crowes’ proceedings against it on various grounds, including their failure to comply with an order of the High Court made in February 2020. As I have already noted, Hyland J gave judgment on 15 April, 2021 dismissing the Crowes’ claim against the Bank. That order was

made by reason, *inter alia*, of their ongoing and persistent failure to deliver a proper statement of claim which disclosed a claim known to law as against the Bank, in the absence of any proper explanation for that failure.

9. The judge was satisfied that the dismissal of the claim was necessary in the interests of justice and amounted to a proportionate response to that ongoing and persistent failure to deliver a statement of claim which disclosed a cause of action against the Bank. The judge had no confidence that the Crowes could provide a valid statement of claim disclosing a claim against the Bank, even if given yet a further opportunity to do so. The judge concluded, therefore, that it was necessary in the interests of justice and a proportionate response to the repeated failures concerned to dismiss the Crowes' claim against the Bank. The judge made an order in those terms. The Crowes have appealed to this Court from that judgment and order.

Summary of Decision on the Appeal

10. For reasons set out in this judgment, I am satisfied that the High Court judge was entirely correct in her judgment in deciding that the Crowes' claim against the Bank should be dismissed. There is, in my view, no basis for setting aside the judgment and order of the High Court. In my view, the grounds of appeal which have been advanced on behalf of the Crowes (insofar as they could even be understood by the Court) are unstateable and unsustainable. The judge correctly identified and applied the relevant principles in determining the Bank's application. She was absolutely right to identify and bring to the attention of the parties the leading judgment of the Supreme Court relevant to the Bank's application *Tracey v. McDowell & Ors* [2016] IESC 44 ("*Tracey*"), which neither counsel for the Crowes nor counsel for the Bank had referred to in their submissions. The parties were given the opportunity of making further submissions based on that judgment and did so. The judge correctly took those submissions into account in determining the Bank's application.

11. Among the more surprising submissions advanced on behalf of the Crowes in support of their appeal was the contention that the High Court judge ought not to have brought to the attention of the parties the leading Irish judgment relevant to the application. Not only was that contention advanced in the Crowes' notice of appeal and in their written submissions, but it was pursued during the Crowes' counsel's oral submissions to the Court. This was wrong and, in my view, was a contention which should never have been advanced on behalf of the Crowes. Ironically, the judgment in question was one which was arguably more helpful to the Crowes' position on the Bank's application than to the Bank itself. In any event, the judge was fully entitled to, bring the judgment in *Tracey* to the attention of the parties as it was not only a relevant judgment, but was **the** leading and governing judgment for the purposes of the application.

12. In my view, the judge was perfectly entitled to conclude that, having been given several opportunities to deliver a statement of claim which disclosed a claim against the Bank, and having failed to do so, the point had been reached at which it was a proportionate response to the Crowes' ongoing and persistent failure to deliver a valid statement of claim that the claim should be dismissed. The statement of claim which was before the judge when determining the Bank's application was the fourth version of the statement of claim provided by the Crowes (the two most recent of which were delivered at a time when the Crowes were represented by solicitors and counsel), the most recent version of which was deficient in form and in substance in many respects, as the judge rightly concluded.

13. The judge was entitled to conclude that, in all the circumstances, she could have no confidence that the Crowes would be in a position to deliver yet a further statement of claim which would disclose a cause of action against the Bank.

14. The version of the statement of claim which was before the judge and before this Court on appeal discloses no valid claim or cause of action against the Bank. The Crowes' counsel

was unable to articulate any valid cause of action against the Bank. Each time counsel was asked by members of the Court at the hearing of the Crowes' appeal what cause of action the Crowes had against the Bank, counsel sought to rely on fraud (expressed in various different ways), notwithstanding that another High Court judge (O'Regan J.) had struck out the Crowes' claim in fraud against the Bank by order made on 20 June 2019. The Crowes did not appeal that order. Counsel was unable to articulate any other cause of action against the Bank other than in fraud, a claim they have been precluded from making on foot of that order.

15. I have concluded, therefore, for the reasons set out in this judgment, that the judge was quite correct, to dismiss the Crowes' claim against the Bank by reason of their serious, significant and persistent failure to comply with court orders, including the order made by the High Court (O'Regan J.) on 11 February 2020 which directed that the Crowes deliver a statement of claim disclosing a valid cause of action against the Bank. The dismissal of the Crowes' claim against the Bank was, in my view, a proportionate response to the Crowes' failure to comply with that order. Not only was the dismissal of the Crowes' claim against the Bank within the range of proportionate responses to the situation but, in my view, it was the correct and appropriate response in the circumstances. I am satisfied, therefore, for the reasons set out below, that the Crowes' appeal should be dismissed.

16. I propose first to outline the judgment of the High Court under appeal before moving on to examine each of the Crowes' grounds of appeal in more detail.

High Court Judgment

17. As I have noted, the judgment under appeal is the *ex-tempore* judgment of Hyland J, delivered on 15 April 2021, in which the Crowes' case was struck out for failing to comply with the order of O'Regan J dated 11 February 2020 (the "2020 order"). The 2020 order directed that an amended statement of claim be delivered within four weeks from 11 February

2020. This statement of claim would be the fourth statement of claim to be delivered in the proceedings, and the third amended statement of claim directed to be delivered by the Crowes on foot of an order made by the High Court. This third amended statement of claim was delivered by the Crowes, not within the four-week period directed by the High Court, but on 27 January 2021, approximately 10 and a half calendar months after the deadline set by the 2020 order. Even taking into account the usual rules for time as set out in O. 122, r. 5 RSC regarding the month of August, the statement of claim was delivered nine months late.

18. In the intervening period, on 14 September 2020, the Bank had delivered a notice of motion to strike out the proceedings for failure to comply with the 2020 order or, in the alternative, under O. 19, r. 28 RSC on the grounds that the statement of claim disclosed no reasonable cause of action. It was on foot of that notice of motion that Hyland J. heard the matter on 13 April 2021 and delivered her judgment on 15 April 2021.

19. The judgment of Hyland J. begins with a summary of the complaints to date. The complaint against the Bank is characterised as “*the existence of a longstanding business relationship between the second defendant and the bank*” and the “*core complaint*” is that “*this relationship ought to have been disclosed*” to the Crowes. The judgment also notes the existence of a “*secondary complaint*” in that “*the bank ought to have advised*” the Crowes “*to obtain independent legal advice*” when providing them with loan facilities, due to the existence of this longstanding referral partnership.

20. The Crowes’ solicitors claimed at the hearing on 13 April 2021 that they had very little time to prepare for the hearing of the Bank’s motion to strike out the proceedings, however, Hyland J. found in fact that the Crowes’ solicitors had been served with the third notice of motion (that is, the Bank’s motion to strike out the proceedings) in November 2020, and, even in circumstances where the Crowes’ solicitor left his old firm to set up his own firm, he was still on notice of the motion in circumstances where he continued to act for the Crowes after

moving firms. Hyland J. was, rightly, critical of the attempt by the Crowes' solicitors to claim that they had very little notice of the strike-out motion when the evidence before the court had shown that that same solicitor had been on notice of the strike-out motion for at least five months. Further, it was advanced by the Crowes' solicitors that they had very little time to instruct a barrister (i.e. had only instructed a barrister the Friday before the motion was heard on 13 April 2021). Hyland J. was, rightly, critical of this also in circumstances where she found that the Crowes' solicitor had been on notice of the motion for approximately five months.

21. The third amended statement of claim, that is, the statement of claim that was eventually delivered on 27 January 2021, is the subject of the preponderance of the judgment in the High Court. The High Court considered the document in detail and noted significant "*procedural defects*" on its face and in its contents. With regard to the procedural defects, the High Court noted that, *inter alia*, the third amended statement of claim:

- a. Had no date of delivery and failed to state who it was delivered by;
- b. Did not identify any of the solicitors involved in the action;
- c. Breached O. 20, r. 7 RSC by failing to identify the relief sought;
- d. Breached O. 28 more generally, where deletions were not struck through, and amendments were not underlined when compared to previous version of the document.

22. More significantly, however, the High Court also noted that the third amended statement of claim contained serious "*substantive breaches*" in relation to its contents. The Court found that the statement of claim did not identify a cause of action known to law. Although various causes of action are pleaded against the Bank, including breach of duty, breach of fiduciary duty and negligence, Hyland J noted that "*when one turns to the document entitled Amended Statement of Claim, it is not possible to understand the basis upon which these pleas are levelled against the bank.*"

23. In particular, the Court examined the Crowes' claim regarding the non-disclosure of the referral partnership between the Bank and KBG in the context of the Crowes' assets being used as security for the loan obtained from the Bank. According to the amended statement of claim (para. 11), the Bank was said to be jointly and severally liable for the alleged contractual breaches of KBG in circumstances where the Bank knew about the relationship between the Crowes and KBG.

24. Hyland J. concluded that this alleged non-disclosure did not amount to a cause of action known to law. There is, it was found, no duty on a bank to insist that their customers obtain independent legal or financial advice. In reaching that conclusion, the Court relied on the authority of *Irish Life and Permanent v Financial Services Ombudsman & Thomas* [2012] IEHC 367 ("*Thomas*"). The Court was unable to identify any legal principle that had been breached by the existence of the referral partnership relationship or its alleged non-disclosure.

25. In relation to the applicable legal principles on an application to strike out for failure to comply with a court order, the judge drew to the parties' attention the judgment of Clarke J. in *Tracey*, specifically paragraphs 5.1 – 5.3 of that judgment. In his judgment, Clarke J in the Supreme Court outlined the principle that the response of a court to a procedural failure must be proportionate, balancing the entitlement of a party to advance their case as against the seriousness or persistence of the procedural failure. Clarke J, at paragraph 5.7 in the judgment stated: -

"Where there is a specific failure to comply with a court direction, the Court must assess how serious and significant the failure is, whether it is persistent and whether there is any legitimate explanation for the failure concerned. In light of those and other relevant factors, the Court must determine what sanction or consequence is proportionate".

26. With regard to the failure to comply with the 2020 order, Hyland J. noted that the failure to comply with the order fell under two broad headings, firstly a failure to deliver the amended statement of claim within the period provided for in the order, and secondly the nature of the amended statement of claim that was ultimately delivered.

27. The Crowes advanced two explanations in the High Court as to why there was a delay in delivering an amended statement of claim. First, as briefly outlined above, it was said that the solicitor had moved practice and was, according to him, only instructed through his own newly set-up practice from January 2021. More generally, the COVID-19 pandemic was relied on as an excuse or explanation as to why there was no amended statement of claim delivered in compliance with the 2020 Order. Neither of those excuses was accepted by the High Court. Hyland J. noted that no evidence was before the court on affidavit providing an explanation for why the change of solicitors would have resulted in a delay, particularly in circumstances where there had been delay between March and December 2020 before the Crowes' solicitor moved and set up his own firm. It was further noted that no COVID-19 restrictions had been in force before the time allowed for the delivery of the amended statement of claim had expired. It was also noted that legal business had generally continued throughout the COVID-19 pandemic, and Hyland J. concluded that to refer to COVID *simpliciter* as a justification for failure to comply with a court order was not an acceptable excuse.

28. All of this led the judge to conclude that there was a serious breach of the 2020 order made by O'Regan J, and that that order was only complied with after a significant period of time had elapsed and further, only in circumstances where the Bank had brought a motion to strike out the proceedings for failing to comply with that order.

29. The nature of the document provided to the court was characterised as a “*more serious breach*” than the fact of the statement of claim being delivered out of time, in that the document that was ultimately delivered was found by the judge to be “*not a statement of claim within the*

meaning of the term”. Hyland J noted that, alongside the time limits set out in the 2020 Order by O’Regan J., it must have been the intention of that order that a statement of claim within the meaning of that term be produced by the plaintiffs, and that implicitly, therefore, there was an obligation on the plaintiffs to identify an allegation or cause of action known to law within that statement of claim. The order made by O’Regan J. in June 2019 (following a previous application to strike-out from the first-named defendants) stated that the plaintiffs must amend their statement of claim “*with sufficient particulars of all and any allegations made against the First named defendant*”. The amended statement of claim filed after that order (the second amended statement of claim) failed to comply with the order. The High Court judge relied on this aspect of the procedural history of the case to found her conclusion that the failure to identify the particulars of allegations made against the Bank was a breach of the 2020 order made by O’Regan J. It was noted that the Crowes had been given two opportunities to do so and that, despite those opportunities, there had still been a failure to identify a cause of action known to law in the statement of claim then before the High Court.

30. Overall, the third amended statement of claim was characterised by the High Court as containing “*fairly fundamental procedural gaps*” and Hyland J. notes that “*the failure to identify the solicitor acting for the plaintiff and the failure to identify the reliefs sought are particularly egregious, particularly given the procedural history of the case*”.

31. The High Court then moved on to identify the principles which it should apply in the application, and it identified in particular the principles outlined by Clarke J. at paragraph 7.7 of his judgment in *Tracey*. These principles, in summary, are that the court should first determine whether a dismissal of the proceedings is within the range of proportionate responses open to the court in the circumstances of the case. The court should then move on to an analysis of where the balance of justice lies in the particular case before it, and in circumstances where the delay was occasioned by a persistent failure to comply with a specific direction, in assessing

the balance of justice, having regard to whether the dismissal of proceedings in those circumstances is a proportionate response to the failure to comply with the direction of the court. The court noted that it should consider whether there are any other steps that it could take to meet the circumstances of the case and that, in general, it should use the least restrictive means to achieve the aim of ensuring compliance with the previous direction of the court.

32. The overall conduct of the proceedings was analysed by Hyland J., and it was noted that the Crowes, although not represented for the period of the case involving the first and second amended statement of claim, then had a solicitor and counsel advising them and that the third amended statement of claim had been drafted with the benefit of that representation. This, in the judge's opinion, made the failure to comply with the 2020 order of O'Regan J more serious. She stated that, because of this, there was no reason for the court to think a different course of action would be taken if liberty to amend the statement of claim were to be given a further (fourth) time.

33. The overall conduct of the proceedings was also considered, and the judge noted that there had been "*no attempt to get the matter on*" by the Crowes. At the time of the High Court's decision, KBG had still not entered an appearance when the plaintiffs had not (and still have not) applied for substituted service in circumstances where the vast majority of the claims concern that defendant. The judge noted that this is "*particularly problematic*". The High Court noted that the case had not progressed at all between 2018 and 2021, and the case against the Bank still had not been adequately identified in circumstances where there had been multiple motions by the Bank seeking to identify particulars of the claim against it, and in circumstances where, by the High Court's count, three versions of the statement of claim had been delivered.

34. The Crowes attempted to assert the defence that the Bank should have raised particulars, however, the judge rejected that argument. She noted that the purpose of particulars is to understand the details of a claim, and as no claim or cause of action known to law had

been identified by the Crowes there was nothing to particularise and no onus on the Bank to raise particulars in those circumstances.

35. Further defences raised by the Crowes were rejected by the High Court, the first of which was a defence that the test of “*sufficiently serious and persistent*” failure had not been met in the circumstances of the case. With regard to that defence, Hyland J. disagreed, referring to her earlier reasoning concerning the seriousness of the breach of the order. The second defence raised by the Crowes was that the 2020 order did not refer to striking out the proceedings, however this was also rejected by the judge as it was open to the Bank to bring a motion striking out the proceedings and it had done so.

36. The Crowes sought to rely on the authorities of *Coyne v Danske Bank* [2017] IEHC 436 (“*Coyne*”) and *Flanagan v AIB* [2020] IECA 57 (“*Flanagan*”), but the judge distinguished those cases from the present application, noting that “*those cases are not applicable here because both of them concerned applications to strike out because of Henderson v Henderson grounds or because they were res judicata.*”

37. Overall, the High Court judge concluded that there was an ongoing and persistent failure to comply with the 2020 order, and this failure was characterised by the judge as “*significant and serious*”. Hyland J. had no confidence that permitting a further amended statement of claim to be delivered would result in the disclosure of a cause of action known to law. She concluded that the legal team acting for the Crowes had delivered a statement of claim that was “*grievously wanting*” and that, in those circumstances, the balance of justice favoured striking out the claim against the Bank for failure to comply with the 2020 order.

Grounds of Appeal and Grounds of Opposition

38. The Crowes appealed the decision of the High Court to this Court. Their notice of appeal outlined four grounds of appeal, however, only three of those grounds were pursued at the substantive hearing of the appeal. Those grounds of appeal may be summarised as follows:

- a. The trial judge erred in her assessment of the amended statement of claim in forming a view that it disclosed no cause of action.
- b. The decision of the judge was disproportionate in striking out the action.
- c. The judge cited an authority to assist counsel for the Bank of her own motion, showing a lack of neutral stance and unjust favour towards the Bank.

39. Each of those grounds of appeal was opposed by the Bank, which submitted five grounds of opposition that were pursued at the hearing of the appeal (there were initially six in total, however, the first ground of opposition fell away in circumstances where the Crowes did not pursue what was their first ground of appeal at the hearing before this Court). Those grounds of opposition that were pursued may be summarised as follows: -

- a. The trial judge was correct in concluding that the latest version of the amended statement of claim contained no cause of action known to law.
- b. The trial judge was correct in concluding that the Crowes had failed to comply with the order of O'Regan J.
- c. The judge's decision to strike out the proceedings as against the Bank was a proportionate response to the Crowes' continuous failure to comply with the order of O'Regan J. and/or to deliver an amended statement of claim that disclosed a cause of action known to law.
- d. The trial judge was correct in law in citing an authority which had not been submitted by any party, the judge was entitled to do so and the Crowes and the Bank were invited to make submissions on the additional authority and did do so.

- e. The trial judge was correct in striking out the proceedings as against the Bank and in holding that the Crowes should be liable for the costs of the motion.

Submissions on behalf of the Crowes

40. The Crowes furnished the Court with written submissions in advance of the hearing of the appeal and the Court also heard oral submissions from the Crowes' counsel in the course of the appeal hearing.

41. The proceedings were characterised by the appellants as complex, so complex, in fact, that counsel for the Crowes asserted that the complexities of the "*fraud*" in the case would, or could be said to, require a senior counsel to be instructed. This assertion came at the start of the oral submissions made by the Crowes' counsel to the Court. It should be noted that the Crowes' oral submissions were peppered with unsubstantiated allegation of "*fraud*" as against the Bank, and a large portion of the time allocated to the hearing of this appeal was spent trying to obtain from counsel any other claim known to law as against the defendant bank that was not some species of alleged fraud. Regrettably, those attempts by members of the Court were unsuccessful.

42. The Crowes, throughout their oral and written submissions, emphasised various aspects of the case, such as the alleged "*referral partnership*" between the Bank and KBG. Counsel sought to refer to alleged reckless lending on the part of the Bank to the Crowes and referred to various matters including that the loan application was "*immediately approved*" by the Bank, that the loans in question were ultimately approved by the Bank without the benefit of the accounts of the various public houses the subject of the loan security and that, instead, the Bank relied on projections of those public houses' profits as opposed to historic accounts. This is as far as the claim is put in the Crowes' written submissions to the Court, and it was submitted

that on the basis of the above outlined facts, the Crowes initiated High Court proceedings against the Bank without the benefit of legal representation.

43. The Crowes' written submissions outline, it must be noted, very superficially, the procedural issues arising throughout the High Court proceedings. No valid excuse or reason was put before this Court, either in written or oral submissions, for the failure to comply with the 2020 order throughout the course of the appeal. It is noted throughout the submissions on behalf of the Crowes that the delay in complying with the Order of O'Regan J was "*complicated*" by the actions of KBG, in that they have not entered an appearance in the proceedings. However, there is no acknowledgement of the fact that in the High Court judgment, Hyland J. noted that this was due to a failure on the part of the Crowes to apply for substituted service as against KBG.

44. In their written submissions, the Crowes refer to the Court of Appeal's judgment in *Flanagan*. They did not address in their submissions the fact that the High Court found that *Flanagan* did not apply in the circumstances of this case. Counsel attempted to analogise the facts of this case with *Flanagan* throughout the course of her oral submissions, without regard to the judgment and finding by Hyland J. in the High Court. I observe here that I agree entirely with the finding of Hyland J. that, for the reasons she mentioned, *Flanagan* is not an applicable or useful authority in this case.

45. The Crowes submit that the High Court "*did not act with any degree of proportionality*" in making the order striking out the proceedings. This was evidenced, according to the Crowes, by the judge producing an authority (*Tracey*) at the hearing on 13 April 2021. It is submitted by the Crowes that the judge "*proceeded to assist*" counsel for the Bank with an authority from the Supreme Court which she subsequently relied on in her ruling, and that, therefore, the judge "*may not have viewed matters in a neutral mindset*". This was bolstered by an oral submission by counsel for the Crowes that "*it is lamentable for me to say that it is not for her* [i.e. Hyland

J] *to be bringing a case*” to the attention of the parties. There was, according to Counsel, an obligation on the Bank (and not the judge) to bring this authority to the attention of the court due to the draconian nature of a motion to strike out the proceedings.

46. The Crowes submit that the appropriate course of action the High Court should have taken would be to reflect the failure to comply with the 2020 order of O’Regan J in costs and not to have struck out the proceedings in their entirety.

47. Overall, it must be repeated that a significant portion of both the written and oral submissions on behalf of the Crowes on this appeal was taken up by their (ultimately singularly unsuccessful) attempts to identify a cause of action known to law. The order of O’Regan J., made on 20 June 2019, directed that the Crowes delete all reference to “*fraud*” in their statement of claim, and that the plaintiffs were directed to disclose a cause of action that is known to law that is not “*fraud*”. However, throughout the course of their submissions, counsel for the Crowes, although referring consistently to “*fraud*” throughout her oral submissions failed to identify a cause of action that did not have the indicia of “*fraud*”. These include numerous references to the “*conscious and deliberate dishonesty*” on the part of the bank, a “*breach of contract on foot of dishonesty/concealment*”. Reference was also made to an alleged “*breach of confidential information without the knowledge of the [Crowes]*” in circumstances where KBG informed the Bank of additional income obtained by the Crowes, however the Crowes were not able to link this conveying of information to any cause of action known to law during the course of the appeal hearing.

48. Documents provided to the Court in the course of the appeal were also said to be “*clear evidence of conscious and deliberate dishonesty*”, however the copies of the documents furnished to the Court and exhibited to the most recent affidavit of Mr. Crowe were not readable at the time of the appeal hearing and another copy of these documents was furnished subsequently to the Court after the conclusion of the appeal hearing. Although the impression

obtained from counsel for the Crowes was that the documents would speak for themselves, the documents are simply correspondence between KBG, the co-defendants and the Bank (then NIB). The correspondence does disclose that the accountants were “*primary introducers of business to Bank in the area*” and refer to the accountants as “*longstanding referral partners*” but, as stated above and, as I conclude below, simply showing this does not, in any way, disclose a cause of action known to law.

49. Counsel for the Crowes failed to explain how “*evidence of conscious and deliberate dishonesty*” was different or distinct from “*fraud*” throughout the course of the appeal hearing. In those circumstances, although the Court was provided with these documents, they notably do not disclose or support any cause of action known to law that does not have the indicia of “*fraud*”.

Submissions on behalf of the Bank

50. The Bank submitted to the Court throughout their oral and written submissions that there was no cause of action known to law disclosed in the most recent version of the amended statement of claim. The Bank, correctly in my view, summarised the attempted claims of the Crowes as against the Bank in its written submissions. I have summarised those claims as follows:

- a. That the Bank owed a fiduciary duty of care to the Crowes and breached those duties by failing to disclose the referral partnership between the Bank and KBG, in circumstances where the Bank was aware of the relationship between the Crowes and those accountants.
- b. The Bank failed to advise the Crowes to obtain independent legal advice prior to entering into the related loan agreement,

- c. The Bank is jointly and severally liable, through the referral partnership, for the actions of KBG.

51. The Bank provided the Court with authorities which outline what counsel termed the “*long established position*” that a bank does not ordinarily owe a duty of care to the borrower and that the nature of the relationship between borrower and bank is not a fiduciary one. The authorities provided to the Court were *Kennedy v Allied Irish Banks PLC* [1998] 2 IESC 9 (“*Kennedy*”) and *ACC Bank PLC v Deacon & anor.* [2013] IEHC 427 (“*Deacon*”). According to these authorities, the Bank submits, the duty a bank owes to its customer is one to exercise due care and skill and the “*competent performance of the bank’s obligations*”. The duty is not one where there would be, for example, a duty to disclose its referral relationship with the accountants, which would be a duty characterised as fiduciary in nature.

52. Further, the Bank submitted that there was no obligation on it to insist that the Crowes take independent legal advice. It relied on the judgment of Hogan J. in *Irish Life and Permanent PLC v Financial Services Ombudsman & Ors* [2012] IEHC 376 for that proposition.

53. It was also submitted that the Bank cannot be jointly and severally liable for the actions of the accountants in contract as a matter of law, in circumstances where the Crowes’ relationship with both is on foot of two different contracts containing different obligations. It was, therefore, submitted, that no cause of action known to law was disclosed by the Crowes in the course of their numerous statements of claim.

54. With regard to the issue of proportionality, the Bank submitted that the judge correctly understood and applied the requirement in *Tracey* that the court’s response to the Crowes’ failure to comply with the previous order of the court should be proportionate. The Bank noted that the judge found that the impugned statement of claim was found to be procedurally defective, to have failed to identify a cause of action known to law and also found that there

was a persistent failure on the part of the Crowes to amend the statement of claim to remedy these defects throughout the course of the proceedings.

55. The Bank's submissions on proportionality criticise the Crowes for a "*failure to prosecute the appeal with any expedience*" and that, further, the appellants had not, at the time of the appeal, even obtained an order for substituted service against the KBG. The Bank submits that it had to take up the DAR for the appeal from the High Court itself and that the Crowes had failed to comply with various directions given by Costello J. at the Court of Appeal callover list and had significantly delayed the filing of submissions in the appeal. The respondent notes in its written submissions that "*the appellant's conduct in their Appeal is the same as that in the High Court and the learned trial judge has been proved [sic] correct in her concerns as to the Appellant's appetite to prosecute their claim at all*".

56. The Bank further submits in its written submissions that, admittedly, neither party addressed the High Court initially on the issue of proportionality at all during the hearing of 13 April 2021, and that it was entirely correct for the judge to have drawn the issue and the authority (*Tracey*) to the parties' attention. The Bank submits that the court was "*obliged to consider proportionality*", that both parties were invited to produce oral submissions on the authority provided by the court, and that, in fact, both parties did just that. It was submitted that this happens regularly in court proceedings and that, in and of itself, this does not indicate bias on the part of the judge. It was emphasised by the Bank that the High Court might have erred in law had it not drawn the parties' attention to the authority in *Tracey*. The Bank submits that, overall, there is no basis on which the Crowes can now complain that the authority was raised in circumstances where they were invited to make submissions on the authority and did, in fact, do so. There is, it is submitted, no evidence whatsoever to support the suggestion that the judge was in any way other than neutral.

Analysis and Decision

Failure to Disclose Cause of Action Known to Law

57. This claim, initiated by the Crowes without legal representation, has been before the High Court since 20 March 2017. The Bank filed what was to be the first of many motions to strike out the claim for failure to deliver a statement of claim (in that particular instance, the motion was to strike out for want of prosecution *evidenced* by the failure to deliver a statement of claim) in May 2018 and that motion was heard and determined by O’Hanlon J on 14 May 2018. Thereafter, one day later, the Crowes, as litigants-in-person, delivered a statement of claim to the Bank on 15 May 2018. That statement of claim, having been found wanting in various respects, was ordered to be amended on 20 June 2019 and, on 18 July 2019, the Crowes delivered their first amended statement of claim. This amended statement of claim was identical in all aspects to the first document, apart from a new paragraph which added nothing in the way of substance to the statement of claim.

58. The Crowes sought and obtained legal representation after a second motion was brought by the Bank ordering further amendments to that statement of claim on 6 January 2020 and, since then, at least two further versions of the statement of claim have been before the High Court. Each statement of claim has been found to be seriously wanting and defective. Importantly for the purposes of the appeal, two of those three amended statements of claim - the second amended statement of claim delivered on 20 January 2020 and the third amended statement of claim delivered on 27 January 2021 - were prepared with the benefit of solicitor and counsel for the Crowes.

59. I am satisfied that none of the four versions of the statement of claim that were produced by or on behalf of the Crowes during these proceedings (the original statement of claim, and the three amended versions of the statement of claim) contained a cause of action known to law as against the Bank. I completely agree with the judge’s conclusions in that regard.

60. It must be stressed that, at various points throughout the hearing of this appeal, the Crowes' counsel was given numerous opportunities to outline to the Court any claim known in law that could be stated and particularised against the Bank. Counsel was asked, on several occasions, by all members of the Court to identify a claim known in law against the Bank. No satisfactory response was provided by counsel. On each occasion that an answer was attempted, that answer depended upon an indicia of fraud or some other related claim of dishonesty or collusion on the part of the Bank and KBG, a claim the Crowes have been precluded from making by a previous order made by O'Regan J which was never appealed.

61. This is only further emphasised by the Crowes' strong reliance on the case of *Balber Kaur Takhar v Gracefield Develeopments Ltd & Ors* [2020] EWHC 2791 in the course of counsel's oral submissions. This was deployed as authority for the proposition that a previous judgment of the court can be set aside in the case of fraud that materially goes to the core of the subject matter of the proceedings. Counsel did not, at any stage during oral submissions, explain how this case applies when fraud cannot be relied on in these proceedings as a cause of action, having regard to the previous order of O'Regan J. by which the Crowes are bound.

62. I also note that many of the attempted claims concerning fraud, collusion or any other allegation of dishonesty on the part of the Bank rely, factually, quite heavily on the involvement of KBG, i.e. the accountants. It is difficult to see how the Court could entertain such claims in circumstances where, at the time of the hearing of the appeal, the Crowes had not even applied for an order for substituted service on that defendant and had not progressed the proceedings as against it (in, indeed, any other defendants) in any meaningful way in between the judgment of the High Court and the hearing of this appeal. When asked about this during the appeal hearing, counsel for the Crowes could not provide the court with any adequate response as to why this basic, simple, and straightforward step had not been taken.

63. Overall, I would conclude on this point that at no point in these lengthy proceedings have the Crowes been in a position to identify any cause of action known to law against the Bank. The judge's conclusions in this respect were unavoidable, and, in my view, she did not err in reaching them. I reject the Crowes' appeal based on the judge's finding that the most recent version of the amended statement of claim did not disclose any stateable cause of action known to law, notwithstanding numerous attempts to do so by at least four different versions of the statement of claim. The judge was clearly right to make that finding.

Proportionality

64. In my view, this case involves a serious and persistent failure on the part of the Crowes to comply with a court order directing them to do what is, in most litigation, a fundamental and basic task, that is, to identify and particularise the claim as against the Bank and to provide that claim in the form of a statement of claim within a reasonable period of time. This case has a long and protracted procedural history, and a large part of the challenge in the Crowes' appeal is coming to terms with the multiple versions of various court documents produced in a haphazard fashion over a period spanning many years. The Crowes were asked, on three separate occasions, by two different High Court judges to produce an adequate statement of claim, and even when legal advice was sought and counsel and solicitor were instructed, that still did not happen.

65. In reaching the decision to strike-out the Crowes' claim for failure to comply with a court order, the High Court was absolutely right to bring to the parties' attention and to apply Clarke J's leading judgment in the area in *Tracey*. That judgment provides a cogent and straightforward analysis of the proportionality standard to be applied in the circumstances of persistent procedural failure by a party to litigation. The fact that *Tracey* is the leading case is

not in dispute by either party, nor are the principles to be applied contested. Instead, what is relied on by the Crowes is the bare assertion that the High Court's decision was not proportionate having regard to various aspects of the case, including an alternative approach that could have been taken by the judge. The Crowes submit that the proportionate response in this case would be not to strike out the claim in its entirety, and instead, to reflect their failure to comply with the court order in costs. I disagree.

66. In *Tracey Clarke J* said:

*“The jurisprudence concerning the dismissal of proceedings for want of prosecution is now well settled. It does not seem to me to be necessary to add to that jurisprudence for the purposes of this judgment. However, it is, in my view, important to identify a distinction which can properly be made between a general failure of a party to progress their proceedings in a timely manner, on the one hand, and the consequences which it may be appropriate to apply to a specific failure on the part of a litigant to comply with a direction or order of the Court, on the other hand. The former question is the subject of much of the jurisprudence of the courts since at least *Lismore Homes Limited v. Bank of Ireland Finance Limited* [1999] 1. I.R. 501. However, in my view, somewhat different considerations apply where a court is concerned with a specific failure on the part of a litigant to take a step which has been expressly directed by the Court, most particularly where the failure concerned is either itself significant and highly material to the litigation or, indeed, where the relevant failure or failures are persistent.*

It must, of course, be recognised that the response of a court to any procedural failure must be proportionate. Dismissing a claim or, indeed, striking out a defence or otherwise taking significant action which would diminish or extinguish the entitlement of a party to put its case forward at a full trial is a step which should not lightly be taken and should only be taken in response to procedural failure where, in all the

circumstances, that failure is sufficiently serious or persistent to justify the action concerned.

But it does have to be recognised that there will be cases where it will be proportionate to take very serious action, such as striking out a claim, if the relevant procedural failure is sufficiently serious or persistent. It is also important to understand the reason why that is so.” (paras 5.1 – 5.3).

67. Clarke J. stated later in the judgment:

*“However, the question remains as to whether a dismissal of each of the relevant proceedings, rather than some lesser measure, was within the range of proportionate responses which it was open to the Court to take in all the circumstances of the case. In all such cases the Court is required to determine where the balance of justice lies. The factors which may be relevant to such a consideration may vary from one type of case to another. Where, as here, the focus is not so much on delay per se **but delay occasioned by a persistent failure to comply with a specific direction of the Court, nonetheless, in assessing the balance of justice, the Court must consider whether dismissal of the proceedings is a proportionate response.**” (at para. 7.7, emphasis added).*

68. These are the very passages to which the judge had specific regard in her judgment the subject of this appeal.

69. It is clear from the above passages in *Tracey* that, in considering where the balance of justice lies and what would be a proportionate response, there will be, in all cases, a “*range of proportionate responses*” open to the court in each case, and it is not the case that there is one decision that will be, on appeal, considered acceptable to the exclusion of all other decisions that could have been taken by the judge.

70. Although not mentioned by the parties, I note the observations regarding the purpose of a statement of claim at para. 5 of MacMenamin J's judgment in *Tracey v Minister for Justice, Equality & Law Reform & Ors* [2018] IESC 45:

“To provide a framework for what follows, it may be helpful to make some general remarks on pleadings, and particularly a statement of claim. It is by now well established that the purpose of a statement of claim is to state succinctly the facts upon which a plaintiff relies, and the reliefs which are claimed. As a matter of basic fairness, if a plaintiff makes claims against a number of different defendants, each defendant is entitled to know precisely the case which is made against it. (See, in this connection, Order 20, Rules 3 and 8, RSC 1986). A pleading must be so clear and precise as to leave no reasonable doubt as to the matter which the court must determine, and for each party to know the case which must be met. A claim of a tort, or breach of right, other than particularisation of one already pleaded, will require an amendment to the statement of claim itself. In a reply to particulars, a plaintiff may identify with greater precision the factual basis of the claim already made against each defendant. In a case of complexity, the duty of precision, and particularisation, is much the greater in order that a court will be aware of what matters truly form the basis of the claim. If the pleading in the statement of claim is unclear in that it does not precisely set out the case which is to be made, a defendant may be entitled to bring an application to strike out under Order 19, Rule 28, on the basis that the claim is, as the Rules of the Supreme Courts describe it, “frivolous and vexatious”. When so found, these terms mean that the claim does not disclose a cause of action against the relevant defendant, and that, as a result, it would be unfair to compel such party to incur costs in continuing to defend the case.”

71. MacMenamin J’s judgment in *Tracey v Irish Times* [2019] IESC 62 is also relevant and further explains the importance of Clarke J’s dicta in *Tracey*:

“Thus, the Chief Justice pointed out, there may well be cases where a significant or persistent failure to comply with express court orders, or directions, might justify dismissal as a proportionate consequence, as a result of major procedural non-compliance. (See paras. 5.5, 5.6 and 5.8 of Tracey v. McDowell [2016]). The Chief Justice went on to point out that, in considering applications such as these, the duty of a court is to take into account the rights and interests of all parties, rather than one party, and that to adjourn a case as a result of one party’s nonattendance has the potential to affect the rights of other parties well beyond the individual on whose health status a doctor may be required to report. The judgment emphasises that a court is required to balance all the rights involved, and that, in order to achieve this end, a court will often require more information than is sometimes proffered in order to enable it to carry out that task properly. (para. 6.4).” (para. 21)

72. Later, he said:

“Clarke C.J. then went on to pose the rhetorical question, as to whether a dismissal of each of the relevant proceedings, rather than some lesser measure, was within the range of proportionate responses which it was open to the court to take in all the circumstances? He pointed out that, in all such cases, the court is required to determine where the balance of justice lies. The factors which may be relevant to such a consideration may vary from one type of case to another. In doing so, a court will bear in mind whether there is prejudice to any particular party. (paras. 7.6 and 7.7).” (para. 24)

73. The Court of Appeal recently considered and applied this long-established jurisprudence in *Greenwich Project Holdings Ltd v Con Cronin* [2022] IECA 154. That

decision is, of itself, a useful summary of this thread of jurisprudence. However, as this judgment was delivered after the hearing of this appeal, I should make clear that it did not form or enter into my reasoning or decision-making in this case, and instead I simply note that the judgment exists as a useful primer and summary of the line of jurisprudence in *Tracey v McDowell*, concerning O. 19 r. 28 RSC in circumstances where there has been a considerable level of non-compliance with an order of the High Court.

74. There is significant latitude, therefore, afforded to a judge in determining where the balance of justice lies in considering the case before him or her, having regard to the totality of the evidence before the court and the particular circumstances in which the procedural failure has arisen. Notably, none of the factual findings of the judge in this case in this regard have been disturbed, nor was it sought to disturb them, on appeal. The excuses proffered to the High Court for the failure to deliver a statement of claim within the time period directed, i.e. that the Crowes' solicitor had, in the interim, set up his own practice and that COVID-19, generally, had given rise to difficulties in delivering the statement of claim, are, in my opinion, not adequate to justify such a long delay, and, further, not nearly adequate enough to justify the myriad of procedural and substantive defects present in the statement of claim that ultimately was delivered by the Crowes.

75. In light of all of those breaches and considering Clarke J's comments on what should happen in the case of "*serious and persistent failure*" in *Tracey*, it is an unescapable conclusion that the option of striking out the proceedings in their entirety was well within the "*range of proportionate responses*" open to the judge in this case. I find her conclusions in reaching that decision to be unimpeachable.

76. In reaching that conclusion, I have regard to the competing rights involved. Although it is within the Crowes' right to bring a case before the court to have it determined, it is a fundamental and inescapable requirement that that case must involve a claim known to law.

The right of the Bank not to have to defend frivolous, vexatious and obscure claims levelled against it is also clear. The entire purpose of a statement of claim is frustrated when that statement of claim fails to disclose any action known to law. It must be borne in mind that this was the fourth statement of claim to be delivered by the Crowes.

77. Although striking out proceedings is an extreme measure, the Court must, if it is to have control of its own processes, have the power to do so in cases such as this, where there has manifestly been a serious, persistent failure by a litigant to particularise and outline their claim within a reasonable period of time. The exercise of that jurisdiction by the judge in this case was, in my view, clearly appropriate and well within the scope of her discretion.

78. As has been well-established in the case law, this Court should be slow to interfere with the exercise of discretion by the High Court where there has been no error of principle, although the Court does retain the ultimate discretion and can interfere with that exercise of discretion if it can be established that an injustice will be done.

79. In the context of an appeal to this Court of a refusal by the High Court to dismiss a claim for inordinate and inexcusable delay, Irvine J. (as she then was), in her judgment in *Collins v Minister for Justice, Equality and Law Reform* [2015] IECA 27 (“Collins”) stated:

“For all of these reasons, therefore, we consider that the true position is that set out by MacMenamin J. in Lismore Homes, namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate discretion is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed” (para. 79)

80. In *Lawless v Aer Lingus* [2016] IECA 235 (“Lawless”), Irvine J. made the additional observation:

“However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application de novo in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted in the High Court judge at the original hearing. This is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion” (para. 23)

81. These authorities were summarised in the case of *Betty Martin Financial Services Limited v EBS DAC* [2019] IECA 327 by Collins J, where he states:

“Accordingly, while as a matter of principle, ‘great weight’ is to be given to the views of the High Court Judge, the ultimate decision on this appeal is for this Court. It is also clear that the EBS [the appellant] is not required to establish any error of principle as a pre-requisite to this Court coming to a different conclusion to the Judge.” (para. 39)

82. I referred to these cases in my judgment in *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2022] IECA 131, in the context of a finding in the High Court that the plaintiff company did not have standing to maintain a challenge to a decision made in a tender process. I stated (at para. 103) that:

“It is clear that ‘great weight’ must be given to the views of the High Court judge, but ultimately it is for this Court to determine the appeal. If the appellant establishes an error in principle, it should be entitled to succeed in its appeal. However, in the absence of an error of principle, it should also be entitled to succeed on its appeal if it can

establish that a real injustice will be done to it if the decision of the Judge is left undisturbed.”

83. Applying the principles above, I see no reason for departing from the decision of the Trial Judge in this case. It has not been established at any stage in these proceedings by the Crowes that a “*real injustice*” would be done to them if the proceedings were to be struck-out for their persistent failure to disclose a cause of action known to law. I am satisfied that no such injustice would be done. Although striking out the proceedings in their entirety is a serious step, it is an option that must be available and within the scope of the judge’s discretion in circumstances such as this case, where there has been a serious and unjustifiable persistent breach of orders and directions of the court, in order for the Court to be able to control its own processes and regulate the administration of justice.

84. There was also, in my view, no error in principle by the High Court judge in this case, and, in fact, without her intervention in bringing the *Tracey* authority to the attention of the parties, there very well could have been. It is clear that *Tracey* is the leading judgment of the issue of determining the consequences of a persistent and serious failure to comply with the orders and directions of a High Court judge. Remarkably, the Crowes object to the very bringing of that authority to the parties’ attention, and it is to that ground of appeal that I now turn.

The Court Raising Authorities on its own Motion

85. The appellants have stated, in their third ground of appeal before this court, that the judge should not, of her own motion, have raised an authority that, they say, assisted the Bank and that this showed a “*lack of neutrality*” on the part of the judge. In the course of their submissions, as outlined above, the Bank outlined that neither party had addressed the High Court on the issue of proportionality, and that the judge brought to the attention of the parties

the judgment of Clarke J. in *Tracey*. Both parties were invited to make submissions on this authority by the judge and were given an opportunity to consider that case over the course of a lunch break during the hearing. There is, it must immediately be said, nothing at all unusual about this. Both parties did make submissions on the *Tracey* judgment, and the principles outlined in that judgment were relied on and applied by Hyland J. in the course of her judgment. *Tracey* is the leading judgment on the issue and on this appeal, and I have derived considerable assistance from the judgment in reaching the conclusions I have on this appeal.

86. The core issue under this ground is that the judgment was brought to the parties' attention by the judge. In bringing the judgment to the parties' attention, the Crowes submit, the judge showed a lack of "*neutral stance*" and "*unjust favour*" towards the Bank. As I referred to above, the Crowes' counsel submitted at the hearing that this was the judge "*influencing*" the proceedings and stated that "*it is lamentable for me to say that it is not for her to be bringing a case.*"

87. This submission is absurd and this ground of appeal is, in my view, utterly unstateable. There is a fundamental and core obligation on judges to apply the law correctly in each case. To suggest, as the Crowes do, that judges in each case are limited to the cases cited to them by counsel is patently wrong. In the present case, if the application in the High Court were to be decided without regard to the issue of proportionality and without regard to the leading judgment of the issue (*Tracey*), the judgment would be open to criticism and appeal. Further, it is clear (and not disputed by the Crowes) that both parties had an opportunity to comment on the case through submissions, and both parties availed of that opportunity. The judgment referred to by the judge was not only pertinent to the application before it, but counsel also had ample opportunity to consider it and make submissions on the basis of that judgment. There is no suggestion that counsel for the Crowes did not have sufficient time to consider the judgment.

88. The primary concern of every judge is to deal the issues before him or her correctly and on the basis of the correct legal principles and the most up to date statement of the law. I can see absolutely no basis on which the judge can be criticised for her entirely appropriate action in bringing the *Tracey* case to the attention of the parties and in giving them the opportunity to consider it and to make submissions on it. Indeed, it is most surprising that counsel for the Crowes would advance or stand over submissions to the contrary. This, in my view, is an utterly unstateable ground of appeal.

Conclusion

89. It follows that I would dismiss the appeal in its entirety and affirm the decision of the judge to strike out the proceedings as against the Bank. This case involves a serious and persistent breach of the directions and orders given by the High Court. There were not mere technical breaches but, as I have outlined earlier, breaches that went to the heart of the fundamental and fair administration of justice, that is, the right of a defendant to know the case being made against it and that such a case is one that is known to law. The Bank was deprived of that right, and the High Court provided the Crowes with ample opportunity to particularise their claim as against the Bank.

90. I am not satisfied, having regard to the totality of the evidence, that any claim stateable in law has been disclosed to the court, either through the various statements of claim proffered over the years by the Crowes (either when they were litigants-in-person or when they were legally represented) or through the oral and written submissions provided to this court in the course of this appeal by their counsel. Further, the decision to strike out the proceedings as against the Bank was a proportionate one, in my view, having regard to the totality of the circumstances of the case and the explanations provided by the Crowes to the judge.

91. Given that it has been entirely successful in this appeal, it is my provisional view that the Bank is entitled to the costs of this appeal as against the Crowes to be adjudicated on in default of agreement. If the Crowes wish to contend otherwise and seek an alternative order for costs, they must provide written submissions on that issue within 21 days of the delivery of this judgment. The Bank would then have a further 21 days to respond to those submissions. If the Court needs to hear from the parties, it will schedule a hearing on the question of costs. Otherwise, the Court will determine the issue of costs on the basis of the written submissions only and the parties will be informed of the Court's decision.

Murray J. and Collins J. agree with this judgment and with the orders proposed.